

HABITUALLY OFFENDING THE CONSTITUTION:
THE CRUEL AND UNUSUAL CONSEQUENCES OF HABITUAL
OFFENDER LAWS AND MANDATORY MINIMUMS

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INTRODUCTION

Lee Carroll Brooker will die before seeing another day of freedom.¹ At the age of seventy-six years old, the disabled veteran currently sits in prison, waiting out the remainder of his days, serving a mandatory life sentence for a non-violent drug charge.² In 2011, Brooker received a life sentence for a marijuana conviction.³ As a veteran suffering from chronic pain, Brooker grew marijuana plants behind his son's home.⁴ Brooker intended the marijuana only for personal use.⁵ During an unrelated home search, police recovered less than three pounds of marijuana plants, which included unusable pieces such as stalks and vines.⁶

On July 20, 2011, Investigator Ronald Hall of the Dothan Police Department obtained written consent from Brooker's son, Darren, to search the family home.⁷ Darren consented to the search in connection with an investigation into stolen bicycles.⁸ While searching the house, investigators discovered a smaller growing operation in an upstairs bedroom.⁹ Investigators decided to search outside the premises, and Brooker confirmed the presence of additional plants behind the home.¹⁰ The multiple investigators on the scene discovered sev-

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¹ See *Ex parte* Brooker, 192 So. 3d 1 (Ala. 2015).

² Editorial, *Outrageous Sentences for Marijuana*, N.Y. TIMES (Apr. 14, 2016), http://www.nytimes.com/2016/04/14/opinion/outrageous-sentences-for-marijuana.html?_r=1 [hereinafter *Outrageous Sentences*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Ex parte* Brooker, 192 So. 3d 1, 2 (Ala. 2015).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

eral potted infant plants right outside the back door, as well as thirty-seven larger marijuana plants about 100 yards behind the home.¹¹

In connection with his personal growing operation, the police arrested and charged the veteran with felony possession of and trafficking marijuana.¹² A trial court convicted Brooker of these charges.¹³ At Brooker's sentencing hearing, the State produced records addressing Brooker's past criminal activity while a resident of Florida.¹⁴ These records indicated that prior to this conviction, Brooker obtained convictions for one count of attempted robbery with a firearm and three counts of robbery with a firearm.¹⁵ The criminal charges dated back thirty years, when Brooker committed armed robbery at several liquor stores.¹⁶ For sentencing purposes, the trial court determined that under Alabama law, these prior convictions qualified as Class A felonies.¹⁷ This triggered Alabama's Habitual Felony Offender Act, and Brooker received a life without parole sentence—the second harshest sentence available in the American justice system.¹⁸

Alabama's Habitual Offender Act mandated a life sentence for Brooker.¹⁹ When reviewing Brooker's sentence, Alabama Chief Justice Roy Moore affirmed, yet he wrote, "I believe Brooker's sentence is excessive and unjustified."²⁰ Even so, the Supreme Court denied hearing Brooker's appeal in April 2016.²¹ Without any action from state legislators, Brooker will spend the rest of his life behind bars.

Changing attitudes regarding sentencing, especially for non-violent crimes, demand legislators repurpose harsh mandatory minimum

¹¹ *Id.*

¹² *Ex parte Brooker*, 192 So. 3d 1, 3 (Ala. 2015); Matt Elofson, *Jury Finds 75-Year-Old Man Guilty of Drug Trafficking*, DOTHAN EAGLE (Aug. 29, 2014), http://www.dothaneagle.com/news/crime_court/jury-finds--year-old-man-guilty-of-drug-trafficking/article_cacd0d12-2f97-11e4-8d08-0017a43b2370.html.

¹³ *Brooker*, 192 So. 3d at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Jesse Wegman, *The Supreme Court Passes Up a Chance to Ban a Terrible Sentence*, N.Y. TIMES (Apr. 19, 2016), <https://takingnote.blogs.nytimes.com/2016/04/19/the-supreme-court-passes-up-a-chance-to-ban-a-terrible-sentence/>.

¹⁷ *Ex parte Brooker*, 192 So. 3d 1, 3 (Ala. 2015).

¹⁸ See Wegman, *supra* note 16.

¹⁹ ALA. CODE § 13A-5-9 (2017).

²⁰ *Brooker*, 192 So. 3d at 2.

²¹ Wegman, *supra* note 16.

laws.²² Because of changing attitudes towards crime and punishment in recent decades, mandatory minimum reform is a bipartisan issue.²³ Prominent political figures from both ends of the spectrum support and call for a restructuring and repeal of many mandatory minimum laws, especially those that inflict lengthy sentences for non-violent drug offenses.²⁴

Additionally, evolving attitudes towards marijuana use, especially for medicinal purposes, make Brooker's sentencing cruel and unusual.²⁵ Mandatory minimum laws were not designed with the intention to lock up elderly, disabled veterans for non-violent possession charges. Unfortunately, although extreme, Brooker's case is not unique. Mandatory minimums condemn undeserving citizens to life sentences and deny judges any discretion or role in the sentencing process. Life sentences are inappropriate for offenses where there was no harm to other human beings.

First, this Comment will explain the evolution of mandatory minimums. Specifically, this Comment will discuss how mandatory minimums originally emerged as a result of the war on drugs and continue to create lengthy, excessive, and unjust punishments. Next, this Comment will turn to mandatory life sentences for non-violent offenders and current cases to determine the extent of this problem, and how unjust life sentences demand consideration under the Eighth Amendment. This Comment will address the harshest statutes, found in several states, including Alabama, some of which demand life sentences for non-violent drug offenses. Finally, this Comment will propose that non-violent marijuana offenders are a class of people who should be excluded from receiving life sentences, regardless of state mandatory minimum laws.

²² See, e.g., FAMM, OMNIBUS SURVEY, (2008), <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>.

²³ See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 5 (2010).

²⁴ *Id.*

²⁵ Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RESEARCH CENTER (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

I. BACKGROUND

A. *History of Mandatory Minimums*

Enacted by state and federal statutes, mandatory minimums set the lower limits for the sentencing of particular criminals.²⁶ The limits correspond with specific offenses as well as individual offenders.²⁷ Mandatory minimums are a vessel through which the legislature is able to prescribe compulsory prison terms for certain criminals.²⁸ Minimum sentences are an attempt to deter other criminals from committing similar crimes, ensure the sentences appropriately punish the crime, and create a uniformity of sentencing among individuals convicted of similar crimes.²⁹ When determining the applicability of a mandatory minimum for an individual offender, judges consider objective criteria, such as the quantity of drugs possessed or prior criminal history.³⁰ Likewise, mandatory minimum statutes adhere to strict formulas.³¹ For example, a criminal convicted of crime A, such as possession with intent to sell, must be sentenced to B years, subject to C condition, such as past felony convictions.³²

1. Mandatory Minimums as a Consequence of the War on Drugs

Over the past forty years, the number of incarcerated individuals in the United States has quadrupled.³³ The United States reigns as the most incarcerated nation in the world.³⁴ Although only five percent of the world's population is from the United States, twenty-five percent of the world's incarcerated population is from the United States.³⁵

²⁶ FAMM, *What are Mandatory Minimums?*, <http://famm.org/mandatory-minimums/> (last visited July 26, 2017).

²⁷ *See id.*

²⁸ *See* Luna, *supra* note 23, at 5.

²⁹ *Id.* at 11.

³⁰ *Dorsey v. United States*, 567 U.S. 260, 265-66 (2012).

³¹ *See id.*

³² *See id.*

³³ ACLU, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NON-VIOLENT OFFENSES 32* (2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> [hereinafter *Living Death*].

³⁴ *Living Death*, *supra* note 33; Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (July 10, 2017), <http://www.prb.org/Publications/Articles/2012/us-incarceration.aspx> [hereinafter *Tsai*].

³⁵ *Id.*

Mandatory minimums play a substantial role in keeping the rates of incarceration high and rehabilitation low.³⁶ The majority of both federal and state mandatory minimum laws are aimed at drug crimes.³⁷ The assumption that drugs are firmly linked to violence developed as a result of media and political hype surrounding the war on drugs.³⁸ The war on drugs—launched by the Nixon administration and continued today—stems from this presumption that drugs and violence are linked.³⁹

Mandatory minimums existed as early as 1790.⁴⁰ Originally, mandatory minimum sentences were reserved for crimes such as piracy and murder.⁴¹ In recent times, an increase of mandatory minimum sentences for drug offenses began largely in support of the war on drugs.⁴² During the 1970s, the Nixon Administration determined 1.3% of Americans were addicted to drugs.⁴³ Instead of addressing addiction's root cause, legislators reacted by enacting mandatory minimum sentences for drug users and suppliers.⁴⁴

Increasing moral panic in the United States prompted Congress to pass the Sentencing Reform Act of 1984.⁴⁵ The act eliminated parole, requiring that incarcerated individuals serve at least eighty-

³⁶ Living Death, *supra* note 33, at 32-33; Tsai *supra* note 34.

³⁷ See U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 10 (1991), <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991MandMinReport.pdf>.

³⁸ Michael Tonry, *Why Are U.S. Incarceration Rates So High?* 45 CRIME & DELINQ. 419, 425 (1999) (asserting that two of the reasons U.S. incarceration rates are so high are strict penalties and misinformed public opinion about drugs); Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 231 (2015) (explaining violent crime is not an unavoidable consequence of drug use as evidenced by the high level of drug offenders incarcerated for non-violent drug offenses).

³⁹ Baradaran, *supra* note 38, at 231; Tonry, *supra* note 38, at 428.

⁴⁰ Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U.L. REV. 935, 938 (2001).

⁴¹ *Id.*

⁴² See *United States v. Vasquez*, 2010 U.S. Dist. LEXIS, at *6-7 32293 (E.D. N.Y. Mar. 30, 2010) (explaining that Congress enacted the Anti-Drug Abuse Act of 1986 as a reaction to the war on drugs and inflamed by the sudden death by overdose of a University of Maryland basketball star).

⁴³ Matthew C. Lamb, *Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 127 (2014).

⁴⁴ See *id.*

⁴⁵ 18 U.S.C. § 3551 (1984); Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Non-violent Offenses*, 66 CASE W. RES. 525, 531 (2015) [hereinafter Sarma].

five percent of their sentence.⁴⁶ Additionally, in 1986 Congress enacted the Anti-Drug Abuse Act.⁴⁷ The law mandated severe minimum sentences with the intention of keeping large-scale mastermind drug dealers locked up and off the streets.⁴⁸

Today, state and federal legislatures continually attempt to use mandatory minimums as a weapon in the war on drugs.⁴⁹ The rationale rests on the presumption that the knowledge of harsh sentences will dissuade potential offenders from violating the law.⁵⁰ This notion relies heavily on deterrent theories, which are modeled after rational actors.⁵¹ Using this theory, Legislators overlook the inherent nature of drug culture.⁵² Many factors, mainly addiction, prevent mandatory minimums from serving as a valuable weapon in the war on drugs.⁵³

Despite Congress' intention to keep dangerous drug dealers in jail and prevent addiction, the current sentencing scheme is inefficient.⁵⁴ Congress' response to the war on drugs, attempting to win the war largely with increased drug sentences, is a failed tactic, which pays no mind to the effect these harsh penalties have on drug offenders at different levels.⁵⁵ Mandatory minimum statutes typically ignore an individual offender's level of involvement in narcotics distribution and fail to sufficiently differentiate between major and minor violators.⁵⁶ The vast majority of individuals who receive mandatory minimum sentences are not vital to any narcotics distribution organization.⁵⁷ Individuals such as street dealers typically rank the lowest, rendering them completely replaceable, and thus have no positive offensive force.⁵⁸ Senior Judge Whitman Knapp of the United States District Court for New York illustrated this point in an address to the

⁴⁶ *Id.*

⁴⁷ 21 U.S.C. § 801 (1986).

⁴⁸ 21 U.S.C. § 801 (1986); *United States v. Vasquez*, 2010 U.S. Dist. LEXIS, at *6-7 32293 (E.D.N.Y. Mar. 30, 2010).

⁴⁹ Mascharka, *supra* note 40, at 947.

⁵⁰ *Id.* at 947-48.

⁵¹ *Id.* at 948.

⁵² *Id.* at 949.

⁵³ *Id.* at 948.

⁵⁴ John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J. L. ETHICS & PUB POL'Y 311, 317 (2004).

⁵⁵ *Id.*

⁵⁶ *See, e.g. United States v. Vasquez*, 2010 U.S. Dist. LEXIS, at *7 32293 (E.D. N.Y. Mar. 30, 2010).

⁵⁷ Martin, *supra* note 54, at 317.

⁵⁸ *Id.*

Merchants Club in New York City.⁵⁹ In his address, Judge Knapp eloquently stated,

But to sum it all up, I will just tell you that I don't think you can find a federal—or indeed, a state—judge who will deny a sense of the utter futility in presiding over drug prosecutions. It is simply a matter of taking a minnow out of a pond; the thousands of dollars and hours spent in processing the particular minnows on trial have absolutely no effect on the life of the pond they used to inhabit.⁶⁰

Despite the ongoing war on drugs, in recent years state legislatures have taken an evolved approach to drug legislation regarding non-violent marijuana crimes.⁶¹ Many states have taken steps to legalize and decriminalize marijuana.⁶² Even so, the federal government still classifies marijuana as a Schedule I drug.⁶³ Schedule I drugs typically carry lengthier prison sentences and heavier fines than other drug classifications.⁶⁴ With the war on drugs still alive and well, the implication for marijuana offenders can lead to severe and harsh punishments.

2. The Problem with Mandatory Minimums

Mandatory minimums statutorily require judges to impose, at a minimum, a specific sentence for certain criminal offenses.⁶⁵ At the most basic level, mandatory minimums ignore each offender's individuality.⁶⁶ Bound by this, judges remain unable to consider the relevant and unique qualities of each criminal defendant.⁶⁷ Considerations

⁵⁹ WHITMORE KNAPP, *THE WAR ON DRUGS*, 5 FED. SENT'G REP. 294 (1993).

⁶⁰ *Id.* at 295.

⁶¹ See *Recent State Level Reforms to Mandatory Minimums Laws* FAMM, (May 10, 2017), <http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf>.

⁶² Seth Motel, *6 Facts About Marijuana*, PEW RESEARCH CENTER (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/6-facts-about-marijuana/>.

⁶³ BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, *DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS* 3 (2015).

⁶⁴ *Id.*

⁶⁵ Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, THE STATE FACTOR, March 2016, at 2, <https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf>.

⁶⁶ See FAMM, <http://famm.org/sentencing-101/quick-facts/> (last visited Jan. 8, 2017).

⁶⁷ See Newburn, *supra* note 65, at 5.

such as whether or not punishment is necessary to keep the public safe, whether someone was injured, whether there is a possibility of rehabilitation, the individual's role in the crime, and motive for engaging in criminal activity all fall to the wayside when mandatory minimums deny judicial discretion.⁶⁸

By denying judicial discretion, power is directly given to federal and state prosecutors.⁶⁹ Using mandatory minimums, prosecutors are able to pressure criminal defendants into pleading guilty to lower crimes, rather than invoking their constitutional right to a trial, thus risking conviction and potentially receiving a harsh mandatory minimum penalty.⁷⁰ Prosecutors possess the ability to ask for a lower sentence based on "substantial assistance" from cooperating defendants.⁷¹ Typically, the higher the position a defendant holds in a drug operation, the more information the defendant possesses to substantially assist the prosecutor in making further convictions.⁷² Lower-level offenders often lack the information needed to substantially assist prosecutors, and instead face the decision to plead out or risk receiving daunting minimum sentences.⁷³ As a result, the higher-ups in drugs schemes can work with prosecutors to finagle their sentences down to lengths comparable to those intended for low ranking drug offenders.⁷⁴

B. *Life Sentences for Non-Violent Offenders as a Product of Mandatory Minimums*

The mass incarceration resulting from mandatory minimum laws has resulted in more than 3,000 non-violent offenders across the United States receiving life sentences without the possibility of parole.⁷⁵ Life without parole sentences affect even low-level criminals.⁷⁶

⁶⁸ Luna, *supra* note 23, at 13.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ Mascharka, *supra* note 40, at 943.

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.* at 944.

⁷⁵ *Living Death*, *supra* note 33, at 32.

⁷⁶ *Id.*

1. Defining Non-Violent Offenders

The statutory definition of violence varies among jurisdictions.⁷⁷ For example, in Virginia, violent crimes are defined as “acts of violence” and include a list of seven different offenses.⁷⁸ These offenses include murder, mob-related felonies, kidnapping, assault, robbery, sexual assault, and arson.⁷⁹ In South Carolina, the definition of violent crime is much more specific and extends to over fifty offenses.⁸⁰ Such offenses include crimes like drug trafficking and a “vessel operator’s failure to render assistance resulting in death.”⁸¹

Despite the vast differences among state statutes, the overarching theme across jurisdictions remains: a violent crime is a crime against another.⁸² The obvious examples of violent crime include rape, murder, and assault.⁸³ In November 2013, the American Civil Liberties Union (ACLU) published a report, which defined violent crimes, explaining violent crimes do not include drug offenses, property crimes, and crimes that do not involve threat or force against another.⁸⁴ Even so, individuals convicted of low-level non-violent offenses receive life without parole sentences, oftentimes because of past convictions.⁸⁵

Notably, the ACLU’s report does not include drug offenses in their definition of violent crime.⁸⁶ The adoption of three-strike and habitual offender laws spiked during the 1980s and 1990s because of media and political hysteria conflating drug offenses with increased violence.⁸⁷ Conversely, the mass incarceration of drug users has not

⁷⁷ Caitlyn Lee Hall, *Good Intentions: A National Survey of Life Sentences for Non-violent Offenses*, 16 N.Y.U. LEGIS. & PUB. POL’Y 1101, 1108 (2013).

⁷⁸ VA. CODE ANN. § 19.2-297.1 (1994).

⁷⁹ *Id.*

⁸⁰ S.C. CODE ANN. § 16-1-60 (2012).

⁸¹ *Id.*

⁸² See Hall, *supra* note 77, at 1108.

⁸³ Sarma, *supra* note 45, at 529.

⁸⁴ See *Living Death*, *supra* note 33, at 18, 21 (explaining that while jurisdictions vary on the definition of violent crime, “for the purposes of collecting and analyzing data and documenting cases for this report, the ACLU classifies crimes as non-violent if they do not involve the use of threat of physical force against a person).

⁸⁵ *Id.*

⁸⁶ *Id.* at 20.

⁸⁷ Sarma, *supra* note 45, at 529.

impacted violence rates.⁸⁸ The rate of violent crime actually remains stable, even as drug use rates surge upward.⁸⁹

The ACLU collected data from the Bureau of Prisons and state Departments of Corrections.⁹⁰ The ACLU calculated that in 2012, there were 3,278 individuals serving life sentences in the federal system and nine states without the possibility of parole for non-violent drug and property crimes.⁹¹ Of the 3,278 individuals, seventy-nine percent were serving time for non-violent drug convictions.⁹² Louisiana, Florida, Georgia, Alabama, Mississippi, South Carolina, and Oklahoma have the highest number of prisoners serving life sentences without the possibility of parole for non-violent crimes.⁹³ The high rates in these states result mainly from various three-strikes and habitual offender laws, which mandate life sentences in connection with certain non-violent crimes.⁹⁴

2. Mass Life Without Parole Populations in Alabama, Mississippi, and Louisiana

The emergence of three-strike and habitual offender laws was a response to public outcry over the growth of violent crime in the 1990s.⁹⁵ Several highly publicized murders gave political advocates for the war on drugs a platform for fear mongering, drawing the attention of terrified citizens.⁹⁶ Mass hysteria from constituents compelled legislatures to offer three-strikes and habitual offender laws as a solution to the spike in violent crime.⁹⁷ Legislatures presented these laws to the public as a way to stop career criminals—those deemed incapable of rehabilitation—from walking free on the streets.⁹⁸ Although the intentions of three-strikes and habitual offender laws may appear

⁸⁸ Baradaran, *supra* note 38, at 231; Sarma, *supra* note 45, at 530 (explaining crime rates have decreased and violent crime is at its lowest point since the 1970s).

⁸⁹ Sarma, *supra* note 45, at 530.

⁹⁰ *Living Death*, *supra* note 33, at 2.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 23.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 35.

⁹⁶ *Living Death*, *supra* note 33.

⁹⁷ *Id.*

⁹⁸ *Id.*

pure, convictions under these laws often trigger extreme consequences for non-violent criminals.⁹⁹

According to the ACLU's report, Alabama ranks supreme in the incarceration of non-violent drug offenders.¹⁰⁰ Alabama's state prison system contains the overall largest population of inmates serving life without parole as well as the largest population of inmates serving life without parole for non-violent offenses, largely as the result of many criminal defendants' habitual offender statuses.¹⁰¹

Specifically, Alabama's habitual offender law is responsible for the incarceration of more than 150 individuals in connection with non-violent crimes.¹⁰² Under Alabama's habitual offender law, when a criminal defendant is convicted of a Class A felony, and the defendant has at least one prior conviction for any Class A felony, he *must* be punished for life without the possibility of parole.¹⁰³ The word "must", as it appears in the statute, forbids any sort of judicial discretion.¹⁰⁴ Because the court has no discretion, Alabama's habitual offender laws can result in life sentences for first time drug offenders.¹⁰⁵ As of 2015, Alabama has 171 prisoners serving life without parole for non-violent property and drug offenses.¹⁰⁶

Habitual offender laws in Mississippi are especially ruthless. Mississippi allows life sentences for second offenders caught selling drugs in a school zone, regardless of the type or quantity of drug.¹⁰⁷ Most jarringly, in Mississippi, a person convicted of possession with intent to sell defined amounts for certain drugs are immediately subjected to life without parole, even if the individual possesses no prior criminal background.¹⁰⁸ For example, a one-time conviction of possession with intent to sell ten pounds or more of marijuana or synthetic cannabis

⁹⁹ *Id.* at 35.

¹⁰⁰ *Id.* at 23.

¹⁰¹ Living Death, *supra* note 33, at 22, 24.

¹⁰² *Id.* at 24.

¹⁰³ ALA. CODE § 13A-5-9(c)(4); Lane v. State, 66 So. 3d 824, 829 (Ala. 2010) (“[T]he recidivist statute at § 13A-5-9 contains clear and unambiguous language evidencing the Alabama Legislature’s intent that offenders sentenced under the HFOA be subjected to a different range of punishment than those sentenced pursuant to the general felony range.”).

¹⁰⁴ *See id.*

¹⁰⁵ ALA. CODE § 13A-5-9; Sarma, *supra* note 45, at 537.

¹⁰⁶ Living Death, *supra* note 33, at 23.

¹⁰⁷ MISS. CODE ANN. § 41-29-142 (2013).

¹⁰⁸ *Id.*

during any twelve month period will land anyone twenty-one years or older in jail for life without the possibility of parole.¹⁰⁹

Louisiana is a notable contestant on the list of states with the most severe life without parole laws. Under Louisiana law, if a defendant is convicted of a felony for a third time, and his two prior felonies are crimes listed under “violent crime”¹¹⁰ or any other crime punishable by at least twelve years, or a combination thereof, Louisiana mandates sentencing of life without the possibility of parole.¹¹¹ The official list of the forty-six crimes which can activate the habitual offender sentencing guidelines in Louisiana, include crimes such as “purse snatching,” “aggravated criminal damage to property,” and “aggravated flight from an officer.”¹¹² In addition, Louisiana law permits life without parole sentences for large-scale financial crimes as well as certain racketeering offenses.¹¹³

C. *Mandatory Life Sentences for Non-Violent Offenders are Cruel and Unusual*

A life sentence without the possibility of parole is one of the harshest punishments an individual can receive, second only to the death penalty.¹¹⁴ A model policy would reserve severe punishments to repeat violent offenders, rather than low-level non-violent offenders.¹¹⁵

1. Eighth Amendment Jurisprudence

The Eighth Amendment prohibits excessively cruel and unusual punishment.¹¹⁶ A sentence is considered excessive, even if it falls within the statutory range, if “it is grossly disproportionate to the seri-

¹⁰⁹ *Id.*

¹¹⁰ LA. STAT. ANN. § 14:2(B) (2016). This section defines “crime of violence,” which means, “an offense that has, as an element, the use attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.”

¹¹¹ *State v. Lopez*, 2013-0373, 2013 WL 5915203, at *5 (La. Ct. App. Nov. 1, 2013).

¹¹² LA. STAT. ANN. § 14:2 (2016).

¹¹³ Hall, *supra* note 77, at 1122.

¹¹⁴ See Wegman, *supra* note 16.

¹¹⁵ Newburn, *supra* note 65, at 5.

¹¹⁶ U.S. CONST. amend. VIII.

ousness of the offense or imposes needless and purposeless pain and suffering.”¹¹⁷ In reviewing claims of excessive punishments, the appellate court must consider whether the punishment is so severe and disproportionate as to “shock the court’s sense of justice.”¹¹⁸

Specifically, the Eighth Amendment states, “[e]xcessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.”¹¹⁹ Courts are called to look to “the evolving standards of decency that mark the progress of a maturing society” when responding to potential Eighth Amendment violations.¹²⁰ Standards of cruelty develop as the morals of society change overtime.¹²¹ Federal and state courts must recognize the humanity of even the most heinous criminals and respect those human attributes when crafting an appropriate sentence.¹²²

Evolving Eighth Amendment jurisprudence focuses narrowly on whether a punishment is disproportionate to the crime as a standard for deciding if the sentence is cruel and unusual.¹²³ A sentence may be disproportionate if it does not serve a societal purpose or far outweighs the seriousness of the crime.¹²⁴ The overall balancing test rests not on whether the punishment would serve a utilitarian goal by correcting and deterring lawlessness, but whether a person is deserving of such a punishment.¹²⁵ Even so, in recent times, proportionality review has been reserved to capital punishment.¹²⁶ For example, the Court ruled that capital punishment was disproportionate to the crime of rape.¹²⁷ On the other hand, Eighth Amendment review can also be considered from a categorical approach.¹²⁸ For example, the Court

¹¹⁷ See *Enmund v. Florida*, 458 U.S. 782 (1982) (finding the death penalty an excessive punishment for felony murder when the defendant did not take the life or intend to take the life of the deceased); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“[S]entence of death is grossly disproportionate and excessive punishment for the crime of rape.”); *State v. Davis*, 171 So. 3d 1223, 1225 (La. Ct. App. Jun. 30, 2015).

¹¹⁸ *Davis*, 171 So. 3d at 1226.

¹¹⁹ U.S. CONST. amend. VIII.

¹²⁰ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹²¹ *Graham v. Florida*, 560 U.S. 48, 58 (2012).

¹²² *Id.* at 59.

¹²³ *Id.*

¹²⁴ *Rummel v. Estelle*, 445 U.S. 263, 293 (1980) (Powell, J., dissenting).

¹²⁵ See *id.* at 288.

¹²⁶ See *id.* at 272.

¹²⁷ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹²⁸ See *Graham v. Florida*, 560 U.S. 48, 59 (2010).

decided the death penalty was impermissible for prisoners who are considered insane.¹²⁹ The categorical approach presents much wider avenues by which individuals can challenge lengthy prison sentences under the Eighth Amendment.¹³⁰

2. *Graham v. Florida* Brings Change for Juvenile Offenders

The most recent example of evolving Eighth Amendment jurisprudence is the Court's position that life sentences without the possibility of parole for juvenile offenders are cruel and unusual punishment.¹³¹ In the aftermath of having abolished its parole system, a Florida court revoked probation and sentenced a sixteen-year-old to life imprisonment.¹³² Without the chance of parole, the young man had no possibility of release unless granted by executive clemency.¹³³

Terrance Jamar Graham was born into a family of crack cocaine addicts.¹³⁴ He attended school, but doctors diagnosed him with attention deficit hyperactivity disorder at a young age.¹³⁵ Graham began drinking alcohol and smoking cigarettes at nine years old, and smoking marijuana when he was only thirteen.¹³⁶ When Graham was sixteen years old, he and three other juveniles attempted to rob a barbecue restaurant.¹³⁷ One of the restaurant's youth employees left the back door open, so Graham and his accomplices were able to enter without force.¹³⁸ Once inside, one of Graham's accomplices struck the manager in the back of the head with a metal bar, and the juveniles ran off without taking any money.¹³⁹ The manager required stitches for his head, but did not suffer any life-threatening injuries.¹⁴⁰

The police arrested Graham, and the prosecutors elected to charge him as an adult.¹⁴¹ Graham was charged with armed burglary with assault and battery, which in Florida is a first-degree felony car-

¹²⁹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

¹³⁰ See *Sarma*, *supra* note 46, at 550-51.

¹³¹ *Graham*, 560 U.S. at 80.

¹³² *Id.* at 48.

¹³³ *Graham v. Florida*, 560 U.S. 48, 80 (2010).

¹³⁴ *Id.* at 53.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Graham v. Florida*, 560 U.S. 48, 53 (2010).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

rying the maximum sentence of life imprisonment without the possibility of parole.¹⁴² Graham pled guilty and received a three-year probationary period.¹⁴³ The court required Graham to spend the first twelve-months of probation in the county jail, with credit for time served awaiting trial.¹⁴⁴

While out on probation, the police arrested Graham in connection with two home invasions in the course of one evening.¹⁴⁵ Graham denied any involvement with the home invasions, but admitted to violating probation.¹⁴⁶ The court found Graham violated his probation committing a home invasion, possessing a firearm, and associating with persons engaged in criminal activity.¹⁴⁷ The trial court sentenced Graham to the maximum penalty: life imprisonment.¹⁴⁸

In reviewing this decision, the Supreme Court opined that life without parole negates the ability to rehabilitate criminals.¹⁴⁹ Vocational and rehabilitative services are often denied to prisoners serving life sentences, which speaks to the disproportionality of such extreme sentences for nonhomicide crimes.¹⁵⁰ The Court decided that in the case of Graham, a juvenile who did not kill or intend to kill does not deserve the same severity of punishment as those given to murderers.¹⁵¹ Although serious nonhomicide offenses can result in devastating harm, individuals who commit nonhomicide crimes typically do not have the same “moral depravity” as that of a murderer.¹⁵² As a result, criminals who commit nonhomicide crimes tend to pose less harm to the community and the individuals themselves are “not beyond repair.”¹⁵³ The Supreme Court held that life sentences without the possibility of parole for non-violent juvenile offenders constitutes cruel and unusual punishment.¹⁵⁴

¹⁴² *Id.*

¹⁴³ *Id.* at 54.

¹⁴⁴ *Id.*

¹⁴⁵ *Graham v. Florida*, 560 U.S. 48, 54 (2010).

¹⁴⁶ *Id.* at 55.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 57.

¹⁴⁹ *Id.* at 74.

¹⁵⁰ *Id.*

¹⁵¹ *Graham v. Florida*, 560 U.S. 48, 69 (2010).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 74.

3. *Miller v. Alabama* Further Protects Juvenile Offenders

Not long after the decision in *Graham*, the Court reviewed a decision regarding a life imprisonment for a juvenile offender convicted of second-degree murder.¹⁵⁵ The two fourteen-year-old offenders in this case were sentenced to life imprisonment without the possibility of parole.¹⁵⁶ Petitioner Evan Miller spent his life moving in and out of foster care.¹⁵⁷ He had a history of drug and alcohol abuse, as well as four suicide attempts.¹⁵⁸

One night, after engaging in recreational drug use, Miller and his friend stole their neighbor's wallet while he slept.¹⁵⁹ After retrieving the cash, the boys attempted to return the wallet but ultimately woke the neighbor.¹⁶⁰ The neighbor, realizing what the boys were doing, began choking Miller, prompting Miller's accomplice to hit the neighbor with a baseball bat.¹⁶¹ Once the neighbor released Miller, he too hit the neighbor before both boys retreated back to Miller's family trailer.¹⁶² Soon the boys returned to the neighbor's residence, attempting to cover the evidence by burning down the neighbor's trailer, ultimately killing the neighbor.¹⁶³

Under Alabama law, prosecutors retained the discretion to try Miller either as a juvenile or an adult.¹⁶⁴ Ultimately, the state charged Miller as an adult with murder in the course of arson, a crime that carried a mandatory minimum punishment of life imprisonment without the possibility of parole.¹⁶⁵

Relying on their previous decision in *Graham*, the Supreme Court held that life sentences for juvenile offenders without the possibility of parole, even for murder convictions, were cruel and unusual punishment.¹⁶⁶ The Court recognized the flaws in condemning youth offenders to life sentences.¹⁶⁷ In reaching their decision, the Court

¹⁵⁵ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁵⁶ *Id.* at 462.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Miller v. Alabama*, 567 U.S. 460, 468 (2012).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 469.

¹⁶⁷ *See Miller v. Alabama*, 567 U.S. 460, 469-73 (2012).

emphasized mitigating factors.¹⁶⁸ Miller's youth coupled with his troubled background rendered a life sentence disproportionate to address his culpability.¹⁶⁹ Such an exaggerated sentence fails to provide any positive benefit to society, but rather denies Miller any chance of rehabilitation.¹⁷⁰ The Court urged judges and juries to consider mitigating circumstances before imposing the harshest sentences.¹⁷¹

The imposition of mandatory minimums denies the judiciary any chance to consider mitigating circumstances before sentencing individual offenders. As the nation moves away from policies that place emphasis on mass incarceration, rulings such as those in *Miller* and *Graham* offer hope that mandatory minimums demanding unduly harsh sentences will be reformed.¹⁷² Although considering mitigating issues in children to reduce culpability is essential, the importance of exploring the background of adult criminal defendants and the nature of their crimes cannot be ignored.

Notably, when deciding *Miller* and *Graham*, the Court relied on a categorical approach to evaluate whether a life sentence for juvenile offenders violated the Eighth Amendment.¹⁷³ A categorical approach turns on two considerations: the nature of the offense and the nature of the offender.¹⁷⁴ The Court also employed a categorical approach when deciding that capital punishment is not allowed for non-homicide crimes.¹⁷⁵

¹⁶⁸ *Id.* at 476.

¹⁶⁹ *Id.* at 475-76.

¹⁷⁰ *Id.* at 479.

¹⁷¹ *Id.* at 478 (explaining that Alabama's mandatory sentencing scheme subjected the defendant to a disproportionate punishment).

¹⁷² Mary Price, *Bombshell or Babystep? The Ramifications of Miller v. Alabama for Sentencing Law and Juvenile Crime Policy: Article: Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama*, 78 MO. L. REV. 1147, 1154 (2013).

¹⁷³ *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Graham v. Florida*, 560 U.S. 48, 60 (2011).

¹⁷⁴ *Graham*, 560 U.S. at 60-1.

¹⁷⁵ *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (deciding the death penalty is not a proportional punishment for the crime of rape).

D. *Shifting Standards in Eighth Amendment Review*

1. The Proportionality Test Developed in *Solem v. Helm*

In the past, the Supreme Court interpreted the Eighth Amendment to prohibit disproportionate punishments.¹⁷⁶ For instance, in *Solem v. Helm*, the Supreme Court ruled on whether a life sentence without the possibility of parole for a seventh non-violent felony violated the Eighth Amendment.¹⁷⁷ The defendant in *Solem* had previous convictions resulting from third-degree burglary, obtaining money under false pretenses, grand larceny, driving while intoxicated, and writing a bad check.¹⁷⁸

When deciding *Solem*, Justice Powell emphasized the importance of prescribing proportionate punishments to crimes.¹⁷⁹ In arriving at this conclusion, Justice Powell noted the long-standing English common law rule that criminal punishment must be proportional.¹⁸⁰ Referencing the English Bill of Rights, from which the language for the Eighth Amendment originated, this rule states, “excessive Baile [sic] ought not to be required nor excessive Fines imposed nor cruel and unusual punishments inflicted.”¹⁸¹

As a result, the Court argued, when the Framers of the Constitution adopted the same language as used in the English Bill of Rights, they likewise adopted the English principle of proportionality.¹⁸² Powell explained a consistent theme throughout the drafting of the Constitution was that Americans possessed all the rights of Englishmen.¹⁸³ Thus, the Court decided that in using language from the English Bill of Rights, the Framers of the Constitution intended to extend the same protections to American citizens, including the right to be free from disproportionate punishment.¹⁸⁴

¹⁷⁶ *Solem v. Helm*, 463 U.S. 277, 284 (1983) (“[T]he final clause of the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”).

¹⁷⁷ *Id.* at 277.

¹⁷⁸ *Id.* at 280-81.

¹⁷⁹ *Id.* at 284.

¹⁸⁰ *Id.* at 285.

¹⁸¹ *Id.* (citing 1 W. & M., sess. 2, ch.2 (1689)).

¹⁸² *Solem v. Helm*, 463 U.S. 277, 285 (1983).

¹⁸³ *Id.* at 286 (citing 1 J Continental Cong. 83 (W. Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) (“[W]e claim all the benefits secured to the subject by the English constitution.”)).

¹⁸⁴ *See Solem*, 463 U.S. at 286.

2. A History of Proportionality Review

Solem was not the first case to emphasize a proportionality standard. The Supreme Court has a long-standing history of recognizing the principal of proportionality.¹⁸⁵ As early as 1910, the Court reversed a sentence that required a man convicted of falsifying a public document to serve fifteen years of labor in chains.¹⁸⁶ Using the proportionality standard, the Court determined the sentence was excessive when viewed in light of the crime.¹⁸⁷

The proportionality standard was also applied in deciding *Robinson v. California*, which held for the first time that the Eighth Amendment was applicable to punishment imposed by state courts.¹⁸⁸ In *Robinson*, the defendant received a ninety-day sentence for “being addicted to the use of narcotics.”¹⁸⁹ The Court explained, although a ninety-day punishment in itself is not cruel or unusual, it is disproportionate to the crime.¹⁹⁰ Likening addiction to illness, the Court noted that even one day in prison would be a disproportionate amount of time for the crime of having a common cold.¹⁹¹

3. Striking Down the Proportionality Test in *Solem*

Over the years, the Court found many sentences violated the Eighth Amendment by using this proportionality standard.¹⁹² Even so, in 1991, the Court overruled *Solem*, and instead held the Eighth Amendment contained no proportionality guarantee.¹⁹³ In *Harmelin v. Michigan*, Justice Scalia opined the only guarantee granted by the Eighth Amendment is freedom from unprecedented punishment, rather than excessive punishment.¹⁹⁴ *Harmelin* involved a mandatory

¹⁸⁵ See *Robinson v. California*, 370 U.S. 660, 676 (1962); *Weems v. United States*, 217 U.S. 349, 367-68 (1910).

¹⁸⁶ *Weems*, 217 U.S. at 382.

¹⁸⁷ *Id.*

¹⁸⁸ *Robinson v. California*, 370 U.S. 660, 667 (1962).

¹⁸⁹ *Id.* at 677 n.5.

¹⁹⁰ *Id.* at 677.

¹⁹¹ *Id.*

¹⁹² See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding the death penalty was excessive punishment for felony murder when the defendant did not take, attempt to take, or intend to take a life); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that a death sentence is disproportionate to the crime of rape).

¹⁹³ *Harmelin v. Mich.*, 501 U.S. 957, 965 (1992).

¹⁹⁴ *Id.* at 995.

life sentence for a drug possession by a first time offender.¹⁹⁵ Michigan did not have the death penalty, so life without parole was the most severe punishment available.¹⁹⁶

The Court in *Harmelin* held that, although mandatory minimums may be cruel, they are not unusual in a constitutional sense.¹⁹⁷ In addition, the Eighth Amendment does not require a proportionality test, as advocated for in *Solem*.¹⁹⁸ Instead, the plurality in *Harmelin* limits proportionality review to situations where the sentence is grossly disproportionate to the crime.¹⁹⁹ In *Harmelin*, the Court refused to extend grossly disproportionate review to a life without parole sentence, explaining, “there is no comparable context outside the capital context, because of the difference between death and all other penalties.”²⁰⁰ This created a window so narrow that Eighth Amendment challenges are essentially reserved to capital punishment.²⁰¹

4. Michigan Refuses to Get Rid of Proportionality Standard

Despite the Courts ruling in *Harmelin*, the state of Michigan continues to interpret and overturn cruel and unusual sentences using the proportionality standard.²⁰² Although Michigan did not strike down *Harmelin*, the Michigan Constitution allows for a proportionality consideration when reviewing criminal sentences.²⁰³ The state of Michigan refuses to adhere to the Supreme Court’s denial of a proportionality requirement when deciding the unfairness of punishment.²⁰⁴ In interpreting Article I, §16 of the Michigan Constitution, Michigan’s Supreme Court has long ruled consistent with the reasoning of the *Harmelin* dissenters.²⁰⁵ Michigan firmly abides by their own state con-

¹⁹⁵ *Id.* at 961.

¹⁹⁶ *Id.*

¹⁹⁷ *See id.* at 995.

¹⁹⁸ *Id.*

¹⁹⁹ *Harmelin v. Mich.*, 501 U.S. 957, 995 (1992).

²⁰⁰ *Id.*

²⁰¹ Sarma, *supra* note 45, at 553 (explaining the proportionality doctrine has become so narrow it only offers relief for those challenging the most extreme sentences).

²⁰² *See* *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992); *see also* *People v. Lorentzen*, 194 N.W.2d 827, 831 (Mich. 1972).

²⁰³ *Bullock*, 485 N.W.2d at 873.

²⁰⁴ *See id.*

²⁰⁵ *See* MCLS. CONST. art. I, § 16; *Bullock*, 485 N.W.2d at 873.

stitution and applies a *Lorentzen-Solem* analysis to Eighth Amendment cases.²⁰⁶

In 1972, before the Supreme Court overturned *Solem*, the Michigan Supreme Court overturned a twenty-year sentence for the sale of marijuana.²⁰⁷ The court reviewed the sentence in *People v. Lorentzen*, using proportionality, evolving standards of decency, and rehabilitation tests.²⁰⁸ The court found the statute that provided for the extensive sentence would equally apply to a “first offender high school student” as well as a “wholesaling racketeer,” making the sentence inherently disproportionate.²⁰⁹

Notably, the court viewed the specific marijuana charge in terms of the “evolving standards of decency” requirement.²¹⁰ The court explained that twenty-six other states had no minimum sentence for the sale of marijuana.²¹¹ Instead, many states had recently reduced penalties for marijuana crimes, indicating a twenty-year sentence for a first-time marijuana offender did not meet the evolving standards of decency.²¹²

In another decision shortly after *Harmelin*, Michigan abided by the proportionality standard.²¹³ In *People v. Bullock*, a forty-eight-year-old grandmother, who had never been convicted of a serious crime, received a sentence of life imprisonment for cocaine charges.²¹⁴ In finding this sentence disproportionately cruel, the court in *Bullock* explained that the defendant’s sentence was harsher than she would have received for “second-degree murder, rape, mutilation, armed robbery, or other exceptionally grave and violent crimes.”²¹⁵ Overall, the court decided this punishment was unconstitutional on its face.²¹⁶ Despite the desire to reduce drug activity and related problems in

²⁰⁶ *Bullock*, 485 N.W.2d at 873.

²⁰⁷ *Lorentzen*, 194 N.W.2d at 833.

²⁰⁸ *People v. Lorentzen*, 194 N.W.2d 827, 832-33 (Mich. 1972).

²⁰⁹ *Id.* at 831.

²¹⁰ *Lorentzen*, 194 N.W.2d at 832; *see also* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (stating that the Amendment must be interpreted in light of the evolving standard of decency).

²¹¹ *Lorentzen*, 194 N.W.2d at 832.

²¹² *Id.* at 833.

²¹³ *People v. Bullock*, 485 N.W.2d 866, 877.

²¹⁴ *Id.* at 876.

²¹⁵ *Id.* at 877.

²¹⁶ *Id.* at 40.

society, such a severe punishment constituted a disproportionate response to that desire.²¹⁷

II. ANALYSIS

A. *Need for a Proportionality Consideration*

The Eighth Amendment demands courts consider “evolving standards” when determining appropriate sentences for all offenders. Courts have read the Eighth Amendment to require that a punishment must be both cruel and unusual to be a violation.²¹⁸ Lee Carroll Brooker’s sentencing satisfies both the cruel and unusual aims of the Eighth Amendment. The vast majority of cases considering cruel and unusual punishments focus on large-scale drug transactions and homicide. The evolving standards of decency demand courts consider how mandatory minimum sentences affect non-violent drug crimes, especially in relation to low-level offenders. Alabama’s habitual offender law imposes unduly harsh sentences on first time drug offenders, like Brooker, without any consideration for the circumstances of the crime, such as Brooker’s use of marijuana for pain management in connection with his disabilities.

If mandatory minimum sentences are to be effective, they must serve a purpose. One purpose of criminal sentences is to deter others from committing a similar crime.²¹⁹ Society’s view of low-level drug crimes, especially the use of marijuana, has lightened over time.²²⁰ Harsh sentencing statues such as Alabama’s deprive citizens of uniformity in sentencing. Even though Brooker’s conviction could have resulted in a fine or probation in a neighboring state, the severity of Alabama’s law condemned Brooker to a lifetime in prison.

As a result of *Harmelin*, courts no longer have to consider a criminal sentence in proportion to the crime.²²¹ The proportionality test as advocated in *Solem* is instrumental to upholding the Eighth Amend-

²¹⁷ *Id.*

²¹⁸ *Solem v. Helm*, 463 U.S. 277, 285 (1983); *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *People v. Bullock*, 485 N.W.2d 866, 877 (Mich. 1992).

²¹⁹ *Motel*, *supra* note 62; Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005).

²²⁰ *Motel*, *supra* note 62.

²²¹ *Harmelin v. Michigan*, 501 U.S. 957, 990-94 (1991).

ment.²²² Justice Scalia explained the Court's decision in *Harmelin*, writing,

Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is “disproportionate”; yet as some of the examples mentioned above indicate, many enacted dispositions seem to be so—because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology. This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur.²²³

Justice Scalia suggests the proportionality test is unnecessary because legislatures do not set out to create disproportionate sentences.²²⁴ Yet Lee Carroll Brooker sits behind bars for the rest of his natural life after conviction on a single marijuana charge. Although legislatures do not set out to create disproportionate sentences, they do set out to create mandatory minimums. Mandatory minimums create disproportionate sentences.

Also in *Harmelin*, the Court referenced a statement made by Justice Frankfurter, explaining that Constitutional adjudication does not require courts to conjure up all the potential horrible possibilities that never happen in the real world.²²⁵ Justice Frankfurter continued analogizing the Eighth Amendment to the Takings Clause by explaining it would be as futile to hold the Eighth Amendment forbids disproportionate punishment, as it would be to hold the Takings Clause forbids disproportionate taxation, because otherwise the state could take away all income.²²⁶ Essentially, Frankfurter's argument is similar to Scalia's in that both Justices believe a proportionality consideration is unnecessary, considering the aim of criminal sentencing is not to create cruel and unusual or disproportionate sentences.

The contention that a disproportionality analysis is pointless because such disproportionate sentences do not occur violently disre-

²²² *Solem v. Helm*, 463 U.S. 277, 284 (1983).

²²³ *Harmelin*, 501 U.S. at 985-86.

²²⁴ *Id.*

²²⁵ *Id.* at 986 (quoting *New York v. United States*, 326 U.S. 578, 583 (1946)).

²²⁶ *New York*, 326 U.S. at 582-83.

gards basic human rights to freedom. The decision in *Harmelin* ignores the all too real consequences individuals such as Lee Carroll Brooker face.

Justice Scalia also reasoned that if the Founders intended to construct the Eighth Amendment so as to forbid disproportionate punishments, they would have done so in clear plain English.²²⁷ Yet the term “unusual” provides for a consideration of disproportionate punishments. Unusual is defined as “not normal or usual,” and explained to mean “different or strange in a way that attracts attention,” “remarkable or interesting because different from or better than others.”²²⁸ The term “unusual” calls for consideration of “others.” It calls for the consideration of other laws, other criminals, and other sentences. Without a proportionality consideration, individuals like Lee Carroll Brooker remain victims of unfair sentencing schemes.

In his dissent to *Harmelin*, Justice White elaborated on this idea, explaining that although there is not an explicit reference to proportionality in the Eighth Amendment, the Amendment forbids “excessive” fines.²²⁹ Determining whether the fine is excessive requires a consideration of whether the fine imposed is proportionate to the crime.²³⁰ Naturally, it also follows that to consider whether or not something is unusual, the punishment needs to be viewed in relation to other crimes. By construing “cruel and unusual” to require a proportionality principal, prior courts have successfully overruled unreasonable sentences.²³¹

In the past, the Court has recognized that a punishment becomes excessive when it “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering,” and when the punishment is “(2) grossly out of proportion to the severity of the crime.”²³² Such consideration led the Court to hold that the death penalty for the crime of rape was unconstitutional.²³³ Without a consideration of proportionality, many of the Court’s past holdings, over-

²²⁷ *Harmelin*, 501 U.S. at 981.

²²⁸ *Unusual*, MERRIAM WEBSTER (2017), available at <https://www.merriam-webster.com/dictionary/unusual>.

²²⁹ *Harmelin*, 501 U.S. at 1009 (White, J., dissenting).

²³⁰ *See id.*

²³¹ *See Solem v. Helm*, 463 U.S. 277 (1983).

²³² *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

²³³ *Id.*

turning extremely disproportionate sentences, could not have survived.²³⁴

Notably, Scalia explained the Court's past proportionality review of certain cases by reasoning, "proportionality review is one of several respects in which we have held that 'death is different.'"²³⁵ Arguably, life imprisonment, especially for a man of Lee Carroll Brooker's age, is a sentence on par with death. If the Court distinguishes between life and death in terms of when proportionality tests are allowable, an exception should similarly be made for life without parole sentences. The requirement that capital punishment must be on the line ignores the sanctity of life and humanity of all criminals, especially those whose livelihoods are destroyed when sentenced to remain behind bars until the day they die.

Additionally, the Court has long recognized the flexibility needed to analyze cases under the Eighth Amendment as society ages and develops.²³⁶ In deciding *Weems v. United States*, Justice McKenna artfully articulated, "[t]ime works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."²³⁷

To evaluate a punishment in light of the evolving standards of decency, a court needs to focus on objective societal factors that render punishments fair or unduly harsh. Justice White explained that courts are not to consider their own subjective moral values or those of the legislators over the objective values of society as a whole.²³⁸

The severity of Alabama's law and Brooker's sentence clashes with the objective societal opinions regarding the corruption of marijuana users. Rather, the outrage in the wake of Brooker's sentence indicates society's standards have evolved, specifically concerning marijuana use.²³⁹

²³⁴ See *Roper v. Simmons*, 545, U.S. 551 (2005) (deciding the executing minors violates the Eighth Amendment); see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (deciding a sentence of death for raping a child, when the rape did not result in death, violates the Eighth Amendment); *Weems v. United States*, 217 U.S. 349 (1910) (determining fifteen years for defrauding the government as cruel and unusual under the Eighth Amendment).

²³⁵ *Harmelin*, 501 U.S. at 994.

²³⁶ See generally *Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002); see also *Gregg v. Georgia*, 428 U.S. 153, 170-71 (1976), *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

²³⁷ *Weems v. United States*, 217 U.S. 349, 373 (1910).

²³⁸ *Harmelin*, 501 U.S. at 1016.

²³⁹ See *Outrageous Sentences*, *supra* note 2.

B. *Using a Categorical Approach to Review Excessive Sentences*

The proportionality test since *Harmelin* is extremely narrow and typically reserved to those cases focusing on capital punishment.²⁴⁰ Instead, an effective alternative to overturning cruel and unusual sentences on Eighth Amendments grounds is the categorical approach. *Graham* and *Miller* relied on the categorical approach rather than the grossly disproportionate standard to find life sentences cruel and unusual when imposed on minors.²⁴¹ This categorical review turns on two considerations: nature of the offense and the characteristics of the offender.²⁴² When using the categorical approach, the Court determines whether the punishment in question violates the Constitution by considering “objective indicia of society’s standards.”²⁴³ Because the disproportionality approach provides little room for individuals to challenge life sentences on Eighth Amendment grounds, individuals should challenge their sentences using a categorical approach. The decisions in *Graham* and *Miller* show the Court is open to using a categorical approach for Eighth Amendment challenges. Using the categorical approach, non-violent marijuana offenders such as Lee Carroll Brooker could have a chance at avoiding unreasonably harsh punishments resulting from mandatory minimum laws.

In order for the Court to use a categorical approach, the challenging party must first claim the government cannot subject a type of person or a person convicted of a particular crime, such as rape, to a certain punishment, such as the death penalty.²⁴⁴ In cases such as Lee Carroll Brooker’s, a potentially effective categorical challenge would be a claim that life sentences without the possibility of parole for non-violent marijuana convictions violates the Eighth Amendment.

²⁴⁰ *Harmelin*, 501 U.S. at 995 (White, J., dissenting).

²⁴¹ *Miller v. Alabama*, 567 U.S. 460, 482 (2012); *Graham v. Florida*, 560 U.S. 48, 77-78 (2011).

²⁴² *Id.* at 60.

²⁴³ *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

²⁴⁴ *See Graham*, 560 U.S. at 60 (explaining that one type of categorical challenge considers the nature of the offense and the other type considers the characteristics of the offender); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

1. Society's Evolving View of Marijuana Users Supports a Categorical Exemption

A rapid shift in public opinion with regard to marijuana has occurred in recent times.²⁴⁵ The majority of Americans believe marijuana should be made legal, which is a steep climb from the mere twelve percent of Americans who believed in legalizing marijuana in 1969.²⁴⁶ As of 2017, twenty-six states and the District of Columbia have adopted laws that legalize marijuana in some form.²⁴⁷ California, Massachusetts, and Nevada all passed laws legalizing recreational marijuana use.²⁴⁸

The categorical approach calls for courts to consider the evolving standards of decency. With the swift rise in acceptance of marijuana use, a life sentence for non-violent marijuana offenses violently disregards society's evolving standards of decency. Unlike the proportionality standard, the categorical approach promotes uniformity across the country.²⁴⁹ The Supreme Court Justices frequently refuse to hear Eighth Amendment appeals based solely on claims of disproportionate sentences because it requires a case-specific analysis of each appeal.²⁵⁰ On the other hand, because a categorical approach would have consequences for entire classes of people and types of crimes, presumably, the Court would be more inclined to hear such far-reaching appeals. A categorical review of Lee Carroll Brooker's case could have the effect of barring life sentences for non-violent marijuana offenses regardless of current mandatory minimum laws.

²⁴⁵ Motel, *supra* note 62.

²⁴⁶ Art Swift, *Support for Legal Marijuana Use Up to 60% in U.S.*, GALLUP (Oct. 19, 2016), <http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>; Jennifer De Pinto et. al., *Marijuana Legalization Support at All-time High*, CBS NEWS, (Apr. 20, 2017), <http://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high>.

²⁴⁷ State Marijuana Laws in 2017 Map, GOVERNING MAG. (Mar. 23, 2017), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (explaining that eighteen of the twenty-six states have legalized medical marijuana but not yet recreational marijuana).

²⁴⁸ *Id.*

²⁴⁹ Sarma, *supra* note 45, at 559.

²⁵⁰ *Id.*

C. *Legislators Must Consider the Consequences of Mandatory Minimums*

1. Safety Valves Provide a Solution

The simplest resolve to protect citizens from cruel and unusual punishments resulting from mandatory minimums is to repeal and repurpose those laws which possess no safeguards, such as the statute which condemned Brooker to life behind bars, or pass legislation which creates safety valves. Safety valves are exceptions to mandatory minimum laws.²⁵¹ Without repealing or eliminating mandatory minimum laws, safety valve legislation allows a judge to sentence an individual below the mandatory minimum, given certain conditions are met.²⁵² For example, state or federal legislators could pass a safety valve, barring non-violent drug offenders from receiving life sentences.

Currently, under federal law, there is one safety valve.²⁵³ This protects first time offenders convicted of a drug crime from receiving a life sentence so long as they were non-violent, not a leader of others involved in the offense, and fully cooperative with the government.²⁵⁴ Although this safety valve is important, it is extremely narrow. Future safety valves need to extend to larger categories of non-violent drug offenders.

2. The Benefit of Repealing Mandatory Minimums

With increased incarceration comes increased spending by the taxpayer.²⁵⁵ In the past two decades, spending on correctional facilities has risen by over 300 percent.²⁵⁶ In 2012, prisons and jails cost taxpayers a whopping sixty billion dollars.²⁵⁷ Over the last decade,

²⁵¹ Leila McDowell, *New FAMM-ALEC Report Highlights Benefits of Sentencing Reform*, FAMM (Mar. 29, 2016), <http://famm.org/new-famm-alec-report-highlights-benefits-of-sentencing-reform-2/>.

²⁵² *Id.*

²⁵³ 18 U.S.C. § 3553(f) (2010).

²⁵⁴ *See id.*

²⁵⁵ *Why Should I Care*, FAMM, (last visited July 31, 2017), <http://famm.org/sentencing-101/the-facts/>?

²⁵⁶ *Id.*

²⁵⁷ *Id.*

seventeen states have significantly cut their prison population.²⁵⁸ All of these states also experienced a decline in crime.²⁵⁹

One of these states, Michigan, realizing they were “warehousing too many low-level [non-violent] offenders with a minimal role in the drug trade for too long in costly prison beds,” repealed almost all of their drug-related mandatory minimum laws.²⁶⁰ As a result, Michigan’s prison population experienced a sharp fall, and the state saved billions in tax dollars.²⁶¹ The crime rate in Michigan also fell by twenty-seven percent.²⁶²

In Minnesota, the legislature added a safety valve to the State’s existing mandatory minimum statute.²⁶³ This safety valve permits judges to sentence an individual below the mandatory minimum for the commission of crimes involving a firearm.²⁶⁴ The adoption of this safety valve saved the state 1,200 prison beds and thus, thirty-seven and a half million dollars.²⁶⁵

In 2016, Oklahoma Governor Mary Fallin (R) signed into law HB 2479.²⁶⁶ The bill created a safety valve by repealing mandatory minimum sentences for first and second drug possession offenses.²⁶⁷ As a leader in sentencing reform, the state of Oklahoma has made great strides to returning judicial discretion to sentencing for drug related crimes.²⁶⁸

Safety valves provide a balance between the need for public safety and the necessity of protecting human rights. Although mandatory minimums can keep career criminals off the streets, they can also put non-violent low-level offenders such as Brooker behind bars for life. Safety valves address this problem by allowing the judges to sentence offenders under the mandatory minimum in cases where the minimum is not necessary to protect public safety. Safety valves

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Newburn, *supra* note 65, at 3.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ MINN. STAT. § 609.11, subd. 8 (2012).

²⁶⁴ *Id.*

²⁶⁵ Newburn, *supra* note 65, at 6.

²⁶⁶ Leila McDowell, *FAMM Applauds Oklahoma Governor Mary Fallin for Signing Repeal of Mandatory Minimum Drug Sentences*, FAMM (Apr. 28, 2016), <http://famm.org/nations-leading-sentencing-reform-group-applauds-oklahoma-governor-mary-fallin-for-signing-repeal-of-mandatory-minimum-drug-sentences/>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

work because they allow courts to make common sense decisions to avoid unreasonable and unintended consequences of mandatory minimums laws, all while reducing taxpayer spending on unnecessary incarceration.

CONCLUSION

Lee Carroll Brooker's life sentence is grossly disproportionate to his crime. Marijuana has been legalized in some states yet is still capable of rendering life sentences for offenders in other states. Although legislators may not set out to create cruel and unusual punishments, the unforeseen consequences of mandatory minimum laws in some of the harshest-on-crime states rob individuals of their freedom. The second harshest punishment available in the criminal justice system, life without parole, should be reserved for deplorable crimes of violence, rather than non-violent drug offenses.

In cases like Brooker's, a categorical approach to reviewing severe sentences can be the difference for those who have fallen victim to arguably flawed mandatory minimum and habitual offender laws. Protecting non-violent marijuana offenders from life sentences is necessary to match society's evolving standards of decency.

Further, safety valves should be swiftly implemented to protect both individuals and the taxpayer against the unintended consequences of mandatory minimums. Alabama's Chief Justice, Roy Moore, recognized the "grave flaws" in the state's sentencing laws when denying review of Brooker's case.²⁶⁹ Had Alabama adopted a safety valve for non-violent drug offenders under their Habitual Offender Law, a 75-year old disabled veteran could be enjoying his retirement instead of living out the end of his life behind bars.

²⁶⁹ *Outrageous Sentences*, *supra* note 2.