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Not Just Kid Stuff? Extending *Graham* and *Miller* to Adults

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I. INTRODUCTION

The Supreme Court of the United States' recent decisions in *Graham v. Florida*[1] and *Miller v. Alabama*[2] are plainly milestones in the field of juvenile justice, but do they also point the way to expanded Eighth Amendment protections for adult defendants? In *Graham*, the Court prohibited sentences of life in prison without the possibility of parole (LWOP) for juveniles convicted of nonhomicide offenses.[3] The holding raises the question of whether there should be parallel Eighth Amendment limitations on the ability of a state to sentence *adults* to LWOP for nonhomicide offenses. Then, in *Miller*, the Court prohibited mandatory LWOP sentences for juveniles convicted of homicide; the majority held that the sentencing judge must be free to consider the juvenile offender's age as a mitigating factor on a case-by-case basis.[4] This raises the question of whether there should be any similar requirement mandating the individualized, discretionary sentencing of adults.

In this Article, I consider the prospects for extending *Graham* and *Miller* to adults. I assume that, in the normal spirit of constitutional adjudication, the Supreme Court and lower courts will be – and should be – open to extending the decisions to new cases presenting reasonably analogous considerations, taking into account the holdings of earlier Eighth Amendment decisions and the general approach to judging associated with our common law traditions.[5]

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1. 130 S. Ct. 2011 (2010).
2. 132 S. Ct. 2455 (2012).
3. *Graham*, 130 S. Ct. at 2034.
4. *Miller*, 132. S. Ct. at 2475.
5. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise the same capacity which by tradition courts always have exercised: reasoned judgment."). To be sure, my common law approach to understanding the Eighth Amendment in light of the Court's precedent stands in opposition to originalist approaches, which some Justices would clearly prefer. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 975 (1991) (Scalia, J., announcing judgment of Court) ("[T]he ultimate question is . . . what [the] meaning [of cruel and unusual punishment] was to the Americans who adopted the Eighth Amendment."). The original meaning of the Cruel and Unusual Punishments Clause

The Court's earlier decisions, however, are a mixed bag, which makes it difficult to offer firm conclusions about the meaning and significance of *Graham* and *Miller*. The central challenge is this: *Graham* and *Miller* differ markedly in spirit and analytical methodology from the Court's two prior decisions on the constitutionality of noncapital sentences, yet *Graham* and *Miller* did not overturn the earlier decisions or even offer particularly convincing grounds for distinguishing them. In *Harmelin v. Michigan*, the Court upheld a mandatory LWOP sentence for a drug crime.[6] Then, in *Ewing v. California*, the Court upheld California's draconian "three-strikes" law as applied to a defendant whose third strike was for a trivial shoplifting offense.[7] Despite their minimalist approach to Eighth Amendment protections, *Harmelin* and *Ewing* were recognized as good law in *Graham*[8] and *Miller*,[9] so any account of the latter two decisions must show how they can be reconciled with the former.

In the end, I do not think it possible to fit these decisions together as the expression of a single, overarching principle. Rather, the decisions reflect an ad hoc, but not entirely incoherent, balancing of four ideals: (1) proportionality in punishment; (2) judicial deference to legislative policy choices and state court judgments; (3) social reintegration of offenders; and (4) individualized, discretionary sentencing. As the Court developed these concepts in *Graham* and *Miller*, they do not provide much basis for sweeping reversals of adult LWOP sentences. On the other hand, *Graham* and *Miller* may provide a basis for relief for various specific categories of adult offenders, either in the

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is a complex topic lying beyond the scope of this Article. For a recent assessment of the history that provides some originalist support for robust proportionality review, see John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011). In some respects, particularly its emphasis on culpability, Stinneford's historically grounded approach to proportionality review dovetails with the approach that I describe in Part II below as emerging from *Graham* and *Miller*. *See id.* at 972 ("If the punishment is unjustly harsh in light of the defendant's culpability, it is cruel.").

6. 501 U.S. at 961, 996.

7. 538 U.S. 11, 18, 30-31 (2003). On the same day as *Ewing*, the Court also decided *Lockyer v. Andrade*, another case affirming a California three-strikes sentence. 538 U.S. 63, 77 (2003). Unlike *Ewing*, *Lockyer* was a habeas case, and its disposition was controlled by the federal habeas statute. *Id*. at 71 ("In this case, we do not reach the question whether the state court erred and instead focus solely on whether [28 U.S.C.] § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim."). As a result, I do not consider *Lockyer* to be a central part of the Eighth Amendment "canon," and I do not discuss it further here.

8. *See Graham*, 130 S. Ct. at 2022 ("The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant's sentence . . . .").

9. *See Miller*, 132 S. Ct. at 2470 ("Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*.").

form of an LWOP prohibition for certain kinds of cases (a *Graham* remedy)[10] or a requirement for an individualized, discretionary process before LWOP can be imposed (a *Miller* remedy).[11]

In further developing these points, the Article proceeds as follows. Part II more fully unpacks the central jurisprudential values that animate *Graham* and *Miller*. By reference to these values, Part III explains how *Graham* and *Miller* may be reconciled with *Harmelin* and *Ewing*. Finally, Part IV discusses the application of *Graham* and *Miller* to one particular category of adult offenders – those sentenced under the three-strikes provision of 21 U.S.C. § 841(b)(1)(A) – and concludes that at least some of these offenders may have viable Eighth Amendment claims.

II. MAKING SENSE OF *GRAHAM* AND *MILLER*

Graham and *Miller* are centrally concerned with the ideal of proportionality in punishment, but neither opinion is structured as simply an open-ended inquiry into the excessiveness of a challenged sentence. Rather, the proportionality analysis of both opinions seems conditioned by a set of collateral considerations – considerations that may influence the rigor of the proportionality analysis and the Court's choice of remedies. These considerations include ideals relating to judicial deference, the reintegration of offenders into society, and discretionary, individualized sentencing.

This Part first explores the proportionality analysis of *Graham* and *Miller*, and then describes the role played by the conditioning considerations. It concludes that the Court may be heading toward a sliding-scale approach to Eighth Amendment review, similar to that which it uses in other areas of constitutional jurisprudence.

A. Proportionality

Graham and *Miller* are explicitly premised on the belief that the Eighth Amendment prohibits disproportionately harsh punishments. As the Court put it in *Graham*: "Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense."[12] Thus, the Court has banned various sentencing practices "based on mismatches between the culpability of a class of offenders and the severity of the penalty."[13] This Section discusses the basic structure of the "mismatch" analysis in *Graham* and *Miller*, unpacks the factors that the Court has particularly used to assess culpability, and final-

10. *See Graham*, 130 S. Ct. at 2034.

11. *See Miller*, 132 S. Ct. at 2475.

12. *Graham*, 130 S. Ct. at 2021 (alterations in original omitted) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)) (internal quotation marks omitted).

13. *Miller*, 132 S. Ct. at 2463 (citing *Graham*, 130 S. Ct. at 2022-23).

ly considers the role of utilitarian purposes of punishment (deterrence, incapacitation, and rehabilitation) in the Court's reasoning.

1. Basic Structure of the Analysis: Categorical, Ordinal Ranking of Offenses and Penalties

Despite the popularity of glib proportionality formulae like "an eye for eye," it is not at all clear how to translate a given level of offense severity into a particular sentence, especially when the sentence is a term of imprisonment. The units of measure for offense severity and punishment severity seem wholly incommensurable. Contemporary proportionality theory has met the problem by adopting an ordinal, as opposed to a cardinal, orientation; that is, the most serious category of crime should be punished with the most serious punishment, the second-most serious category of crime should be punished with the second-most serious punishment, and so forth.[14]

This logic seems very much in line with *Graham*'s approach to proportionality. Thus, for instance, *Graham* tells us that nonhomicide offenders must not be exposed to the worst punishment available to murderers – that is, the death penalty – because nonhomicide offenders are categorically less culpable than murderers.[15] Likewise, in light of the various deliberation- and character-related considerations to be discussed below, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[16] This calls for punishment that is also at least twice diminished, or, in other words, for something less than LWOP.[17] Conceptually speaking, it is easy to imagine this "degrees-of-diminution" formula being extended in various ways; for instance, by prohibiting a twice-diminished punishment (relative to the death penalty) from being imposed in cases of *thrice*-diminished culpability (relative to adult homicide).[18] This categorical, ordinal approach provides the basic structure of the proportionality analysis under *Graham* and *Miller*.

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14. Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1255-56 (2011) (citing Andrew von Hirsch, *Penal Theories*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 659, 668 (Michael Tonry ed., 1998)).

15. *Graham*, 130 S. Ct. at 2027.

16. *Id.*

17. *See id.*

18. To be sure, although this approach is conceptually straightforward enough, there might be important practical difficulties in deciding where to draw the lines; for instance, should a sentence of life with parole eligibility after fifty years be treated like LWOP as once diminished, or should it be regarded as categorically less severe? Does the answer depend on the age and health of the defendant? On the liberality of the parole standards and practices of the jurisdiction? It seems that there must necessarily be some arbitrariness around the margins in the line-drawing process; such practical difficulties, however, should not necessarily lead the courts to abandon any

2. Culpability Factors

If the proportionality analysis requires a culpability-based comparison between the offender before us and an adult murderer, we must have some criteria for assessing culpability. Although the Court has not set forth such criteria in a systematic fashion, we can infer a workable list from the reasoning of *Graham* and other Eighth Amendment decisions.

a. Harm

The Court has emphasized the importance of harm in distinguishing the culpability of different classes of offenders, particularly in distinguishing between those guilty of homicide and those guilty of lesser crimes. *Graham* put it this way:

> There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability. This is because life is over for the victim of the murderer, but for the victim of even a very serious nonhomicide crime, life is not over and normally is not beyond repair. Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense.[19]

Thus, although proportionality theorists are divided on the question of whether resulting harm should matter in assessing offense gravity,[20] the Court seems to have embraced harm as a key consideration.[21]

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effort to extend *Graham*'s categorical-proportionality logic beyond juvenile LWOP. Indeed, *Graham* itself created various difficult line-drawing problems even in the juvenile LWOP area, for instance, with respect to the question of what it means for juvenile offenders to be given some "realistic opportunity to obtain release." *See generally* Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. T. L. REV. 310, 314 (2012). There would be few principles of justice left standing if courts limited themselves to those that could be enforced without engaging in any contestable line-drawing.

19. 130 S. Ct. at 2027 (alterations in original omitted) (citations omitted) (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008); Enmund v. Florida, 458 U.S. 782, 797 (1982)) (internal quotation marks omitted).

20. *See, e.g.*, Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 13 (2003) ("[P]eople disagree about

b. Intent and Deliberation

In addition to the objective harm done, the Court also sees the defendant's subjective state as an important aspect of culpability. This seems to include the traditional criminal law concept of "intent." For instance, while the Court sometimes seems to define the most serious culpability category exclusively by reference to resulting harm (as in the previously quoted passage), at other times the Court discusses the homicide category more broadly as also encompassing those who merely "intend to kill" or even "foresee that life will be taken."[22] The suggestion seems to be that a sufficiently blameworthy state of mind may elevate the seriousness of a crime beyond what would normally be expected based solely on the objective harm. If so, the converse might also be true – that is, an offender might not be held fully accountable for a harm that was neither intended nor foreseen.[23]

While intent and knowledge do seem important to the culpability calculus, the Court has also suggested a broader view of what counts in an evaluation of the offender's state of mind, including a constellation of factors that might collectively be labeled "deliberation."[24] The Court seems to be asking to what extent the offender's actions reflected a free, informed, and carefully considered choice to do wrong. Thus, various deliberation-related impairments specific to juveniles played a prominent role in justifying the Court's decisions in *Graham* and *Miller*. Citing *Graham* and *Roper v. Simmons*, the Court summarized its reasoning this way in *Miller*:

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what affects blameworthiness. The most dramatic example I can think of is that some people think that resulting harm ought to increase punishment while others think it ought not and that the focus should be only on things like one's conduct, culpability, and capacities.").

21. Payne v. Tennessee, 501 U.S. 808, 819-20 (1991). The Court has also embraced the relevance of harm to culpability in its leading decision on the admissibility of victim impact evidence. *Id.* I'm grateful to Paul Litton for reminding me of this.

22. *Graham*, 130 S. Ct. at 2027.

23. The relative weight to ascribe to harm and intent has been a subject of considerable debate among punishment theorists. Michael Moore suggests that we ought to think about the relationship this way: the subjective aspects of culpability (which he labels simply "culpability") are both necessary and sufficient for punishment; however, when these are present, the harm ("wrongdoing") "independently influences how much punishment is deserved." MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 193 (1997). "Indeed . . . the amount of wrong done may often swamp the degree of culpability with which it is done as the major determinant of how much punishment is deserved." *Id.* This approach seems consistent with the Court's discussion of proportionality in *Graham*, although the Court's analysis is sufficiently imprecise that it would be unwise to assume that it intends to endorse any particular systematic theory of proportionality. *See Graham*, 130 S. Ct. at 2021-22.

24. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569-70 (2005).

> Because juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments. [Prior] cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.[25]

On such grounds, *Graham* was able to conclude that a "juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult";[26] hence, "because juveniles have lessened culpability they are less deserving of the most severe punishments."[27]

c. Character

The Court's discussion of deliberation-related factors bleeds into another dimension of proportionality review – the offender's character. Note, for instance, the third "gap" in the preceding quotation from *Miller*, which suggests that juveniles should be regarded as less culpable because their crimes are less likely to serve as reliable "evidence of irretrievable depravity."[28] This seems a conceptually distinct inquiry from questions like how much harm was done and with what state of mind.

Emphasizing character is an idiosyncratic move by the Court.[29] In contemporary punishment theory, culpability and proportionality are more typically thought of in relation to a specific voluntary act and not as a function of characteristics intrinsic to the offender's person.[30] For example, we are

25. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (alterations in original omitted) (citations omitted) (quoting *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569, 570) (internal quotation marks omitted).

26. Graham, 130 S. Ct. at 2026 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)) (internal quotation marks omitted).

27. *Id.* (citing *Roper*, 543 U.S. at 569).

28. 132 S. Ct. at 2464 (alteration in original omitted) (quoting *Roper*, 543 U.S. at 570).

29. *See, e.g.*, MOORE, *supra* note 23, at 191 ("The concept of responsibility presupposed by Anglo-American criminal law is one whereby . . . persons . . . are responsible for their choices (not their characters).").

30. *See, e.g.*, *id.*; MODEL PENAL CODE § 2.01(1) (Proposed Official Draft 1962) ("A person is not guilty of an offense unless his liability is based on conduct that

commonly told to condemn the sin, not the sinner; as such, it may seem unfair and illiberal to punish based on who the offender is rather than what the offender has done. Yet, for Eighth Amendment purposes the Court indicated that it considers "the culpability of the offenders at issue in light of their crimes *and characteristics*."[31]

At noncapital sentencing, offender characteristics are normally addressed not in connection with culpability, which is a moral judgment, but in an effort to assess dangerousness: does the offender require simple incapacitation, or can the offender be expected to respond favorably to rehabilitative treatment? Yet *Graham* spoke of character in unmistakably moral terms. For instance, the Court observed that "from a *moral* standpoint[,] it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[32] Indeed, the key words chosen by the Court in *Graham* and *Miller* – words like "character," "depravity," and "corruption" – have a distinctly moral valence, especially in comparison with more technocratic phrases, such as "risk assessment" or "likelihood of recidivism," that might have been used instead.[33]

Although it may be unusual to treat character as an aspect of culpability or proportionality, the Court would not be entirely alone or beyond justification in doing so. An established Aristotelian, or "aretaic," tradition of thinking about punishment focuses on character in ways that share something of the same spirit as *Graham* and *Miller*.[34] In the words of Professor Kyron

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includes a voluntary act or the omission to perform an act of which he is physically capable.").

31. *Graham*, 130 S. Ct. at 2026 (citing *Roper*. 543 U.S. at 568) (emphasis added); *see also Miller*, 132 S. Ct. at 2463 (referring to "precept of justice that punishment for crime should be graduated . . . to *both the offender* and the offense" (emphasis added) (quoting *Roper*, 543 U.S. at 568) (internal quotation marks omitted)).

32. 130 S. Ct. at 2026-27 (alteration in original omitted) (emphasis added) (citation omitted) (quoting *Roper*. 543 U.S. at 568) (internal quotation marks omitted).

33. Although *Miller* borrows the moralistic phraseology from *Graham*, the more recent opinion does not as clearly treat the character question as an aspect of culpability. For instance, in explaining why juveniles are less deserving of the most severe punishments, *Miller* observed that its "findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's moral culpability *and* enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Miller*, 132 S. Ct. at 2464-65 (emphasis added) (quoting *Graham*, 130 S. Ct. at 2027) (internal quotation marks omitted). This language suggests that culpability assessment is to be regarded as a separate consideration from whether the offender's character deficiencies are likely to be reformed. Still, whether or not *Miller* contemplates that character goes to culpability, there is no question that *Miller* treats character, or something much like it, as part of the proportionality calculus. *See id.* at 2467.

34. For a general discussion of the aretaic theory of punishment, see Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 98-99 (2002).

Huigens, a leading exponent of this view, the aretaic theory of punishment "takes the principal justifying purpose of punishment to be the inculcation of virtue"[35] – that is, "a capacity for sound practical judgment, both on the occasion of action and in the assembly and maintenance of one's system of ends and standing motivations."[36] On this view, a finding of criminal fault is "an inference . . . to the effect that the defendant's practical reasoning is flawed or deficient."[37] Criminal fault, thus understood, is punished because "we bear a responsibility to others to conceive and pursue our ends in a way that promotes the greater good. Defining the good and determining ends are acts over which we maintain some control and upon which the well-being of others depends."[38] Such a line of thinking may provide a plausible justification for the Court's suggestion that character is a subject fit for culpability judgments.[39]

3. Downplaying of Utilitarian Purposes

As the Court observed in *Graham*, culpability is typically seen as the particular concern of retributive approaches to punishment.[40] In theory, however, punishments that are excessive relative to culpability might nonetheless effectively serve utilitarian crime-control ends through deterrence, incapacitation, or rehabilitation. Under *Graham* and *Miller*, these utilitarian purposes

35. *Id.* at 99.

36. *Id.* at 98.

37. *Id.* at 107.

38. *Id.* at 117.

39. Moreover, the aretaic theory also provides a basis for limiting penal severity insofar as punishment bears on the virtue of the "punishing majority": as we punish, we must acknowledge that the way we do so defines our own character. *Id.* at 120-21. It would be hypocrisy, for instance, for us to punish a defendant for failing to make a selfless choice that we would not be willing to make either. *Id.* at 121. Likewise, as Huigens argues, ours would be "a brutal society instead of an enlightened one" were we to punish a defendant whose mental illness deprived him of the ability to "assess and govern his own conduct." *Id.*

Analogous reasoning may underlie the Court's treatment of juvenile status in *Graham* and *Miller*. We might say, for instance, that punishment of juveniles must be moderated because we were all young and foolish once, with deficient practical reasoning, and there would be a certain flavor of hypocrisy not to recognize that at sentencing. Moreover, the juvenile does not have a fully developed capacity to assess and govern his own conduct, and there does seem something brutal about punishing him as if he did. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012). Finally, young people are not yet full-fledged, autonomous members of our society, and as such we should not expect them to shoulder an adult level of responsibility. In sum, a young person's crime simply does not carry the same social significance as that of an adult.

40. Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

have a role to play in the Eighth Amendment analysis, but the role is uncertain and seems secondary to the culpability considerations described above.

For instance, in describing its general approach to the Eighth Amendment, the *Graham* Court indicated that it would assess the "culpability of the offenders at issue in light of their crimes and characteristics," but then added that it would "also consider[] whether the challenged sentencing practice serves legitimate penological goals."[41] The Court thus seemed to indicate that the moral fit between culpability and punishment alone was not the be-all and end-all of the Eighth Amendment analysis; however, it did not elaborate on how precisely the broader assessment of penological goals might affect its reasoning.[42]

Still, the Court did make clear that utilitarian benefits would not necessarily save an otherwise-disproportionate sentence. Thus, the Court acknowledged the possibility of deterrence benefits from juvenile LWOP but concluded, "Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence."[43] The Court seemed to reach a similar conclusion as to incapacitation.[44]

The Court may have a sliding-scale approach in mind, which might work in ways that parallel the constitutional analysis in other areas of law. For instance, when a sentence does not appear disproportionate relative to culpability, the Court might employ a deferential rational basis review to determine whether the sentence is penologically justified. However, when a sentence is *excessive* relative to culpability, a more rigorous approach to judicial review might be appropriate.[45] This seems at least roughly consistent with the reasoning in *Graham*.[46]

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41. *Id.* at 2026.

42. *See id.* at 2028.

43. *Id.* at 2029.

44. *See id.* ("Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."). By contrast, the Court found no plausible rehabilitation benefits to LWOP. *Id.* at 2029-30.

Miller treated utilitarian goals in much the same way as *Graham*, giving such goals little emphasis in comparison to proportionality. *See Miller*, 132 S. Ct. at 2465. Indeed, in its general summary of the Eighth Amendment analysis, *Miller* made no reference at all to the broader penological-goals test, but instead simply discussed proportionality. *Id.* at 2463. On the other hand, as suggested above, *Miller* may have reconceptualized proportionality so as to incorporate incapacitation- and rehabilitation-type concerns. *See* discussion *supra* note 33.

45. *Cf.* Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring) ("Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster . . . . We have consistently held, however, that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."

(citations omitted)); Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

46. The role of utilitarian considerations in the Eighth Amendment analysis has been a matter of particular debate and uncertainty in both the Supreme Court decisions and the scholarly literature. *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005). As Youngjae Lee has observed, the *Ewing* plurality opinion rests on what he calls the "disjunctive theory," that is, the idea that a sentence survives Eighth Amendment review if it can be justified on the basis of *any* of the major purposes of punishment, even if it is excessive in relation to all of the rest. *Id.* at 682. Lee argues that the disjunctive theory is "wrongheaded" and that the Eighth Amendment restriction on excessive punishment should instead be understood as a retributively grounded "side constraint" on a state's ability to pursue the utilitarian purposes of punishment. *Id.* at 683. On this view, a punishment that goes beyond what is permitted by retributive proportionality might be unconstitutional, regardless of its deterrence and incapacitation benefits. *Id.* at 684. Although the Court has not explicitly embraced this side constraint view, Lee observes – correctly, I think – that the Court's recent Eighth Amendment decisions in *capital* cases indicate that the Court no longer takes the disjunctive approach very seriously. *See* Youngjae Lee, *The Purposes of Punishment Test,* 23 FED. SENT'G REP. 58, 58 (2010). Lee depicts *Graham* as an extension of this trend into the *noncapital* arena. *Id.* at 59-60. He suggests that *Graham* may be pointing in the direction of a new approach to Eighth Amendment analysis similar to the sliding scale I have described above. *See id.* at 60 ("*If* a punishment fails the culpability test, then the punishment is presumptively unconstitutional and a compelling reason is needed to overcome the presumption of unconstitutionality. That is, the Eighth Amendment right against excessive punishment is defined by the retributivist constraint . . . but the right is not absolute." (emphasis in original)).

Richard Frase has suggested a somewhat different approach. He argues that proportionality is not necessarily a retributive concept, but that three different approaches to proportionality should (and do) inform the determination of whether a challenged punishment is permissible. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 575-76 (2005). The first approach, limiting retributivism, employs retributive proportionality as a side constraint on punishment, as Lee proposed. *Id.* at 591. The second approach, ends disproportionality, considers whether the punishment's costs and burdens outweigh its likely benefits. *Id.* at 592. The third and final approach, means proportionality, considers whether there are less costly or burdensome means available to achieve the same benefits. *Id.* In Frase's view, a punishment would be unconstitutional if it was "grossly disproportionate" under *any* of the three approaches to proportionality, subject to confirmation through intra- and inter-state comparisons. *Id.* at 633-34. Consistent with this view, Frase finds in *Graham* some support for the idea that "retributive disproportionality might, by itself, be a basis for finding a prison sentence to be in violation of the Eighth Amendment." Richard S. Frase, *Graham's Good News – and Not*, FED. SENT'G REP. Oct. 2010, at 55. He also sees in Justice Kennedy's analysis some implicit consideration of the two nonretributive proportionality principles, but criticizes Kennedy for not expressly

B. Conditioning Considerations

While proportionality seems to be the Court's central concern in *Graham* and *Miller*, the Court's analysis seems conditioned by a set of considerations that are only tangentially related to proportionality. The Court has not precisely defined the role played by these considerations, but a careful reading of *Graham* and *Miller* does provide some sense of what the Court may have in mind. This Section first assesses the Court's treatment of a trio of considerations that seem connected to the ideal of judicial deference, and then turns to two additional considerations relating to the social reintegration of offenders and individualized, discretionary sentencing.

1. Deference

The deference ideal demands respect for the work of legislatures and lower courts, with an eye toward preserving the legitimacy of the judiciary (which might be undermined, for instance, by starkly counter-majoritarian decision making); the stability of law and legal judgments; the role of state-level autonomy and experimentation in our federalist system of government; and the comparative advantages of legislatures in making policy choices and local trial judges in determining appropriate sentences in light of particular community circumstances and values.[47] Such ends are obviously disserved if the Supreme Court issues sweeping Eighth Amendment decisions that overturn well-established laws or legal practices, especially when the decisions are seen as a product of the idiosyncratic social values of five unelected Justices. The Court does make an effort to avoid such negative perceptions of its Eighth Amendment jurisprudence, albeit perhaps not as much of an effort as some would like to see.

Reflecting such an effort, *Graham* and *Miller* devote considerable attention to a trio of deference-related variables: frequency of the challenged sentence in practice, extent of deliberate legislative support for the sentence, and consistency of the sentence with international legal norms. Before describing

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indicating "that the two nonretributive proportionality principles are independent of each other, so that a violation of either principle can invalidate a proposed nonretributive punishment rationale." *Id.* at 55-57. Thus, like Lee (and me), Frase thinks that *Graham* leaves open the possibility that in some circumstances a retributively disproportionate sentence might be saved by a sufficiently compelling utilitarian justification – a possibility that Frase finds regrettable. *Id.* at 54.

47. Several of these points were expressly noted as important Eighth Amendment concerns in Justice Kennedy's controlling opinion in *Harmelin v. Michigan*. 501 U.S. 957, 998-1001 (Kennedy, J., concurring in part and concurring in the judgment); *see also* Michel M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2135-55 (2010) (discussing justifications for deference by appellate courts to sentencing decisions made by trial court judges).

these variables in more detail, though, it is helpful to appreciate that the discussions of deference are framed somewhat differently in the two cases.

Graham addressed deference through its determination that a "national consensus" existed against juvenile LWOP for nonhomicide crimes.[48] This conclusion of a national consensus, however, seems far too strong based on the available evidence, particularly, as the dissenters pointed out, in light of the frequency with which legislatures have approved juvenile LWOP.[49]

Miller considered a similar body of evidence, but eschewed a "national consensus" conclusion, speaking instead in a more open-ended way of "objective indicia" of public attitudes.[50] Perhaps this marks a turn away from the misleading "national consensus" framework that the Court employed in its earlier Eighth Amendment decisions.[51] I follow *Miller*'s lead in avoiding the language of "national consensus"; what the Court has really been doing, I think, in its purported search for "consensus" has been assessing the relative strength of the case for deference in light of the considerations described below.

a. Frequency of the Challenged Sentence in Practice

In *Graham*, the most important deference consideration may have been the infrequency of the challenged sentence (juvenile LWOP for nonhomicide crimes). Indeed, the Court went to some pains to establish that only 123 "juvenile nonhomicide offenders" were serving LWOP sentences nationwide when the case was decided.[52] The number was particularly impressive in light of the many tens of thousands of juveniles arrested each year for aggravated assault, robbery, and other serious offenses.[53] Such infrequency in the imposition of a challenged sentence makes clear that overturning the sentence will not impose major disruptions on the day-to-day functioning of state criminal justice systems and also diminishes concerns that the Court is acting in a starkly counter-majoritarian way.[54]

In contrast, *Miller* potentially affects a much higher number of sentences; at the time of the decision, the actual number of individuals serving mandatory LWOP for juvenile homicides apparently exceeded 2,000.[55] Yet, even for homicide, the Court found juvenile LWOP to be a rare and disfavored

48. *Graham*, 130 S. Ct. at 2026.

49. *Id.* at 2048-50 (Thomas, J., dissenting).

50. Miller v. Alabama, 132 S. Ct. 2455, 2470-71 (2012).

51. For another controversial use of the "national consensus" framework in addition to *Graham*, see Kennedy v. Louisiana, 554 U.S. 407, 422-26 (2008).

52. *Graham*, 130 S. Ct. at 2024.

53. *Id.* at 2025.

54. Although neither the Court's nor my approach to the Cruel and Unusual Punishments Clause has been particularly textual, the importance of infrequency could also be justified through its natural connection to the term "unusual."

55. *Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

sentence based on data from jurisdictions in which juvenile LWOP was discretionary, noting "[t]hat figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely. And . . . [the Court has] held that when judges and juries do not often choose to impose a sentence, it at least should not be mandatory."[56]

b. Deliberate Legislative Support for the Sentence

Although precedent indicated that legislation was the "clearest and most reliable objective evidence of contemporary values,"[57] in *Graham* and *Miller* the Court seemed to effectively reject this view. Indeed, *Graham* overturned the law in thirty-nine U.S. jurisdictions including the federal system and the District of Columbia, while *Miller* overturned the law in twenty-nine jurisdictions.[58]

In both cases, the Court downplayed the legislative evidence in light of concerns that the legislation reflected a sort of inadvertence, rather than a deliberate choice. As the Court observed in *Miller*:

> Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age. And indeed, some of those States set no minimum age for who may be transferred to adult court in the first instance, thus applying life-without-parole mandates to children of any age – be it 17 or 14 or 10 or 6. As in *Graham*, we think that underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.[59]

Of course, such an absence of deliberate choice undercuts the general assumption that overturning legislation contravenes majoritarian preferences.

56. *Id.* at 2472 n.10.

57. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

58. *Miller*, 132 S. Ct. at 2471.

59. *Id.* at 2473 (footnotes omitted) (citations omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2026 (2010)) (internal quotation marks omitted).

c. Consistency with International Legal Norms

In addition to U.S. law and practice, *Graham* also looked to international legal norms, stating, "[T]he judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it."[60] Although the Court's citation of international norms in Eighth Amendment cases has proven controversial,[61] this can be understood as a deference-oriented device to help ensure that Eighth Amendment holdings are not merely the products of the idiosyncratic social values of five justices, but are instead in accord with widespread, objectively ascertainable human-rights norms. Moreover, an inconsistency between state law and nearly universal international norms may heighten suspicions that the state law did not result from a deliberate, well-informed policy choice.

International legal norms thus join frequency in practice and deliberate legislative choice as important factors in deciding how much deference to give to a challenged sentence or sentencing law. Such a threshold determination might play a decisive role in the constitutional analysis in many – perhaps even most – cases, given the looseness of the proportionality test.[62] In other words, because there will often be room for reasonable minds to differ over how many times "diminished" a given punishment or offender is from the most serious, it will often be critical whether the analysis is undertaken with a strong presumption in favor of the constitutionality of the challenged sentence or law, a weak presumption, or no presumption at all.

2. Social Reintegration of Offenders

Among the conditioning considerations, the deference factors received the most extensive and explicit treatment in *Graham* and *Miller*. However, there do seem to be additional considerations that played a role in the Court's thinking. For instance, the Court's proportionality analysis does not by itself seem quite capable of justifying the breadth of the holding in *Graham*. Rather, the holding also seems to rest on a particular aversion to the sort of permanent social exclusion represented by LWOP.

Recall that the *Graham* Court adopted a flat prohibition on juvenile LWOP for nonhomicide offenses.[63] In so doing, the Court expressly rejected the alternative that courts "take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the

60. *Graham*, 130 S. Ct. at 2034.

61. For a defense of this practice, see Jessica Olive & David Gray, *A Modest Appeal for Decent Respect*, FED. SENT'G REP., Oct. 2010, at 72.

62. *See* discussion *supra* note 46.

63. *Graham*, 130 S. Ct. at 2030.

seriousness of the crime."[64] Although the Court conceded the possibility that LWOP might indeed be an appropriate sentence for some juvenile nonhomicide offenders, the Court was not convinced that the decision could be made with "sufficient accuracy."[65]

The Court thus chose a categorical, prophylactic rule that eliminated the risk of one type of error: the false positive (that is, an incorrect determination that a juvenile nonhomicide offender deserves LWOP).[66] At the same time, the Court enhanced the risk of a different type of error: the false negative (that is, an incorrect determination that a juvenile nonhomicide offender does *not* deserve LWOP). If there are *any* cases in which a juvenile nonhomicide offender actually deserves LWOP, which is a possibility that the Court did not reject, then *Graham* guarantees erroneous – that is, disproportionately lenient – sentences in those cases. Thus, *Graham* cannot be taken at face value as a decision that is driven by concern for accuracy in proportionality decisions. Rather, *Graham* trades off one type of risk of error for another, implicitly revealing that one type of error is of more concern to the Court than the other.

Why was *Graham* more concerned about false positives than false negatives? The Court first suggested that there might be systemic tendencies to impose overly harsh sentences for juveniles. Quoting its earlier decision in *Roper v. Simmons*, which banned the juvenile death penalty, the Court observed that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[67] Further exacerbating the risk of error were the "special difficulties encountered by counsel in juvenile representation," such as the tendency for juveniles to mistrust adults.[68]

Yet it is far from clear that juvenile status tends, on the whole, to create a greater risk of false positives than false negatives. The majority in *Graham* clearly appreciated that youth was a mitigating factor, and there is no reason to think that the justices on the Supreme Court are possessed of some special moral sensitivity that is not shared by judges in lower sentencing courts. Indeed, the very rarity of juvenile LWOP sentences that seemed so important in *Graham* and *Miller* would belie any claim that the brutality of a crime commonly "overpower[s]" the mitigating aspects of youth.[69] Of course, this is not to say that juvenile LWOP sentences are *never* disproportionately harsh, but it suggests that any systemic tendencies to over-

64. *Id.* at 2031.
65. *Id.* at 2032.
66. *Id.*
67. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
68. *Id.*
69. *See supra* text accompanying note 53.

harshness likely operate on the margins and are frequently offset by systemic tendencies to lenience. Graham himself initially received a sentence of *probation* for a violent armed robbery attempt;[70] the life sentence was not imposed until after Graham violated his probation and the case was transferred to a different judge.[71]

In light of the uncertainty as to whether the likelihood of false positives really is substantially greater than the likelihood of false negatives, the categorical rule of *Graham* likely arises, at least in part, from another consideration: whatever their relative frequency, false positives are simply a less acceptable type of error than false negatives – thus, courts should err in favor of a lesser sentence than LWOP. Indeed, as if recognizing the difficulties with relying on accuracy concerns alone, the Court offered another justification for its categorical rule: such a rule "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[72] The significance of the word "all" in this context is not entirely clear, but it seems best read to emphasize the Court's interest in giving *even those juvenile offenders whose crimes really merit LWOP* an opportunity to "demonstrate maturity and reform."[73] After all, the word appears in response to the suggestion that judges should have the freedom to impose LWOP in cases involving "particularly heinous crimes."[74] The Court is trying to give us a reason to prefer false negatives over false positives; *everyone* should eventually be given a chance to demonstrate maturity and reform, even those who have committed "particularly heinous crimes" involving the sort of aggravated culpability that may not really qualify as "twice diminished."[75]

In determining why, the Court's precise choice of words may again be telling. The Court speaks of "demonstrat[ing] maturity and reform."[76] A "demonstration" implies a social act – there is an audience and a judgment of the quality of the act. Thus, the Court does not contemplate that the reformed offender will enjoy his newfound maturity in isolation. Rather, maturity and reform are pathways to what Justice Anthony Kennedy, the author of the majority opinion in *Graham*, elsewhere called "ordinary civic life in a free society."[77]

Graham seems to embrace a particular vision of human flourishing – a vision that is essentially social and centered on the individual's moral relationships with others. Consider, for instance, the Court's explanation of why

70. *Graham*, 130 S. Ct. at 2018.
71. *Id.* at 2019-20.
72. *Id.* at 2032.
73. *Id.*
74. *Id.* at 2031.
75. *Cf. id.* at 2030 (finding that it is "not appropriate" for "the State [to] make[] an irrevocable judgment about [a juvenile nonhomicide offender's] value and place in society").
76. *Id.* at 2032.
77. Romer v. Evans, 517 U.S. 620, 631 (1996).

LWOP raises the "same concerns" as the death penalty: "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[78] The four-way association is striking, with the Court linking death, hopelessness, physical separation from society, and moral separation from society. A life of social exclusion, the Court suggests, is hardly a life at all.[79]

While exclusion from society may be ordered, the period of exclusion can and should be an occasion for the offender to make atonement for his crimes, rather than merely a time to await release or death. The real evil of LWOP is that the sentence eliminates incentives for atonement and precludes the possibility of reconciliation with society:

> Terrance Graham's sentence guarantees that he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.[80]

While the Court's express focus here is on the moral status of the *offender*, the Court's reasoning also seems implicitly premised on the moral responsibility of society to respond to efforts made by the offender to achieve atonement. In a moral-relational view of human flourishing, we must remain open to the possibility of reconciliation with those who have wronged us; otherwise, we stunt our own moral development and capacity for fulfillment.[81] Fear and hatred can be prisons, too – *Graham* seems at some level an effort to remind us of this great truth. Providing offenders with a realistic path back to "ordinary civic life in a free society" may be as much for our benefit as theirs.[82] To be sure, the Court was hardly explicit about such moral

78. *Graham*, 130 S. Ct. at 2032.

79. *Id.* at 2032-33 ("Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.").

80. *Id.* at 2033.

81. *Cf.* Michael M. O'Hear, *Solving the Good-Time Puzzle: Why Following the Rules Should Get You out of Prison Early*, 2012 WIS. L. REV. 195, 220 ("[T]he offender who performs well in prison has indicated a desire and a capacity to reform . . . We owe it to him and to ourselves to respond in some positive fashion . . . .").

82. This line of thinking may profitably be connected to Professor Huigens' insight that we constitute our collective character in important ways through our penal practices. *See* discussion *supra* note 39; *see also* Huigens, *supra* note 34, at 120-21.

foundations to its reasoning, but intuitions along these lines seem to underlie *Graham*'s choice of a broad prophylactic remedy and help to illuminate the Court's particular concerns with LWOP as a sentence.

3. Preference for Individualized, Discretionary Sentencing

Miller's basic holding – no mandatory LWOP even for juvenile killers – seems puzzling in light of *Graham*'s proportionality analysis. After all, the juvenile killer does not have Graham's "twice diminished moral culpability."[83] Because juvenile status only once diminishes the culpability of defendants like Miller, the second-most severe sentence (LWOP) should be presumptively constitutional. It is not entirely clear why a categorical safeguard such as the *Miller* rule is warranted for this set of cases. Rather than overturning a mandatory sentencing law adopted by a majority of the states, the Court might have instead relegated defendants like Miller to case-by-case challenges to their sentences – an approach that would have recognized the presumptively constitutional nature of LWOP for killers, while preserving an opportunity for relief in unusual cases involving additional culpability-diminution.

In embracing a categorical protection, the Court again invoked a concern about inaccuracy, as it had in *Graham*: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [a mandatory LWOP] scheme poses too great a risk of disproportionate punishment."[84] But, standing alone, this concern seems even less compelling as a justification for a categorical rule than it was in *Graham*. After all, *Graham* dealt with a presumptively disproportionate class of sentences, while *Miller* seemingly dealt merely with "once diminished" punishment for "once diminished" culpability.

In short, it is difficult to account for *Miller* except by reference to a particular distrust of mandatory sentencing. After all, under *Miller* a type of punishment – LWOP for juvenile killers – that is categorically acceptable if imposed on a discretionary basis is now unconstitutional solely where it is mandatory.[85] It is not entirely clear why *Miller* adopted this double standard, but the Court's reasoning suggests at least three mutually supporting possibilities. First, the *Miller* rule may reflect deference considerations. For instance, in response to the states' argument that the number of jurisdictions employing mandatory juvenile LWOP precluded holding the practice unconstitutional, the *Miller* Court observed:

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83. Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012) (quoting *Graham*, 130 S. Ct. at 2027).

84. *Id.* at 2469.

85. More recently, the Court again indicated its distaste for mandatory sentencing in *Alleyne v. United States*, in which the Court held that the facts triggering a minimum must be found by a jury instead of a judge. 133 S. Ct. 2151, 2158, 2163 (2013).

> [T]he cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process – considering an offender's youth and attendant circumstances – before imposing a particular penalty.[86]

The Court thus seemed to treat its holding as less of an infringement on the autonomy of state criminal justice systems than earlier Eight Amendment decisions; after all, *Miller* did not rule out LWOP as a sentence for any class of offense or class of offender but only spoke to the *process* by which the sentence may be selected.[87] In so doing, *Miller* actually augmented the power of state trial court judges, even as it somewhat constricted the scope of legislative policy choice. Such a dynamic may lessen deference concerns that would otherwise call for upholding a challenged sentence.

Second, the Court indicated that, as a mitigating factor, juvenile status in particular may demand individualized assessment because it can affect culpability in several important but sometimes quite idiosyncratic ways. Indeed, in its discussion of the significance of youth, the *Miller* Court not only reiterated the key findings of *Graham*,[88] it also highlighted an additional age-related consideration: the fact that many juvenile offenders come from "chaotic and abusive" households[89] and "lack the ability to extricate themselves from horrific, crime-producing settings."[90] The Court observed of Miller himself, "[I]f ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here."[91] The Court concluded that "a sen-

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86. *Id.* at 2471.

87. The Court's underlying reasoning may echo that of *Rita v. United States*, in which the Court held that federal appellate courts may accord a presumption of reasonableness to sentences imposed within the range recommended by the United States Sentencing Guidelines. 551 U.S. 338, 340 (2007). In justifying this decision, the Court observed:

> [B]y the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

Id. at 347 (emphasis in original). Similarly, when there is a "double determination" by both the legislature and the sentencing judge that an LWOP sentence is warranted in a particular case, there is a greater likelihood that the sentence is reasonable (that is, not disproportionate) than if there is only a single determination by the legislature. *Id.*

88. *Miller*, 132 S. Ct. at 2464-65.

89. *Id.* at 2468.

90. *Id.* at 2464 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

91. *Id.* at 2469.

tencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."[92]

Miller thus suggested that (1) juvenile status may sometimes function as a sort of "super-mitigator" that diminishes culpability in some cases in more than one way, and (2) that because this is a sufficiently common occurrence in cases of juvenile homicide, mandatory LWOP creates an unacceptably high risk of proportionality error.[93] Read this way, *Miller*'s skepticism of mandatory sentencing may be limited – at least in its strongest form – to cases presenting mitigating circumstances that have an especially profound and idiosyncratic character, such as juvenile status.

Finally, the *Miller* rule may be a further reflection of the Court's special concerns regarding LWOP and permanent social exclusion. Because LWOP is so disfavored, the Court demands a double procedural safeguard: a legislature must authorize the penalty and a sentencing judge with discretion must choose to impose it.[94] Indeed, *Miller* arguably went beyond even *Graham* in its treatment of LWOP as an extreme penalty. While *Graham* observed that "life without parole sentences share some characteristics with death sentences,"[95] it also reaffirmed that "a death sentence is unique in its severity and irrevocability."[96] *Miller*, however, seemed to up the rhetorical ante in analogizing LWOP to death, asserting that the Court now "view[s juvenile LWOP] as akin to the death penalty."[97] Indeed, the "correspondence" between the two punishments was central to the Court's ban on mandatory juvenile LWOP, for it made "relevant" the line of Eighth Amendment decisions requiring individualized sentencing when the state seeks to impose its "harshest penalties."[98]

To the extent that a heightened concern over the severity of the penalty drove *Miller*'s rejection of mandatory sentencing, it is possible that the con-

92. *Id.*

93. *See id.* at 2467-68 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from the stable household and the child from a chaotic and abusive one."). The sensibility here may reflect a view that, in at least some cases of juvenile crime, society has failed in terribly profound ways in its responsibilities to the child, and society must in some sense hold itself to account in these cases, even as it holds the child to account; it would be hypocritical for society not to recognize in some meaningful way its own contribution to the offense.

94. *See id.* at 2475.

95. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)) (internal quotation marks omitted).

96. *Id.*

97. *Miller*, 132 S. Ct. at 2466.

98. *Id.* at 2467-68.

cern was limited to juvenile LWOP specifically rather than LWOP generally. In *Graham*, the Court's extended discussion of the severity of LWOP made comparatively little mention of the specifics of juvenile status.[99] Although the Court noted – albeit almost in passing and near the end of the discussion – that LWOP is "an especially harsh punishment for a juvenile" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender,"[100] the central point for purposes of the Court's holding was simply that "life without parole is the second most severe penalty permitted by law."[101] In *Miller*, however, the Court more prominently and starkly drew the difference between juvenile and adult LWOP.[102] Additionally, throughout its discussion of the severity of LWOP the Court always included the word "juvenile" in its characterization of the type of sentence at issue.[103]

Although it is possible that the peculiar nature of *juvenile* LWOP played a crucial role in *Miller*'s rejection of mandatory sentencing, nothing in the Court's opinion casts doubt on the notion that LWOP generally should be regarded as highly disfavored under Eighth Amendment analysis. Indeed, such a stance would not be at all inconsistent with the view that juvenile LWOP should be even more disfavored than adult LWOP.

Moreover, *Miller* offered an intriguing suggestion that may have an important bearing on the way courts should view the severity of adult LWOP:

> Although adults are subject as well to the death penalty in many jurisdictions, very few offenders actually receive that sentence. So in practice, the sentencing schemes at issue here result in juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change.[104]

The Court thus indicated that the dramatic, long-term decline in the frequency of the imposition and execution of death sentences in the United

99. *Graham*, 130 S. Ct. at 2027-28.

100. *Id.* at 2028.

101. *Id.* at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)) (internal quotation marks omitted).

102. *Compare id.* at 2028 ("[A] juvenile offender will *on average* serve more years and a greater percentage of his life in prison than an adult offender." (emphasis added)), *with Miller*, 132 S. Ct. at 2466 ("[A juvenile] will *almost inevitably* serve 'more years and a greater percentage of his life in prison than an adult offender.'" (emphasis added) quoting *Graham*, 130 S. Ct. at 2028)).

103. *Miller*, 132 S. Ct. at 2466-67. Elsewhere in this Symposium, however, William Berry argues persuasively that "the distinction between a juvenile LWOP sentence and a life-without-parole sentence is not of great significance." William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1084 (2013).

104. *Miller*, 132 S. Ct. at 2468 n.7 (citation omitted).

States since the 1990s[105] has relevance for the constitutionality of less severe sentences. As a result, we may soon need to start regarding LWOP not as the second-most severe penalty in our punishment system, but as the de facto most severe penalty – a perspective that has important implications for the sort of categorical-proportionality analysis embraced by *Graham*.

C. Synthesis

Graham and *Miller*'s prophylactic rules seem premised on the belief that juvenile offenders normally have diminished culpability relative to adult offenders and should therefore receive lesser punishments for the same crimes. Yet this principle, standing alone, does not seem to fully capture the sensibilities that animate the opinions. First, the opinions attend to deference considerations; it is not clear, for instance, that the cases would come out as they did without the Court's findings of legislative inadvertence. Additionally, the prophylactic rules are hard to account for in the absence of particular reservations about LWOP and mandatory sentencing.

Given their uncertainties and equivocations, it is foolhardy to claim that *Graham* and *Miller* establish anything as formal and definite as a new "test" for Eighth Amendment claims. But one may discern in the two opinions the outlines of a multifaceted heuristic of sorts. Here, it seems, are the key features of the Court's approach.

First, the core of the Eighth Amendment analysis is the culpability-based, categorical proportionality review; in this review, the Court considers how far removed the offense is from the most serious offense (adult homicide), and how far removed the sentence is from the harshest punishment (the death penalty). If the sentence is categorically more severe than the offense, the sentence is at least presumptively unconstitutional, subject to the possibility that utilitarian crime-control benefits are sufficiently compelling as to outweigh the mismatch between culpability and punishment.

Second, this proportionality review is conditioned by various deference-related factors, including the frequency of the challenged sentence in practice, extent of deliberate legislative choice in favor of the sentence, and consistency of the sentence with international legal norms; the more convincingly these factors support deference, the less likely the Court will find that a sentence fails proportionality review. When, however, the case for deference is not particularly strong, the Court may conduct a more rigorous review analogous to the heightened scrutiny sometimes performed in other areas of constitutional law.[106]

Third, proportionality review is also conditioned by a preference for the eventual social reintegration of all offenders; the Court will thus err against

105. *See* Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, FED. SENT'G REP., Oct. 2010, at 4 (discussing death penalty data).

106. *See supra* note 75 and accompanying text.

affirming an LWOP sentence, as it does the death penalty.[107] For instance, the Court is more inclined to adopt a categorical prophylactic rule rather than leave proportionality concerns to case-by-case review.[108]

Finally, the Court also disfavors mandatory sentencing and may overturn a mandatory LWOP regime even in the absence of a clear, categorical mismatch between culpability and punishment (although this may be limited to situations involving certain sorts of super-mitigators or cases of juvenile LWOP).

III. MAKING SENSE OF *HARMELIN* AND *EWING*

This Part considers whether the understanding of *Graham* and *Miller* sketched above can be reconciled with *Ewing* and *Harmelin*.

A. Ewing v. California

In *Ewing*, the Court upheld the application of the California "Three Strikes and You're Out" law to a repeat offender who received a sentence of twenty-five years to life for shoplifting.[109] At first blush, upholding such a harsh sentence for such a minor offense seems hard to square with *Graham*'s robust proportionality review.[110] *Graham*'s own proffered distinction is hardly satisfying:

> The approach in cases such as *Harmelin* and *Ewing* is suited for considering a gross proportionality challenge to a particular defendant's sentence, but here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.[111]

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107. *See* Rachel E. Barkow, *Categorizing* Graham, FED. SENT'G REP., Oct. 2010, at 49 (discussing the Court's "death is different" jurisprudence, which has imposed various limitations on capital punishment based on the Cruel and Unusual Punishments Clause).

108. William Berry has a made a similar argument. *See* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1113 (2010) (arguing "that 'life without parole' merits its own category of heightened review in the application of the Eighth Amendment, requiring perhaps fewer categorical limitations than the death penalty but certainly greater protections" than in the pre-*Graham* cases).

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

110. *Ewing* did not present, and the Court did not consider, a *Miller*-type procedural challenge to his sentence, so there seems no need to try to reconcile *Ewing* with *Miller*.

111. Graham v. Florida, 130 S. Ct. 2011, 2022-23 (2010).

The Court's lack of citation to precedent in this passage is telling, for the distinction between a challenge to a particular sentence and a challenge to a sentencing practice has no grounding in the Court's earlier Eighth Amendment jurisprudence on noncapital sentences. There is, moreover, a good reason why the Court had not previously made such a distinction: any challenge to a particular sentence can easily be reframed as a challenge to a sentencing practice, and there is no obvious basis for limiting such reframing. For instance, Ewing could have couched his attack on the California three-strikes law as a challenge to a "particular type of sentence" (twenty-five years to life) "as it applies to an entire class of offenders who have committed a range of crimes" (from shoplifting to major violent offenses).[112] Indeed, the *Ewing* plurality itself framed the question it confronted in sentencing-practice terms rather than particular-sentence terms, stating, "In this case we decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's 'Three Strikes and You're Out' law."[113]

Nor does it seem very satisfying to distinguish the cases merely on the basis that one involved a juvenile defendant and the other an adult. Recall that Graham's sentence was unconstitutional because his case presented "twice diminished moral culpability": once diminished for his juvenile status, and once again because he did not kill nor intend to kill.[114] The proportionality analysis of *Graham* thus requires analysis not only of the characteristics of the offender, but also of the nature of the offense. There seems no good reason under *Graham* why the defendant who commits an extremely minor crime – like shoplifting – should not be regarded as having moral culpability that is also twice diminished. A more persuasive basis for reconciling *Ewing* with *Graham* is provided by the multifaceted analysis described in Part II above, particularly by reference to the deference considerations and the Court's aversion to LWOP and permanent social exclusion.

1. Conditioning Considerations

The three deference considerations paramount in *Graham* were: (1) the infrequency of juvenile LWOP sentences for nonhomicide offenses, (2) legislative inadvertence, and (3) the nearly universal international condemnation of juvenile LWOP.[115] However, in *Ewing* the defendant did not urge any of these considerations and none of the considerations figured into the plurality's analysis. As to infrequency, the defendant's brief noted in passing that only 1,346 defendants were sentenced under California's three-strikes law for

112. *See id.*
113. *Ewing*, 538 U.S. at 14.
114. *Graham*, 130 S. Ct. at 2027.
115. *See supra* Part II.B.

minor property offenses,[116] but nothing was made of this point and nothing in the *Ewing* Court's various opinions indicates that any of the Justices focused on it. Moreover, the 1,346 figure in *Ewing* is much higher than the 123 defendants affected by *Graham*,[117] which may itself supply a significant ground for distinguishing the cases.[118]

Ewing made no claim of inadvertence at all, and the plurality found quite the opposite. For instance, the plurality characterized the three-strikes law as "respon[sive] to widespread public concerns about crime,"[119] and noted that the California legislature "made a deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in trigger-

116. Brief for Petitioner, *Ewing*, 538 U.S. 11 (No. 01-6978), 2002 WL 1769930, at *16 ("[Three-strikers] were sentenced to twenty-five years to life for property crimes, including grand theft (108), petty theft with a prior (334), vehicle theft (217), receiving stolen property (164), forgery (58), and second degree burglary (455) . . . .").

117. *Graham*, 130 S. Ct. at 2024.

118. Indeed, the gap between *Ewing* and *Graham* in this regard is likely even more than simply 1,346 versus 123. For one thing, the *Ewing* number came from only one state, while the *Graham* number was national. Although the *Ewing* Court did not have before it much data on sentences actually imposed in other states, it is possible that the 1,346 figure would increase if such data were available. *See Ewing*, 538 U.S. at 45-46 (Breyer, J., dissenting) ("With three exceptions, we do not have before us information about actual time served by Ewing-type offenders in other States. . . . In nine . . . States, the law *might* make it legally possible to impose a sentence of 25 years or more, though that fact by itself, of course, does not mean that judges have actually done so." (citations omitted)). Additionally, as *Graham* indicated, the number of defendants receiving a challenged sentence should be considered relative to the number of offenders who commit a relevant crime. *Graham*, 130 S. Ct. at 2024-25. The number of juveniles who are arrested for serious violent crimes each year surely dwarfs the number of two-strikers arrested for minor property offenses, which makes the 1,346 figure seem comparatively even more impressive as an indicator of relatively high frequency. *See id.* at 2025 (noting tens of thousands of annual arrests of juveniles for aggravated assault, robbery, and other serious offenses); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 44, 49 (2001) (noting that about twenty-five percent of felony arrests in California in 1993 were attributable to juveniles, while only 4.3 percent of arrestees in a sample of felony arrests that year had two strikes; of that small percentage of total felony arrestees, only 15.5 percent were arrested for non-burglary thefts). To be sure, this may seem an unfair comparison because the three-strikes sentence in *Ewing* was nominally mandatory, while the juvenile LWOP sentences in *Graham* were discretionary. *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 n.10 (2012) (rejecting relevance of frequency of a mandatorily imposed sentence). However, the California three-strikes sentence was only nominally a mandatory one. *Ewing*, 538 U.S. at 17 ("Thus, [California] trial courts may avoid imposing a three strikes sentence in two ways: first, by reducing 'wobblers' to misdemeanors (which do not qualify as triggering offenses), and second, by vacating allegations of prior 'serious' or 'violent' felony convictions.").

119. *Ewing*, 538 U.S. at 24.

ing the application of the Three Strikes Law."[120] This stands in marked contrast to the *Graham* Court's finding that juvenile LWOP had not been adopted "through deliberate, express, and full legislative consideration."[121]

Finally, Ewing raised international views only in a footnote and, even then, made only a weak showing of international condemnation, citing legal standards in just two foreign jurisdictions.[122] This falls far short of *Graham*'s finding that juvenile LWOP for nonhomicide offenses was a "sentencing practice rejected the world over,"[123] a punishment imposed in only one nation across the entire globe (the United States), and a practice formally condemned in an international treaty "ratified by every nation except the United States and Somalia."[124]

To be sure, there is at least one sense in which Graham's Eighth Amendment claim was actually *more* of a threat to deference ideals than Ewing's: a judgment in Graham's favor would effectively overturn the law in thirty-nine jurisdictions,[125] whereas only twenty-five jurisdictions had three-strikes laws[126] and an even smaller number of states would have authorized the sentence imposed on Ewing.[127] *Graham* and *Miller* make clear, however, that legislative "nose counting" need not be a weighty consideration, particularly where there is evidence of legislative inadvertence.[128] Taking into account the full set of criteria that bear on the question, there seems ample ground for distinguishing *Ewing* from *Graham* on the deference considerations.

Lastly, one must take into account a final conditioning consideration: LWOP-aversion. (Mandatoriness-aversion does not come into play because the sentencing judge did have discretion in Ewing's case.[129]) While the California three-strikes sentence is certainly a long one, it does not embody the kind of permanent exclusion that Graham's did, nor does it evoke the same sense of hopelessness.[130] This too provides a seemingly important basis for explaining the Court's different approaches in *Graham* and *Ewing*.

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120. *Id.* at 30 n.2 (alteration in original) (quoting James A. Ardaiz, Essay, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 9 (2000)) (internal quotation marks omitted).

121. *Graham*, 130 S. Ct. at 2026.

122. Brief for Petitioner, *supra* note 116, at *38 n.32.

123. *Graham*, 130 S. Ct. at 2033.

124. *Id.* at 2034.

125. Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

126. Ewing v. California, 538 U.S. 11, 15 (2003).

127. *See id.* at 46 (Breyer, J., dissenting) ("In nine . . . States, the law *might* make it legally possible to impose a sentence of 25 years or more . . . ." (emphasis in original)).

128. *See supra* Part II.B.1.b.

129. *Ewing*, 538 U.S. at 17.

130. To be sure, the dissenters in *Ewing* did assert that Ewing "will likely die in prison," *id.* at 39 (Breyer, J., dissenting), but it is not clear what the basis for this

2. Categorical-Proportionality Review

One may get a better sense of the importance of the deference factors by considering whether *Ewing* is distinguishable from *Graham* on the basis of categorical-proportionality review alone. This seems quite difficult; after all, if Graham's offense was once-diminished because it did not involve death or an intent to cause death, surely Ewing's was at least twice-diminished to the extent that it did not involve *any* physical injury of any kind, either caused or intended. If one imagines a category comprised of the 1,346 "three-strikers" convicted of low-level property offenses, there is a very strong argument that an LWOP sentence could not be imposed on them consistent with the categorical-proportionality reasoning of *Graham*.

Yet, it may nonetheless be possible to reconcile *Ewing* and *Graham* with respect to proportionality. For one thing, Ewing did *not* receive an LWOP sentence; rather, he received a sentence of twenty-five years to life.[131] This is not "the second most severe penalty permitted by law," as *Graham* characterized LWOP[132] – it may not even be thought of as the third most severe penalty (it is possible, for instance, to imagine a parole-eligible life sentence with a materially longer minimum term than twenty-five years).

Also important may be the criminal history that is necessary to trigger a three-strikes sentence. Conventional theories of retributive proportionality recognize that it may be appropriate to treat repeat offending as more morally blameworthy than first-time offending:

> The first offender who is given a somewhat scaled-down punishment is censured for his act but nevertheless accorded some moral respect for the fact that his inhibitions against wrongdoing appear to have functioned on prior occasions, and some sympathy or tolerance for the all-too-human frailty that can lead to such a lapse.[133]

Although this perspective on proportionality may justify different degrees of punishment for low-level property offenders depending on whether they have a prior record, it remains unclear whether that prior record alone can bring a three-strikes sentence like Ewing's within the range of minimally acceptable proportionality for a crime like shoplifting. For one thing, criminal history is conceptualized here in terms of mitigation, not aggravation; that is, we have a justification for a first-timer *discount*, not a repeat-offender

assertion was (beyond a vague reference to illness), and the plurality opinion did not characterize Ewing's sentence in those terms.

131. *Id.* at 14.

132. Graham v. Florida, 130 S. Ct. 2011, 2027 (2012) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)) (internal quotation marks omitted).

133. Andrew von Hirsch, *Penal Theories*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 659, 670 (Michael Tonry ed., 1998).

enhancement. However, this may be a distinction without a difference in the ordinal culpability analysis suggested by *Graham*. It is possible that the offense-based categorical distinctions – for instance, homicide versus nonhomicide – may assume a first-time offender and recidivism may be thought of as, in some sense, canceling out one unit of culpability-diminution.

Significant difficulties nonetheless remain for the proportionality of Ewing's sentence. Not all prior offenses seem capable of contributing to the blameworthiness of a new offense. For instance, the further removed the priors are in time and nature from the current offense, the less material they seem to the severity of the current offense.[134] Thus, Ewing's prior "strikes" – three burglaries and a robbery occurring more than eight years before the shoplifting incident[135] – might be seen as insufficiently recent or insufficiently similar to the shoplifting to justify a materially harsher sentence than he would have received as a first-time offender.

Finally, even if *some* incremental punishment was justified based on Ewing's criminal history, there may be limits as to how *much*. The loss-of-mitigation theory does not justify continually harsher punishment on the basis of each new offense; at some point fairly early in the process – perhaps at the second or third offense (assuming they are all sufficiently close in time and character) – all available mitigation is lost and additional convictions no longer enhance culpability.[136] It is certainly possible to see shoplifting as so categorically removed from a twenty-five-to-life sentence that mere loss of mitigation cannot possibly cover the severity gap.[137]

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134. *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 167 (2001) ("The fact, for instance, that someone now convicted of theft was convicted of wounding five years ago provides no good reason to impose a harsher punishment for the theft, since it provides no good reason to judge either the current offense or the offender more harshly.").

135. *Ewing*, 538 U.S. at 18-19.

136. DUFF, *supra* note 134, at 169.

137. The loss-of-mitigation theory has been the leading proposal for reconciling harsher sentences for recidivists with retributive ideals. However, Julian Roberts has recently offered an alternative approach, the enhanced culpability model. JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 67 (2008). Based on research on public and offender attitudes, Roberts argues that "a retributive account which wholly, or almost completely, ignores previous convictions violates fundamental, consensual reactions to punishing offenders." *Id.* at xi. He asserts, "Previous convictions speak to the offender's state of mind prior to the commission of the offence in the same way that premeditation reflects an individual more worthy of censure . . . ." *Id.* at 67. Although Roberts would give greater weight to prior convictions than would the loss-of-mitigation theory (especially past the first conviction or two, when mitigation runs out), it seems highly unlikely that Roberts' approach would provide support for Ewing's sentence. For one thing, Roberts insists that prior convictions must be given less weight than other considerations that speak more directly to the seriousness of the current offense: "The[] offender-related factors [like previous convictions] must be subordinate to the

Yet loss of mitigation may not be the only theory on which criminal history is relevant to proportionality. Professor R.A. Duff, for instance, posits the existence of a class of highly dangerous recidivists who deserve very harsh treatment:

> By his persistent, serious criminal wrongdoing [an offender in this class] has made reconciliation – the maintenance or restoration of civic fellowship – impossible. He has disqualified himself from continued participation in the community's normal life. We can thus justly subject him to an extended, indeed if necessary life-long, period of imprisonment, both to protect others from his continuing depredations and as a proportionate

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offense factors within a retributive framework in which offence seriousness predominates. Allowing offender variables to carry the same or more weight at sentencing would shift the focus of sentencing away from the offence to the offender." *Id.* at 89. Additionally, while Roberts would allow prior convictions to continue to increase sentence length even after mitigation has been lost, he would not give as much weight to later convictions as to the first ones. *See id.* ("[T]he difference in culpability between a first offender and an individual with two priors is much greater than that which differentiates an offender with two from another with four priors."). Additionally, Roberts would not treat all prior convictions the same, but would make distinctions, for instance, based on how old the priors are and whether they were of the same character as the current offense. *Id.* at 224. Finally, Roberts believes that "recidivists should be allowed to credit efforts to desist against the elevated culpability ascribed to them at sentencing." *Id.* at 209. Thus, Roberts disagrees with mechanical approaches to handling criminal history, such as that embodied in the three strikes law. *See id.* at 89 ("[T]he recidivist sentencing premium cannot be reduced to the progressive ascription of a quantum of punishment for each prior; consideration of the offender's previous convictions requires a more multidimensional approach . . . .").

Youngjae Lee has also recently proposed a sort of enhanced culpability model for the "recidivism premium." Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 571 (2009). Lee sees the premium as an additional punishment for a type of omission liability, "the omission being [the recidivist's] failure to take steps to prevent himself from committing another crime." *Id.* at 610. Of course, even a first-time offender could be faulted for this sort of omission. What distinguishes the recidivist and merits greater blame is that a first conviction "should prompt a period of reflection on the part of offenders to determine how they ended up committing the prohibited act." *Id.* at 613. However, there is at least one major practical problem with Lee's approach: at the same time that a conviction sends a message that the offender should "organize her life in a way that steers clear of criminality," *id.*, the conviction also constricts, sometimes quite dramatically, the scope of life choices available to an offender, making a reflective and constructive self-reorganization of the offender's life much more difficult, if not a near impossibility. Lee recognizes this problem, but does not offer a clear solution. *Id.* at 618-20. In any event, Lee's account, like that of Roberts, does not purport to justify a large recidivist premium, but rather "places a ceiling on it." *Id.* at 618. Indeed, Lee specifically identifies the California three-strikes law as one that "go[es] too far." *Id.* at 578.

> punishment for his crime. What makes it proportionate, although it is very much more severe than the punishments imposed on other, nonpersistent offenders who committed crimes similar to his latest crime, is that his crime, as part of a pattern of persistent serious criminality, is categorically more serious than theirs. In the context of that pattern, it is no longer a single, isolated attack on others but a further stage in a *continuing* attack, a continuing *campaign* of attacks, on the community's members and its central values.[138]

While there may be some offenders sentenced under California's three-strikes law who could conceivably be placed into this category, it seems doubtful that Ewing himself could, for Professor Duff's theory presupposes "persistent commission of crimes of serious violence against the person."[139] Ewing's crimes were, for the most part, offenses directed at property and not the person, which hardly seems a "campaign of attacks"[140] on society's central values (at least as Professor Duff understands those values to be).

Perhaps criminal history can do more work in the proportionality analysis if it is linked to a character-based theory of culpability. As discussed above, *Graham* contains language suggesting that character may play an important role in the culpability calculus. However, the Court provides no clear sense of how this works outside the context of juveniles and perhaps others whose characters are similarly unsettled, such as the mentally ill.

Indeed, what the Court has in mind for character-assessment may not differ much from the loss-of-mitigation theory.[141] While one may initially feel a sense of "sympathy or tolerance" for all-too-familiar frailties,[142] this does not imply progressively greater punishments as our sympathy runs out and is replaced by swelling indignation over a recidivist's failure to get his character in order. There is nothing in *Graham* that is inconsistent with this limited, dichotomous view of character's relevance; that is, culpability either is or is not once diminished based on whether the instant offense seems the sort of isolated, otherwise explicable lapse with which all of us can

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138. DUFF, *supra* note 134, at 172 (emphases in original). It should be noted that, despite articulating this argument, Duff himself hardly embraces it, but instead confesses that its harshness leaves him feeling "uneasy." *Id.* at 172-73.

139. *Id.* at 170.

140. *See id.* at 172 (emphasis omitted).

141. *Cf.* Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, *in* MITIGATION AND AGGRAVATION AT SENTENCING 40, 57 (Julian V. Roberts ed., 2011) ("*Outside optimism and the 'out of character' assumption that we tend to apply to first offenders*, there can be little room for mitigation based on character. This is antagonistic both to proportionality and to equality of treatment." (emphasis added)).

142. von Hirsch, *supra* note 133, at 670.

and should be able to identify.[143] Among other advantages, this approach saves proportionality analysis from the considerable practical and theoretical difficulties of engaging in a more open-ended assessment of the offender's character.[144]

In the end, there remains enough uncertainty in the categorical-proportionality analysis that one cannot rule out the possibility that Ewing's sentence might pass muster. Still, in light of the great disparity between Graham's violent, armed burglary and Ewing's attempt at shoplifting, the argument hardly seems compelling that categorical-proportionality considerations alone can distinguish the results in the two cases.[145] These proportionality

143. Indeed, it may be best to read all of the discussion in *Graham* of the significance juvenile status for character as really simply establishing that all juveniles qualify per se for a "first-timer" discount, that is, recidivism may not be used against a juvenile in the Eighth Amendment analysis as a justification for a harsher sentence than would otherwise be permissible. *See* Graham v. Florida, 130 S. Ct. 2011 (2010). Consistent with this view, the *Graham* Court gave no apparent weight to the fact that Graham himself was a recidivist or any apparent consideration to the possibility of carving out repeat-offenders from its prophylactic rule. *See id.*

144. *See, e.g.*, DUFF, *supra* note 134, at 168 (arguing against uses of criminal history at sentencing that would "involve an improper intrusion into [the offender's] general moral character . . . ."); Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, *in* MITIGATION AND AGGRAVATION AT SENTENCING, *supra* note 141, at 29 ("The question is whether the sentencing process is properly expected to incorporate a balance sheet of all the good and bad deeds of the offender in social, family, and community circles. The principled answer is that it should not be so expected: a court should take account of previous convictions or absence of convictions, and of aggravating and mitigating factors relevant to harm and culpability, but it is neither appropriate nor always possible for it to attempt this wider exercise in social accounting."); Huigens, *supra* note 34, at 109 ("We might commit the question of fault to the jury in the form of a free-ranging inquiry into the quality of the defendant's practical reasoning, as exhibited in his wrongdoing. If we did this, however, we would raise some difficulties that are unrelated to the nature of fault, but that impose some important limits on how fault is to be adjudicated. These difficulties fall under the heading of the principle of legality.").

145. In this proportionality analysis, I've emphasized a culpability-based approach. However, the *Ewing* plurality itself invoked more instrumental considerations in rejecting the claim that Ewing's sentence was unconstitutionally disproportionate. *See* Ewing v. Cal., 538 U.S. 11, 30 (2003) ("[Ewing's sentence] reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. . . . Ewing's is not the rare cases in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." (citations omitted) (internal quotation marks omitted)). *Graham* accepted that incapacitation might play a role in the proportionality analysis, *see* 130 S. Ct. at 2029 (characterizing incapacitation as a "legitimate reason for imprisonment"), but also expressed concern that "[i]ncapacitation cannot override all other considerations lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Id.* Indeed, the Court recognized that Graham should be incapacitated for a period of

difficulties underscore the importance of the conditioning considerations. Comparing the plurality opinion in *Ewing* with the opinion in *Graham*, it is hard to avoid the impression that the former employed a sort of rational basis review, while the latter – whether due to the influence of infrequency, legislative inadvertence, international condemnation, LWOP-avoidance, or some combination of the four – engaged in a more rigorous form of scrutiny.

B. Harmelin v. Michigan

Because it involved an LWOP sentence and because that sentence was mandated by statute, *Harmelin* seems factually closer to *Graham* – and even more so to *Miller* – than *Ewing* was and is therefore more difficult to reconcile with the recent decisions. This Section first considers how *Harmelin* relates to *Graham*, and then attempt to reconcile *Harmelin* with *Miller*.

1. Reconciling *Harmelin* with *Graham*

As to conditioning considerations, legislative deliberateness may best distinguish *Graham* from *Harmelin*. In contrast to the *Graham* Court's concerns regarding inadvertence, Justice Kennedy's controlling opinion in *Harmelin* emphasized the high quality of the Michigan legislature's work in adopting the "650 lifer law," which mandated LWOP for possession of more than 650 grams of cocaine.[146] Justice Kennedy elaborated, "This system is not an ancient one revived in a sudden or surprising way; it is, rather, a recent enactment calibrated with care, clarity, and much deliberation to address a most serious contemporary problem."[147] Additionally, and also in contrast with *Graham*, the *Harmelin* Court did not note and the defendant did not urge any inconsistency between the 650 lifer law and international legal norms.[148]

time, *see id.* ("Graham deserved to be separated from society for some time in order to prevent what the trial court described as an 'escalating pattern of criminal conduct.'" (citation omitted)), but simply saw the extent of the incapacitation as unjustified. *Id.* Yet, it is hard to see how Ewing's long-term incapacitation was more justified than Graham's, especially in light of the nonviolent nature of his offense; the general difficulties with predicting dangerousness accurately several years down the road even with the most carefully constructed models is shown in Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 464-66 (1997). Additionally, the over-inclusiveness of the California three-strikes law is well-documented in ZIMRING ET AL., *supra* note 118, at 58-61.

146. Harmelin v. Michigan, 501 U.S. 957, 1007-08 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

147. *Id.*

148. *See* Brief of Petitioner, *Harmelin*, 501 U.S. 957 (No. 89-7272), 1990 WL 515104. In other respects, though, deference considerations do not so clearly differentiate *Graham* from *Harmelin*. For instance, the numbers of offenders receiving the sentences at issue may not have differed much. As of 2009, eighteen years after *Harmelin*, the number of offenders sentenced under the 650 lifer law was still only

It is not surprising, then, that the controlling opinion in *Harmelin* emphasized deference as a central value in its analysis[149] and expressly used the language of rational-basis review.[150]

Harmelin is also distinguishable from *Graham* in the categorical-proportionality analysis. Although both cases involved nonhomicide crimes and presented "once diminished" culpability on that basis, *Harmelin* did not offer as clear a ground as *Graham* for further diminution. Harmelin had no prior felony convictions,[151] but this does not necessarily count as mitigating; as suggested in the analysis of *Ewing* above,[152] it may make more sense to think of a first offense as the baseline condition in the culpability analysis and criminal history as aggravating.

There is another possibility: perhaps Harmelin's crime was so minor that the culpability must be considered more than just once diminished. After all, his drug offense was not merely a nonhomicide crime, it was also seemingly nonviolent; we have no reason to think that Harmelin caused or intended to cause any sort of physical injury to any person in connection with his drug-dealing. However, the controlling opinion in *Harmelin* was expressly premised on the belief that the possession of 650 grams of cocaine could in some meaningful sense be characterized as violent:

> Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine. This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses. From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem* [*v. Helm*]. Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our

about 200. *Rethinking the "Lifer Law,"* CBS NEWS (Feb. 11, 2009, 10:14 PM), http://www.cbsnews.com/2100-500164_162-49670.html. Nor is it likely that many offenders like Harmelin were serving LWOP sentences in other states at the time; only Alabama then made LWOP available as a sentence for a first-time drug offender, and even then only for quantities much higher than Michigan's 650-gram threshold. *Harmelin*, 501 U.S. at 1026 (White, J., dissenting). As for legislative support in other jurisdictions, only one other state besides Michigan authorized LWOP for first-time drug offenders, *id.* at 1026 (White, J., dissenting), which stands in marked contrast to the majority of states authorizing LWOP in the circumstances at issue in *Graham*. *See Graham*, 130 S. Ct. at 2023 ("Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances.").

149. *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring and concurring in the judgment).

150. *Id.* at 1004 (Kennedy, J., concurring and concurring in the judgment) ("Similarly, a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill . . . .").

151. *Id.* at 994.

152. *See supra* Part III.A.2.

> population. Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. . . .
>
> [T]he Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine – in terms of violence, crime, and social displacement – is momentous enough to warrant the deterrence and retribution of a life sentence without parole. . . . [A] rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which no sentence of imprisonment would be disproportionate.[153]

Given this premise – that possession of more than 650 grams of cocaine is analogous to felony murder for culpability purposes – and the absence of juvenile status or any other categorical basis for diminishing culpability, Harmelin's sentence is not inconsistent with the logic of *Graham*.

2. Reconciling *Harmelin* with *Miller*

Harmelin involved not merely an LWOP sentence, but a *mandatory* LWOP sentence. Moreover, *Harmelin* – unlike *Ewing* – presented not only a substantive, *Graham*-type challenge to his sentence, but also a procedural, *Miller*-type claim. The affirmance of Harmelin's sentence thus seems to be in real tension with *Miller*'s rejection of a mandatory LWOP regime.

Despite this tension, there are at least four plausible (and not mutually exclusive) possibilities for reconciling the cases. First, the "care, clarity, and much deliberation" underlying the 650 lifer law contrasts with the legislative inadvertence found by the Court in *Miller* and seemingly demands a higher level of deference. Second, there is the "super-mitigator" theory suggested above[154]: juvenile status may trigger special concerns regarding mandatory sentencing that were not present in *Harmelin*. Third, also suggested above, the *Miller* Court may intend to distinguish juvenile LWOP as a more severe and disfavored penalty than LWOP generally.[155]

Finally, there is the intriguing suggestion in *Miller* that the declining use of the death penalty has altered the way LWOP should be viewed for Eighth Amendment purposes.[156] *Miller* noted that, even among adults convicted of homicide, "very few offenders actually receive" the death penalty, which

153. *Harmelin*, 501 U.S. at 1002-04 (Kennedy, J., concurring in part and concurring in the judgment) (citations omitted) (internal quotation marks omitted).

154. *See supra* Part II.B.3.

155. *See supra* Part II.B.3.

156. *See supra* Part II.B.3.

results in "juvenile homicide offenders receiving the same nominal punishment as almost all adults, even though the two classes differ significantly in moral culpability and capacity for change."[157]

However, the American death penalty was in a considerably more robust state in 1991 when *Harmelin* was decided, which meant that LWOP could more appropriately be characterized as the second-most severe penalty in the American criminal-justice system.[158] Today, with LWOP looking increasingly like our most severe penalty, *Harmelin* would present an analogous culpability-mismatch problem to that highlighted by the *Miller* Court: since LWOP has become de facto the harshest penalty imposed in homicide cases, the critical homicide-nonhomicide distinction is blurred when LWOP is permitted in nonhomicide cases as well. In other words, *Harmelin* may have been correctly decided in light of circumstances as they existed in 1991, but *Miller* was also correctly decided in light of the changed circumstances regarding the death penalty that existed two decades later.

IV. APPLICATION TO 21 U.S.C. § 841(b)(1)(A)

Thus far, I have suggested a more nuanced way of reconciling the Eighth Amendment cases than through a rigid juvenile-adult distinction. My account of the cases provides room, at least in theory, for adults to challenge their LWOP sentences, either on substantive, *Graham*-type grounds or on procedural, *Miller*-type grounds. However, my account does not suggest that adult LWOP sentences will always or even usually be unconstitutional. Rather, the analysis turns on the particularities of the claim.

In order to elucidate both the potential and the pitfalls of efforts to extend *Graham* and *Miller* to adults, this Part assesses the prospects for Eighth Amendment challenges to one mandatory LWOP regime established for certain drug offenders by 21 U.S.C. § 841(b)(1)(A). The analysis first describes the statutory regime and identifies a class of offenders who might plausibly raise an Eighth Amendment challenge to the regime. Next, the analysis separately considers the prospects for a *Graham*-type challenge and a *Miller*-type challenge.[159]

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157. Miller v. Alabama, 132 S. Ct. 2455, 2468 n.7 (2012).

158. *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES 18 tbl.14 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cp10st.pdf (showing 268 death sentences imposed in 1991, as compared to only 104 in 2010; the number has steadily declined for more than a decade, and has been well below 268 every year since 1999).

159. I assume for purposes of this Part that federal courts should apply the same Cruel and Unusual Punishments Clause analysis to federal sentences that the Supreme Court has developed in *Graham* and *Miller* for the review of state sentences. However, Michael J. Zydney Mannheimer has recently offered an interesting, historically based argument that the Eighth Amendment should be interpreted differently when federal sentences are under review, specifically, through a requirement that "federal

A. Framing the Hypothetical Eighth Amendment Claims

Section 841(b)(1)(A) appears within a graduated sentencing scheme for drug-trafficking offenses.[160] Quantity is a key consideration in this scheme,

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sentences be no stricter than state sentences for the same crime." Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 74 (2012). As indicated in the Appendix to the present Article, few states authorize LWOP for drug offenses, which suggests that section 841(b)(1)(A) sentences might be subject to even stronger challenges under Mannheimer's approach than my own.

160. The statute's text is as follows:

> (b) Penalties
>
> . . . any person who violates subsection (a) of this section [prohibiting the manufacture of and trafficking in controlled substances] shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving –
>
> (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –
>
> (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
>
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
>
> (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
>
> (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
>
> (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
>
> (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
>
> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
>
> (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight;
>
> (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . If any person commits a violation of this subparagraph . . . after two or more prior convictions for a

and § 841(b)(1)(A) deals with the highest-end quantities of drugs. The basic sentence under § 841(b)(1)(A) is a ten-year mandatory minimum.[161] However, the statute also provides for various enhancements. The provision of immediate concern imposes a mandatory LWOP sentence if the defendant has "two or more prior convictions for a felony drug offense."[162] This provision might thus be conceived as a sort of three-strikes law for drug offenders and, as a matter of convenience, this Part will refer to the provision this way.

What seems most notable about the three-strikes law is its authorization of LWOP sentences for a class that I will call "drug-only" offenders; that is, offenders never convicted of a conventional violent or other non-drug crime and whose instant offense does not involve any proven actual injury, intent to injure, or threat of injury (except, of course, to the extent that drug use may be thought of as intrinsically injurious). The drug-only offender thus stands in marked contrast to the image of the hyperviolent gangster that figures so prominently in depictions of drug traffickers in popular culture and political rhetoric.

The questions for consideration now are whether the Eighth Amendment permits LWOP sentences for drug-only offenders and, if so, whether such sentences may be imposed on a mandatory basis and without regard to any individualized mitigating circumstances the offender has to offer.[163]

B. Substantive Constitutionality: The Graham *Claim*

The substantive Eighth Amendment claim would go something like this: the drug-only three-strikers have culpability that is at least twice diminished because they are not only free of the taint of homicide, but are also innocent of any violence. Such multiple-diminution in culpability leaves them unfit for LWOP, which is no more than once diminished relative to the most severe penalty. Before evaluating this categorical-proportionality argument, however, one should first assess the various conditioning considerations.

1. Conditioning Considerations

a. Deference

Deference considerations provide little support for imposing LWOP on drug-only offenders. Consider frequency of the sentence first. Life sentences

> felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . .

21 U.S.C. § 841(b)(1)(A) (2012).

161. *Id.*

162. § 841(b)(1)(A)(viii).

163. A few three-strikes defendants have already tried, without success, to raise Eighth Amendment claims similar to what I propose in lower courts. *See, e.g.*, United States v. Ousley, 698 F.3d 972 (7th Cir. 2012), *cert. denied*. 133 S. Ct. 1480 (2013).

for drug trafficking offenses are hardly routine, although they may be more common than the juvenile LWOP sentences at issue in *Graham* and *Miller*. At the end of 2010, there were 2,472 defendants in federal prison on life terms for drug trafficking offenses.[164] This is a substantial number, but it is only a small percent of the total 96,829 federal drug-trafficking inmates. The disparity is even more marked in the annual sentencing data: out of 24,411 federal drug-trafficking sentences imposed in 2010, only 124 were for life.[165] Of course, some of those sentences were likely based on death or violence considerations[166] – considerations that are ruled out in our hypothetical claim challenging the application of § 841(b)(1)(A) to drug-only offenders.[167]

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164. Federal sentencing statistics can be obtained on-line through the interactive research tool provide by the United States Department of Justice Bureau of Justice Statistics. *See* Fed. Justice Statistics Res. Ctr., *The Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/fjsrc/ (last visited Nov. 13, 2013) (data available for the years 1998-2010). Since parole release was abolished prospectively in the federal system by the Sentencing Reform Act of 1984, *see* 18 U.S.C. §§ 3551-3586 (1985), all or nearly all of the life terms being served today for drug offenses are likely of the LWOP variety. *See* Fed. Justice Statistics Res. Ctr., *supra*. Note that not all of the 2,472 drug-trafficking lifers necessarily received mandatory life terms, or were sentenced under the three-strikes provisions of § 841(b)(1)(A). *See infra* note 167.

165. *See id.*

166. Discretionary life sentences are authorized by section 841(b)(1)(A)(viii) for *all* drug-trafficking offenses that meet the quantity thresholds, and are required in some cases in which "death or serious bodily injury results from the use" of the trafficked substance. 21 U.S.C. § 841(b)(1)(A)(viii) (2012).

167. One analysis of federal sentences imposed from 1999 to 2012 provides some more precise insight into the frequency of LWOP for drug-only offenders. Paul Hofer has compiled the relevant information from United States Sentencing Commission data. Email from Paul Hofer, Policy Analyst, Federal Public and Community Defenders, to the Author (Jan. 26, 2014) (on file with the *Missouri Law Review)*. He finds 2,114 life sentences for drug offenders in all, and 828 receiving life terms who were convicted under statutory provisions that mandate LWOP. Of the 828, at least a couple dozen seem clearly outside my drug-only category: twenty-nine were sentenced under Part 2A of the federal sentencing guidelines, which deals with murder and other crimes against the person, and one received an adjustment for violence or credible threats of violence. Additionally, Hofer's data highlight a couple of gray-area categories. First, in eleven of the cases, there were indications that death or serious bodily injury resulted from the drug, even though Part 2A of the guidelines was not invoked. It is likely that most or all of these cases involved accidental overdoses, and it is at least arguable that deaths of that sort are not sufficient to raise an offense into the highest culpability category. Second, 264 of the offenders received an adjustment or conviction indicating the involvement of a weapon in the offense. However, it appears that the great majority of these cases involved simple possession of a weapon, and not demonstrated brandishing or use. Again, an argument could be made that these cases are best thought of as nonviolent, drug-only cases.

State-court sentences should also be considered to determine frequency. Pertinent state data are harder to obtain but appear consistent with the federal data. For instance, one study estimated that only about sixteen percent – or approximately 11,000 – of the 70,000 lifers in the United States from 1988 to 2001 are serving time for drug-trafficking offenses.[168] However, the study did not distinguish between life with and without the possibility of parole. If the count were limited to true LWOP sentences, the number would surely be much lower, and would be smaller still if the count were limited to drug-only offenders.

Similar infrequency is also suggested by the felony sentencing data from large urban counties. One study of 2006 data found that only forty-seven percent of convicted drug-trafficking defendants received *any type of prison sentence*.[169] Moreover, among the minority of drug offenders receiving prison sentences, the median length was only two years.[170] Out of 1,568 prison sentences imposed for drug-trafficking felonies, not one was for life and only five were for more than ten years.[171] These five lengthier sentences represented only about .06 percent of the felony defendants in the study who were arrested on drug-trafficking charges, even though a full fifty percent of arrestees had *multiple* prior convictions.[172] In short, it seems safe to say that sentences approaching a life term in severity are an extraordinarily rare occurrence among even repeat drug-trafficking offenders. Again, if we could effectively screen out those with records of violence, the numbers would probably look even more lopsided.

In addition to infrequent imposition in practice, *Graham* and *Miller* also indicate that inadvertence in authorizing a challenged sentence may diminish the deference that would normally be shown to legislative policy choices. At first blush, § 841 may look like the same sort of systematic, graduated, quantity-driven drug-sentencing scheme that the Court approved in *Harmelin*. However, there is a difference insofar as the federal three-strikes law is keyed to prior drug convictions, including convictions obtained under the highly varied and dynamic drug laws of the fifty states. There may be potential for three-strikers with relatively innocuous prior convictions – particularly those suffered under idiosyncratic state laws adopted after the three-strikes provision first appeared in 1986 – to assert inadvertence; that is, that their criminal histories were beyond Congress's contemplation in approving § 841(b)(1)(A).

Then, too, there is considerable evidence of legislative inadvertence in setting the threshold quantity levels in § 841(b)(1)(A). Although Congress

168. *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, http://www.nytimes.com/2005/10/02/national/02life.web.html?pagewanted=all&_r=0.

169. THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, 12 tbl.12 (2010).

170. *Id.* at 13 tbl.13.

171. *Id.* at 27 app. tbl.10.

172. *Id.* at 5 tbl.4.

intended to target "major" traffickers with this provision, a 2011 study by the United States Sentencing Commission (the Commission) found no strong correlation between the quantity thresholds and actual drug-trafficking roles.[173] The Commission concluded that its "analysis suggests that the mandatory minimum penalties for drug offenses may apply more broadly than Congress may have originally intended."[174] The conclusion serves as a reminder that the § 841 mandatory minimums were adopted in 1986 in a fit of election-year, antidrug hysteria that developed in the wake of the cocaine-related death of a college basketball star and without the benefit of committee hearings.[175] Indeed, the new mandatory minimums preempted the sentencing guidelines system that Congress itself created just two years earlier.[176] Moreover, one of the threshold quantities – that for crack cocaine – was subjected to intense, compelling criticism for many years, finally resulting in reform legislation in 2010.[177] In short, it would be hard to say that the 1986 Anti-Drug Abuse Act, as the controlling opinion in *Harmelin* said of the 650 lifer law, was "calibrated with care, clarity, and much deliberation . . . ."[178]

Outside of the federal system, it appears that only twelve states authorize LWOP for drug-only offenders, which is considerably fewer than the thirty-nine states whose laws were overturned by *Graham*.[179] International legal norms may also increasingly cut against LWOP. For instance, most European nations have rejected LWOP as a sentencing option and those that permit the sentence use it quite sparingly.[180] Moreover, pronouncements by various European legal authorities have cast considerable doubt on the legality of even limited uses of LWOP.[181] Most recently, in July 2013 the Grand Chamber of the European Court of Human Rights ruled in *Vinter v. United Kingdom*:

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173. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 168-69 (2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_08.pdf.

174. *Id.* at 169.

175. TED GEST, CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 116-22 (2001).

176. *Id.* at 121-22.

177. Ronald F. Wright, *Portable Minimalism in Sentencing Politics*, 2011 CARDOZO L. REV. DE NOVO 9, 15-17.

178. Harmelin v. Michigan, 501 U.S. 957, 1008 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

179. The Appendix provides a list of these twelve states along with relevant statutory references.

180. Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 40-41 (2010).

181. *Id.* at 41-44.

> [I]n the context of a life sentence, Article 3 [of the European Convention on Human Rights, barring "inhuman or degrading treatment or punishment"] must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.[182]

In sum, while the deference factors may not cut quite as strongly against the sentence at issue here as they did in *Graham* – in that the frequency of the sentence may be a bit higher, the legislative inadvertence less facially manifest, and the contrary international norm less firmly established – the analogy to *Graham* may nonetheless be close enough to warrant some heightening of the judicial scrutiny of § 841(b)(1)(A). These factors may also arguably serve to distinguish *Harmelin*, in which contrary international norms were not considered (and, for that matter, were not as well developed as they are now in light of *Vinter* and other recent decisions[183]) and in which the legislature was found to have acted with such care and deliberation.

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182. Vinter v. U.K., Nos. 66069/09, 130/10 & 3896/10, HUDOC, para. 119 (Eur. Ct. H.R. 2013) (Eur.), *available at* http://hudoc.echr.coe.int/webservices/content/pdf/001-122664?TID=bnhdrclhla. At the same time, the Grand Chamber did not indicate that the required review must be judicial, but expressly recognized the possibility that executive review might comply with Article 3. *Id.* at para. 120. It is thus possible that U.S. LWOP sentences might be acceptable under the reasoning of *Vinter* based on the existence of a gubernatorial pardoning power. *Cf. id.* at para. 55 (noting House of Lords decision suggesting as much). However, a merely theoretical possibility of executive clemency may be insufficient to save a life sentence. For instance, in *Vinter* itself, the Grand Chamber found the system of whole-life sentences in England and Wales to be in violation of Article 3 notwithstanding the government's argument that the Secretary of State had legal authority to release even whole life prisoners when there was no longer any legitimate penological reason for holding them. *Id.* at para. 129. The Grand Chamber found the "lack of clarity" about the availability of review and release to be unacceptable. *Id.* The court also indicated that it must be concerned with the law "as it is applied in practice to whole life prisoners." *Id.* at para. 126. "[F]or a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review." *Id.* at para. 110. Clemency in some or most jurisdictions may fall short of these ideals. *Cf.* Solem v. Helm, 463 U.S. 277, 301-03 (1983) ("Commutation . . . is an *ad hoc* exercise of executive clemency. A governor may commute a sentence at any time for any reason without reference to any standards. . . . In South Dakota, commutation is more difficult to obtain than parole. . . . In fact, no life sentence has been commuted in over eight years.").

183. *Vinter* supplies a lengthy summary of relevant European, international, and comparative law.

b. Aversion to LWOP and Permanent Social Exclusion

The Court's aversion to LWOP – which stems from its sense that LWOP is not merely the endpoint on a continuum of sentences but is qualitatively different from any other prison term and is analogous in some respects to the death penalty – should support categorical, prophylactic rulings against three-strikes sentences under § 841(b)(1)(A) to the extent that the proportionality analysis points to a significant likelihood that such sentences are excessive. There is language in *Miller*, and to a lesser extent *Graham*, suggesting that the Court's LWOP-aversion is particularly strong as to juveniles.[184] However, this does not preclude the existence of heightened concerns regarding adult LWOP, and a bright-line distinction in this area would be hard to justify. The symbolic, moral significance of an LWOP sentence, with its categorical rejection of the possibility of reform and atonement, seems equally harsh at any age.[185]

While the raw number of years served by a juvenile condemned to LWOP will, on average, be greater than the number of years served by an adult, a focus on number of years alone misses the significance of the Court's treatment of LWOP as a qualitatively unique sentence. Moreover, many adults convicted under § 841(b)(1)(A) may be relatively young themselves and still face decades of incarceration.[186] It is not clear that there is a significant experiential difference between fifty years of hopelessness and forty years of hopelessness, especially in light of the psychological literature on adjustment to prison, which indicates that the first year tends to be the hardest.[187]

2. Categorical Proportionality

An analysis of the conditioning considerations suggests viability to our hypothetical *Graham* claim. We have yet to determine, however, if there really is a categorical mismatch between the seriousness of the offense and the severity of the punishment. Following *Graham*'s lead, this requires an

184. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012); Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

185. If we take seriously the analogy in *Graham* between the death penalty and the living death of LWOP, then age at time of the offense should not matter much – the Court's death penalty jurisprudence has never suggested that the death penalty is somehow a less severe penalty for constitutional purposes if it is imposed on an older person who has already had a good opportunity to enjoy life.

186. Most federal drug-trafficking defendants sentenced to life in prison are under age forty at the time of commitment, and a substantial minority is under age thirty. Fed. Justice Statistics Res. Ctr., *supra* note 164.

187. For a summary of the research, see John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1047-49 (2009).

assessment of both the culpability-diminution relative to adult homicide and the penalty-diminution relative to the death penalty.

a. Culpability-Diminution

The greatest difficulty facing the *Graham* claim may be *Harmelin* and the controlling opinion's treatment of high-volume drug trafficking as a sort of violent crime analogous in its severity to felony murder. Indeed, the invocation of felony murder, with its implicit determination of extreme recklessness relative to human life,[188] suggests that the § 841(b)(1)(A) three-strikers may not even have once diminished culpability. On the other hand, extreme recklessness is not quite the same thing as intent to kill, and in other Eighth Amendment settings the Court rejected the proposition that all felony murderers should be indiscriminately categorized with the worst of the worst.[189] Let us assume, then, that drug-only offenders have a level of culpability that is at least once diminished.

Further diminution seems problematic; again, the controlling opinion in *Harmelin* squarely rejected the defendant's argument that his crime was nonviolent.[190] Of course, there may be *some* drug-only three-strikers who are juveniles or who otherwise possess characteristics that categorically diminish culpability, such as mental retardation or severe mental illness.[191] These subclasses of three-strikers might be able to establish categorical disproportionality even if others could not. However, if one focuses on just unimpaired, adult three-strikers, *Harmelin* presents a real difficulty.

There are at least two plausible responses to the *Harmelin* problem (in addition, of course, to the possibility that *Harmelin* may be distinguished on the basis of the deference considerations). First, the controlling opinion's treatment of high-volume cocaine-trafficking as a crime of violence may have

188. *See* MODEL PENAL CODE § 210.2(1)(b) (2013) ("Such recklessness and [extreme] indifference [to the value of human life] are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit [one of several listed felonies].").

189. *See* Enmund v. Florida, 458 U.S. 782, 797 (1982) ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.").

190. It should be noted that, *Harmelin* notwithstanding, there are serious questions as to whether and under what circumstances drug dealing can be considered the sort of public wrong that warrants *any* criminal punishment. Michael M. O'Hear, *Drug Treatment Courts as Communicative Punishment*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 234, 246-47 (Michael Tonry ed., 2011).

191. Elsewhere in this Symposium, William Berry discusses a number of the offender characteristics that might be analogized to juvenile status. William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053, 1077 (2013).

been premised on the particular social realities of 1991. The late 1980s and early 1990s were indeed an extraordinarily violent time in American history, and much of the violence was particularly associated with the distribution of crack cocaine.[192] Public fears led Congress to adopt a draconian new sentencing regime for crack in 1986 and to make it even harsher in 1988.[193] Indeed, the *Harmelin* controlling opinion made much of the contemporary data establishing what it labeled a "direct nexus between illegal drugs and crimes of violence."[194]

The world, however, has changed since 1991. The crack epidemic abated[195] and criminal violence more generally plummeted.[196] In public opinion surveys, mentions of drugs as the nation's top problem peaked in 1990 and then fell dramatically.[197] Thus, while the dangerousness of cocaine trafficking in 1991 may have warranted the Court's treatment of the offense as a violent one, the experience of the ensuing two decades may have undermined the factual basis of the Court's decision. Certainly, there seems nothing inherently violent about trafficking in addictive psychoactive substances – for example, one does not think of Starbucks, Anheuser-Busch, or Philip Morris as violent organizations, despite what one may think about the products they peddle.

What makes drug dealing arguably a violent activity is the particular social circumstances in which it takes place; if those circumstances change, then our evaluation of the violent character of the activity may also change. In that sense, a reaffirmation of the legal principles articulated by the *Harmelin* controlling opinion does not necessarily imply that the Court would or should adhere to the view that possession of more than 650 grams of cocaine today is the moral equivalent of a serious crime of violence like felony murder.

Second, even if the Court continues to believe that the specific drug crime at issue in *Harmelin* remains properly characterized as violent, that would not necessarily justify a similar characterization for *all* of the drug offenses covered by § 841(b)(1)(A); there might be subclasses of § 841(b)(1)(A) offenders who can claim protection under *Graham*, even if the cocaine offenders cannot. After all, the controlling opinion in *Harmelin* itself carefully qualified its conclusions based on the dangers associated with "this

192. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 81 (2007) (quoting Alfred Blumstein, *The Recent Rise and Fall of American Violence*, *in* THE CRIME DROP IN AMERICA 1, 39 (Alfred Blumstein & Joel Wallman eds., 2000)).

193. GEST, *supra* note 175, at 120-22.

194. Harmelin v. Michigan, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part and concurring the judgment).

195. ZIMRING, *supra* note 192, at 75.

196. *Id.* at 5-7.

197. PRINCETON SURVEY RESEARCH ASSOCIATES INTERNATIONAL FOR THE NATIONAL CENTER FOR STATE COURTS, THE NSCS SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 13 (2006), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/criminal/id/132.

large an amount of cocaine."[198] A different amount of a different drug might call for a much different analysis.

For instance, § 841(b)(1)(A) mandates LWOP for three-strikers who manufacture or distribute 1,000 kilograms of any mixture containing a detectable amount of marijuana or 1,000 marijuana plants regardless of weight.[199] Marijuana is, of course, quite a different drug than cocaine – it is consumed much more frequently by Americans and is not particularly associated with violence and some of the other pathologies associated with so-called hard drugs.[200] Indeed, twenty states and the District of Columbia have approved its use for medical purposes,[201] two states recently legalized its recreational use,[202] various other jurisdictions are known for high levels of official toleration,[203] and fifty percent of Americans support its legalization.[204] Given this degree of social acceptance, it is a mistake to assume uncritically that *Harmelin*'s characterization of cocaine trafficking as a violent crime would or should also apply to marijuana trafficking.[205] It is possible that similar distinctions could also be made with respect to LSD, another drug that is covered by § 841(b)(1)(A).

Even as to some of the harder drugs on the § 841(b)(1)(A) list, the quantity thresholds may be too low to justify equation with the quantity of cocaine at issue in *Harmelin*, a quantity that the controlling opinion assumed to be

198. 501 U.S. at 1003 (Kennedy, J., concurring in part, concurring in judgment).

199. For information about a number of individuals currently serving LWOP sentences for nonviolent marijuana offenses, although not necessarily sentenced under the law at issue here, see LIFE FOR POT: RELEASE NON-VIOLENT MARIJUANA PRISONERS, http://www.lifeforpot.com/ (last visited Nov. 14, 2013).

200. *See* INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 95, 125-27 (Janet E. Joy et al. eds., 1999).

201. Monique Garcia & John Keilman, *It Could Be Next Fall Before First Pot Clinics Open*, CHI. TRIB. (Aug. 2, 2013), http://articles.chicagotribune.com/2013-08-02/news/chi-quinn-to-sign-medical-marijuana-bill-thursday-20130731_1_pot-stores-medical-marijuana-card-law.

202. *See* NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2012: DEVELOPMENTS IN POLICY AND PRACTICE 3 (2013), *available at* http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202012.pdf (noting legalization in Colorado and Washington).

203. *See, e.g.*, Adam Nagourney, *Marijuana, Not yet Legal for Californians, Might as Well Be*, N.Y. TIMES (Dec. 20, 2012), http://www.nytimes.com/2012/12/21/us/politics/stigma-fading-marijuana-common-in-california.html?pagewanted=1&_r=0.

204. Frank Newport, *Record-High 50% of Americans Favor Legalizing Marijuana Use*, GALLUP POL. (Oct. 17, 2011), http://www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx.

205. Marijuana may also be distinguishable from other drug offenses by reference to the deference considerations. For instance, only nine states authorize LWOP for marijuana offenses. *See infra* Appendix.

capable of producing upwards of 65,000 doses.[206] For instance, the threshold for methamphetamine is only fifty grams[207] with common abuse dosages in the range of 0.1 to one gram per day.[208] This suggests a wide disparity relative to the volume of cocaine assumed to be at issue in *Harmelin*.

Thus, there are plausible grounds for distinguishing *Harmelin* with respect to offense severity – on the basis of changed social circumstances since 1991, or on the basis of differences between some of the specific offenses covered by § 841(b)(1)(A) and Harmelin's offense – and thereby finding a § 841(b)(1)(A) offense diminished in culpability relative to homicide. However, an additional difficulty remains for the *Graham* claim: the three-strikes provision at issue requires the presence of a criminal history, which is relevant to proportionality under *Ewing*.

On the other hand, *Ewing* does not indicate that all criminal history should be treated as equally grave or that the existence of some criminal history automatically opens up any possible sentence, no matter how severe. To the contrary, *Ewing* left intact the Court's earlier decision in *Solem v. Helm*, in which the Court overturned an LWOP sentence for a minor offense notwithstanding the defendant's extensive history of prior convictions.[209] Thus, the *Ewing* plurality did not declare that prior convictions per se justified a sentence of twenty-five years to life, but instead emphasized the particularities of Ewing's "long, serious criminal record."[210]

It may thus be possible for some § 841(b)(1)(A) three-strikers to show that their criminal histories are distinguishable from Ewing's. The *Ewing* plurality emphasized that the state "was entitled to place upon Ewing the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State."[211] This echoes the concern in *Graham* and *Miller* with whether a defendant has shown "evidence of irretrievable depravity."[212] In order to offset culpability-diminution, a criminal history may need to be sufficiently grave so as to justify a conclusion along the lines of what the plurality reached in *Ewing*.

Given the breadth of criminal history that may trigger mandatory LWOP under § 841(b)(1)(A), there may well be many cases that fall short of a *Ewing*-type record under the statute. Consider the plurality's characterization

206. Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring and concurring in the judgment).

207. 21 U.S.C. § 841(b)(1)(A)(viii) (2012).

208. *Drugs and Human Performance Fact Sheets: Methamphetamine (and Amphetamine)*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., http://www.nhtsa.gov/People/injury/research/job185drugs/methamphetamine.htm (last visited Nov. 14, 2013).

209. Solem v. Helm, 463 U.S. 277 (1983).

210. Ewing v. California, 538 U.S. 11, 30 (2003) (plurality opinion).

211. *Id.* (alteration omitted) (quoting Rummel v. Estelle, 445 U.S. 263, 284 (1980)) (internal quotation marks omitted).

212. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)) (internal quotation marks omitted).

of this record: "Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior 'strikes' were serious felonies including robbery and residential burglaries."[213] By contrast, a § 841(b)(1)(A) three-striker need not have nine prior terms of incarceration; indeed, it is possible to trigger mandatory LWOP without any prior term of incarceration. Likewise, a § 841(b)(1)(A) three-striker need not commit any offenses while on probation or parole. Finally, a § 841(b)(1)(A) three-striker need not have committed any prior offenses where the gravity approaches that of robbery, a violent crime, or residential burglary – any felony drug offense from any state counts, regardless of how draconian or idiosyncratic a state's drug laws are.

For instance, in *United States v. Rivera-Rodriguez*, the defendant's strikes were all for the crime of simple possession.[214] In *United States v. Millard*, a defendant's LWOP sentence was based, in part, on a prior conviction in Iowa for the crime of sponsoring a gathering with knowledge that a controlled substance would be distributed, used, or possessed at the gathering.[215] Crimes such as these are not persuasive evidence of "irretrievable depravity"[216] or a "simpl[e inability] to bring [one's] conduct within the social norms prescribed by the criminal law of the State."[217]

More generally, as indicated above, the loss-of-mitigation theory of criminal history indicates that prior convictions are most relevant when they are recent and involve crimes that are similar to the current offense.[218] Similarly, crimes that are *too* closely connected with one another may also lack independent moral significance. Yet the crude strike-counting mechanism of § 841(b)(1)(A) does not take into account any of these considerations. For instance, in *United States v. Beckstrom*, the Tenth Circuit indicated that two prior convictions could count against a defendant even though both were part of a single continuing course of conduct.[219] Likewise, in *United States v. Hudacek* the defendant received a mandatory life term based on a twenty-year-old prior conviction.[220] In sum, even though *some* § 841(b)(1)(A) three-strikers may have criminal histories that bear on culpability in important ways, there are other identifiable subclasses or individual defendants whose records are quite distinguishable from Ewing's and do not provide a convincing basis for enhancing culpability.

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213. *Ewing*, 538 U.S at 30 (plurality opinion).

214. 617 F.3d 581, 609 (1st Cir. 2010).

215. 139 F.3d 1200, 1209 (8th Cir. 1998).

216. *Miller*, 132 S. Ct. at 2464 (2012) (internal quotation marks omitted) (citation omitted).

217. *Ewing*, 538 U.S. at 30 (plurality opinion) (quoting Rummel v. Estelle, 445 U.S. 263, 284 (1980)) (internal quotation marks omitted).

218. *See supra* Part III.A.2.

219. 647 F.3d 1012 (10th Cir. 2011).

220. 24 F.3d 143 (11th Cir. 1994).

Criminal history may come into play in the Eighth Amendment analysis by a route other than culpability-assessment. *Graham* did not reject the relevance of incapacitation as a legitimate objective of the criminal-justice system. An extensive criminal history will often serve as a reliable indicator of a propensity to recidivate and thus justify a longer sentence for incapacitation purposes than might otherwise be suitable. Yet *Graham* also stated, "Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[221]

The Court thus seems to indicate that where there is a marked disconnect between culpability and sentence, the evidence for offsetting incapacitation benefits must be quite strong. Yet, the cases of concern here – cases of multiply-diminished culpability in the current offense and relatively non-serious criminal history – are not apt to offer much by way of demonstrable incapacitation benefits. It is quite doubtful, moreover, whether such a long and inflexible sentence as LWOP can ever be justified on incapacitation grounds, given the very low recidivism rates of elderly ex-convicts.[222]

b. Penalty-Diminution

How severe should we regard the LWOP penalty provided by § 841(b)(1)(A)? There is the intriguing possibility, suggested by *Miller* and noted above, that the de facto phasing out of the American death penalty means that LWOP sentences should now be regarded as the most severe punishment for Eighth Amendment purposes.[223] If that premise is accepted, then LWOP for a drug-only crime would have great difficulty surviving proportionality review.

However, assume the Court maintains the view articulated in *Graham* that LWOP is merely "the second most severe penalty permitted by law."[224] As discussed above, *Miller*'s indications of an even closer "correspondence" between LWOP and the death penalty may be limited to the particularities of juvenile LWOP.[225] If that is correct, then § 841(b)(1)(A) defendants would seemingly have to demonstrate that their culpability is at least twice diminished in order to establish a *Graham* violation. Such a claim runs into the Scylla and Charybdis of *Harmelin* and *Ewing*. Yet, for the reasons suggested above, the difficulties may not be impossible to overcome, particularly as to

221. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010).

222. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28-29 (2010); *see also* Berry III, *supra* note 108, at 1132-35 (presenting reasons to doubt incapacitation and deterrence benefits from LWOP sentences).

223. *See supra* Part II.B.3.

224. 130 S. Ct. at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring and concurring in the judgment)) (internal quotation marks omitted).

225. *See supra* Part II.B.3.

various discrete subclasses of § 841(b)(1)(A) defendants – for instance, marijuana defendants whose criminal history does not satisfy the criteria for loss of mitigation. And, of course, it remains possible to distinguish *Harmelin* and *Ewing* on the basis of the conditioning considerations.

C. Procedural Constitutionality: The Miller *Claim*

Even if LWOP for drug-only three-strikers is not categorically unacceptable under *Graham*, *Miller* may nonetheless prohibit the imposition of LWOP on these offenders on a *mandatory* basis if the risk of disproportionality in individual cases is too high. It is hard to know where to draw the line on risk of error but, as discussed above, *Miller* suggests two distinct types of factors that may be important.[226] First, the analysis may turn on the presence of a super-mitigator, like juvenile status, that has profound, multifaceted, and highly individualized implications for culpability that in many cases are apt to render the sentence at issue disproportionately severe. It is not clear that any analogous considerations exist with respect to the drug-only three-strikers.[227]

Second, *Miller* also suggests that the uniquely harsh character of LWOP may render the sentence highly disfavored and unlikely to be approved for any offenders but adult killers, except in very unusual cases. As to other offenders, the facially-suspect nature of the sentence means that its imposition on a mandatory basis per se creates an unacceptably high risk of error. Whether or not this reading of *Miller* has anything to offer § 841(b)(1)(A) defendants depends on the uncertain question of whether it was LWOP generally or merely juvenile LWOP that provoked the Court's concerns.

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226. *See supra* Part II.B.3.

227. Perhaps one such consideration would be role in the offense. The federal sentencing guidelines have long recognized that drug-trafficking organization include individuals serving in a wide range of different roles, and that those with less responsibility in an organization should generally be treated more leniently than their supervisors. U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1-3B1.2 (2012). The determination of an offender's role and its impact on his culpability is often quite fact-intensive and case-specific. *See* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1266-67 (1997) (describing case law differentiating "minor" and "minimal" participation in the offense). As the Sentencing Commission's research has demonstrated, the simple quantity of drugs attributed to a particular offender is a poor proxy for his role. U.S. SENTENCING COMM'N, *supra* note 173, at 168. For that reason, although the quantity thresholds of § 841(b)(1)(A) are intended to target the organizational big fish, the statute may be used about as often against medium and small fry. *See id.* (showing that a little over eighty percent of high-level suppliers/importers and organizers/leaders are convicted of crimes carrying mandatory minimums, while over ninety percent of mid-level managers are, and over sixty-five percent of street-level dealers). Thus, role in the offense may be similar to juvenile status insofar as it often has a large, mitigating effect on culpability, but demands individualized assessment in order to determine the full extent of the mitigation.

Finally, in considering whether a *Miller* claim offers stronger prospects for success than a *Graham* claim, it may also be important to consider the deference factors. For instance, the frequency of *mandatory* LWOP sentences for drug-only offenders is likely much less than the overall frequency of LWOP sentences for such offenders.[228] Similarly, international norms against mandatory LWOP are even stronger than the norms against LWOP generally.[229]

V. CONCLUSION

There are good arguments in favor of overturning *Ewing* and *Harmelin* but, as long as these decisions remain good law and courts continue to take them seriously as precedent, they impose substantial obstacles to extending the protections of *Graham* and *Miller* to adults. However, there are at least some categories of adults – such as marijuana offenders facing LWOP sentences – who should be reasonably well-positioned to distinguish *Ewing* and *Harmelin*, even if they have some prior drug convictions.

As to *Ewing*, it is important to recognize that the case did not involve an LWOP sentence, and the Court in *Graham* and *Miller* seemed to recognize that LWOP is qualitatively different for Eighth Amendment purposes from any other sentence of imprisonment. Because *Ewing* did not involve an LWOP sentence, it does not preclude lower courts from adopting categorical, prophylactic LWOP-limiting rules analogous to what the Court adopted in *Graham* and *Miller*.

Additionally, while *Ewing* makes clear that criminal history plays an important role in the Eighth Amendment proportionality analysis, the plurality did not adopt an "anything goes" approach to sentencing recidivists but instead emphasized the particularly aggravating specifics of Ewing's own criminal history. In effect, the plurality concluded that Ewing's record

228. Only eight states *mandate* LWOP for any drug-only offenders. *See infra* Appendix. *See also supra* note 167 (indicating that only a minority of life-sentenced drug offenders have been convicted under statutory provisions that mandate a life sentence).

229. *See, e.g.*, Van Zyl Smit, *supra* note 180, at 41 (noting that life sentences in the Netherlands, while permissible, are never mandatory); Vinter v. U.K., Nos. 66069/09, 130/10 & 3896/10, HUDOC, para. 106 (Eur. Ct. H.R. 2013) (Eur.), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{"itemid":["001-122664"]}. ("Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. *This is particularly so when such a sentence is not mandatory* but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case." (emphasis added) (citation omitted)).

demonstrated what *Miller* later described as "irretrievable depravity."[230] But offenders with lesser criminal histories need not necessarily suffer this characterization and its implications for categorical-proportionality review. Finally, *Ewing* may be distinguishable from some LWOP cases based on deference considerations, which take into account the number of offenders who received three-strikes sentences like Ewing's, the number of states with three-strikes laws, the deliberateness of those enactments, and the ongoing shift away from acceptance of LWOP in international law.

Harmelin may seem at first a more daunting obstacle, with the Court upholding a mandatory LWOP sentence on a first-time, adult drug offender. Yet, the controlling opinion was premised on the belief that high-volume cocaine trafficking was a serious violent crime, comparable to felony murder. More clearly nonviolent offenses should be readily distinguishable, including even drug offenses involving lesser quantities of drugs or different types of drugs. Moreover, the controlling opinion also specifically praised the "care, clarity, and much deliberation" with which the challenged sentencing statute was crafted;[231] not all LWOP statutes merit such accolades, and lesser deference to the legislature may be warranted where, as in *Miller*, LWOP was not adopted "through deliberate, express, and full legislative consideration."[232] Finally, Harmelin himself did not argue that his sentence was inconsistent with international legal norms, and the Court did not explicitly consider the possibility; an offender raising the issue today may merit different treatment, particularly in light of the trend away from LWOP in international law.

Graham and *Miller* constitute an important breakthrough, with the Court recognizing for the first time the unique and inhumane character of LWOP as a punishment. Yet, at the same time, the Court avoided truly sweeping holdings and the express reversal of precedent. The Court's "go-slow" approach, reflecting the values of judicial deference, may not be unjustified. But, even with the reaffirmation of *Ewing* and *Harmelin*, the Court's approach leaves room for lower courts to begin the process of extending *Graham* and *Miller* and developing principled limitations on the imposition of LWOP on adult offenders.

230. Miller v. Alabama 132 S. Ct. 2455, 2464 (2012).

231. Harmelin v. Michigan, 501 U.S. 957, 1007-08 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

232. *Miller*, 132 S. Ct. at 2473.

Appendix

Maximum Penalties for Drug Offenses in States with Life Without Parole Sentences

State	Max Penalty for Drug Only Offender	LWOP Mandatory?	Max Penalty for Marijuana Only Offender
Alabama	LWOP[233]	Yes[234]	LWOP[235]
Arizona	Life with Parole[236]	N/A	Life with Parole[237]
Arkansas	Life with Parole[238]	N/A	Life with Parole[239]
California	9 Years[240]	N/A	4 Years[241]
Colorado	64 Years[242]	N/A	64 Years[243]
Connecticut	Life with Parole[244]	N/A	25 Years[245]
Delaware	LWOP[246]	Yes[247]	LWOP[248]

233. ALA. CODE § 13A-5-9(c)(4) (2013) (LWOP for habitual felon with Class A felony); § 13A-12-231 (defining some drug trafficking crimes as Class A felonies).

234. § 13A-5-9(c)(4).

235. *Id.* (LWOP for habitual felon with Class A felony); § 13A-12-231 (defining trafficking in cannabis as Class A felony).

236. ARIZ. REV. STAT. ANN. § 13-3410 (2013).

237. *Id.*

238. ARK. CODE ANN. §§ 5-4-401(a)(1), 5-4-501(a)-(b), 5-64-440(c) (2013) (trafficking a controlled substance is a Class Y felony).

239. §§ 5-4-401(a)(1), 5-4-501(a)-(b), 5-64-440(c) (trafficking marijuana, a schedule VI substance, is a Class Y felony).

240. CAL. HEALTH & SAFETY CODE § 11352(b) (West 2013).

241. HEALTH & SAFETY CODE § 11360(a).

242. 2013 Colo. Legis. Serv. Ch. 333 (S.B. 13-250) *amending* COLO. REV. STAT. ANN. § 18–1.3–401.5 (West 2013) (defining drug felony levels and imprisonment), COLO. REV. STAT. ANN. § 18-1.3-801 (habitual criminal penalty for level 1 drug felony with three prior felony convictions is sixty-four years imprisonment).

243. 2013 Colo. Legis. Serv. Ch. 333 (S.B. 13-250) *amending* COLO. REV. STAT. ANN. §§ 18–1.3–401.5, 18-1.3-801, 18–18–406(b)(iii)(a) (West 2013) (dispensing marijuana is a level 1 drug felony at certain aggregate amounts).

244. CONN. GEN. STAT. ANN. § 21a-278(a) (West 2013).

245. § 21a-278(b).

246. DEL. CODE ANN. tit. 11, § 4214 (b) (West 2012) (LWOP for habitual criminal with specifically enumerated drug felony).

247. *Id.*

248. *Id.* (LWOP for habitual criminal with specifically enumerated drug felony); tit. 16, § 4752(1) (possession with intent to manufacture or deliver a Tier 4 quantity controlled substance); tit. 16, § 4751C(2) (Tier 4 quantity of Marijuana is four kilograms or more).

Florida	LWOP[249]	Yes[250]	LWOP[251]
Georgia	LWOP[252]	No	40 Years[253]
Hawaii	Life with Parole[254]	N/A	Life with Parole[255]
Idaho	LWOP[256]	No	LWOP[257]
Illinois	Life with Parole[258]	N/A	Life with Parole[259]
Indiana	50 Years[260]	N/A	12 Years[261]
Iowa	150 Years[262]	N/A	150 Years[263]

249. FLA. STAT. ANN. § 893.135 (West 2013).

250. *Id.*

251. § 893.135(1) (trafficking in cannabis is 1st degree felony); § 775.084(4)(a)(1) (life sentence for habitual felony offender who commits 1st degree felony); § 944.275(4)(b) (life sentenced prisoners must serve natural life).

252. GA. CODE ANN. § 17-10-7(c) (West 2013) (for fourth felony, offender must serve maximum sentence imposed by judge without parole eligibility); § 16-13-30(d) (for second or successive conviction for trafficking in controlled substances, judge may impose life).

253. § 16-13-32.4(b)(2).

254. HAW. REV. STAT. § 706-606.5(1)(c) (West 2013) (life with parole for repeat offender with Class A felony); § 712-1240.7(2) (methamphetamine trafficking in the 1st degree is a Class A felony).

255. § 706-606.5 (1)(c) (life with parole for repeat offender with Class A felony); § 712-1249.4 (commercial promotion or distribution of marijuana in the 1st degree is a Class A felony).

256. IDAHO CODE ANN. § 19-2514 (West 2013) (person convicted for third time of felony may be sentenced to life); § 19-2513 (providing judge with discretion to include an indeterminate, parole-eligible portion of sentence).

257. § 19-2514 (person convicted for third time of felony may be sentenced to life); § 37-2732B(a)(1) (designating trafficking in marijuana as felony).

258. 720 ILL. COMP. STAT. ANN. 570/401(a) (West 2013) (manufacturing or delivering various controlled substances is a Class X felony); 730 ILL. COMP. STAT. ANN. 5/5-4.5-95(a)(5) (West 2013) (natural life imprisonment for habitual criminal upon Class X felony conviction with two prior convictions); 730 ILL. COMP. STAT. ANN. 5/5-8-1(d)(1) (parole and mandatory supervised release for natural life imprisonment).

259. 730 ILL. COMP. STAT. ANN. 5/5-4.5-95(a)(5) (natural life imprisonment for habitual criminal upon Class X felony conviction with two prior convictions); 730 ILL. COMP. STAT. ANN. 5/5-8-1(d)(1) (parole and mandatory supervised release for natural life imprisonment); 720 ILL. COMP. STAT. ANN. 550/5(g) (Class X felony for manufacture or delivery of cannabis exceeding five kilograms).

260. IND. CODE ANN. § 35-48-4-1(d) (West 2013) (Level 2 felony for dealing in at least twenty-eight grams of cocaine); § 35-50-2-8(i) (maximum twenty year sentence enhancement for habitual offender upon level 1 through 4 felony conviction with two prior unrelated felonies).

261. § 35-48-4-10(c) (Level 5 felony for dealing in at least ten pounds of marijuana); § 35-50-2-8(i) (maximum six year sentence enhancement for habitual offender upon level 5 or 6 felony conviction with two prior unrelated felonies).

262. IOWA CODE ANN. § 124.401(1)(a) (West 2013) (defining some drug manufacturing and delivery crimes as class B felonies subject to maximum of fifty years

Kansas	34 Years[264]	N/A	34 Years[265]
Kentucky	Life with Parole[266]	N/A	Life with Parole[267]
Louisiana	LWOP[268]	Yes[269]	LWOP[270]
Maine	10 Years[271]	N/A	10 Years[272]
Maryland	40 Years[273]	N/A	5 Years[274]
Massachusetts	20 Years[275]	N/A	15 Years[276]
Michigan	LWOP[277]	Yes[278]	30 Years[279]

imprisonment); § 124.411(1) (upon second and subsequent drug convictions, sentencing may be enhanced up to three times the allowable term).

263. § 124.401(1)(a) (marijuana manufacturing and delivery exceeding one thousand kilograms subject to maximum fifty year sentence); § 124.411(1) (upon second and subsequent drug convictions, sentencing may be enhanced up to three times the allowable term).

264. KAN. STAT. ANN. § 21-5703(b)(3) (West 2013) (defining drug severity level 1 felony for unlawful manufacturing of controlled substances); § 21-6805(e) (drug offense sentencing grid with sentence enhancement for prior convictions of unlawful manufacturing of controlled substances).

265. § 21-5703(b)(2) (defining drug severity level 1 felony for multiple convictions); § 21-6805(e) (drug offense sentence enhancement for prior convictions of unlawful manufacturing of controlled substances).

266. KY. REV. STAT. ANN. § 218A.1432(2) (West 2013) (Class A felony for second and subsequent conviction of manufacturing methamphetamine); § 532.080(6)-(7) (maximum life imprisonment for first degree persistent felony offender with Class A or B felony upon third felony conviction).

267. § 218A.1421(4)(b) (Class B felony for trafficking in five or more pounds of marijuana); § 532.080(6)-(7) (maximum life imprisonment for first degree persistent felony offender with Class A or B felony upon third felony conviction).

268. LA. REV. STAT. ANN. § 15:529.1(A)(3)(b) (2013) (imposing LWOP for third drug felony punishable by ten years or more); § 40:966(b) (authorizing sentences of greater than ten years for various drug offenses, including marijuana trafficking).

269. § 15:529.1(A)(3)(b). Louisiana courts do have discretion, however, to impose a lesser sentence if LWOP would be unconstitutionally excessive. Louisiana v. Sims, 123 So. 3d 806, 814 (La. App. 4 Cir. 2013).

270. § 15:529.1(A)(3)(b).

271. ME. REV. STAT. tit. 17-A, § 1103(1-A)(A) (2006) (trafficking a schedule W drug is a Class B crime); tit. 17-A, § 1252(A) (ten year maximum for Class B Crime).

272. tit. 17-A, § 1103(1-A)(A) (trafficking twenty or more pounds of marijuana is a Class B crime); tit. 17-A, § 1252(A) (ten year maximum for Class B Crime).

273. MD. CODE ANN., CRIM. LAW § 5-608(d)(1) (West 2013) (forty year mandatory minimum sentence for fourth-time offender of various narcotics-based crimes); CRIM. LAW § 5-905(a)(1) (doubles sentence authorized for repeat drug offenders).

274. CRIM. LAW § 5-612(c)(1) (five year mandatory minimum sentence for manufacture or distribution of fifty or more pounds of marijuana); CRIM. LAW § 5-905(a)(1) (doubles sentence authorized for repeat drug offenders).

275. MASS. GEN. LAWS ANN. ch. 94C, § 32E(c)(4) (West 2013) (maximum twenty years imprisonment for trafficking heroine).

276. § 32E(a)(4) (maximum fifteen years imprisonment for trafficking marijuana).

Minnesota	40 Years[280]	N/A	40 Years[281]
Mississippi	LWOP[282]	Yes[283]	LWOP[284]
Missouri	LWOP[285]	No	LWOP[286]
Montana	Life with Parole[287]	N/A	Life with Parole[288]
Nebraska	Life with Parole[289]	N/A	60 Years[290]
Nevada	LWOP[291]	No	LWOP[292]
New Hampshire	Life with Parole[293]	N/A	40 Years[294]
New Jersey	Life with Parole[295]	N/A	Life with Parole[296]

277. MICH. COMP. LAWS ANN. § 333.7401(2)(a)(i)-(iv) (West 2013) (narcotic drug manufacturing and delivery penalties ranging from less than twenty years to life imprisonment); § 333.7413(1)(a)-(b) (mandatory life sentence for second and subsequent conviction for violation of 333.7401(2)(a)(ii) or (iii)).

278. § 333.7413(1).

279. § 333.7401(2)(d) (maximum fifteen year sentence for marijuana manufacture or delivery exceeding forty-five kilograms); § 333.7413(2) (sentence doubled for various second and subsequent drug convictions).

280. MINN. STAT. ANN. § 152.021 (West 2013) (forty year sentence for second of subsequent conviction of selling various drugs in aggregate amounts).

281. *Id.*

282. MISS. CODE. ANN. § 41-29-139(f) (West 2013) (mandatory LWOP for drug manufacture or distribution in aggregate amounts).

283. *Id.*

284. *Id.*

285. MO. REV. STAT. § 195.222 (2006).

286. § 195.222(7)(2).

287. MONT. CODE ANN. § 45-9-101(3)(a) (2013).

288. § 45-9-101(4).

289. NEB. REV. STAT. ANN. § 28-416(7) (2013) (defining manufacture or delivery of cocaine exceeding 140 grams as a Class IB felony); § 28-105 (maximum of life imprisonment for class IB felonies).

290. § 28-416(12) (defining possession of one pound or more of marijuana as a Class IV felony); 28-105 (maximum of life imprisonment for class IV felonies); § 29-2221(1) (maximum of sixty years imprisonment for habitual criminal upon third felony conviction).

291. NEV. REV. STAT. ANN. § 207.010(b)(1) (West, Westlaw through the 2011 76th Regular Session of the Nevada Legislature, and technical corrections received from the Legislative Counsel Bureau (2012)).

292. *Id.*

293. N.H. REV. STAT. ANN. § 318-B:26(a)(1)-(4) (2013) (maximum life imprisonment for second or subsequent manufacture of specific drugs various amounts).

294. § 318-B:26(b)(6) (maximum forty years imprisonment for second or subsequent manufacture of marijuana in five pounds or more).

295. N.J. STAT. ANN. § 2C:35-5(b)(1) (West 2013) (first degree crime for manufacture of heroin at specified amount); § 2C:43-6(f) (second and subsequent convictions for drug manufacturing crimes are subject to extended term); § 2C:43-7(c) (extended term of life imprisonment for first degree crime under § 2C:43-6(f)).

New Mexico	26 Years[297]	N/A	26 Years[298]
New York	25 Years[299]	N/A	25 Years[300]
North Carolina	23.5 Years[301]	N/A	18.5 Years[302]
North Dakota	Life with Parole[303]	N/A	20 Years[304]
Ohio	11 Years[305]	N/A	8 Years[306]
Oklahoma	Life with Parole[307]	N/A	Life with Parole[308]

296. § 2C:35-5(b)(10)(a) (first degree crime for manufacture of marijuana exceeding twenty five pounds); § 2C:43-6(f) (second and subsequent convictions for drug manufacturing crimes are subject to extended term); 2C:43-7(c) (extended term of life imprisonment for first degree crime under § 2C:43-6(f)).

297. N.M. STAT. ANN. § 30-31-20 (B)(2) (West 2013) (first degree felony for second or subsequent conviction for various manufacture and distribution drug offenses); § 31-18-15 (A)(3) (eighteen years imprisonment for first degree felony); § 31-18-17(C) (eight year sentence increase for habitual criminal with three or more prior felony convictions).

298. § 30-31-20(B)(2) (first degree felony for second or subsequent conviction for manufacture of schedules I through V controlled substances); § 30-31-6 (C)(10) (marijuana is a schedule I substance); § 31-18-17(C) (eight year sentence increase for habitual criminal with three or more prior felony convictions).

299. N.Y. PENAL LAW § 220.75 (McKinney 2013) (first degree manufacture of methamphetamine is a class B felony); PENAL LAW § 70.10 (Class A-I felony for persistent felony offender with third non-violent felony conviction); PENAL LAW § 70.00 (twenty-five year maximum imprisonment for Class A-I felony conviction).

300. PENAL LAW § 221.55 (first degree criminal sale of marijuana is a class C felony); PENAL LAW § 70.10 (Class A-I felony for persistent felony offender with third non-violent felony conviction); PENAL LAW § 70.00 (twenty-five year maximum imprisonment for Class A-I felony conviction).

301. N.C. GEN. STAT. ANN. § 90-95(h)(3b)(c) (West 2013) (trafficking in over 400 grams of methamphetamine is a Class C felony with a maximum 23.5 year sentence).

302. § 90-95 (h)(1)(d) (trafficking in over 10,000 pounds of marijuana is a Class D felony with a maximum 18.5 year sentence).

303. N.D. CENT. CODE ANN. § 19-03.1-23(1)(a) (West 2013) (defining manufacture or delivery of methamphetamine as a Class A felony); § 12.1-32-09(2)(a) (life imprisonment for habitual offender with a Class A felony conviction and two Class C or higher prior felony convictions).

304. § 19-03.1-23(1)(b) (defining manufacture or delivery of marijuana as a Class B felony); § 12.1-32-09(2)(a) (maximum twenty years for habitual offender with a Class B felony conviction and two Class C or higher prior felony convictions).

305. OHIO REV. CODE ANN. § 2925.03 (C)(4)(g) (West 2013) (trafficking in over 100 grams of cocaine is a first degree felony); § 2929.14 (A)(1) (maximum of eleven years for a first degree felony).

306. § 2925.03 (C)(3)(g) (trafficking in over 40 kilograms of marijuana is a second degree felony but can amount to a first degree felony in certain circumstances); § 2929.14 (A)(2) (maximum of eight years for a second degree felony).

307. OKLA. STAT. ANN. tit. 63, § 2-401(B)(1) (West 2013) (maximum life imprisonment for manufacturing or distributing schedule I or II narcotic drugs).

Oregon	20 Years[309]	N/A	10 Years[310]
Pennsylvania	30 Years[311]	N/A	20 Years[312]
Rhode Island	Life with Parole[313]	N/A	Life with Parole[314]
South Carolina	LWOP[315]	Yes[316]	LWOP[317]
South Dakota	50 Years[318]	N/A	50 Years[319]
Tennessee	60 Years[320]	N/A	60 Years[321]

308. § 2-401(B)(2) (maximum life imprisonment for manufacturing or distributing schedule I through IV controlled substances); § 2-204 (C)(12) (marijuana is a schedule I substance).

309. OR. REV. STAT. ANN. § 475.752(1)(a) (West 2013) (manufacture or delivery of a schedule I controlled substance is a Class A felony); § 161.605(1) (twenty years imprisonment for a class A felony).

310. § 475.856(2) (manufacture of marijuana is a Class B felony); § 161.605(1) (ten years imprisonment for a class B felony).

311. 35 PA. STAT. ANN. § 780-113(f)(1) (West 2013) (maximum fifteen years imprisonment for manufacture or delivery of schedule I or II narcotic drug); § 780-115(a) (doubled sentence upon second or subsequent convictions under § 780-113(a)(30)).

312. § 780-113(f)(1.1) (maximum ten years imprisonment for manufacture or delivery of over 1,000 pounds of marijuana); § 780-115(a) (doubled sentence upon second or subsequent convictions under § 780-113(a)(30)).

313. R.I. GEN. LAWS ANN. § 21-28-4.01(a)(2) (West 2013) (maximum life imprisonment for manufacture or delivery of schedule I or II controlled substances).

314. § 21-28-4.01.2(a)(3), (b) (maximum life imprisonment for possession, manufacture, or sale of more than five kilograms of marijuana).

315. S.C. CODE ANN. § 17-25-45(B)(1), (C)(2)(a)-(b) (2013) (LWOP for third conviction of serious offense including trafficking controlled substances); § 44-53-370(e) (defining trafficking controlled substances with various aggregate amounts and penalties).

316. § 17-25-45(B).

317. § 17-25-45(B)(1), (C)(2)(a)-(b) (LWOP for third conviction of serious offense including trafficking controlled substances); § 44-53-370(e)(1) (defining trafficking marijuana with various aggregate amounts).

318. S.D. CODIFIED LAWS § 22-42-6 (2013) (Class 3 felony to possess more than ten pounds of marijuana); § 22-7-8.1 (sentence moves up two felony levels upon fourth non-violent felony conviction); § 22-6-1(4) (maximum fifty years imprisonment for class 1 felony conviction).

319. § 22-42-7 (Class 3 felony to distribute more than one pound of marijuana); § 22-7-8.1 (sentence moves up two felony levels upon fourth non-violent felony conviction); § 22-6-1(4) (maximum fifty years imprisonment for class 1 felony conviction).

320. TENN. CODE ANN. § 39-17-417(j)(1) (West 2013) (Class A felony for manufacture, delivery, or sale of 150 grams or more of heroine); § 40-35-108(a)(2) (career offender with fourth Class A felony conviction is sentenced under Range III); § 40-35-112(c)(1) (maximum sixty years imprisonment with Range III Class A felony conviction).

321. § 39-17-417(j)(13A) (Class A felony for manufacture, delivery, or sale of 300 pounds or more of marijuana); § 40-35-108(a)(2) (career offender with fourth

Texas	Life with Parole[322]	N/A	99 Years[323]
Utah	Life with Parole[324]	N/A	15 Years[325]
Vermont	Life with Parole[326]	N/A	Life with Parole[327]
Virginia	Life with Parole[328]	N/A	Life with Parole[329]
Washington	20 Years[330]	N/A	10 Years[331]
West Virginia	Life with Parole[332]	N/A	Life with Parole[333]
Wisconsin	LWOP[334]	Yes[335]	29 Years[336]

Class A felony conviction is sentenced under Range III);40-35-112(c)(1) (maximum sixty years imprisonment with Range III Class A felony conviction).

322. HEALTH & SAFETY § 481.112(e) (West 2013) (maximum life imprisonment for manufacture or delivery of penalty group 1 drugs).

323. HEALTH & SAFETY § 481.120(b)(6) (maximum ninety-nine years imprisonment for manufacture or delivery of marijuana exceeding 2,000 pounds).

324. UTAH CODE ANN. § 58-37-8(1)(a), (b)(i) (West 2013) (first degree felony upon second and subsequent convictions for manufacture or production of schedule I or II controlled substances); § 76-3-203(1) (maximum life imprisonment for first degree felony).

325. § 58-37-8(2)(a)(i), (b)(i) (second degree felony for possession of 100 pounds or more of marijuana); § 76-3-203(2) (maximum fifteen years imprisonment for second degree felony).

326. VT. STAT. ANN. tit. 18, § 4231(c)(1) (West 2013) (maximum thirty years imprisonment for trafficking in cocaine at 150 grams or more); tit. 13, § 1 (offenses with maximum sentences exceeding two years are considered felonies); tit. 13, § 11 (life imprisonment for offender upon fourth or subsequent felony conviction).

327. VT. STAT. ANN. tit. 18, § 423o(c) (maximum thirty years imprisonment for trafficking in marijuana at fifty pounds or more); tit. 13, § 1 (offenses with maximum sentences exceeding two years are considered felonies); tit. 13, § 11 ((life imprisonment for offender upon fourth or subsequent felony conviction).

328. VA. CODE ANN. § 18.2-248(H)(5) (West 2013) (maximum life imprisonment for manufacture, sale, or distribution of 100 grams of methamphetamine).

329. § 18.2-248(H)(4)-(5) (maximum life imprisonment for manufacture, sale, or distribution of 100 kilograms of marijuana).

330. WASH. REV. CODE ANN. § 69.50.401(1)-(2)(a) (West 2013) (maximum ten years imprisonment for Class B felony of manufacture or delivery of schedule I or II narcotic drugs); § 69.50.408(1) (sentence doubled for various drug offenses upon second or subsequent convictions).

331. § 69.50.401(2)(c) (maximum five years imprisonment for Class C felony of manufacture or delivery of schedule I or II controlled substances); § 69.50.204(c)(22) (marijuana is a schedule I controlled substance); § 69.50.408(1) (sentence doubled for various drug offenses upon second or subsequent convictions).

332. W. VA. CODE ANN. § 60A-4-401(a)(i) (West 2013) (maximum fifteen years imprisonment for manufacture or delivery of schedule I or II narcotic drugs); § 61-11-18(c) (life with parole upon third conviction of crime "punishable in a penitentiary").

333. § 60A-4-401(a)(ii) (maximum five years imprisonment for manufacture or delivery of schedule I, II or III controlled substance); § 60A-2-204 (d)(19) (marijuana is a schedule I controlled substance); § 61-11-18(c) (life with parole upon third conviction of crime "punishable in a penitentiary").

Wyoming	40 Years[337]	N/A	20 Years[338]
D.C.	60 Years[339]	N/A	10 Years[340]

334. WIS. STAT. ANN. § 939.62(2m) (West 2013) (mandating LWOP for "persistent repeaters," based on commission of at least three "serious felonies," and defining "serious felonies" to include various violations of Chapter 961, Uniform Controlled Substances Act).

335. *Id.*

336. § 939.50(3)(e) (setting maximum penalty for Class E felony as fifteen years); § 961.41(1)(h)(5) (defining high-volume marijuana trafficking offenses as Class E felonies); § 961.46 (adding five years to maximum for distribution to minor); § 961.48(1)(b) (adding four years for repeat offense); § 961.49(1m) (adding five years for distribution in certain protected places).

337. WYO. STAT. ANN. § 35-7-1031(a)(i) (West 2013) (maximum twenty years imprisonment for manufacture or delivery of methamphetamine or other schedule I and II narcotic drugs); § 35-7-1038(a) (sentence doubled upon second or subsequent conviction for various drug crimes).

338. § 35-7-1031(a)(ii) (maximum ten years imprisonment for manufacture or delivery of other schedule I and II controlled substances); § 35-7-1014(d)(xiii) (marijuana is a schedule 1 controlled substance); § 35-7-1038(a) (sentence doubled upon second or subsequent conviction for various drug offenses).

339. D.C. CODE § 48-904.01(a)(2)(A) (2013) (maximum thirty years imprisonment for manufacture or distribution of schedule I and II narcotic or abusive drugs); § 48-904.08(a) (sentence doubled upon second or subsequent conviction for various drug crimes).

340. § 48-904.01(a)(2)(B) (maximum five years imprisonment for manufacture or distribution of schedule I, II, or III controlled substances); § 48-902.08(a)(6) (cannabis designated as schedule III substance); § 48-904.08(a) (sentence doubled upon second or subsequent conviction for various drug crimes).