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SUGARCOATING THE EIGHTH AMENDMENT

Christopher J DeClue

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SUGARCOATING THE EIGHTH AMENDMENT: GROSS DISPROPORTIONALITY REVIEW IS SIMPLY THE FOURTEENTH AMENDMENT RATIONAL-BASIS TEST

Christopher J. DeClue

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“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, Gonzalez argued the sentence was an unconstitutional imposition of cruel and unusual punishment. The Ninth Circuit agreed, explaining the sentence was “grossly disproportionate” to the offense and, therefore, violated the Eighth Amendment.

Notwithstanding Gonzalez’s fortunate outcome, there are relatively few successful challenges to the length of a sentence under the Eighth Amendment’s

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2 Gonzalez v. Duncan, 551 F.3d 875, 889 (9th Cir. 2008).
prohibition of cruel and unusual punishment. To succeed in such a challenge, a defendant must establish that his sentence is “grossly disproportionate” to the offense. This presents a problem, however, because the Supreme Court has neither clearly defined what constitutes a grossly disproportionate sentence nor offered consistent, workable guidelines to determine whether a sentence is grossly disproportionate. In the most recent Supreme Court decision addressing the Eighth Amendment, Chief Justice Roberts recognized that the Court “has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes,” and has “not established a clear or consistent path for courts to follow in applying the highly deferential narrow proportionality analysis.” This lack of clarity has caused inconsistent

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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 under gross disproportionality standard of review); 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.”).

4 See, e.g., United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006) (recognizing that 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.”).


results from the lower courts as they continue to face a sweeping question: how does a court determine whether a sentence is grossly disproportionate to the offense?

This Article demonstrates that Eighth Amendment gross disproportionality review is virtually identical to the Fourteenth Amendment rational-basis test. Under the Fourteenth Amendment rational-basis test, a law is upheld so long as it furthers a conceivable government purpose. Case law illustrates a similar standard is applied in the face of an Eighth Amendment challenge to the length of a prison sentence. Under gross disproportionality review, the length of a sentence is upheld so long as the sentence furthers a conceivable penological purpose. Moreover, under this standard, the length of a sentence violates the Eighth Amendment only on the rare occasion that the court concludes the length of the sentence furthers no conceivable penological purpose. As a

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


9 See infra. Part IV.

10 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).
result, the Eighth Amendment, like the Fourteenth Amendment, is merely a safeguard against arbitrary or irrational sentencing.\footnote{\textit{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 context of capital punishment.}}

Unfortunately, gross disproportionality review has never been articulated in such a precise manner,\footnote{\textit{See} Doyle Horn, \textit{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, \textit{Recidivist Statutes-Application of Proportionality and Overbreadth Doctrines to Repeat Offenders – Wanstree v. Bordenkircher}, 276 S.E.2d 205 (W.Va. 1981), 57 W.A. L. REV. 573, 586-87 (1982). \textit{See also} Adil Admad Haque, \textit{Lawrence v. Texas and the Limits of the Criminal Law}, 21 HARV. C.R.-C.L. L. REV. 1, 28 (2007) (stating that proportionality review is a “direct analogue to the rational basis test . . . .”); Michael P. O’Shea, \textit{Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences}, 72 TENN. L. REV. 1041, 1045 (2005) (arguing that Supreme Court decisions have created a “rationality review of sentencing . . . in the form of rationality review with bite”); Chris Baniszewski, \textit{Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement}, 25 ARIZ. ST. L. J. 929, 959 (1993); Allyn G. Heald, \textit{United States v. Gonzalez: In Search of a Meaningful Proportionality Principle}, 58 BKN. L. REV. 455, 480 (1992).} especially with respect to rational-basis language traditionally applied under the Fourteenth Amendment. However, this Article demonstrates that the standards set by the Supreme Court, and the lower courts’ application of those standards, creates a simple rational-basis test, one which happens to have a fancy name. 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 properly aligns 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 the lower courts’ use of legislative deference creates a rebuttable presumption that the length of a sentence is constitutional. Part III offers a brief summary of the current rational-basis test applied to 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 purpose, 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.” Determining what constitutes “cruel and unusual” has troubled the Supreme Court since the nineteenth century and has yielded inconsistent results. Despite the continuing ambiguity, the Court has never clearly defined the phrase “cruel and unusual punishment.”

A.

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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).

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.”).

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).

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.”).
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. 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 unfettered power to prescribe punishments for crimes.” The Court also recognized that the framers “had a particular concern with the establishment of a safeguard against arbitrary punishments.” In this respect, the Clause acts as a constitutional check that ensures that legislation defining crimes and proscribing punishment is subject to judicial scrutiny. However, the fact that America is still the world’s leader in per capita

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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.”).


19 Id. at 274. 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) (“[T]he 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.”). But see Chris Baniszewski, 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).

20 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.”); Furman, 408 U.S. at 261 (“[T]he 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.”). 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”).
imprisonment\textsuperscript{21} suggests that the Eighth Amendment’s is a relatively weak safeguard mechanism.

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.\textsuperscript{23} 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, the Eighth Amendment prohibits criminalization and punishment of status, where the defendant is nearly void of culpability - for example, the status of \textit{being} a drug addict.\textsuperscript{24} Second, the Eighth Amendment forbids certain kinds of punishment, either altogether or applied to particular crimes.\textsuperscript{25} For example, it is well established that the Eighth Amendment prohibits torture\textsuperscript{26} and limits the imposition of capital punishment to aggravated murder.\textsuperscript{27} Finally, the Eighth Amendment prohibits sentencing for a term of

\begin{itemize}
\item \textsuperscript{22} Louis Kaplow & Steven Shavell, \textit{Fairness Versus Welfare}, 114 HARV. L. REV. 961, 1317 (2001).
\item \textsuperscript{23} \textit{See} Payne v. Tennessee, 501 U.S. 808, 819 (1991) (quoting J. FARRER, CRIMES AND PUNISHMENTS 199 (1880)).
\item \textsuperscript{24} \textit{See} Robinson v. California, 370 U.S. 660, 667 (1962) (holding that it is unconstitutional to punish someone for their status). \textit{See also} Furman, 408 U.S. at 273.
\item \textsuperscript{25} \textit{See}, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978) (recognizing that certain conditions of solitary confinement 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).
\item \textsuperscript{26} \textit{See}, e.g., \textit{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”).
\item \textsuperscript{27} \textit{See}, e.g., Graham v. Florida, 130 S.Ct. 2011, 2034 (2010) (holding that a juvenile cannot be sentenced to life-without-parole unless the juvenile is convicted of homicide); 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 capital punishment upon certain types of individuals. \textit{See}, e.g., Roper v. Simmons, 543 U.S. 551, 578 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2003) (mentally retarded).
\end{itemize}
years that is grossly disproportionate to the offense.\(^\text{28}\) Although there is some debate as to whether the Eighth Amendment was intended to prohibit disproportionate punishment,\(^\text{29}\) the Supreme Court has nonetheless established that the Eighth Amendment prohibits sentences that are grossly disproportionate to the offense.\(^\text{30}\) 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.

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 are unquestionably inconsistent.\(^\text{31}\) Nevertheless, we can identify certain characteristics and principles that consistently flow from these few opinions and lower courts’ application of the Supreme Court’s precedent.

\(^{28}\) See Weems v. United States, 217 U.S. 349, 371 (1910) (quoting O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting) (explaining the Eighth Amendment is a general prohibition “‘against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.’”). The Court continues to acknowledge this principle. See Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (plurality opinion) (Kennedy, J., concurring in part, joined by O’Connor and Souter, JJ.) (explaining that stare decisis requires the Court to recognize a proportionality principle).

\(^{29}\) 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).


\(^{31}\) 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).
First, a court will grant substantial deference to the legislature in determining what conduct to criminalize and the appropriate sentence to impose upon violators.\textsuperscript{32} 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 purpose.\textsuperscript{33} In order to identify these characteristics and principles, it is important to briefly summarize the primary Supreme Court cases addressing gross disproportionality review.

\textbf{B. SUPREME COURT CASE STUDIES}

The Court first considered the proportionality principle in \textit{O’Neil v. Vermont}.\textsuperscript{34} In \textit{O’Neil}, the defendant challenged a sentence of nearly 20,000 days of hard labor for 307 counts of selling liquor without a license.\textsuperscript{35} Although the majority did not address 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.”\textsuperscript{36}

Nearly two decades later, the Court reconsidered the issue in \textit{Weems v. United States}.\textsuperscript{37} In \textit{Weems}, the Court held that a sentence of hard physical labor and carrying an ankle chain was disproportionate to the crime of falsifying documents. For the first time,

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\begin{itemize}
\item \textsuperscript{32} See infra, III.A.
\item \textsuperscript{33} See infra, III.B.
\item \textsuperscript{34} 144 U.S. 323 (1892).
\item \textsuperscript{35} Id. at 326-27.
\item \textsuperscript{36} Id. at 339-40 (Field, J., dissenting).
\item \textsuperscript{37} 217 U.S. 349 (1910).
\end{itemize}
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 forged check in the amount of $28.36. A closely divided Supreme Court held that the sentence did not violate the Eighth Amendment.

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38 Id. at 367. Later, the Supreme Court relied on Weems, but emphasized Weems involved both a grossly disproportionate sentence and improper modes of punishment. See Rummel v. Estelle, 445 U.S. 263, 273 (1980) (plurality opinion).


40 See infra, III.B. However, the Court continues to emphasize dignity and the moral values of humanity in the context of capital punishment. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (“[T]he Eighth Amendment[] mandate[s] that capital sentencing be an individualized procedure based on a reasoned moral response to the defendant’s character and background.”), overruled on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (“[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”).


42 Id. at 265.
Essentially, the Court puntèd, explaining that “the length of the sentence actually imposed is purely a matter of legislative prerogative.” Moreover, the Court recognized that society had an interest in incapacitating repeat offenders who were incapable of ceasing their criminal behavior. Although the Court recognized the sentence was a serious penalty, it granted substantial deference to the legislature. By doing so, the Court left two questions unanswered; (1) does the Eighth Amendment actually contain a viable proportionality principle for noncapital sentences, and (2) if so, what is the standard for applying such a principle?

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

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43 *Id.* at 274.

44 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.

45 *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.

46 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. Such a statement implies that the proportionality principle applies the non-capital punishment, but the Court was not entirely clear on the issue.


Sugarcoating the Eighth Amendment

*Solem*, the defendant received a life sentence without the possibility of parole for “uttering a no account check for $100.” 49 Although the Court granted substantial deference to the legislature and recognized that the defendant was a repeat offender, 50 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.” 51 The Court’s opinion thus ushered in a proportionally principle of the Eighth Amendment that is still recognized today. 52

Additionally, the *Solem* 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. 53

Applying these factors, the Court explained that the gravity of the offense was relatively minor, 54 and the severity of the sentence excessively harsh. 55 Hence, the sentence was grossly disproportionate and therefore unconstitutional. 56

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49 *Id.* at 281.

50 *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).

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

52 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).


54 *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.
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.” Justice Kennedy explained that certain principles embedded in proportionality review suggest “[t]he 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.”

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55 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.*

56 *Id.* at 303.


58 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).


60 *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.*

61 *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”).

62 *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...
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 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.

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).

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

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

65 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.”).

66 Harmelin, 501 U.S. at 1004. Ironically, if Harmelin had shot and killed the officers who pulled him over out of panic and then been sentenced to life, he would have been eligible for parole in ten years. See Kelly A. Patch, Note, Hamrelin v. Michigan: Is Proportionate Sentencing Merely Legislative Grace?, 1992 Wis. L. REV. 1697, 1723 (1992).

67 See id. at 1001 (furthering the penological theory of deterrence and retribution).
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 the legislatures. 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

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68 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.


70 *Id.*

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

72 *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.

73 *Id.*

74 *Ewing*, 538 U.S. at 28.
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 so severely
furthered 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
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

75 Id. at 25.
76 Id. 25-27.
77 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.”).
78 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.,
sentences due to the weight of criminal history as an aggravating factor.”).
79 Ewing, 538 U.S. at 30.
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;” 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

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80 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*).

81 See infra, IV.A.


83 Id. at 77.

84 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).

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

86 Id. at 74.
for the courts to follow”\textsuperscript{87} and “precedents in this area have not been a model of clarity.”\textsuperscript{88}

\textit{Ewing} and \textit{Andrade} are the two most recent Supreme Court decision to specifically address gross disproportionality review. However, not only did these two decisions fail to articulate standards of which to apply gross disproportionality review, but the decisions significantly reduced the Court’s role in determining Eighth Amendment violations. In effect, the Supreme Court gave reviewing courts a channel to avoid gross disproportionality review altogether,\textsuperscript{89} and, as a result, court uphold the vast majority of sentences challenged under the Eighth Amendment’s gross disproportionality test.

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.

\section{II. LEGISLATIVE DEERENCE}

\textsuperscript{87} Id.

\textsuperscript{88} Id. at 72.

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.\(^{90}\) Recently, Chief Justice Roberts recognized that Eighth Amendment review of non-capital sentences “emphasize[s] the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors.”\(^{91}\) In this respect, courts 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. 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.\(^{92}\)

The Supreme Court explained that courts have a limited role in applying Eighth Amendment requirements as a restraint on legislative power,\(^{93}\) and reviewing courts

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should grant substantial deference to the legislature’s penological determinations.\textsuperscript{94} However, courts’ application of this “limited role” appears to be more like complete abstinence.\textsuperscript{95} 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.\textsuperscript{96} According to some commentators, this form of inquiry constitutes judicial activism that is beyond the scope of the court’s traditional role.\textsuperscript{97} The Supreme Court recognized this potential for judicial activism, which may well be the driving force behind the Court’s

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\textsuperscript{94} 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....").

\textsuperscript{95} See Donna Lee, Resuscitating Proportionality in Noncapital Criminal Sentences, 40 ARIZ. ST. L. J. 527, 530 (2008) ("[T]he principle of legislative primacy has been too easily interpreted as absolute deference to legislatively imposed sentencing protocols."). But see David Hackney, A Trunk Full of Trouble: Harmelin v. Michigan, 111 S. Ct. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262 (1992) ("The need for federal review of state punishments is especially necessary in light of the apparent irrationality sometimes manifested in administering criminal sanctions."). On the other hand, some commentators argue that the Constitution precludes any judicial review under the Eighth Amendment that allows the court to insert its own subjective will. See Bradford R. Clark, Constitutional Structure, Judicial Discretion, and the Eighth Amendment, 81 NOTRE DAME L. REV. 1149, 1202 (2006) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S 518, 533 (1928) (Holmes, J., dissenting)) ("[T]he Court's current approach . . . permits courts to exercise will rather than judgment and thus represents ‘‘an unconstitutional assumption of powers by courts of the United States.’").


unwillingness to invalidate legislatively prescribed sentences.\textsuperscript{98} As a result, courts grant substantial deference to the penological determinations of the legislature.\textsuperscript{99}

It is well established that each state and the federal government has the sovereign authority to make and enforce its own criminal laws,\textsuperscript{100} and such laws are the clearest evidence of contemporary values.\textsuperscript{101} 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,\textsuperscript{102} a principle that dates

\begin{footnotesize}
\begin{enumerate}
\item 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”); State v. Pribble, 285 S.W.3d 310, 314 (Mo. 2009) (“This Court will not question the General Assembly's determination beyond this narrow inquiry, as matching prison terms with particular crimes is, as a general matter, the legislature's province.”). 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.”).
\item See Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 657 (1992) (“Nowhere is this moral progress better demonstrated than in the decisions of the state legislatures.”) (Stevens, J., dissenting); Solem, 463 U.S. at 303 (Powell, J., dissenting). See also Furman v. Georgia, 408 U.S. 238, 259 (1972) (Brennan, J., concurring) (“[L]egislatures 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”).
\item 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.”), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002).
\item 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
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back to English common law. 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.” 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. The Supreme Court even concedes that courts “lack clear and objective standards to distinguish between sentences for different terms of

(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 MICHAEL 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 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).

103 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, 13 (1999) (“[N]owhere in the realm of public policy is there a greater disjuncture between research and policy.”).

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

105 McClesky, 499 U.S. at 491 (emphasis added). 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”); 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.”).
years” and recognizes that determining the reasons for a particular sentence is a policy choice for the legislature. As a result, courts refrain from invalidating sentences even when the sentence is perceivably harsh or unwise.

Furthermore, uniformity is not required among penal codes and, consequently, legislative penological decisions vary from state to state. Interestingly, however, this variance remains uncontested. Society expects legislatures to generate criminal codes

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106 Harmelim, 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.” 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”); 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 present themselves as supporters of laws that impose swifter, more severe punishment...”); Gerald F. Uelmen, Victims' Rights in California, 8 ST. JOHN’S J. LEGAL COMMENT. 197, 199 (1992) (“[P]olitical leaders are obsessed with the fear that any rational considerations of alternatives will result in their being labeled ‘soft on crime’”).

107 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. McDoucherty, 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.”).

108 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 “abdicat[ed] its responsibility as a guardian of the Eighth Amendment”).
that differ from each other because it reflects different societal values. Some commentators argue that 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 legislature. 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.” Thus, courts are extremely reluctant to invalidate a sentence either on the face of the statute or as applied to a particular sentence under the basic 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 *United States v. Angelos*, the defendant sold bags of marijuana to government informants on several

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109 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).


111 *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in judgment).


114 345 F. Supp. 2d 1227 (D. Utah 2004), aff’d, 433 F.3d 738 (10th Cir. 2006).
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{115} Pursuant to federal law,\textsuperscript{116} 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{117} The trial 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.”\textsuperscript{118}

In \textit{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.\textsuperscript{119} 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 \textit{Yirkovsky}, the defendant agreed to help his landlord remodel a house in exchange for exonerating his rent.\textsuperscript{120} 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.\textsuperscript{121} Subsequently, the defendant’s ex-girlfriend filed a complaint alleging the defendant possessed her property.\textsuperscript{122} When the defendant authorized the police to search his room for his ex-

\textsuperscript{115} \textit{Id.} at 1231.

\textsuperscript{116} 18 U.S.C. § 924(c) (2000).

\textsuperscript{117} \textit{Angelos}, 345 F. Supp. 2d at 1242-43.

\textsuperscript{118} \textit{Id.} at 1230. \textit{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).

\textsuperscript{119} 259 F.3d 704, 705 (8th Cir. 2001).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}
girlfriend’s property, the police found the .22 caliber bullet.\textsuperscript{123} 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.\textsuperscript{124} The 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.”\textsuperscript{125}

Cases such as \textit{Angelos} and \textit{Yirkovsky} raise a growing concern as to whether the Eighth Amendment even applies to sentences for a term of years.\textsuperscript{126} 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 \textit{Gregg v. Georgia},\textsuperscript{127} a capital punishment case, the Supreme Court indicated that the Court will presume a punishment selected by the legislature is valid.\textsuperscript{128} However, in the context of gross disproportionality review, the Supreme Court and some lower courts continue to deny this principle. In \textit{Solem}, Court pronounced that “no penalty is per se constitutional . . . [and] a single day in prison may be unconstitutional in some

\textsuperscript{123}\textit{Yirkovsky}, 259 F.3d at 705.

\textsuperscript{124} \textit{Id.} at 706.

\textsuperscript{125} \textit{Id.} at 710 n.4.


\textsuperscript{127} 428 U.S. 153 (1972) (plurality opinion).

\textsuperscript{128} \textit{Id.} at 173.
circumstances." However, this does not imply a sentence may not be presumed constitutional, but rather, should be presumed constitutional unless properly rebutted. As a result, a general rule has emerged: a sentence is presumed constitutional so long as it is within the statutory limits. Some courts are reluctant to even review a sentence that falls within the statutory limits due to such high deference to the sentence’s validity. These courts conclude that

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129 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).

130 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 threshold showing of disproportionality); United States v. Parker, 241 F.3d 1114, 1117 (9th Cir. 2001) (recognizing that a sentence that does not exceed the statutory limit will, generally, not violate the Eighth Amendment); United States v. Vega-Mejia, 611 F.2d 751, 753 (9th Cir. 1979) (explaining a sentence “within the limits set by a valid statute may not be overturned” unless the challenger establishes the sentence is grossly disproportionate); State v. DeSalvo, 903 P.2d 202, 207 (Mont. 1995) (upholding a fifteen-year sentence for possession of drugs because the sentence was within the statutory parameters). Even members of the bench have publically announced the presumption that a sentence is constitutional. See, e.g., Scott Graham, Trial Judges Trying to Determine Their Role in Three Strikes Cases, THE RECORDER, Sept. 27, 1994 (quoting Los Angeles Superior Court Judge John Torribio) (“The law is constitutional in general, but . . . some sentences will be struck down as cruel and unusual on a case-by-case basis.”). A good example of this presumption is the Fifth Circuit’s recent decision in United States v. Looney, 532 F.3d 392 (5th Cir. 2008) (per curiam). In that case, the court affirmed a 548-month sentence for possession of drug with the intent to distribute. Id. at 397. The defendant was a woman in her fifties with no prior convictions and the crime did not involve violence. Id. at 396. The court recognized that the sentence was exceedingly harsh but, nonetheless, declined to scrutinize the sentence because it was the statutorily proscribed mandatory minimum. Id. at 397.

131 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”).

132 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
the mere fact that the sentence is legislatively mandated or within the statutory limits renders the sentence valid under the Eighth Amendment.\textsuperscript{133}

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.\textsuperscript{134} 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.\textsuperscript{135} In other words, \textit{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.\textsuperscript{136}

Particularly, the requirement that a sentence must further a conceivable penological theory 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

\textsuperscript{133} 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{134} 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.").

\textsuperscript{135} See infra, IV.

\textsuperscript{136} This concept is addressed in section IV, infra.
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.”\(^{137}\) 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.”\(^{138}\)
Government conduct may violate the Fourteenth Amendment if it infringes on a
fundamental liberty interest or discriminates against a suspect class.\(^{139}\) However, when a
law does not fall into one of these categories, the law is reviewed under a lenient and very
deerential rational-basis test.\(^{140}\)

Under the Fourteenth Amendment rational-basis test, a law is upheld if it is
rationally related to any conceivable government interest.\(^{141}\) A law rarely fails such a
deerential standard. Generally, a law fails the Fourteenth Amendment rational-basis test
if the court concludes the law is not related to any conceivable government interest and.
In other words, a court will only invalidate a law under the rational basis test if the court

\(^{137}\) U.S. CONST. amend. XIV.

\(^{138}\) 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).

\(^{139}\) See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 791 (3d ed. 2006).

(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).

\(^{141}\) See Williamson v. Lee Optical, Inc., 348 U.S. 483, 487 (1955). See also Lindsley v. Natural Carbonic
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).
concludes the law is “irrational” or arbitrary, and such a conclusion is exceedingly rare. Nonetheless, this principle properly aligns with the Fourteenth Amendment. According the Supreme Court, “the touchstone of due process is protection of the individual against arbitrary action of government.”

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. 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 . . . .” Such judicial restraint embodies the notion that legislation is presumed constitutional.

142 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”).

143 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”).

144 See, e.g., Romer, 517 U.S. at 633 (holding that a Colorado law was irrational because its only conceivable purpose was “disadvantage 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).


146 See FCC v. Beach Commc’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”).


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. Even if the legislature does not clarify the government interest furthered by the law, the court will still uphold the law if it can conceive of a possible government interest furthered by the law. As a result, a plaintiff challenging a law bears the heavy burden to negate every 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,

149 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. Compare, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) with United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-77 (1980).

150 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”).


152 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.”).

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

154 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 seems 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.”).
but need only be *related* to achieving the desired result.\textsuperscript{155} Such a deferential standard prevents the court from imputing its own judgment regarding proper public policy\textsuperscript{156} and makes it exceedingly rare for a law to fail the rational-basis test.\textsuperscript{157}

The touchstone case illustrating the degree of deference that courts afford the legislature under the rational-basis test is *Williamson v. Lee Optical*.\textsuperscript{158} 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.\textsuperscript{159} However, other eye care specialists, such as optometrists and sellers of ready-to-wear glasses, were not subject to the same requirement.\textsuperscript{160} 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.\textsuperscript{161} The Court reasoned that “reform takes one step at a

\textsuperscript{155} 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.").


\textsuperscript{157} 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 rational basis scrutiny.”). See also Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L. J. 591, 603 (1999-2000).

\textsuperscript{158} 348 U.S. 483 (1955).

\textsuperscript{159} Id. at 485.

\textsuperscript{160} Id.

\textsuperscript{161} Id. at 487.
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.  

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.” Further, the 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

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

163 *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.

164 *Id.* at 488.

165 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.”).

166 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.”).
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.”\(^{167}\)

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.\(^{168}\) 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, 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”\(^{169}\) and, a law that does not further any legitimate government interest will fail the rational-basis test.\(^{170}\) The landmark case illustrating this principle is *City of Cleburne v. Cleburne Living Center.*\(^{171}\) In that case, the city of Cleburne denied landowners a permit to build a housing facility for the mentally retarded.\(^{172}\) The challengers argued that, because the city approved permits for


\(^{172}\) *Id.* at 437.
other housing facilities, 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.

Contrary to what might have been expected under the *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. According to the Court, such a bias or ill-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

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173 Id. at 447.

174 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. Id.

175 Id.

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

177 Id. at 449.
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 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.

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178 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.

179 *Id.* at 449.

180 *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.

181 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.”).

182 *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.”).

183 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
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.\(^{184}\) Indeed, if the Court had applied the deferential rational-basis test articulated in Lee Optical, the outcome would have likely been different.\(^{185}\) Regardless, the ends sought in both the Lee Optical approach and the Cleburne approach are the same: if the court concludes a law does not further a conceivable legitimate government purpose, therefore making it arbitrary, the law will fail the rational-basis test.\(^{186}\)

C.

**SUMMARY: 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

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\(^{184}\) See, e.g., Powers v. Harris, 379 F.3d 1208, 1223-24 (10th Cir. 2004).

\(^{185}\) 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).

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. 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 purpose. 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. 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. SERVING A PENOLOGICAL THEORY

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 any penological purpose, and it should not impute its own judgment as to

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187 See supra, III.

188 See Graham v. Florida, 130 S.Ct. 2011, 2026 (2010) (recognizing that reviewing a sentence under the Eighth Amendment requires that “the Court also consider[] whether the challenged sentencing practice serves legitimate penological goals.”). 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).
whether the punishment is the most suitable means to further that penological purpose.\textsuperscript{189}

According to Justice Marshall, “a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose,”\textsuperscript{190} and, in this respect, a court will use all of its imaginative powers to identify any conceivable penological purpose furthered by a sentence. 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?\textsuperscript{191} Generally, a reviewing court will uphold a sentence so long as it furthers any penological theory.\textsuperscript{192}

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 \emph{conceivable} penological theory.

\textsuperscript{189} Gregg v. Georgia, 428 U.S. 153, 182-83 (1976) (plurality opinion) (“[W]e 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.”). However, Justice Scalia contends that the Court’s decisions illustrate that the Court is actually inserting its own judgment. \textit{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”).

\textsuperscript{190} Furman v. Georgia, 408 U.S. 238, 331, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring);

\textsuperscript{191} 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. \textit{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, \textit{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.”).

\textsuperscript{192} \textit{See} Wilhelm, \textit{supra} note 10, at 578 (recognizing a legislative purpose test, under which a court will “examine the legislative, or penal, purpose of [a] statute.”).
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.”\(^{193}\) Applying this test, Justice Kennedy determined that the defendant’s crime of possessing cocaine\(^{194}\) 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.”\(^{195}\) Consequently, the defendant’s life sentence served legitimate deterrent, rehabilitative, and incapacitating purpose.\(^{196}\) Kennedy concluded that the sentence did not create an inference of gross disproportionality because there were conceivable penological interests furthered by the sentence.\(^{197}\)

Similarly, in *Rummel*, the Court recognized that the primary goals of Texas’s recidivist statute were to (1) deter repeat offenders and (2) incapacitate those who are incapable of ceasing their criminal behavior.\(^{198}\) The language and the reasoning of these


\(^{194}\) The defendant, a first time offender, was charged and convicted of possession of 650 grams of cocaine.

\(^{195}\) *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.*

\(^{196}\) *Id.*

\(^{197}\) *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).

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.199

The “inference of gross disproportionality” requirement articulated by Justice Kennedy in *Harmelin* currently governs Eighth Amendment review of sentences.200 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.201 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.202 The common

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199 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.”).

200 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”).

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

202 See Donna Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing, 40 ARIZ. ST. L. J. 527, 530 (2008). See also David Hackney, A Trunk Full of Trouble: *Harmelin* v. Michigan, 111 S. CT. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262, 277 (1992) (arguing that Kennedy’s threshold test articulate in *Harmelin* “acts as a bar to Eighth Amendment protection for non-capital defendants”). For example, a court could say that any sentence imposed with the possibility of parole conceivably serves a rehabilitative and deterrent purpose i.e. a convict who knows he is eligible for parole would (1) be encouraged to rehabilitate and (2) be deterred from engaging in conduct that may be detrimental to his parole chances.
penological theories identified by the courts, which are by no means exhaustive, are deterrence, incapacitation, and criminal history under recidivist statutes. 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. Justice Kennedy explained that the Constitution does not mandate any particular penological theory. In context, this suggests that courts do not need to engage in detailed scrutiny of a sentence and, instead, only need to identify a conceivable penological theory furthered by the sentence.

Several courts have held that the possibility of parole forecloses gross disproportionality review altogether. See, e.g., United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995); United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995); United States v. Meirvitz, 918 F.2d 1376, 1381 (8th Cir. 1990). But see Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) (explaining that the possibility of parole should merely be one factor to consider).

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, 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.”).

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.”).

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).

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
The requirement that a sentence must merely further a penological theory is easily satisfied, and, nonetheless, it is not surprising. According to the Supreme Court, a sentence is not required to be “strictly proportionate” to the offense. The Eighth Amendment merely contains a “narrow proportionality” principle that applies to sentences for a term of years and forbids only “extreme sentences.” 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.

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

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207 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”).

208 *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).


210 883 F.2d 1276 (6th Cir. 1989).
punishment would sufficiently act as a deterrent.\textsuperscript{211} 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.”\textsuperscript{212}

Such a decision highlights the threshold finding required in order to uphold a sentence: does the sentence furthers a penological theory? In \textit{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 \textit{conceivably} further a sentence;\textsuperscript{213} for example, incapacitation.\textsuperscript{214} As a result, courts go to great lengths to uphold harsh sentences by recognizing the sentence furthers a legitimate penological theory.\textsuperscript{215}

\begin{itemize}
\item \textsuperscript{211} \textit{Id.} at 1283.
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textit{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, \textit{Which Crime Is It? The Role of Proportionality in Recidivist Sentencing After Ewing v. California}, 19 BYU J. PUB. L. 279, 289 (2004).
\item \textsuperscript{214} \textit{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 incarceration keeps violent criminals from law-abiding society.” Pete Wilson, \textit{Justice Demands and California Needs “Three Strikes,”} 26 U.W.L.A. L. REV. 239 (1995).
\item \textsuperscript{215} \textit{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.”).
\end{itemize}
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.”

The general reasoning is that, if an offender has committed certain crimes in the past and continues to commit such crimes currently, then enhanced punishment is necessary because the offender has demonstrated that he cannot control his criminal tendencies. In this respect, courts and commentators agree that punishing habitual offenders more severely than first-time offenders serves legitimate penological interests and, as a result, courts are reluctant to second-guess such legislatively mandated sentences. Even the United States Sentencing Guidelines recognize that habitual offenders are more blameworthy than first-time offenders and, therefore, more

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


218 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).

219 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.”).
deserving of punishment. As a result, a reviewing court may easily justify harsh sentences imposed on career criminals.

For example, in *Taylor v. Lewis*, the Ninth Circuit upheld a Three Strikes sentence for possession of .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. The court indicated that removing an offender with such an extensive history of criminal activity was a rational basis for upholding the sentence. If all courts applied similar reasoning, a sentence imposed on a career criminal will presumptively further the penological theory of, at least, incapacitation.

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220 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.”). 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).

221 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”). 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, Recidivist Statutes-Application of Proportionality and Overbreadth Doctrines to Repeat Offenders-Wanstree v. Bordenkircher, 276 S.E.2D 205 (W. Va. 1981), 57 WASH. L. REV. 573, 588 (1982) (“[R]ecidivism creates culpability per se.”).


223 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. Compare id. (upholding a Three Strikes life sentence where the defendant was a repeat offender) 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 .238 grams of cocaine).

224 *Taylor*, 460 F.3d at 1100-01.

225 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)
and the courts that do choose to focus on criminal history will easily find reasons to justify harsh sentences.\footnote{226}

In fact, many courts do apply reasoning similar to \textit{Taylor}, but extend it by considering a defendant’s criminal history as the \textit{determinative} penological justification for upholding a sentence.\footnote{227} As the Supreme Court explained in \textit{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.”\footnote{228} One longstanding rationale is that habitual criminals are “not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.”\footnote{229} Thus, a court reviewing a sentence that is imposed under a recidivist statute may easily avoid rigorous review by illuminating the defendant’s

\footnote{226 For example, in \textit{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 \textit{Reyes v. Calderson, No. CV 00-600, “Order, etc.”} (C.D. Cal. 2006) (unpublished).

\footnote{227 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 \textit{see} \textit{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 disproportionates).


\footnote{229}Graham v. W. Virginia, 224 U.S. 616, 623 (1912).}
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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.\(^{230}\)

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.”\(^{231}\) 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.

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.”\(^{232}\) However,

\(^{230}\)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. Caroza, 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.”). 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).

\(^{231}\)United States v. Walker, 473 F.3d 71, 83 (3d Cir. 2007).

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\textsuperscript{233} or (2) the underlying crime’s harm to society is similar to the underlying crime’s harm in a previously upheld sentence.\textsuperscript{234}

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 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

\textsuperscript{233} 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 \textit{Hutto} and \textit{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 \textit{Rummel}”).

\textsuperscript{234} 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 \textit{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 \textit{Rummel} and \textit{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.”).
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. SERVING NO PENOLOGICAL THEORY

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 defer to the legislature and (2) under certain circumstances, a sentence will not further any conceivable penological purpose.

235 See supra, Part III.B.


237 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 – Wanstree 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.

238 See Baniszewski, supra note 12, at 955.

239 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
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 the 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] defendant did not somehow become twice as dangerous to society.” In other words, the consecutive sentence did not further any deterrent or retribution purpose. Justice

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241 *See Frase, supra* note 8, at 629 (suggesting 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”).

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

243 *See id.*
Souter would have invalidated the sentence because imposing *consecutive* sentences furthered no penological purpose.

The exceedingly few courts that do invalidate a sentence under the Eighth Amendment do so under the reasoning similar to Justice Souter’s dissent in *Andrade* – i.e., the sentence violates the Eighth Amendment because it does not further any conceivable penological purpose.\(^{244}\) The notion that a sentence must serve *any* penological purpose suggests that the Cruel and Unusual Punishment Clause is merely a safeguard against arbitrary punishment.\(^{245}\)

Recently, in *Gonzalez v. Duncan*, the Ninth Circuit invalidated a twenty-eight-year-to-life sentence imposed on a defendant convicted for failing to update annual sex offender registration within five working days of his birthday.\(^{246}\) The court acknowledged that the defendant had previously been convicted of a number of crimes, including cocaine possession, committing a lewd act on a child under the age of fourteen,

\(^{244}\) *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 having 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”).

\(^{245}\) 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.”).

\(^{246}\) 551 F.3d 875, 877 (9th Cir. 2008).
attempted forcible rape, and auto theft.\textsuperscript{247} The court further recognized that the state had an interest in “deterring recidivism [and] [i]ncarceration . . . would incapacitate Gonzalez and thus prevent him from committing additional felonies against the general population.”\textsuperscript{248} Despite these considerations, the court held the sentence was grossly disproportionate the offense.

The Ninth Circuit explained the failing to register was an entirely passive, harmless, and technical violation.\textsuperscript{249} As a result, the court was “unable to discern any 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{250} According the court, the registration requirement was “only tangentially related to the state’s interest,” and failure to comply with it was merely a technical violation.\textsuperscript{251} This language indicates the court was unable to identify any penological purpose for the sentence.

\textsuperscript{247} \textit{Id.} The Ninth Circuit described the defendant’s criminal history as “extensive, including convictions for possession of a controlled substance and auto theft in 1988, attempted forcible rape and lewd conduct with a child under the age of fourteen in 1989, robbery in 1992, and spousal abuse in 1999.” \textit{Id.} at 886.

\textsuperscript{248} \textit{Id.} at 886-87.

\textsuperscript{249} \textit{Id.} at 885. In fact the court explained that “failure to update his sex offender registration annually is a crime of omission, which is by definition the most passive felony a person could commit.” \textit{Id.} at 890.

\textsuperscript{250} Gonzalez, 551 F.3d at 888 (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); 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{251} Gonzalez, 551 F.3 at 887. 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 attached” and the offense did not “reveal any propensity to recidivate.” \textit{Id.}
As discussed above, reliance on the criminal history of the defendant allows many courts to uphold harsh sentences.\textsuperscript{252} However, the Ninth Circuit declined to utilize this consideration. Indeed, the court explained that the touchstone penological theory common to recidivist sentences - incapacitating habitual criminals whose conduct indicate they are incapable of conforming to society’s laws - did not justify the Three Strikes sentence. According to the court, 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.”\textsuperscript{253}

The Ninth Circuit’s decision in \textit{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.\textsuperscript{254} Had the court illuminated such a state interest, it might have concluded that the severe penalty imposed on the defendant \textit{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 of conforming to the requirements set forth by the legislature. However, by choosing to ignore the excessive deference commonly afforded to the legislature and

\textsuperscript{252} See supra, \textsc{Part IV.A.}

\textsuperscript{253} \textit{Gonzalez}, 551 F.3d at 888. A number of courts have distinguished \textit{Gonzalez} where the defendant’s criminal history is more similar to the triggering offense. \textit{See, e.g.}, \textit{Fryman v. Duncan}, No. C 05-0156 MHP, 2010 WL 145010, at * 10 (N.D. Cal. Jan 8, 2010) (“There is a connection between his current crime and his past crimes insofar as his past crimes were allegedly committed to acquire funds to support his drug habit.”).

\textsuperscript{254} Several cases following \textit{Gonzalez} recognize this principle to distinguish \textit{Gonzalez}. \textit{See, e.g.}, \textit{Calloway v. White}, 649 F. Supp. 2d 1048, 1054 (N.D. Cal. 2009); \textit{People v. Nichols}, 97 Cal. Rptr. 3d 702, 708 (3d Dist. 2009).
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**

Although 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. 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 purpose. Finally, a court will 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. As section III illustrates, these characteristics are virtually identical to 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 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

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255 See *supra*, PART II.A.

256 See *supra*, PART IV.A.

257 See *supra*, PART IV.B.
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.

The Court must recognize the threshold question in Eighth Amendment challenges to the length of a sentence – does the sentence further a conceivable penological theory? Only if he 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.

\[^{258}\text{It is not the purpose of this Article to advocate for or oppose the application of a rational-basis test to an Eighth Amendment challenge. Instead, the purpose of this Article is to identify that such a test is, in fact, applied.}^\]