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EDITOR INTRODUCTION

The 2015 Law Journal for Social Justice Symposium, "Contemporary Discrimination" focused on current concerns regarding civil rights and civil liberty. Discussions ranged from the political legislative process, resistance in enforcement of civil rights judgments, and sexual orientation employment discrimination. Panelists included politicians, scholars from diverse backgrounds, practicing attorneys and community organizers.

Drawing on broader considerations, this issue features articles analyzing an array of concerns in the criminal, civil and international tribunals. The first article, *You Have Your Whole Life in Front of You…Behind Bars*, written by Rachel Forman, beings this issue by discussing a need to ban life without parole sentences for juvenile non-homicide offenders. Inalvis M. Zubiaur, in *Death Row: Mentally Impaired Inmates and the Appeal Process*, continues the focus on sentencing by engaging concerns regarding capital punishment. Next, in *Injection and the Right of Access*, Timothy F. Brown argues for increased access to lethal injection procedures to understand its constitutionality. Shifting consideration to the civil sphere, Victor D. Lopez & Eugene T. Maccarrone raise issues about privacy, due process, public policy and the basic fairness of traffic enforcement by camera, in *Traffic Enforcement by Camera*. Beginning the focus on international concerns, *Fictitious Labeling*, by Efe Ukala, discusses "recommendations that may help curb constitutional issues resulting from deportation." Brittany Fink, in *Increase Quota, Invite Opportunities, Improve Economy*, proposes amendments to the DREAM Act that extend the path to citizenship." Katharine Villalobos then focuses on the sociology of immigration in *The Crucible*, using historical examples to discuss the War on Terror. *Falling Through the Cracks* by Marissa N. Goldberg changes the focus to international law and unique considerations of women in the drug trade industry. Finally, *Seeking Truth in the Balkans* by Erin K. Lovall and June E. Vutrano concludes the issue by discussing the role of international law in seeking justice following the wars in the Balkans. Together these articles analyze issues that raise important questions about fairness and civil rights in the domestic and international contexts.

Special thanks to the entire staff of the Law Journal for Social Justice, who helped create this edition.

Kristyne Schaaf-Olson
2014-2015 Editor-in-Chief
The Law Journal for Social Justice

YOU HAVE YOUR WHOLE LIFE IN FRONT OF YOU . . . BEHIND BARS: IT'S TIME TO BAN DE FACTO LIFE WITHOUT PAROLE FOR JUVENILE NON-HOMICIDE OFFENDERS

By Rachel Forman*

Introduction

In April 2013, the Supreme Court denied a writ of certiorari from Chaz Bunch, a sixteen-year-old convicted of kidnapping and rape.[1] The United States Court of Appeals for the Sixth Circuit upheld the eighty-nine year sentence imposed by the trial court.[2] Because this sentence far outlasts his expected lifetime, Chaz Bunch is almost sure to die in prison for a non-homicide crime he committed as a child. His sentence is a perfect example of an unconstitutional de facto life without parole sentence that the Supreme Court has yet to address.[3]

Over the past decade, the Supreme Court has made a large, and somewhat unexpected, effort to promote juvenile justice and to ensure that youth have certain rights that allow them to reenter society when similar adult offenders may not be so entitled.[4] Specifically, in the criminal justice system, the Supreme Court has held that youths ought to be considered less culpable than adults and should receive more lenient

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* Note and Comment Editor, American University Law Review, Volume 64; Alumna, 2015, American University Washington College of Law; B.A., Psychology, 2011, Boston University. I am grateful to Professor Ira P. Robbins for his invaluable guidance and insights; to Christopher Bergin for his advice and helpful input; and to my friends and family for their constant love and support.

[1] Adam Liptak, *Is 100 Years a Sentence of Life? Opinions Are Divided*, N.Y. TIMES (April 29, 2013), http://www.nytimes.com/2013/04/30/us/supreme-court-ruling-on-sentencing-yields-split-interpretations.html?_r=2.

[2] Bunch v. Smith, 685 F.3d 546, 547 (6th Cir. 2013) (holding that consecutive sentences equating a lifetime in prison is not legally equivalent to a life without parole sentence); *see also* Liptak, *supra* note 1.

[3] Liptak, *supra* note 1 (pointing out the problematic impact of lengthy sentences for juvenile offenders).

[4] *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)) (explaining that juveniles' misconduct is not as morally reprehensible as adults' irresponsible and criminal conduct); *see also* Brian J. Fuller, *Criminal Law-A Small Step Forward in Juvenile Sentencing, But Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences*; *Miller v. Alabama, 132 S. Ct. 2455 (2012)*, 13 WYO. L. REV. 377, 404 (2013) (concluding that juveniles constitutionally must have a meaningful chance for release based on demonstrated maturity and rehabilitation).

sentencing than adults committing similar crimes.[5] In 2005, the Court determined that youths are constitutionally different from adults because they are less mature, more vulnerable to negative influences, and their characters are not as fully formed.[6] Thus, the Supreme Court has moved toward more lenient sentencing schemes for juveniles, focusing more on rehabilitation and education, rather than long-lasting imprisonment and punishment.[7]

Based on legislation and common law, judges have wide discretion in sentencing convicted juveniles; however, judges may not sentence convicted juveniles to mandatory life without parole.[8] When determining the proper sentence for juveniles, judges must take into account the defendant's age because juvenile conduct ought to be considered categorically less morally reprehensible than adult conduct.[9] Unfortunately, across the United States there are juveniles that have been sentenced to aggregate term-of-year sentences that will undoubtedly exceed the juveniles' expected lifetimes, known as de facto life without parole sentences.[10] Due to the ambiguousness in Supreme Court rhetoric, judges are only specifically barred from imposing literal sentences of life without parole for juvenile non-homicide offenders, and "[i]f the Supreme Court has more in mind, it will have to say what that is."[11]

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[5] *Roper*, 543 U.S. at 570–71, 578 (2005) (holding that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed); *see also* Graham v. Florida, 560 U.S. 48, 74 (2010) (holding that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide).

[6] *Roper*, 543 U.S. at 569–70 (noting three major differences between children and adults); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (noting that "Roper and Graham establish that children are constitutionally different from adults for purposes of sentence . . . [b]ecause juveniles have diminished culpability and greater prospects for reform . . .").

[7] *Roper*, 543 U.S. at 570–71, 578 (finding that the tension between punitive social perceptions and juvenile rehabilitation collided in 2005 when the United States Supreme Court categorically outlawed the death penalty for juveniles, due to a stronger focus on rehabilitation).

[8] *See Mille*r, 132 S. Ct. at 2475 (holding that mandatory life without parole for those under age eighteen at the time of their crime, violates the Eighth Amendment).

[9] *See id*. at 2466 (internal citations omitted) (addressing that the heart of the retribution rationale relates to an offender's blameworthiness).

[10] Erik Eckholm, *Juveniles Facing Lifelong Terms Despite Rulings*, N.Y. TIMES (Jan. 19, 2014), http://www.nytimes.com/2014/01/20/us/juveniles-facing-lifelong-terms-despite-rulings.html.

[11] *See Bunch*, 685 F.3d at 547 (explaining that the Court never specified whether *Graham* prohibits consecutive sentences when they amount to the practical equivalent of life without parole).

Courts generally recognize that juvenile conduct should not be considered as morally reprehensible as adult conduct, and courts now embrace the idea that juveniles can, and sometimes should, be treated differently than adults with respect to the law.[12] In the past five years, some states have adopted systems that forbid life without parole for juvenile offenders.[13]

Currently, courts cannot sentence juvenile offenders with the death penalty or with mandatory life without parole, but the Supreme Court has not yet addressed certain loopholes within these categorical juvenile sentencing rules.[14] In order to make sure that these categorical sentencing laws are appropriately enforced, the Supreme Court must determine that a categorical rule against de facto life without parole sentences for juvenile non-homicide offenders exists. At the bare minimum, the Supreme Court must recognize this sentencing practice as functionally and legally equivalent to literal life without parole sentencing.[15] The Supreme Court should not have denied certiorari in *Bunch v. Smith* and should have taken the opportunity to establish a categorical rule prohibiting punishments functionally equivalent to life without parole sentences for juvenile non-homicide offenders (de facto life without parole sentences).[16]

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[12] Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L. J. 1445, 1465 (2012).

[13] Sarah Schweitzer & Michael Levenson, *Mass. SJC Bars No-Parole Life Terms for Youths: Says Brains of Juveniles Not Yet Fully Developed*, BOSTON GLOBE (Dec. 24, 2013), http://www.bostonglobe.com/metro/2013/12/24/mass-high-court-strikes-down-life-without-parole-sentences-for-juveniles/eyjKrVSE2EXD0KF7wQXX5M/story.html (noting that before this case, Massachusetts had some of the most punitive penalties in the country for juveniles convicted of murder, and Massachusetts was a leader in the number of youths facing life sentences without parole—in addition to California, Louisiana, Michigan, and Pennsylvania—other states, for example Wyoming, Colorado, and Texas, have already abolished life without parole for juveniles). This article notes that in "Iowa, for example, the governor commuted life-without-parole sentences of 38 juvenile offenders and instead ordered them to serve 60-year terms before they could be considered for parole. The Iowa Supreme Court struck down the governor's decision, saying the 60-year sentences were the 'practical equivalent' of a mandatory life sentence." *Id.* (Additionally, an Iowa judge struck down a decision by the governor to commute the life sentences of 38 juvenile offenders to 60-year terms before they could be paroled, finding it the equivalent of a life sentence).

[14] State courts have been left to decide whether to enforce *Miller v. Alabama* retroactively and whether they should even allow discretional life without parole sentences for juveniles. However, the Court's decision in *Miller* emphasizes how much youth ought to matter during sentencing. Wood, *supra* note 12, at 1485.

[15] Graham v. Florida, 560 U.S. 48, 75 (2010) (declaring that juvenile non-homicide offenders may not be sentenced to life without parole because they must be entitled to some "meaningful opportunity to obtain release").

[16] *Roper*, 543 U.S. at 570–78 (highlighting that juveniles are considered less culpable than adults and therefore should not receive the death penalty); *see also Graham*, 560 U.S. at 82

Part I of this Article provides a background explanation of the Eighth Amendment's ban against cruel and unusual punishment as it applies to juvenile offenders.[17] Part I also illustrates the evolution of juvenile justice and the treatment of juveniles in sentencing, and describes important Supreme Court's precedent regarding juvenile sentencing decisions.[18] Part II applies the rules laid out in *Graham v. Florida*[19] and argues that the Supreme Court should develop a categorical ban against de facto life without parole sentences[20] or, on the other hand, that the Court's holding in *Graham* should extend to banning lengthy sentences that legally equate to life without parole for juvenile non-homicide offenders.[21] Part III concludes by declaring that the Supreme Court ought to specifically ban de facto life without parole sentences for juvenile non-homicide offenders in order to promote social justice and to protect such an immature and vulnerable class of offenders.[22]

I. THE EIGHTH AMENDMENT AND JUVENILE SENTENCING IN THE SUPREME COURT

This Section addresses the Eighth Amendment and how it has been analyzed and interpreted in light of recent Supreme Court decisions regarding juvenile sentencing. First, this Section describes what the Eighth Amendment actually limits and how the Supreme Court determines which sentencing schemes are cruel and unusual. Then, this Section summarizes the most important Supreme Court decisions limiting juvenile sentencing and highlights the Supreme Court's trend in moving toward a juvenile justice system that focuses less on harsh sentences, and more on rehabilitation.

A. The Eighth Amendment Overview

The Eighth Amendment states that cruel and unusual punishments shall not be imposed.[23] The United States Supreme Court evaluates the Eighth Amendment in light of "the evolving standards of decency that

(highlighting that because juveniles are less culpable than adults, non-homicide juvenile offenders should not be sentenced to life without parole).

[17] *Infra* Part I.A, Part I.B.

[18] *Infra* Part I.C.

[19] 560 U.S. 48 (2010).

[20] *Infra* Part II.A.

[21] *Infra* Part II.B.

[22] *Infra* Part III.

[23] U.S. CONST. amend. VIII.

mark the progress of a maturing society."[24] As society progresses and evolves, so does the Court's definition of what constitutes cruel and unusual punishment.[25] Civilized society may come to recognize certain punishments as unacceptable, even if those punishments were once accepted and commonly imposed.[26] Punishment by death used to be common, acceptable, and extremely publicized; however, as society progresses and evolves, these publically-imposed harsh punishments, as drastic as public hanging and beheading, have become completely unacceptable.

The Eighth Amendment extends beyond protecting citizens from "inherently barbaric" punishments, and it prohibits disproportionate sentences as well.[27] In determining whether a sentence is cruel and unusual, courts must consider the proportionality of the sentence to the crime committed.[28] This concept of proportionality is central to the Eighth Amendment because grossly disproportionate sentences are inherently cruel and unusual.[29]

Typically, courts decide whether punishments are cruel and unusual on a case-by-case basis under the gross disproportionality test.[30] In order to do so, the Supreme Court established a two-step test. First, the court must compare the "gravity of the offense and the severity of the sentence."[31] If the court finds an indication of "gross disproportionality," then the court compares the defendant's sentence with those of other offenders in the same jurisdiction and with other sentences imposed for

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[24] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Trop v Dulles, 356 U.S. 86, 101 (1958) (internal quotation marks omitted)).

[25] *Id.*

[26] *The Supreme Court, 2009 Term – Leading Cases*, 124 HARV. L. REV. 179, 209 (2010).

[27] *Gamble*, 429 U.S. at 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

[28] *See Graham*, 560 U.S. at 58 (2010) ("To determine whether punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society'" citing *Gamble*, 429 U.S. at 102 (internal citations omitted)).

[29] *See Miller*, 132 S. Ct. at 2463 (2012) (explaining that the Eighth Amendment guarantees that no individual should be sanctioned excessively); *see also Graham*, 560 U.S. at 58 (explaining the standard of extreme cruelty must change as "the basic mores of society" evolve and the State must still respect humans who have committed serious crimes); Weems v. United States, 217 U.S. 349, 367 (1910) (highlighting that restrictions on cruel and unusual punishments includes a "precept of justice that punishment for crime should be graduated and proportioned to [the] offense").

[30] Michi Momose, *A Case for Hope: Examining Graham v. Florida and Its Implications for Eighth Amendment Jurisprudence*, 33 U. HAW. L. REV. 391, 394–96 (2010).

[31] *Graham*, 560 U.S. at 60.

the same crime in alternative jurisdictions.[32] Finally, if the comparison validates the "initial judgment that [the] sentence is grossly disproportionate," then the sentence necessarily violates the Eighth Amendment.[33]

In addition to the case-by-case approach, the Supreme Court also may assess whether a defendant's death penalty sentence is cruel and unusual by considering whether any categorical rules against the sentence should apply.[34] In these types of cases, the Court has divided the categorical rules into cases involving the "nature of the offense" and cases involving the "characteristics of the offender."[35] In "nature of the offense" cases, the Court has held that courts cannot sentence defendants to death for non-homicide crimes.[36] In "characteristics of the offender" cases, the Court has held that the death penalty is inappropriate for juvenile offenders or people "whose intellectual functioning is in a low range."[37]

In these "characteristics of the offender" cases, the Supreme Court uses a two-prong test to determine whether a categorical rule should exist in the particular sentencing practice. First, the Court considers whether there is a "national consensus against the sentencing practice."[38] If a national consensus exists, the Court next "must determine in the exercise of its own independent judgment whether the punishment" violates the Eighth Amendment of the Constitution.[39] When exercising independent judgment in determining whether the Eighth Amendment has been violated, the Court considers all factors, including the culpability of the class of offenders and whether the sentencing practice furthers legitimate penological goals such as retribution, deterrence, or education.[40]

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[32] *Id.* (citing Harmelin v. Michigan, 501 U.S. 957, 1005 (1991)).

[33] *Id.*

[34] Momose, *supra* note 30.

[35] *Graham*, 560 U.S. at 60.

[36] *Id.* (citing Enmund v. Florida, 458 U.S. 782 (1982)).

[37] *See generally* Roper v. Simmons, 541 U.S. 551 (2005) (holding that the death penalty may not be imposed on people under eighteen-years-old); *see also* Atkins v. Virginia, 536 U.S. 304 (2002).

[38] *Graham*, 560 U.S. at 61 (citing *Roper*, 541 U.S. at 572).

[39] *Graham*, 560 U.S. at 61.

[40] *Id.* The legislature can chose among different goals. A sentence lacking any legitimate penological justifications is *per se* disproportionate to the offense. In the case of life without parole for juvenile non-homicide offenders, no legitimate penological sanctions – retribution, deterrence, incapacitation, and rehabilitation – have been regarded as legitimate. *See id.*; *see also* Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) (explaining penological justifications for the sentencing practice are relevant to the Eighth Amendment analysis).

B. Juvenile Justice in the Supreme Court

When it comes to juvenile justice, the Supreme Court has taken a more progressive view in which rehabilitation is preferred over harsh punishment, partially because of the societal trend embracing youth and because society often excuses childish or inappropriate behavior as a side-effect of young age.[41] Specifically, the Court has acknowledged that "[c]hildren have a very special place in life which law should reflect."[42] So, since the early twentieth century, juveniles have been provided with their own juvenile adjudication system, separate from the rest of the criminal justice system.[43] In the juvenile adjudication system, specialized judges pursue rehabilitation over other penological goals and make individual decisions that are intended to be both therapeutic and in the child's best interest.[44]

Although the juvenile justice system was historically intended to be primarily rehabilitative, during the twentieth century there was a societal push towards a more punitive system for all offenders, which resulted in more juveniles being tried as adults.[45] Because courts began charging

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[41] *Graham*, 560 U.S. at 70–74 (explaining that deterrence, retribution, and incapacitation are no longer the primary goals when sentencing minors); *see also* Audrey Dupont, *The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U. L. REV. 255, 257 (2000) (explaining that reformers preferred a system, which nurtured and protected juveniles, rather than one that held them wholly accountable for their offenses); Claude Noriega, *Stick a Fork In It: Is Juvenile Justice Done?*, 16 N.Y.L. SCH. J. HUM. RTS. 669, 676 (2000) (discussing that "[h]istorically, the aim of the juvenile justice system, as an entity separate from the adult criminal system, has been purportedly rehabilitative . . .").

[42] May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

[43] *See id.* at 635 (explaining that the legal system ought to adjust to account for children's vulnerability); *see also* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 192 (1998) (stating that juvenile courts initially did not provide common procedural safeguards found in adult courts, such as the rights to a jury and counsel); *see also May*, 345 U.S. at 536 (Frankfurter, J., concurring) ("[C]hildren have a very special place in life which law should reflect"). Accordingly, the Court has embraced the idea that juveniles should be treated different than adults throughout jurisprudence. Prior to 1899, juveniles were tried in the criminal justice system in the same manner as adult offenders. By 1925, forty-six states and the District of Columbia had established separate juvenile court systems. *See* Michele Detch et al., The Univ. of Tex. At Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at xiv (2009), available at http://www.campaignforyouthjustice.org/documents/NR_TimeOut.pdf.

[44] Feld, *supra* note 43.

[45] *See* Kelly K. Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 136 (1995) (reasoning that the twentieth century increasing focus on punishment is because "[s]ociety is beginning to view

juveniles as adults more frequently during the twentieth century and because juvenile courts were historically structured with different procedural safeguards than adult courts, the Supreme Court began overtly ensuring certain protections for juveniles.[46]

Beginning in 1966, in *Kent v. United States*,[47] the Court held that juvenile proceedings must, at the very least, comply with the standards of due process and fairness.[48] For example, in 1967, in *In re Gault*,[49] the Court specified that juveniles possess the right to notice of charges, counsel, confrontation of witnesses, and protection against self-incrimination.[50] In addition, the Court affirmed the value of rehabilitation in the processing and treatment of juveniles, and specifically held that the procedural issues of a juvenile ought not to effect that rehabilitative focus.[51] In 1970, *In re Winship*[52] established that the government must prove all charges against juveniles beyond a reasonable doubt, the same burden of proof that exists within the adult criminal justice system.[53]

An unfortunate result of juveniles being tried as adults is that courts are sentencing juveniles like adults. The adult criminal sentencing practice is largely focused upon punitive considerations and often neglects rehabilitation concerns, which fairs very poorly for juveniles.[54] The Court explicitly acknowledges that the Constitution ought to apply differently to juveniles and adults, which has led to much Constitutional interpretation

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children as less innocent and more capable of distinguishing right from wrong").

[46] *See e.g.,* J.D.B v. North Carolina, 131 S. Ct. 2394 (2011) (holding that a child's age properly informs the Miranda custody analysis, specifically that J.D.B.'s youthful thirteen-year-old age should have been taken into account when determining whether he was in police custody or not); *see also* Sarah M. Cotton, Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK. L. REV. 563, 567–69 (1994) (describing how the Supreme Court required juvenile courts to follow certain procedural requirements when adjudicating juvenile offenders' cases – for example, protection of the juvenile's identification).

[47] 383 U.S. 541 (1966).

[48] *Id.* at 562.

[49] 387 U.S. 1 (1967).

[50] *Id.* at 32–57.

[51] *Id.* at 21–22.

[52] 397 U.S. 358 (1970).

[53] *Id.* at 368 (holding that juvenile adjudications required the same burden of proof as adult criminal trials). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement").

[54] Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 20 (2011) ("[A]dult court sentencing practices are largely based upon punitive considerations"). Rehabilitation ought to be considered the primary goal when sentencing juveniles, even if they were tried as adults. *See id.* at 22–23, 50.

and litigation surrounding these particularly punitive sentencing schemes.[55]

C. The Court Draws Categorical Rules in Juvenile Sentencing

The Supreme Court has heard many cases about juvenile sentencing requiring it to interpret which "cruel and unusual punishments [shall not be] inflicted."[56] Categorical rules that shape and define Eighth Amendment standards, such as the rule prohibiting the death penalty for the mentally disabled population, were first created in response to the death penalty because it is traditionally considered the harshest of all punishments.[57]

The Supreme Court has struggled with imposing limits on juvenile sentencing.[58] In 1988, the Supreme Court held that the death penalty could not be imposed on juveniles who committed serious crimes before the age of sixteen.[59] One year later, the Court held that imposing capital punishment on a juvenile who committed a capital crime at sixteen or seventeen years of age did not constitute cruel and unusual punishment under the Eighth Amendment.[60] The Court made clear that certain ages defined by a fine line would be a determining factor in whether capital punishment was cruel and unusual.

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[55] *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("Our acceptance of juvenile courts as distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently than adults"). It is in the "interests of society to protect the welfare of children" and to allow states to enforce laws that apply to children, which may be unconstitutional with regard to adult application. *See* Prince v. Massachusetts, 321 U.S. 158, 164–65 (1944) (upholding the State's right to restrict a minor's work schedule due to the State's interest in protecting its children's welfare).

[56] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[57] *See Kennedy*, 554 U.S. at 446–47 (2008) (holding that imposition of the death penalty on individuals convicted of non-homicide crimes was unconstitutional); *see also Atkins*, 536 U.S. at 321 (holding that imposition of the death penalty on "mentally retarded" criminals was categorically unconstitutional).

[58] *See, e.g.*, *Thompson*, 487 U.S. at 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen at the time of his or her offense). *But see* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming constitutionality of death sentences for juveniles sixteen or older at the time of offense), *overruled by Roper*, 543 U.S. at 578.

[59] *Thompson*, 487 U.S. at 838.

[60] *Stanford*, 492 U.S. at 380, *overruled by Roper*, 543 U.S. at 574, 578.

i. Roper v. Simmons

In In 2005, Justice Kennedy, writing for the majority in *Roper v. Simmons*,[61] overturned *Stanford v. Kentucky*[62] and established a categorical rule prohibiting the death penalty for any offender under the age of eighteen noting that juvenile misconduct is less morally culpable than adult misconduct.[63] In *Roper*, the seventeen-year-old defendant, Christopher Simmons, kidnapped, bound, and killed a woman by throwing her off a bridge.[64] After being convicted of first-degree murder, a Missouri trial court sentenced Simmons to death.[65] Simmons appealed, and the Missouri Supreme Court held that the execution of any defendant under the age of eighteen at the time of his or her convicted crimes was prohibited under the Eighth Amendment.[66]

The United States Supreme Court affirmed the decision of the Missouri Supreme Court,[67] stating that even if a juvenile commits a "heinous" crime like Christopher Simmons did, the State "cannot extinguish [the juvenile's] life and his potential to attain a mature understanding of his own humanity."[68] The Court repeatedly noted a trend that juvenile misconduct is not as morally reprehensible as adult's misconduct because youths have less ability than adults to process information, to communicate, to learn from mistakes, and to control impulses.[69]

In creating this categorical rule, the Supreme Court applied its two-prong categorical rule test. The Court first considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there [was] a national consensus against the

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[61] Roper v. Simmons, 543 U.S. 551 (2005).

[62] Stanford v. Missouri, 492 U.S. 361 (1989).

[63] *Roper*, 543 U.S. at 578.

[64] *Id.* at 555–57 (highlighting that after the murder, Simmons bragged about the killing).

[65] *Id.* at 558.

[66] *See id.* at 559–60 (reasoning that Simmons' death sentence should be set aside and he should be resentenced to life imprisonment without eligibility for probation, parole, or release).

[67] *See id.* at 572–74, 578 (writing for the majority, Justice Kennedy confirmed a categorical rule prohibiting capital punishment for juveniles).

[68] *Id.* at 573–74.

[69] *Roper*, 543 U.S. at 593 (O'Connor, J., dissenting) (explaining that similar to children, the mentally disabled have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logistical reasoning, to control impulses, and to understand the reactions of others).

sentencing practice."[70] Since thirty states already prohibited the juvenile death penalty, and even those that allowed it rarely imposed it, the Court noted a consistent trend toward abolishing the death penalty for juveniles.[71] In confirming that this national consensus had developed against the juvenile death penalty, the Court also acknowledged that almost no other country imposed such sentences.[72]

Next, in evaluating whether juvenile death penalty sentences violated the Eighth Amendment, Justice Kennedy addressed youth culpability and the Eighth Amendment by explaining three main differences between adults and juveniles under the age of eighteen.[73] First, juveniles are inherently less mature than adults and have a less developed sense of responsibility than adults.[74] Second, because of their immaturity and lack of control, juveniles are more vulnerable or susceptible to negative influences and pressure from peers.[75] Finally, the third major difference between adults and children is that the character and personality of a juvenile is significantly less well-formed than that of an adult.[76] Based on these three major differences, the Court held that "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[77] There is greater possibility for a juvenile's character deficits to be reformed than an adult's might be later in life.[78]

The Court acknowledged and adopted society's view that juveniles as a class are more vulnerable to coercion and subject to peer pressure.[79] The

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[70] *Id.* at 564.

[71] *Id.* (noting that even states that allowed the juvenile death penalty rarely actually imposed such sentences).

[72] *Id.* at 575 (explaining that international norms and standards are not "dispositive" in decision-making, but they are considered by the Court to be "instructive for its interpretation of the Eighth Amendment").

[73] *Id.* at 569.

[74] *See id.* (explaining that scientific and sociological studies show that juveniles are less mature and responsible than adults tend to be, which results in more impulsive, reckless behavior).

[75] *Id.* at 569 (pointing out that since juveniles lack the freedom that adults have to remove themselves from criminogenic and risky settings—being a juvenile entails being susceptible to influence and to psychological damage).

[76] *See id.* at 570 (highlighting that the personality traits of juveniles are more transitory and less well-fixed).

[77] *See id.* (citing *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting)).

[78] *See Roper*, 543 U.S. at 570–72 (highlighting the decision from *Thompson v. Oklahoma*, in which the court held that children have more opportunity for reform and there is less need for retribution and deterrence when issuing punishment).

[79] Society generally accepts that juveniles are less capable of defending themselves against abuse than adults. Additionally, juveniles are more subject to peer pressure, more vulnerable to criminal socialization, and are less capable of surviving in a hostile jail or prison environment that is dominated by adult convicts. Wood, *supra* note 12.

majority further pointed out that the Eighth Amendment should be viewed and applied with "special force" because "the death penalty is the most severe punishment."[80] The *Roper* Court concluded that society and the law view juveniles as categorically less culpable than the average adult criminal.[81] Since *Roper*, the Supreme Court has consistently recognized that juvenile offenders are not to be considered the same as adults in sentencing because they are simply less mature.[82]

ii. Graham v. Florida

Five years later, Justice Kennedy, writing for the majority in *Graham v. Florida*, held that juvenile non-homicide offenders shall not be sentenced to life without parole.[83] A Florida trial court sentenced sixteen-year-old Terrance Jamar Graham, to life without parole for his involvement in an armed burglary where a store clerk suffered head injuries from one of Graham's friends who was also involved in the burglary.[84] Graham initially received a low-end sentence, but a judge imposed a life sentence after Graham violated probation.[85] The Supreme Court overturned the Florida trial court and held that the Eighth

[80] *Roper*, 543 U.S. at 568. Justice O'Connor, in dissent, wrote that the objective evidence of contemporary societal values and the Court's moral proportionality analysis failed to justify the ruling. Justice O'Connor believed that a categorical rule was not proper because some juveniles could act with sufficient moral culpability when committing murders that were "premeditated, wanton, and cruel in the extreme." *See id.* at 587, 600 (O'Connor, J., dissenting); *see also id.* at 608 (Scalia, J., dissenting) (criticizing the Court's finding of a national consensus on the "flimsiest of grounds" and the Court's view of itself as the alleged "sole arbiter of our Nation's moral standards" in exercising its own independent moral judgment).

[81] *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

[82] *Roper*, 543 U.S. at 569 (highlighting major differences between adults and juveniles, which inherently make juveniles less culpable for their criminal actions); *see also Graham*, 560 U.S. at 68 ("Roper established that because juveniles have lessened culpability they are less deserving of the most severe punishments"). *Roper* addressed the *Thompson* plurality, which stressed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *See Roper*, 543 U.S. at 561 (citing *Thompson*, 487 U.S. at 835) (explaining that teenagers could not engage in cost-benefit analysis that attaches to a decision which may result in the possibility of execution).

[83] *Graham*, 560 U.S. at 53-56.

[84] *Id.* (stating how Graham initially received a different sentence, but a judge imposed the life without parole sentence after Graham violated probation).

[85] *Id.* at 53 (explaining that Graham initially pled guilty to his first charges and was sentenced to probation after writing an apologetic and hopeful letter to the Court, unfortunately, less than six months later, Graham was arrested again). Based on Florida law, Graham's life sentence provided no opportunity for parole. *Id.*

Amendment prohibited the imposition of life without parole on a juvenile who had not committed homicide.[86]

The Court determined that a categorical rule against life without parole sentences was appropriate in this case because there was a national consensus against such sentences for juvenile non-homicide offenders.[87] The Court independently determined that imposing life without parole sentences on juvenile non-homicide offenders equates cruel and unusual punishment based on an interpretation and analysis of the Eighth Amendment.[88]

In creating this categorical rule, the Court first considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there [was] a national consensus against the sentencing practice at issue."[89] The Court concluded that the sentence of "life without parole" for juvenile non-homicide offenders was so rare that a national consensus against such a sentence had developed,[90] despite the thirty-eight jurisdictions that still permitted such practices.[91] Like in *Roper*, the *Graham* court dedicated an entire section of the opinion to considering international norms and standards surrounding the sentencing scheme in question.[92] In *Graham*, the Court made clear that a juvenile non-homicide offender is entitled to a "realistic opportunity to obtain release based on demonstrated maturity and rehabilitation" if the state imposes a sentence of "life,"[93] emphasizing the Court's changing focus from punishment to reform.[94] Many have interpreted this text to mean that *Graham* requires courts must provide juveniles with an

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[86] *Id.* at 81.

[87] *Id.* at 61-63.

[88] *Graham*, 560 U.S. at 69-73.

[89] *See id.* at 61 (quoting *Roper*, 543 U.S. at 572).

[90] *Id.* at 67 (explaining that the majority of states did not sentence juvenile non-homicide offenders to "life without parole" even before the *Graham* decision was released).

[91] *Id.* at 62-67 (noting that thirty-seven states and the federal government allowed juvenile life without parole sentences for non-homicide offenders); The court found additional support for its decision in the form of actual sentencing practices: only 123 juvenile offenders, seventy-seven from Florida, were serving life without parole sentences nationwide even though thirty-seven states, as well as the federal government allowed for juvenile life without parole sentencing for non-homicide offenders. *Id.*; *see also* Fuller, *supra* note 4.

[92] *See Graham*, 560 U.S. at 79-81 (finding that the United States was the only jurisdiction to impose life without parole on juvenile non-homicide offenders—suggesting that it was logical that a national consensus had developed in the United States against such a sentencing practice because no other countries were doing it either).

[93] *Id.* at 81 (highlighting that the Court made no specification about the functional equivalent of a life sentence).

[94] *Id.* at 74.

opportunity to develop emotionally, socially, and cognitively while they are imprisoned.[95] Several courts have interpreted this text as constitutionally banning all sentences that have the same effect as an explicit life without parole sentence for juvenile non-homicide offenders.

In the *Graham* decision, to forbid life without parole sentences for juvenile non-homicide offenders, the Court analyzed compliance with the standards set out by the Eighth Amendment and determined that life sentences like Graham's did not further penological goals of retribution, deterrence, incapacitation, or rehabilitation.[96] The Court explained that a sentence lacking any legitimate penological justifications is inherently disproportionate to the crime committed.[97] A sentence of life without parole, or a life in prison, "means denial of hope;" a life in prison "means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[98] These life without parole sentences are especially harsh penalties for juveniles because they necessarily must spend more years in prison than an adult offender would.[99]

In addressing specific penological justifications, the Court found that retribution cannot support a sentence of juvenile life without parole for non-homicide offenders. The Court explained that the foundational theory of retribution is the idea that the criminal sentence must be directly related to the culpability of the offender; and when it comes to juveniles, the culpability of the offender is inherently diminished.[100]

Deterrence also cannot justify a juvenile life without parole sentence for non-homicide offenders.[101] The Supreme Court found that the source of a juvenile's diminished culpability would likely be a lack of forethought in the juvenile's decision-making ability since "they are less likely to take a possible punishment into consideration when making decisions."[102]

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[95] Green, *supra* note 54.

[96] *Id.* at 70-75.

[97] *Id.* at 70 ("[A] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense").

[98] *Id.* at 71 (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)) (addressing the implications of spending a lifetime in prison).

[99] *Id.* at 70 (discussing the discrepancy between an adult and a juvenile being sentenced to a life in prison).

[100] *See id.* (highlighting that the Court has already held that juveniles are less culpable than adults); *see also Roper*, 543 U.S. at 571 (explaining that "[r]etribution is not proportional if the law's most severe penalty is imposed on the juvenile murderer" because a juvenile offender is less culpable than an adult offender who committed the exact same crime).

[101] *Graham*, 560 U.S. at 70.

[102] *See id.* at 70-72 (highlighting that deterrence does not justify a juvenile life

Because of the juvenile offender's diminished culpability, any deterrent effect provided by life without parole cannot be considered enough to justify such a sentencing scheme.[103]

Incapacitation also cannot support a sentence of life without parole for juvenile offenders, even though it does provide a legitimate reason for imprisonment when recidivism is likely and public safety is a concern.[104] However, there is no way to determine, with accuracy, which juvenile offenders will reoffend.[105] In order to justify a life without parole sentence, the Court must be extremely confident the offender will reoffend without such a sentence; however, due to juveniles' developing characters and maturity levels, as well as their ability to change more easily than adults, there is no way for the Court to make such a determination.[106]

Assuming that a juvenile will be a danger to society throughout his or her lifetime is implausible because, as *Roper* noted, it is "difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[107] Such a judgment on a juvenile's likelihood to reoffend cannot be made when a criminal offense is committed during childhood.[108] The Court finally established, even if there is some merit to the absolute and total life incapacitation of a juvenile offender, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate

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without parole sentence because juveniles often fail to recognize the possibility of punishment due to their lack of maturity).

[103] *See id.* at 72 (explaining that there would be little deterrent effect by sentencing juveniles with the harshest punishments).

[104] *See id.* at 73 (recognizing that incapacitation may be a justified reason for juveniles being sentenced with harsh punishments when they are a risk to the community).

[105] *See id.* (highlighting the problem in establishing whether juveniles may reoffend); *see also* Aryn Seiler, Comment, *Buried Alive: The Constitutional Question of Life Without Parole for Juvenile Offenders Convicted of Homicide*, 17 LEWIS & CLARK L. REV. 293, 312 (2013); Amanda Tufts, Comment, *Born to Be an Offender? Antisocial Personality Disorder and its Implications on Juvenile Transfer to Adult Court in Federal Proceedings*, 17 LEWIS & CLARK L. REV. 333, 343–46 (2013) (discussing the difficulty of determining future dangerousness for juveniles diagnosed with antisocial personality disorder).

[106] *See Graham*, 560 U.S. at 73 (establishing that the difficulty in determining whether a juvenile is likely to recidivate results in the Court's inability to sentence such a juvenile extremely harshly).

[107] *See Roper*, 543 U.S. at 573 (highlighting the difficulty in determining whether a juvenile is likely to reoffend within his lifetime).

[108] *See* Graham, 560 U.S. at 73-74 (establishing that such a difficulty in determining whether a juvenile is likely to reoffend equates to an inability to make such a determination).

sentences be a nullity."[109] Rehabilitation is intended to form the basis of the juvenile justice system,[110] and a sentence of life without parole inherently has no opportunity for meaningful rehabilitation.[111] Juvenile offenders are most in need of rehabilitation, and the absence of such opportunities "makes the disproportionality of the sentence all the more evident."[112]

The Supreme Court's holding that no penological justification exists for life without parole sentences for juvenile non-homicide offenders suggests that States must give juvenile defendants a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[113] By holding that every non-homicide-offending juvenile should have the chance to demonstrate rehabilitation, the Court essentially forbid any State from making the decision to bar such a child from reentering society during their expected lifetimes.[114] The majority in *Graham* relied on the three general differences between adults and juveniles that were previously discussed in *Roper*.[115] The majority recognized that scientific studies continue to show fundamental differences between juvenile and adult brains and thought processes.[116] Although the Court recognized that a categorical rule banning life without parole for non-homicide offenders might be problematic in some cases, this rule beneficially gives all juveniles a chance to show reform, and it eliminates issues that would arise with a case-by-case determination of constitutionality.[117]

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[109] *See id.* at 72-73 (explaining that incapacitation is not a sole reason to justify juvenile life without parole for a non-homicide offender).

[110] Seiler, *supra* note 105105.

[111] *See Graham*, 560 U.S. at 74 (explaining that "by denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability").

[112] *See id.* at 74 (explaining the judgment is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability).

[113] *See id.* (suggesting that the entire class of juvenile offenders post-*Roper* has, by definition, diminished culpability).

[114] *See id.* at 75 (suggesting that the Eighth Amendment must protect juvenile non-homicide offenders from being behind bars for the rest of their lives).

[115] *See supra* notes 74–76 and accompanying text.

[116] *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adults minds").

[117] With a case-by-case analysis, courts must first compare the gravity of the offense and the severity of the sentence. *Graham*, 560 U.S. at 60 (citing *Harmelin*, 501 U.S. at 1005). If the court draws an inference of gross disproportionality, the court must then compare that sentence with those sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. *Id.* at 60. Finally, if this comparison validates an initial judgment that the sentence is grossly

Despite its clear analysis in banning life without parole sentences for juvenile non-homicide offenders, the Court failed to analyze sentencing laws and practices regarding long-lasting consecutive, fixed-term sentences that are de facto life without parole sentences.[118] Courts across the country are divided when it comes to determining whether *Graham* allows courts to sentence juvenile non-homicide offenders to consecutive, fixed-term, no parole sentences that result in a total sentence that exceeds the defendant's life expectancy, a de facto life without parole sentence.[119]

iii. Miller v. Alabama

Two years later, in 2012, in *Miller v. Alabama*, the Supreme Court relied on *Graham's* reasoning and held that courts may not impose mandatory life without parole sentences on juvenile offenders.[120] A jury found fourteen-year-old Evan Miller guilty of murder in the course of arson.[121] The Alabama trial court mandatorily sentenced him to life without parole.[122] Despite Miller's difficult personal and family background, the Alabama Court of Criminal Appeals affirmed Miller's sentence, holding that the mandatory life without parole sentence was not overly harsh and did not violate the Eighth Amendment.[123]

Miller v. Alabama had a companion case, *Jackson v. Hobbs*.[124] Kuntrell Jackson, like Miller, was fourteen–years-old when he and two other boys robbed a video store; one of the boys had a shotgun and shot and killed the store clerk when she threatened to call the police.[125] Jackson was convicted with capital felony murder and aggravated robbery, and Arkansas law mandated that a defendant convicted of capital murder

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disproportionate, the sentence violates the Eighth Amendment. *Id.*

[118] *Bunch*, 685 F.3d at 552.

[119] *See id.* ("Some courts have held that such a sentence is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham*."); *see, e.g.*, People v. J.I.A., 127 Cal. Rptr. 3d 141, 149 (Cal Ct. App. 2011); People v. Nunez, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. Appl. 2011). Other courts, however, have rejected the de facto life sentence argument, holding that *Graham* only applies to juvenile non-homicide offenders expressly sentenced to "life without parole." *See, e.g.*, Henry v. State, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011).

[120] *Miller*, 132 S. Ct. at 2462.

[121] *Id.* at 2463 (At the time, "[t]hat crime . . . carrie[d] a mandatory minimum punishment of life without parole" in Alabama).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 2460. (explaining that the cases were combined when the Court granted certiorari in both cases in November 2011).

[125] *Id.* at 2461.

be sentenced either to death or to life without parole.[126] The Arkansas trial court imposed mandatory life without parole.[127]

The Supreme Court found that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment.[128] The Court adopted *Graham's* reasoning and considered the risk of imposing the most serious punishment on such a class with diminished culpability—ultimately banning sentences of mandatory life without parole for juveniles.[129] The opinion stated that the Supreme Court held on multiple occasions there are times "that a sentencing rule [is] permissible for adults" and is unconstitutional for children.[130] Further, youth is a time in life where a person is most susceptible to influence and psychological damage, which may lead them down a path of criminality that may later be "fixed."[131] The Court stated that appropriate occasions for sentencing juveniles to life without parole would be uncommon due to the difficulty of distinguishing the recoverable juvenile offender with the irreparably corrupted juvenile offender.[132]

Although the Court established a categorical rule, it did not decide whether a very lengthy mandatory fixed term-of-years sentence with no possibility of parole imposed on a juvenile offender is cruel and unusual under the Eighth Amendment.[133] Like *Graham*, the Court in *Miller* also

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[126] *Miller*, 132 S. Ct. at 2461 (citing ARK. CODE ANN. § 5-4-104(b) (1997)).

[127] *Id.*

[128] *See id.* at 2469 (holding that mandatory life without parole for juveniles violated the Eighth Amendment).

[129] *See id*. at 2465, 2469 (citing *Roper*, 543 U.S. at 573 (relying on the sociological and psychological differences between adult and juvenile offenders, the Court applied those differences when considering life without parole sentences for juvenile homicide offenders because children's distinctive mental traits are not crime-specific)); *see also Graham*, 560 U.S. at 67-68.

[130] *Miller*, 132 S. Ct. at 2470.

[131] *Id.* at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (stressing that youth is a "condition of life when a person may be more susceptible to influence and to psychological damage")). Although juveniles are particularly susceptible to negative influences, they are also more amenable to change because their brains and characters are still in the process of developing throughout adolescence. *See* Angela McGowan et al., *Effects of Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*, 32 AM. J. PREVENTATIVE MED. S7, S7–28 (2007); EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 7 (2007), *available at* http:/eji.org/eji/files/20071017cruelandunusual.pdf.

[132] *See Miller*, 132 S. Ct. at 2469, 2475–77 (Breyer, J., concurring) (noting that if Jackson did not kill or intend to kill the store clerk, his culpability would be "twice-diminished" and *Graham* would preclude a life without parole sentence).

[133] *See Bunch*, 685 F.3d at 552–53 (holding that an eighty-nine year sentence imposed on a juvenile with no possibility of parole was constitutionally permissible under *Graham* and *Miller*).

failed to address whether juvenile offenders, like Bunch, sentenced with fixed-terms that would outlast expected lifetimes, otherwise known as de facto life without parole sentences, should actually be enforceable based upon the rules set out by the Supreme Court.[134]

D. The Unconstitutional Decision in *Bunch v. Smith*

Courts are divided on how to enforce and interpret the rules set out in *Roper*, *Graham*, and *Miller*.[135] Currently, some states do not impose life without parole sentences on any juvenile offenders, while some states do allow non-mandatory life without parole for juvenile homicide offenders. Some states have specifically addressed the issue of de facto life without parole sentences, while others have not. The trend in the Supreme Court implies that the United States is moving towards a criminal justice system where fewer juveniles will be sentenced to any form of life without parole.

In 2012, Chaz Bunch was convicted in Ohio state court of robbing, kidnapping, and repeatedly raping a woman when he was sixteen-years-old.[136] The state trial court imposed consecutive, fixed terms, totaling eighty-nine years of imprisonment—Bunch will be ninety-five years old before he can leave prison.[137] Bunch appealed, arguing that his eighty-nine-year prison sentence amounted to a life sentence without parole that runs afoul of the Court's holding in *Graham*.[138] The district court found *Graham* distinguishable from Bunch's case.[139] The *Bunch* court imposed a ten-year sentence on each of eight felonies for which he was convicted, and an additional nine-year sentence for firearm specifications, all of which were to be served consecutively.[140] The Circuit Court affirmed that the categorical rule set out in *Graham* did not apply because in *Graham* the defendant was sentenced specifically to a life sentence.[141]

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[134] *Id.* at 553 (explaining that *Miller* and *Graham* both failed to address whether a lengthy prison sentence that exceeds life expectancy can actually be considered a life sentence without parole).

[135] Liptak, *supra* note 1.

[136] *Bunch*, 685 F.3d at 547.

[137] *Id.*; *see also* Liptak, *supra* note 1.

[138] *See Bunch*, 685 F.3d at 547 (explaining the rule from *Graham*: "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide").

[139] *See id.* at 549 (differentiating between an explicit "life" sentence and a lengthy term of years sentence).

[140] *Id.*

[141] *See id.* (noting that based on Florida law, there would be no opportunity for parole, even though the sentencing court did not specifically impose "life without parole").

The Supreme Court fails to address juvenile offenders, like Bunch, who receive consecutive fixed-term sentences for various non-homicide convictions.[142] On its face, and as the United States Court of Appeals for the Sixth Circuit held, Bunch's sentence was not contrary to clearly established federal law; however, when *Roper*, *Graham*, and *Miller* are read together, these cases clearly suggest that the Supreme Court is cautiously moving to less harsh sentencing practices for juveniles and is forcing courts to take a more rehabilitative approach when sentencing juveniles. Therefore, Bunch's de facto life without parole sentence ought to be considered unconstitutional.[143] Bunch properly argued that because of his eighty-nine year sentence without the possibility of parole, he was not be given the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" called for specifically by the *Graham* decision.[144]

The United States Court of Appeals for the Sixth Circuit essentially ignored societal demands and the Supreme Court trend when it decided *Bunch v. Smith*. By sentencing Chaz Bunch to eighty-nine consecutive years, the Court deprived Bunch of the opportunity to achieve maturity and rehabilitation.[145] The Sixth Circuit Court of Appeals failed to recognize the differences between adults and children that warrant different sentencing guidelines.[146] Courts in Ohio have relied on *Bunch*, holding that "no federal court has ever extended *Graham*'s holding beyond its plain language to a juvenile offender who received consecutive, fixed-term sentences;" however, these courts fail to make any further, logical justification.[147] Without the ability to rely strictly on the Supreme Court's wording from *Graham*, Bunch's Eighth Amendment claim swiftly, but mistakenly, evaporates.[148]

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[142] *Id.* at 551.

[143] *See id.* at 551 (explaining that the Supreme Court may not have included specific mention of consecutive, fixed-terms, but the Court intended for youths to have a better chance to rehabilitate outside of the prison system over the course of their lives); *see also* Liptak, *supra* note 1.

[144] *Bunch*, 685 F.3d at 551 (citing *Graham*, 560 U.S. at 73).

[145] *Contra Graham*, 560 U.S. at 75 (highlighting that no juvenile non-homicide offender should be deprived of the opportunity to achieve maturity and rehabilitation and to eventually be released from prison).

[146] *See Roper*, 543 U.S. at 569-70 (discussing the main differences between children and adults that warrant different sentencing guidelines); see also Goins v. Smith, No. 4:09-CV-1551, 2012 WL 3023306 at *7 (N.D. Ohio 2012) (holding that an eighty-four year sentence imposed on a teenager did not equate to cruel and unusual punishment justified by *Bunch v. Smith*).

[147] *See Goins*, 2012 WL 3023306, at *5 (holding that the Supreme Court did not set out any categorical rule regarding consecutive life sentences that equated to a life term).

[148] *See Bunch*, 685 F.3d at 552 (holding that Bunch did not suffer from an Eighth

II. BASED ON THE REASONING FROM *GRAHAM V. FLORIDA*, THE SUPREME COURT OUGHT TO BAN LIFE WITHOUT PAROLE SENTENCES FOR JUVENILE NON-HOMICIDE OFFENDERS

This section explains why the Supreme Court ought to consider de facto life without parole sentences on juvenile non-homicide offenders unconstitutional. Section A discusses the creation of a categorical rule against the sentencing practice because a national consensus exists against these types of sentences and because the sentencing practice violates the Eighth Amendment of the Constitution. As a backup argument, Section B discusses how the holding from *Graham*—that states must offer juvenile defendants "a meaningful opportunity for release"—extends to de facto life without parole sentences, thus making these de facto life without parole sentences unconstitutional. Part C addresses why de facto life without parole sentences for non-homicide juvenile offenders cannot be evaluated for constitutionality solely on a case-by-case basis.

A. The Supreme Court Ought to Create a Categorical Rule Against De Facto Life Without Parole Sentences for Juvenile Non-Homicide Offenders

In order to impose a categorical ban against de facto life without parole sentences for juvenile offenders, the Supreme Court must find that: (1) a national consensus exists against imposing de facto life without parole sentences for juvenile non-homicide offenders, and (2) in the Court's independent judgment, the sentencing scheme violates the Eighth Amendment.[149] When evaluating the second element, the Court must examine the culpability of juvenile non-homicide defendants and whether imposition of de facto life without parole sentences actually further any penological goals.[150]

Amendment violation of cruel and unusual punishment); *see also Goins*, 2012 WL 3023306, at *5 (stating that Goins also did not suffer from cruel and unusual punishment by being sentenced to eighty-four consecutive years in prison as a juvenile non-homicide offender).

[149] *Graham*, 560 U.S. at 65 (citing *Roper*, 541 U.S. at 572).

[150] *Id.* at 60, 70-71 (citing *Roper*, 541 U.S. at 568, 572 (stating that the Court considers whether the defendant was under age eighteen or was mentally handicapped)).

i. A National Consensus Exists Against Sentencing Juvenile Non-Homicide Offenders With De Facto Life Without Parole Sentences

In determining whether a national consensus exists against a certain sentencing practice, the Court must look to legislation and actual sentencing practices in different jurisdictions.[151] In *Graham*, the Court evaluated the number of states that allowed juvenile non-homicide life without parole sentences, and how often those states actually imposed those particular sentences.[152] Although the Court found that thirty-seven states and the federal government allowed life without parole sentences for juveniles that committed non-homicide crimes, the Court also found that "only 109 juvenile offenders" were actually serving such sentences.[153] Thus, this method can be extended to other situations—if a supermajority of states allows a sentencing practice, the Court may still find a national consensus against that practice if the states aren't actually imposing it.[154]

There is no exact data to show how many juvenile non-homicide offenders are currently serving de facto life without parole sentences;[155] however, there is data to show how many juveniles are serving life sentences.[156] It is estimated that only seventy-one juvenile non-homicide offenders nationwide were serving de facto life without parole sentences in 2013.[157] It is hypothesized that these sentences are probably being

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[151] *Id.* at 62.

[152] *Id.* at 62-63 (noting that in *Graham*, the Court found that thirty-seven states permitted life without parole sentences for juveniles that committed non-homicide crimes, but "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted . . . disclose[d] a consensus against its use").

[153] *Id.* at 62. However, in his dissent, Justice Thomas argued that no national consensus existed because a supermajority of the states, and the federal government, allowed such sentences. *Id.* at 107 (Thomas, J., dissenting). Justice Thomas claimed that the Court's recognition of the infrequent imposition of the sentence was meaningless—he claimed that just because "a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed." *Id.* at 111.

[154] *Id.* at 62.

[155] Telephone Interview with Ashley Nellis, Ph.D., Senior Research Analyst, The Sentencing Project (March 13, 2014).

[156] *Juvenile Life Without Parole*, CENTER FOR CHILD. L. AND POL'Y, http://www.cclp.org/jlwop.php (last visited Dec. 19, 2015).

[157] Mark T. Freeman, Comment, *Meaningless Opportunities Graham v. Florida and the Reality of the de Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 974-75 (2013). This estimate was based on 2011 data. In order to get this number, Freeman first calculated the number of prisoners serving time in state prisons, he then calculated the number of those prisoners serving time for murder or other crimes irrelevant to this analysis and subtracted them from the total. This left Freeman with a number of 1,414, and he conservatively and somewhat randomly assumed that only 5% of those were

served in California, Texas, Pennsylvania, Florida, and Nevada.[158] Besides these estimates, no other data exists addressing how many juvenile non-homicide offenders are serving de facto life without parole sentences across the nation. In fact, there are no studies that estimate how many juveniles are serving de facto life without parole sentences generally.[159]

Although, there are no hard statistics to declare that there is a national consensus against imposing de facto life without parole sentences for juvenile non-homicide offenders, there are many state laws that demonstrate such a national consensus has formed. After finding de facto life without parole sentences unconstitutional for juvenile non-homicide offenders in *People v. Caballero*,[160] California, one of the five states with the highest number of juveniles incarcerated, proposed a law to make all juvenile non-homicide offenders eligible for parole after twenty-five years of imprisonment.[161] Likewise, Iowa, another state with highly punitive sentencing practices, found that juveniles mandatorily sentenced to terms over sixty years were serving sentences functionally the same as life without parole sentences, and these sentences should be considered unconstitutional for juvenile non-homicide offenders based upon *Graham* and *Miller*.[162] Even Florida, which has had substantial publicity around

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serving de facto life sentences: 71 juveniles. In choosing this conservative 5% estimate, Freeman noted that, there are only a few circumstances in which a juvenile can receive a de facto life without parole sentence. For example, in 2011, in California, a juvenile non-homicide offender could only receive a de facto life without parole sentence if he committed: (1) a violent crime against multiple victims during separate incidents, or (2) certain enumerated offenses, discharged a gun, and inflicted great bodily harm against at least two victims. *Id.* Freeman notes that between 1985 and 1997, the average prison sentence for a juvenile offender who committed a violent crime was only eight and one half years. *Id.* at 974.

[158] Freeman, *supra* note 157 at 974 (citing ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 17-18 (2009), *available at* http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf (noting that these five states have the largest juvenile life offender populations)). Juvenile offenders who received actual life without parole sentences for non-homicide offenses were concentrated in only three states, with the majority in Florida. PAOLO G. ANNINO ET AL, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES; FLORIDA COMPARED TO NATION 15 (2009).

[159] This accounts for homicide offenders as well. *See* Telephone Interview with Ashley Nellis, *supra* note 155.

[160] 282 P.3d 291 (2012).

[161] A.B. 1276, Leg., Reg. Sess. (Cal. 2013) (Committee on Appropriations).

[162] "For all practical purposes, the same motivation behind the mandates of *Miller* applies to the commuted sentence in this case or any sentence that is the practical equivalent to life without parole . . . Thus, the rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a

juvenile non-homicide offenders appealing de facto life without parole sentences, has proposed a law which would allow non-homicide offenders sentenced as juveniles to be eligible for parole and receive a resentencing hearing after serving twenty-five years.[163] These relevant changes in state law, within some of the states that sentence juveniles most harshly, as well as the public's negative take on such sentencing practices, demonstrate that a national consensus against the sentencing scheme exists.[164]

For further support against the practice, the Supreme Court may look to other countries' practices as well.[165] The Supreme Court has

> treated the laws and practice of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the 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.[166]

The *Graham* decision noted that in 2010, the United States was the only country in the world that imposed life without parole for juveniles that committed non-homicide crimes.[167] It is similarly notable that the United States is one of the only countries that allows for de facto life without parole sentences to emerge from regular prison terms. Seventy-nine countries in the world do not allow consecutive sentences or they mandate that the lesser offenses merge with the most serious offense when the different offenses are part of the same act.[168] The United States is

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life sentence without parole." State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013); *see also* Iowa Supreme Court Strikes Down Extreme Sentences, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Aug. 23, 2013), http://fairsentencingofyouth.org/2013/08/23/iowa-supreme-court-strikes-down-extreme-sentences/.

[163] S.B. 0384, Leg, Reg. Sess. (Fla. 2014) (Appropriation).

[164] Eckholm, *supra* note 10.

[165] *Graham*, 560 U.S. at 79 (explaining that although not dispositive, the international consensus against the sentencing practice does influence the Supreme Court's decision on whether or not a national consensus has developed against such a practice); *Roper*, 541 U.S. at 576–78.

[166] *Graham*, 560 U.S. at 81.

[167] *Id.* at 79–80.

[168] CONNIE DE LA VEGA, ET AL., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 41 (2012) [hereinafter *Cruel and Unusual*], *available at* www.usfca.edu/law/clgj/criminalsentencing_pr/ (Across the world, forty-one other countries cap the length of time allowed for consecutive sentences, while some countries, like North Korea, have a general cap on all consecutive sentencing, and others, like Finland, have a cap for some offenses, but no cap for grave or violent crimes. Eleven other countries, including Sweden, Iceland, and Hungary, only issue one sentence by enhancing the greatest offense by a mandatory sentence, but cap certain numbers of years or percentages).

among only thirty-six countries (21% of countries in the world) that continue to allow concurrent sentencing without any maximum cap.[169] These issues in extreme sentencing are especially apparent when they are applied to juvenile offenders, like Chaz Bunch. Thirty-three states set no minimum age of criminal responsibility, which means, in essence, these states could sentence a five-year-old non-homicide offender to a de facto life without parole sentence.[170] Thus, factors including low enforcement statistics, recent state laws, and international standards support that a national consensus does exist against this sentencing practice.

ii. In the Court's Independent Judgment, De Facto Life Without Parole Sentences for Non-Homicide Juvenile Offenders Violate the Eighth Amendment

In order to independently decide that a sentencing practice violates the Eighth Amendment, the Court must look to the culpability of the class of offenders in light of changing standards of decency, and to whether the sentencing practice furthers any legitimate penological goals.[171] First, the Court must look to the culpability of juvenile offenders as a class.[172] The Supreme Court, in *Roper v. Simmons*, has established that juveniles are less mature, lack a strong sense of responsibility and fully formed character, and are vulnerable to peer pressure in comparison to adults.[173] Thus, juvenile offenders are categorically less culpable than adults who commit the same offenses.[174] In *Roper*, the Court also recognized that neuroscience and psychology show that juveniles' brains are less developed than adults' brains.[175]

Additionally, the Court has reasoned that a life without parole sentence is particularly harsh and unjust for juvenile offenders because, under such a sentence, a juvenile would spend a greater number of years

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[169] *Id.* at 42.

[170] *Id.* at 52–54. Very young, non-homicide offending children may be sentenced to de facto life without parole sentences even though laws throughout the world reflect juveniles' diminished culpability (i.e. age restrictions for drinking, gambling, contractual and marriage rights).

[171] *Graham*, 560 U.S. at 70 (discussing how the Court evaluates whether a sentencing practice violates the Eighth Amendment).

[172] *Id.* at 60.

[173] *Id.* at 67; *Roper*, 541 U.S. at 569–70.

[174] *Graham*, 560 U.S. at 67.

[175] *See generally* Natalie Pifer, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia of Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495 (2010) (describing scientific findings).

and percentage of life in prison than would an adult offender.[176] A de facto life without parole sentence is equally harsh and unjust because it is functionally the exact same as an express life without parole sentence; in both situations, the juvenile offender will spend an overwhelming majority of his life in prison.[177]

The Court must also look to whether de facto life without parole sentences for juvenile non-homicide offenders actually further any legitimate penological goals when deciding whether a categorical ban against de facto life without parole sentences for this class of offenders is appropriate.[178] First, de facto life sentences without parole for juvenile non-homicide offenders do not further the goal of retribution. The Supreme Court has described retribution as a way for society to fix "the moral imbalance caused by the offense."[179] In order for retribution to be achieved, "a criminal sentence must be directly related to the personal culpability of the criminal offender."[180] In *Graham*, the Court explained that life without parole sentences imposed on juvenile non-homicide offenders do not properly acknowledge the lessened culpability of the class of juveniles in general.[181] The same reasoning extends to de facto life without parole sentences because of juveniles' diminished culpability.

De facto life without parole sentences are the functional equivalent of "the second most severe penalty" in the United States criminal justice system.[182] When states impose de facto life without parole sentences on juveniles, the government often overlooks the juvenile's personal background.[183] Many of these juveniles come from broken homes, suffer from mental illness, or have suffered through other personal trauma that ultimately led them down a path of criminality.[184] Since de facto life

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[176] *Graham*, 560 U.S. at 70.

[177] People v. Caballero, 282 P.3d 291, 295 (2012) (finding that a de facto life without parole sentence is the functional equivalent of a "literal" life without parole sentence).

[178] *Graham*, 560 U.S. at 70.

[179] *Id.*

[180] *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

[181] *Id.* at 70 (explaining that "retribution does not justify imposing the second most severe penalty [life without parole] on the less culpable juvenile non-homicide offender").

[182] *Id.*; California v. Mendez, 114 Cal. Rptr. 3d 870, 882 (Ct. App. 2d Dist. 2010) (recognizing the juvenile defendant's de facto life without parole sentence as "materially indistinguishable" from a literal life without parole sentence).

[183] *See generally* ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 22 (2012) [hereinafter *Survey*], *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

[184] *See Graham*, 560 U.S. at 53-57 (noting that Graham's parents were addicted to crack and Graham began drinking alcohol at age nine and smoked marijuana at age

without parole sentences often do not reflect a juvenile offender's personal history, the sentences do not further the goal of retribution, which is supposed to be a reflection of the defendant's personal culpability.[185]

De facto life without parole sentences for juvenile non-homicide offenders also do not further the goal of rehabilitation. The concept of rehabilitation is somewhat vague, but it certainly requires some "meaningful opportunity to obtain release."[186] Similar to a literal life without parole sentence, a de facto life without parole sentence keeps juvenile non-homicide offenders imprisoned for life and inherently "forswears altogether the rehabilitative ideal."[187] By imposing a de facto life without parole sentence, the states make "an irrevocable judgment about that person's value and place in society"[188] and a juvenile offender cannot take advantage of any positive transformations in their personality or moral character.[189] De facto life without parole sentences for juvenile non-homicide offenders deny the juvenile offenders *any* hope for personal improvement and do not offer any meaningful opportunity for release.[190] Thus, these sentences fail to further the goal of rehabilitation.[191]

De facto life without parole sentences for juvenile non-homicide offenders do not further the goal of deterrence. Deterrence serves to prevent future crime.[192] In *Graham*, the Supreme Court determined that

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thirteen); *See also Caballero*, 282 P.3d at 293 (noting that Caballero had schizophrenia at the time of his crimes); California v. J.L.A., 127 Cal. Rptr. 3d 141, 146 (Ct. App. 4th Dist. 2011) (noting that J.L.A. was sexually abused as a child).

[185] Brief for Petitioner at 8, California v. Caballero, 250 P.3d 179 (Cal. 2011) (No. B 217709), 2011 WL 2357944, at *17.

[186] *Graham*, 560 U.S. at 70.

[187] *Id.*

[188] *Id.* at 74.

[189] *Id.* Surveys have identified that most juveniles sentenced to life without parole do not participate in rehabilitation programming in the prison system. Many are not permitted to participate because of their lengthy sentences, and many prisons are without sufficient programming or have taken everything available to them already. *Survey*, *supra* note 183, at 23.

[190] *Graham*, 560 U.S. at 69.

[191] *Id.* A sentence that denies "the convict of the most basic liberties without giving the hope of restoration" does not further the penological goal of rehabilitation. Solem v. Helm, 463 U.S. 277, 300–01 (1983). The Court recognizes that juveniles have not yet fully matured physically, cognitively, socially, or emotionally. The adult facilities that juvenile offenders are often ordered into for sentencing have lower staff to inmate ratios than juvenile facilities. Likewise, adult facilities are not equipped to handle the special educational, developmental, physical, and emotional needs of juveniles, thereby depriving them of rehabilitation and reform opportunities even more. *Wood*, *supra* note 12, at 1458.

[192] Russell J. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 853 (2002).

juveniles, as a class, are less susceptible to deterrence because they lack maturity and a sense of responsibility, and because they frequently engage in "impetuous and ill-considered actions and decisions" without considering the consequences.[193] Justice Kennedy further pointed out that life without parole sentences do not deter juvenile offenders from committing crimes because so many states already rarely imposed the sentence prior to 2010, so many juvenile non-homicide offenders did not even consider a life without parole sentence to be an expected consequence.[194]

Finally, incapacitation does not justify de facto life without parole sentencing for juvenile non-homicide offenders. The incapacitation theory of punishment suggests that a state should imprison criminals so that those criminals do not go on to commit more crimes against society.[195] In *Graham*, the Supreme Court suggested that incapacitation is not an appropriate goal in juvenile sentencing because the theory requires "the assumption that the juvenile offender forever will be a danger to society" and requires courts to deem juvenile offenders irreparable and "incorrigible."[196]

Although advocates of de facto life without parole sentences for juvenile non-homicide offenders will argue that incapacitation is an important goal, it is completely contradictory to violate the central principle of *Graham* that juvenile non-homicide offenders must receive some meaningful opportunity for release. Further, based on the Supreme Court's emphasis on juvenile reform and rehabilitation, it is inappropriate for a court to assume any juvenile non-homicide offender will forever be a danger to society. Thus, incapacitation does not justify de facto life without parole sentences. It is entirely possible to impose stiff punishment on youth offenders while still allowing them some opportunity to seek release from imprisonment.[197]

The Court should find that de facto life without parole sentences imposed on juvenile non-homicide offenders violate the Eighth Amendment. De facto life without parole sentences for juvenile non-homicide offenders do not adequately further any penological goals, and

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[193] *Graham*, 560 U.S. at 70 (citing *Roper*, 543 U.S. at 571); *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993).

[194] *Graham*, 560 U.S. at 70–73.

[195] *Id.* at 72–74 (noting the limitations of incapacitation as an explanation for life without parole sentences).

[196] *Id.* at 72–74; *see also* Workman v. Kentucky, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968) (noting that "incorrigibility is inconsistent with youth").

[197] *Survey*, *supra* note 183, at 19 (Many juveniles in prisons actually act worse when they are initially locked up).

juvenile non-homicide offenders as a class are categorically less culpable than similar adult offenders or any homicide offenders.

B. Extending *Graham's* and *Miller's* Holdings

Rather than arguing for an entirely new categorical ban on de facto life without parole sentences for juvenile non-homicide offenders, a less controversial method to ban juvenile non-homicide life without parole sentences is for the Supreme Court to declare these sentences legally equivalent to those sentences outlawed by *Graham*. Some lower courts already take this approach.[198] The *Graham* decision specifically stated that all juvenile non-homicide offenders must be entitled to some meaningful opportunity for release, which de facto life without parole sentences inherently restrict. This language means that states should give all juvenile non-homicide offenders some chance to grow and prove that they are rehabilitated and deserve another change to freely reenter civilized society.[199]

According to the California Supreme Court in *People v. Caballero*, *Miller* "made it clear that Graham's 'flat ban' on life without parole sentences applies to all non-homicide cases involving juvenile offenders, including the term-of-years sentence that amount[] to the functional equivalent of life without parole . . . ."[200] California noted that *Graham* does not exclusively address the precise wording of an imposed sentence.[201] Instead *Graham* forces states to provide a juvenile non-homicide offender with some realistic opportunity to obtain release from imprisonment during his or her expected lifetime.[202] Other courts have

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[198] Floyd v. State, 87 So. 3d 45, 46–47 (Fla. Dist. Ct. App. 2012) (per curium) ("Graham applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences" and "a de facto life sentence is one that exceeds the defendant's life expectancy").

[199] *See Graham*, 560 U.S. at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation"); *see also* People v. Rainer, No. 10CA2414, 2013 WL 1490107, at *15 (Colo. App. Apr. 11, 2013) (finding that Rainer's 112-year sentence was the functional equivalent of a life sentence without parole, which "improperly denie[d] [him] a chance to demonstrate growth and maturity" in violation of *Graham*).

[200] *Caballero*, 282 P.3d at 294-95 (citing *Miller*, 132 S. Ct. at 2469); Thomas v. State, 78 So. 3d 644, 646 (Fla. 1st DCA 2011) (per curiam) ("at some point, a term-of-years sentence may become the functional equivalent of a life sentence").

[201] *Caballero*, 282 P.3d at 295.

[202] *Id.* (quoting *Graham*, 560 U.S. at 2034); *see also* People v. Rainer, No. 10CA2414, 2013 WL 1490107, at *6, *12 (Colo. App. Apr. 11, 2013) (concluding that Rainer's aggregate 112-year sentence "qualified as an unconstitutional de facto sentence to life without parole" because it did not "offer him . . . a meaningful opportunity to

found that the Supreme Court did not intend to narrow *Graham's* application; rather, the Supreme Court purposefully "employed expansive language" that can and should be interpreted to include de facto life without parole sentences.[203]

Several federal courts have also interpreted *Graham* to cover de facto life without parole sentences. The United States District Court for the Southern District of Florida held that *Graham* is applicable to a de facto life without parole sentence.[204] The Court reasoned that youth-defendant Mathurin's mandatory minimum 307-year aggregate sentence did not provide him with the requisite opportunity to obtain release upon demonstrated maturity and rehabilitation, as *Graham* suggests is the standard in determining whether a sentencing scheme is the equivalent to a life without parole sentencing scheme that violates the Eighth Amendment.[205]

Likewise, the United States District Court for the Eastern District of Pennsylvania also held that *Graham* applies to lengthy term-of-years sentences that fail to provide juvenile non-homicide offenders with a meaningful opportunity for release during their expected lifetimes.[206] The Court extended *Graham's* holding and reasoned that it did not "believe that the Supreme Court's analysis would change simply because a sentence is labeled a term-of-years sentence rather than a life sentence if that term-of[-]years sentence does not provide a meaningful opportunity for parole in a juvenile's lifetime."[207] The Court further concluded:

> [C]oncerns about juveniles' culpability and inadequate penological justification apply equally in both situations, and there is no basis to distinguish sentences based on their label . . . [t]he sentence imposed in this case, though a term-of-years sentence, violates *Graham* as it provides no meaningful opportunity to obtain release, based upon demonstrated maturity and rehabilitation, during Thomas's expected lifetime.[208]

Similar to these cases, Chaz Bunch's sentence clearly denied him any meaningful opportunity for release during his expected lifetime. In *Bunch v. Smith*, the petitioner, Bunch, argued that the imposed eighty-nine year

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obtain release before the end of his expected life span . . .").

[203] People v. Rainer, 2013 WL 1490107 at *13–14.

[204] United States v. Mathurin, No. 09-21075, 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011).

[205] *Id.* at *3.

[206] Thomas v. Pennsylvania, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012).

[207] *Id.*

[208] *Id.*

sentence was completely contradictory to the Supreme Court's rationale.[209] The sentencing court was clear in its judgment that Bunch was intended to die in prison. In fact, the judge stated, "I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there, because it would be a mistake to have you back in society. It would be--then I'd be the one committing the crime."[210] Obviously, the sentencing court completely ignored the *Graham* decision when the Ohio court decided to intentionally sentence Chaz Bunch without any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[211]

In *Miller*, the Supreme Court noted that mitigating factors, including the age of the offender, must be considered, thereby erasing mandatory life without parole sentences for juvenile offenders.[212] The *Miller* opinion is particularly focused on the circumstances of homicide offending juveniles, and the holding requires judges and juries to consider mitigating circumstances before imposing the harshest penalty for all homicide offending juveniles.[213] De facto life without parole sentences should require the same considerations. Because this paper discusses only non-homicide crimes, the offenders are inherently less culpable than those addressed in the *Miller* opinion. This reduced culpability, as well as individual mitigating factors, like family and home environment, should be considered before imposing any lengthy prison sentences.

C. Case-by-Case Analysis

Using the Court's simplest approach, in order for juvenile offenders to challenge their sentences as grossly disproportionate to the offense committed, the juvenile must successfully prove that the sentence is grossly disproportionate to the crime committed.[214] The convicted juvenile must first show that the severity of a de facto life without parole sentence is largely disproportionate to the gravity of the non-homicide offense.[215] Courts can consider the defendant's particular mental state, such that juvenile non-homicide offenders may argue "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth

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[209] *Bunch*, 685 F.3d at 547.

[210] Resentencing Tr. Vol. V, 35, July 13, 2006, Bunch v. Smith, 2011 WL 1836020 (6d Cir.) at *6.

[211] *Graham*, 560 U.S. at 75.

[212] *Miller*, 132 S. Ct. at 2467–68.

[213] *Miller*, 132 S. Ct. at 2475.

[214] *Graham*, 560 U.S. at 61.

[215] *Id.* (citing *Harmelin*, 501 U.S. at 1005 (addressing the first element of the Grossly Disproportionate Test)).

and immaturity."[216] A de facto life without parole sentence is particularly severe because it renders "good behavior and character improvement" immaterial, and it denies the defendant all hope.[217]

Assuming that a court agrees that the first prong of the test is satisfied, the next step under the Grossly Disproportionate Test is for the defendant to argue that his or her de facto life without parole sentence is harsher than sentences imposed on other offenders "in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[218] Unfortunately, there is no precise data to show how many juveniles are sentenced to de facto life without parole sentences across the United States. Further, since this test is fact-specific, not all juvenile non-homicide offenders will successfully challenge their de facto life without parole sentences.[219]

Successful challenges are "exceedingly rare" under the Grossly Disproportionate Test.[220] Juvenile offenders are likely to raise inferences of gross disproportionality due to their age.[221] However, even if most juveniles can satisfy the elements of this test, the test if fact-specific, and not all juvenile defendants will successfully challenge their de facto life without parole sentences.[222] A de facto life without parole sentence is comprised of individual sentences for different convictions that all stemmed from one act of criminality. Courts may analyze gross disproportionality by looking at each individual sentence for each count separately. This method of analysis is arguably correct and constitutional, and it makes it very difficult for juvenile non-homicide offenders to prove that their de facto life without parole sentences are grossly disproportionate. In order to achieve the highest level of fairness to all juvenile non-homicide offenders, the Supreme Court should impose a categorical ban against de facto life without parole sentences, or it should extend *Graham's* holding to cover aggregate term-of-years sentences that last longer than the juvenile non-homicide offender's predicted lifespan.

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[216] *Id.* at 91 (Roberts, C.J., concurring) (citing *Solem*, 463 U.S. at 290–91); *Roper*, 543 U.S. at 571.

[217] *Id.* at 70 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989) (internal quotation marks omitted)).

[218] *Id.* at 60 (citing *Harmelin*, 501 U.S. at 1005 (addressing the second element of the Grossly Disproportionate Test)).

[219] *Id.* at 60, 72.

[220] Rummel v. Estelle, 445 U.S. 263, 272 (1980).

[221] *Graham*, 560 U.S. at 91 (Roberts, C.J., concurring) (concluding that the Court should have invalidated Graham's sentence under the Grossly Disproportionate Test and that an offender's age should be factored into the proportionality analysis).

[222] *Id.* at 2022, 2039.

The Supreme Court is moving toward a scheme where juveniles are sentenced less harshly than adults simply because of their juvenile status.[223] At this point, courts can only sentence juvenile homicide offenders to explicit life without parole sentences when the state allows such sentencing and when homicide is the crime. Many states are moving toward a less harsh juvenile sentencing scheme that forbids all juvenile life without parole sentences.

Many of the same policy concerns for restricting juvenile life without parole sentences also demand that de facto life without parole sentences should be forbidden. Currently, many states do not allow their inmates serving lengthy prison sentences to participate in rehabilitative programs because there is no possibility of reconsideration of sentence or release.[224] Banning de facto life without parole sentences for juvenile non-homicide offenders will encourage those convicted juveniles to demonstrate reform and rehabilitation in order to reach their eventual freedom.

CONCLUSION

The Supreme Court missed an important opportunity when it denied certiorari in *Bunch v. Smith*. In doing so, the Court failed to create a categorical rule against juvenile non-homicide offender de facto life without parole sentences. The Court also missed an invitation to extend *Graham*, which held that juvenile non-homicide offenders are entitled to a meaningful opportunity for release from imprisonment, such that *Graham's* sentencing ban must also exclude de facto life without parole sentences for this class of offenders. Even though the Supreme Court has yet to explicitly express a rule prohibiting juvenile non-homicide de facto life without parole sentences, based on the most recent juvenile justice decisions, it necessarily follows that the Court suggests that life without parole should never be a sentencing option for juveniles.[225] Now is the perfect time for the Supreme Court to take one step further than it has in the past and either categorically ban de facto life without parole sentences or extend the rule from *Graham* and achieve the same result. As the

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[223] *See supra* Part I.C.

[224] In California, "prison security classifications prevent juveniles from accessing vocational and other rehabilitative services." Similarly, in Florida, inmates serving lengthy prison terms cannot participate in rehabilitative, vocational, or educational programs because they have no release date within their life expectancies. *See* Gerald Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognizing Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 340 (2012).

[225] *End Mandatory Life Sentences*, N.Y. TIMES (Sept. 16, 2013), http://www.nytimes.com/2013/09/17/opinion/end-mandatory-life-sentences.html?_r=0.

Supreme Court's trend in juvenile justice suggests, society is moving away from harsh sentencing for juveniles. Banning de facto life without parole sentences for juvenile non-homicide offenders will promote society's interest in rehabilitating and reforming juveniles.