

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at \$399 apiece.²³⁴ A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]."²³⁵ The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,²³⁶ and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle."²³⁷ Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law."²³⁸ Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow."²³⁹

Declaring that "[t]he concept of proportionality is central to the Eighth Amendment," Justice Kennedy, writing for a five-Justice majority in *Graham v. Florida*,²⁴⁰ held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."²⁴¹ Justice Kennedy characterized proportionality cases as falling within two general types. The first type comprises challenges to the length of actual sentences imposed as being grossly disproportionate, and such challenges are resolved under approaches taken in *Solem*, *Harmelin*, and similar cases.

²³⁴ *Ewing v. California*, 538 U.S. 11 (2003).

²³⁵ 538 U.S. at 29–30.

²³⁶ 538 U.S. at 31.

²³⁷ 538 U.S. at 32. The four dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the *Solem v. Helm* test would have been more appropriate for a recidivism case. See 538 U.S. at 32, n.1 (opinion of Justice Stevens).

²³⁸ *Lockyer v. Andrade*, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25-year-to-life sentences on a 37-year-old convicted of two petty thefts with a prior conviction.

²³⁹ 538 U.S. at 72.

²⁴⁰ 560 U.S. ___, No. 08–7412, slip op. (2010).

²⁴¹ *Id.* at 31. The opinion distinguishes life without parole from a life sentence. An offender need not be guaranteed eventual release under the *Graham* holding, just a realistic opportunity for release based on conduct during confinement.