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I. Introduction

In 2012, the Supreme Court held in *Miller v. Alabama*[2] that mandatory life sentences without the possibility of parole were unconstitutional for juveniles. In response to this decision, Iowa Governor Terry Branstand decided to commute thirty-eight juveniles' sentences within his state.[3] While the decision was originally seen as a potentially positive move for juvenile rehabilitation, it quickly became clear that the decision was anything but positive. Branstand commuted the thirty-eight life sentences without potential parole to merely life sentences with the possibility of parole at sixty years.[4] This would mean that a fifteen-year-old who had their sentence commuted in this way would not receive an opportunity for parole until they were seventy-five. How could this decision honor the Court's recognition that denying juveniles an opportunity for parole

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2 Miller v. Alabama, 587 U.S. 460 (2012).

3 Mike Wiser, *Branstad Commutes Life Sentences for 38 Juvenile Offenders*, The Gazette (July 16, 2012) https://www.thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers.

4 Id.

violates their constitutional rights? Is there any meaningful difference between life with the possibility of parole at seventy-five or life without parole when the average lifespan in the United States is seventy-eight years? This is a relevant concern, especially given that people in prison have shorter lifespans than the national average. In fact, in one study of New York parolees, researchers found that for every additional year a person was in prison, there was an average two year decrease in life expectancy.[5] Eventually, the Iowa State Court found that this commutation did not honor the precedent set by the Supreme Court, and when the Supreme Court held that its 2012 decision was retroactive in *Montgomery v. Louisiana*, the people who had been sentenced as juveniles were able to appeal for an opportunity for release.[6]

The Supreme Court's past precedent on juvenile justice has left important gaps in the types of sentences that are permissible for juveniles. In *Graham v Florida*,[7] the Court expressly banned life sentences without the possibility of parole for non-homicide juvenile offenders. In *Miller*,[8] the Court also banned mandatory life sentences without the possibility of parole for any juvenile offender regardless of whether the offense was a non-homicide or homicide offense. These two cases do not answer every question though. In fact, even Branstand's order was not explicitly against Supreme Court precedent. Additionally, legal scholars, attorneys, and lower courts have all considered whether bans on life sentences without parole also

5 See e.g., Evelyn J. Patterson, The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003, 103 Am J. Pub. Health 523 (2013) (detailing the effects of prison time on mortality).

6 Victoria Ottomanelli, *Iowa Juvenile Killers Expected to Appeal their Sentences,* KCCI Des Moines (Aug. 16, 2013) https://www.kcci.com/article/iowa-juvenile-killers-expected-to-appeal-their-sentences/6882856.

7 Graham v. Florida, 560 U.S. 48 (2010).

8 *Miller,* 587 U.S.

include term of years sentences.[9] For example, if someone is sentenced to 100 years in prison without the possibility of parole, is that excluded under the Supreme Court's precedent even though it is not specifically life without parole? Legal scholars have also looked at parole systems throughout the United States to see if they align with the discretionary requirement articulated in *Miller* for juvenile sentencing.[10] Though legal scholarship on juvenile justice abounds, relatively little work has been done on how the minimum amount of time before a juvenile has a chance for parole affects the constitutionality of a sentence. People collectively raised concerns with Branstand's decision to only allow for parole at sixty years, but States like Texas and Colorado still allow courts to sentence non-homicide juvenile offenders to lengthy terms in prison with their first opportunity for parole being at forty years.

The Supreme Court should extend its reasoning in *Graham* and *Miller* to hold that lengthy minimum parole requirements are unconstitutional for juvenile non-homicide offenders. To honor this decision, the Court should adopt a categorical rule that non-homicide juvenile offenders should be given the possibility of parole before thirty years. I begin by presenting the Supreme Court's past decisions regarding juvenile justice and the sentencing scheme at issue. Then, I articulate the reasoning in *Graham* and *Miller* and apply it to lengthy minimum parole requirements for juvenile non-homicide offenders, illustrating how and why lengthy minimum parole requirements are unconstitutional for non-homicide juvenile offenders. Lastly, I address why the Court should adopt a categorical rule

9 See e.g., Anton Tikhomirov, Comment, *A Meaningful Opportunity for Release: Graham and Miller Applied to De Facto Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C. L. Rev. II-332 (2019) (discussing term of life sentences and suggesting they aren't constitutional)

10 See e.g. Erica L. Ramstad, Monster under the Bed: The Nightmare of Leaving Juvenile Life Sentences up to the Parole Board, 64 S.D. L. Rev. 126 (2019) (talking about the legal and logistical problems of parole boards' roles in sentencing); see also Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment,* 89 Ind. L. J. 372 (2014) (making explicit claims about what parole practices should be allowed from boards).

stating that minimum parole requirements that are thirty years or greater are unconstitutional for non-homicidal juvenile offenders.

II. Background

Juvenile sentencing under the Eighth Amendment has been shaped by three landmark cases. Together, these cases represent the meaningful precedent for understanding the constitutionality of any juvenile sentencing scheme. In *Roper v Simmons*,[11] the Court ruled that the death penalty was unconstitutional for juvenile offenders. In *Graham*,[12] the Court ruled that life in prison without the possibility of parole was unconstitutional. In *Miller*,[13] the Court held that mandatory life in prison without the possibility of parole was to be unconstitutional. To understand the legal argument around lengthy minimum parole requirements, a history of these cases is necessary.

A. Roper v Simmons

In 2005, the Court ruled that the death penalty for juvenile offenders under eighteen years old was unconstitutional.[14] The Court acknowledged juveniles as constitutionally different than adults and ordered that this must be reflected in sentencing. This distinction rested on three main points. First, juveniles "lack maturity and have an undeveloped sense of responsibility."[15] Because of this lack of maturity as compared to adults, juveniles are much more likely to engage in rash, reckless, and ill-advised behavior. In fact, the Court cited social science research showing that those under eighteen were statistically overrepresented in almost every category of reckless behavior.[16] Second, juveniles are "more vulnerable or susceptible to negative

11 Roper v. Simmons, 543 U.S. 551 (2005).

12 *Graham*, 560 U.S.

13 *Miller,* 587 U.S.

14 *Roper,* 543 U.S.

15 *Id*. at 15.

16 *Id.*

influences and outside pressures, including peer pressures.''[17] This Court specifically pointed out the importance of this fact given that juveniles have less control over their environment.[18] Lastly, juveniles' character and personality traits are not fully formed. Because of the unique nature of childhood, "the personality traits of juveniles are more transitory, less fixed."[19] When looking at these facts together, these differences "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," and thus should be exempt from punishments reserved for the worst offenders.[20]

B. Graham v Florida

In 2009, the Court extended their rationale regarding the differences in juvenile offenders to rule that sentencing non-homicidal juvenile offenders to life without the possibility for parole (LWOP) is unconstitutional.[21] The Court affirmed that an "offender's age is relevant to the Eighth Amendment, and that criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[22] They held that because juveniles are less culpable, non-homicidal crimes are less severe, and the "sentence lack[ed] any legitimate penological justification" sentencing juveniles to LWOP for non-homicide offenses is unconstitutional.[23] Additionally, this sentencing scheme did not offer juveniles who had changed later in life a meaningful opportunity for release. This case also introduced an important distinction in juvenile law between homicidal and non-homicidal offenses. The court defined non-homicidal crimes as those where a defendant "[does] not kill, intend to kill, or foresee that

17 *Id*. at 15.

18 *Id*.

19 *Id*. at 16.

20 *Id*. and 15.

21 *Graham,* 560 U.S.

22 *Id*. at 25.

23 *Id*. at 20.

life will be taken."[24] People who commit non-homicidal crimes "are categorically less deserving of the most serious forms of punishment than are murderers."[25]

C. Miller v Alabama

The Court heard a challenge to the constitutionality of mandatory LWOP sentences for juveniles in 2012. Using the legal precedent in *Roper* and *Graham*, and extending concerns about mandatory sentencing schemes, the Court held that mandatory LWOP for juveniles is unconstitutional.[26] This does not mean that juveniles cannot be sentenced to LWOP, but instead that the "state's most severe penalties on juvenile offenders cannot proceed as though they were not children."[27] This means that courts must take into account the mitigating nature of age when sentencing juveniles. Subsequently, LWOP should be very rare and only for the most incorrigible of offenders.[28] The Court again articulated the idea that juveniles should be offered a meaningful opportunity for release as first discussed in *Graham*.

D. Current State of Juvenile Law and Types of Challenges

Together, these cases suggest three important things in understanding whether a sentencing scheme for juveniles is constitutional. First, juveniles are constitutionally different than adults. These differences make them less culpable and subsequently less deserving of harsh punishment. Sentencing schemes that do not honor the unique status of juveniles are unconstitutional. Second, the severity of the offense also matters in whether a sentence is justified. The types of crimes that justify capital punishment are different than crimes that warrant less severe responses. Namely, more severe crimes, such as homicidal

24 *Id*. at 18.

25 *Id*. at 18.

26 *Miller,* 587 U.S.

27 *Id*. at 12.

28 *Id.* at 10.

crimes, warrant more severe punishment. Lastly, sentences that lack a legitimate penological purpose are unconstitutional.

These cases also bring up an important distinction in the legal argument against lengthy mandatory minimum parole requirements. The Court has identified two different types of legal challenges for sentencing under the Eighth Amendment. The first is length of term challenges. These challenges are not concerned with the actual sentencing law, but simply that the court applied in a disproportionate way to the offender in question.[29] For example, in *Solem v. Helm*,[30] the Court held that LWOP was a disproportionate sentence for the defendant's seventh nonviolent felony of passing a worthless check. They did not challenge LWOP sentences but simply that it was a disproportionate sentence for the crime. The second type of challenges are categorical challenges. Categorical claims are concerns with the sentencing law itself. These challengers seek categorical remedies against the sentencing scheme. All three cases above represent examples of categorical claims. Another example is *Atkins v. Virginia*[31] where the Court held that sentencing schemes that allowed for people with intellectual disabilities to be sentenced to death were unconstitutional. Here they are arguing against the law or scheme, not the application.

Categorical claims hinge on two dimensions. First, the nature of the offense, and second, the nature of the offender. If the nature of the offense is less severe, then it requires a less severe punishment. The Court ruling that capital punishment for non-homicide crimes is unconstitutional is an example of this because the nature of the offense was not severe enough to warrant such a severe punishment.[32] Regarding the nature of the offender, the Court held that the diminished culpability of various defendants warrants less severe punishment. In *Atkins*, the Court held that the death penalty was

29 *Graham,* 560 U.S.

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

31 Atkins v. Virginia, 536 U.S. 14 (2002)

32 Edmund v. Florida, 458 U.S. 782 (1982)

unconstitutional for mentally disabled offenders.[33] As the challenge to lengthy minimum parole requirements is a categorical claim, the legal analysis rests broadly with the nature of the offense and the nature of the offender.

E. Lengthy Parole Requirements

To understand the legal argument against lengthy minimum parole requirements, there must be a clear definition. Parole, like sentencing, is determined on a state-by-state basis. This means that there is variety in sentencing and parole schemes. Some states, like Michigan,[34] require juvenile consideration of parole ten years after sentencing. Other states, like Colorado,[35] have schemes that allow for parole only after forty years of the juvenile's sentence has already been served. This sentencing scheme means that a juvenile could have their earliest opportunity for release when they are in their late fifties. At this age, they are well past the typical time to build a career, have children, and get married. In effect, these requirements deny juvenile offenders their life regardless of whether they are released later. *Graham*[36] and *Miller*[37] require that there be a "meaningful opportunity for release," and while the Court does not explicitly define this term, lengthy minimum parole requirements deny juveniles that option. Though there is some ambiguity in the exact definition of what constitutes a lengthy minimum parole requirement, for this argument, we will define lengthy minimum parole requirements as anything over thirty years. As stated above, not allowing parole before thirty years means most juveniles sentenced under these schemes will not have a chance for release until they are over fifty years old.

33 *Atkins,* 536 U.S.

34 *Russell, supra* note 10, at 408.

35 *Id.* at 408.

36 *Graham,* 560 U.S.

37 *Miller,* 587 U.S.

III. Criteria for determining Constitutionality as Understood in Graham and Applied in Miller

As mentioned above, the Court views categorical claims on two dimensions: the nature of the offense and the nature of the offender. Within these two dimensions, the Court applied a two-step approach when determining the constitutionality of LWOP for non-homicide offenses in *Graham*. The Court used this same approach in *Miller*. As this is another categorical juvenile sentencing case case under the Eighth Amendment, which outlaws cruel and unusual punishment, this analysis will take the same approach as the Court in both previous cases.

In both *Graham* and *Miller,* the Court first looked to "objective indicia of society's standards, as expressed in legislative enactments and state practice"[38] to determine that national consensus on the statute in question. Next, "guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose"[39] the Court exercised its own independent judgment about whether the statute violates the Constitution. The second part of this approach is the Court's recognition of the fact that the "task of interpreting the 8th amendment remains [their] responsibility."[40] The Court's analysis on the second point centers on culpability of the offender, the severity of the crime, and the practical penological purposes.

A. "Objective indicia of society's standards"

The Court's first step in *Graham* and *Miller* was looking at society's view of the sentencing scheme. Eighth Amendment case law is unique in that instead of viewing cruel and unusual through a historical prism, the Court is concerned with "the evolving standards

38 *Roper,* 543 U.S.

39 *Graham,* 560 U.S.

40 *Graham*, 560 U.S.

of decency that mark the progress of a maturing society."[41] This is because what was cruel and unusual in the past is different from what is cruel and unusual now. Scalia gave the example of public lashing and branding. Both were forms of colonial punishment, and at the time of ratification, neither punishment would have been considered cruel or unusual. Nonetheless, today those punishments would be both.[42] Given this standard, the question then becomes how to determine "evolving standards of decency."[43] In *Atkins*, the Court held that "the clearest and most reliable objective evidence of contemporary values is in the legislation enacted by the country's legislatures."[44] By looking at the legislative status across the country, the Court can determine if there is a national consensus against its use.

The first step is to look at the base acceptability under statute. Namely, how many states allow for the type of sentencing in question. This was the standard used in *Roper*. Only a small set of states allowed juveniles to be sentence to death, and there was a clear trend in rejecting the death penalty for juveniles. The Court used this information to rule that there was national consensus against its use. Legislative permissibility is not enough on its own, though. In *Graham*, "thirty-seven states as well as the District of Columbia allowed for life without parole for a juvenile non-homicide offender in some way."[45] Even as such, the Court held that the argument that this showed no national consensus against the practice was "incomplete and unavailing."[46] The Court made a similar judgment in *Miller*.[47] It determined that having twenty-nine jurisdictions that allowed mandatory life sentences for juveniles was not by itself sufficient to

41 Estelle v Gamble, 429 U.S. 97 (1976).

42 Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cinn. L. Rev. 849 (1989) at 861.

43 *Estelle*, 429 U.S.

44 *Atkins,* 536 U.S.

45 *Graham,* 560 U.S.

46 *Id*. at 11.

47 *Miller,* 587 U.S.

prove that there was not a national consensus against the sentencing.[48] In both cases, the Court looked past simply counting the number of states that allowed that sentencing to see whether that sentencing was endorsed by looking at the actual application of the sentencing scheme.

This same reasoning applies to lengthy minimum parole requirements for non-homicide juvenile offenders. While it is a little unclear how many states allow for lengthy minimum parole options, as shown in *Graham* and *Miller*, this is not the only concern. The number could potentially be as high as the thirty-seven states in *Graham*[49] and alone it would still not be convincing. What is convincing here is the actual sentencing practices. Only three states have express provisions that allow for or require that a minimum parole requirement be thirty years or longer for non-homicide offenses, so only three states have expressly endorsed this sentencing for juveniles. Like in the previous cases, with only three states having express provisions, this cannot equate to the actual endorsement needed to signify a national consensus for its use.

Furthermore, in both *Graham* and *Miller*, the Court recognized that the possibility of the sentencing in question was not necessarily an affirmative judgment on that type of sentencing. This is especially true in juvenile justice cases. For example, the sentencing schemes in *Graham* and *Miller* were allowed only because juveniles could be tried as adults and adults could be sentenced in that way. While the rules made these sentences "possible for some non-juvenile offenders" the Court held that they "did not justify a judgment that many States intended to subject such offenders to" these sentences because they were intended for adults.[50] The Court recognized this again in *Miller*, concluding again that "it was impossible to say whether a legislature has endorsed a given penalty"[51] just because that sentencing was possible.

48 *Id*. at 15.

49 *Graham*, 560 U.S.

50 *Id.* at 16.

51 *Miller,* 587 U.S.

Again, this is relevant when considering lengthy minimum parole requirements for juvenile non-homicide offenders. The states, excluding the three with express provisions allowing this type of sentencing, that allow for the earliest opportunity for parole to be thirty years or later are a product of juveniles being transferred to adult court and courts being allowed to sentence adults in this way. As acknowledged in *Graham* and reaffirmed in *Miller*, this does not equate to affirmative judgment on lengthy minimum parole requirements.

Considering the low level of express affirmation for this sentencing scheme both in application and in practice, there is no clear national consensus in favor of lengthy minimum parole requirements. Furthermore, ten states have express requirements that the maximum time before an opportunity for parole must be less than twenty-five years for non-homicide juvenile offenders. When comparing the three states with express support for lengthy minimum parole requirements to the ten states having expressed disapproval of the sentencing scheme, there is a national consensus against it. Altogether, using the reasoning of evolving standards first articulated in *Trop v. Dulles*[52] and reaffirmed specifically for juveniles in *Graham* and *Miller*, there is a national consensus against lengthy minimum parole requirements for juvenile non-homicide offenses.

B. "Task of interpreting the 8th Amendment remains our responsibility"

National consensus is not the only factor the Court uses to determine the constitutionality of sentencing schemes under the Eighth Amendment. The Court has also acknowledged their own role in interpreting and applying the Constitution. Justice Kennedy addressed this in *Graham* when he wrote, "in accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.'"[53] In interpreting the Eighth Amendment, the Court has considered three main factors: the culpability of the offender, the

52 Trop v Dulles, 356 U.S. 86 (1958).

53 *Graham*, 560 U.S.

severity of the crime, and whether the punishment serves a practical penological purpose. For lengthy minimum parole requirements, all three factors weigh in favor of finding the practice unconstitutional. Thus, the Court should hold that lengthy minimum parole requirements are unconstitutional.

C. Culpability

Culpability is how responsible someone is for their crime. It changes how one is punished and the justification of the punishment. In considering the constitutionality of a sentencing scheme under the Eighth Amendment, the Court is very interested in the culpability of the offender. In fact, in *Atkins*[54] it was the diminished culpability of mentally disabled people that made sentencing them to death cruel and unusual. In *Graham*, Kennedy set out two considerations when looking at culpability under the Eighth Amendment for juveniles: "The age of the offender and the nature of the crime."[55] In other words, when looking at the constitutionality of juvenile sentencing, the Court must consider the age and the type of crime they committed.

When looking at the age of the offender, *Roper* lays out the relevant points. These have since been affirmed in both *Graham* and *Miller*. In *Roper*, the Court solidified that there is a constitutional difference between adults and children in their level of culpability. This difference hinges on three considerations. First, "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."[56] Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures."[57] Lastly, "the character of a juvenile is not as well formed as that of an adult" and "the personality traits of juveniles are more transitory and less fixed."[58] The

54 *Atkins*, 536 U.S.

55 *Graham*, 560 U.S.

56 *Roper*, 543 U.S.

57 *Id*. at 15.

58 *Id*. at 16.

Court acknowledged that all these factors meant that juveniles are less culpable for their actions. "Once the diminished culpability of juveniles is recognized" sentencing must reflect that diminished culpability.[59] *Graham* echoed this stating that a juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult."[60] As the Justices pointed out in *Miller*, the distinctive characteristics of juveniles are not sentencing specific.[61] All three points hold regardless of the sentencing scheme in practice. This means that this analysis holds when considering lengthy minimum parole requirements for juvenile non-homicide offenders.

The second thing the Court considers when looking at culpability is the severity of the crime. In *Graham*, the Court reiterated that they have "recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[62] This reflects a line between non-homicidal and homicidal crimes. This is due in part to the permanence of homicidal crimes. There is something irreversible and irrevocable about taking a life. Non-homicidal crimes differ in both the severity and permanence from homicidal crimes and thus "those crimes differ from homicide crimes in a moral sense."[63] Together with juveniles' differences due to age, the Court held that "...when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[64] This analysis is the same when considering lengthy minimum parole requirements because this paper is only concerned with this issue for non-homicide offenses. Where the analysis regarding the characteristics of juveniles and the crime is the same as in *Graham* and *Miller*, it follows that the results should

59 *Id*. at 17.

60 *Graham*, 560 U.S.

61 *Miller*, 587 U.S.

62 *Graham*, 560 U.S.

63 *Id.* at 18.

64 *Id*. at 18.

be the same as well. Namely, that juveniles convicted of non-homicide offenses have "twice diminished moral culpability" and that must be reflected in sentencing.

D. Severity of Punishment

The next thing the Court considers is the severity of the punishment. In *Roper*, the Court acknowledged that the death penalty was an especially severe punishment. The death penalty could not be revoked. If the state made the wrong choice, they could not redress that mistake. In *Graham*, the Court established that, while still different from death sentences, "life without parole sentences share some characteristics with death sentences."[65] Without parole, there is no opportunity for release barring executive clemency. This means that "the sentence alters the offender's life by a forfeiture that is irrevocable."[66] No amount of good behavior or character change or rehabilitation will matter because they will spend the rest of their days in prison. As the Court said, it "means a denial of hope."[67] The Court held that this was especially severe for juveniles as "under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[68]

This is the place where the argument against lengthy parole minimums requirements begins to differ from previous precedent. Lengthy parole minimums are neither LWOP nor death sentences. They are less severe sentences, but like both of those sentencing schemes, there is a denial of hope. Consider the juvenile who at 16 is sentenced in Texas. Under Texas' current sentencing scheme, where the first opportunity for parole is after forty years, that juvenile's first chance of release would be at 56 years old. They would have missed the time to have a family, the time to have a job, and the time to get an education. This is assuming they are even released. This sentence

65 *Id*. at 18.

66 *Id*. at 19.

67 *Id*. at 19.

68 *Id*. at 19.

denies the ability to change "without giving hope of restoration."[69] It takes the most fruitful years of a person's life, and in doing so commits a harm with an irrevocability similar to that in *Graham* and *Roper*. Again, the sentence is especially severe for juveniles. The 16-year-old in Texas would never have a chance to finish high school or get their first job. Juveniles liek this are sentenced as children with very little skills and only released as older citizens with little opportunity for hope. While it is true that these arguments apply equally well to a someone who is eighteen and as such falls out of the technical definition of juveniles, the Court has engaged in this distinction throughout the precedent regarding juvenile. The break was eighteen for the death penalty even though there is little one can do to say how an eighteen-year-old is distinctly different. This justification depends on consistency. The courts have used this age to determine juvenile status throughout the United States. While it may present problems, courts must draw the line somewhere.

E. Practical Penological Purposes

The Court also recognized that "the penological justifications for the sentencing practice are also relevant"[70] in determining whether a punishment is cruel and unusual. The Court acknowledged that it is the legislature's job to determine which justification for punishment is most salient and how to implement that punishment. While this is true, it does not mean that "the purposes and effects of penal sanctions are irrelevant to the determination" of constitutionality under the Eighth Amendment.[71] The goal of the Court is not to determine the best justification for punishment or how to apply that justification. Instead, the question is whether there is any legitimate penological purpose because "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[72] The

69 *Id*. at 19.

70 *Id.* at 20.

71 *Id.* at 20.

72 *Id.* at 20.

four justifications that the Court has considered in past cases are retribution, deterrence, incapacitation, and rehabilitation.[73]

Retributivists justify punishment under the idea that people should be held accountable for their crimes simply because they committed them.[74] The Court described retributivism as the ability to "express condemnation of the crime and seek restoration of the moral imbalance caused by the offense."[75] Central to retributivism is the idea of culpability. As already acknowledged, culpability is categorically smaller for juveniles because of their distinct characteristics. Given that children are less culpable the "...case for retribution is not as strong with a minor as with an adult."[76] The culpability of the juvenile in question with regards to lengthy minimum parole requirements for juveniles are even smaller because we are only interested in non-homicide offenses. Culpability is central to retributivism and because culpability is diminished for juveniles especially those who committed non-homicidal offense, there is not a legitimate retributivist justification.

Deterrence is the second justification the Court considers. Here the idea is that harsher punishments deter people from committing the crime because of the fear of punishment. The Court correctly pointed out that the "same characteristics that render juveniles less culpable… suggest that they will be less susceptible to deterrence."[77] Namely, juveniles are more likely to make rash decisions and often do not consider the full effect of their actions. Given that this is true, juveniles are not considering the potential punishment they could receive when they decide whether to commit a crime. If the punishment is not considered when choosing to commit the crime, then deterrence is not at play. Here the penological justification is weaker in part because it is less effective. This remains the case for

73 See e.g. Roper, 543 U.S. and Graham, 560 U.S. and Miller, 587 U.S.

74 Adil Ahmad Haque, Retributivism: The Right and The Good, 32 Law and Philosophy 1 (2013).

75 *Graham*, 560 U.S. at 20.

76 *Roper*, 543 U.S. at 170.

77 *Id.* at 18.

lengthy minimum parole requirements. The same features that lead us to believe that juveniles are different force the conclusions that deterrence is not an adequate penological justification for juveniles. Moreover, most juveniles likely do not even know the rules regarding parole. This means that it acts as even less of a deterrent. Some may say that even with a weaker effect, the punishment still might have acted as a deterrent for some juveniles. The Court responded to this concern in *Graham* by saying that "even if punishment has some connection to a penological goal it must be shown that punishment is not grossly disproportionate in light of the justification offered."[78] This point is especially clear when looking at a separate hypothetical example. Perhaps a state decided to sentence everyone who ignored speeding laws to ten years in prison. This may cause some people to stop speeding, but that does not automatically mean it is justified under deterrence as it is still "grossly disproportionate"[79] for the crime of speeding.

The third penological justification the Court considers is incapacitation. Incapacitation is largely concerned with mitigating the effect of recidivism--the likelihood that people will commit crimes again if they are released back into society. While the Court recognized recidivism as a serious risk and incapacitation as a legitimate goal, it was still inadequate justification for juveniles who did not commit homicide. Under incapacitation courts must justify the punishment "on the assumption that the juvenile offender will forever be a danger to society."[80] For the same reasons that juveniles are different from adults, this judgment is especially fraught for juveniles. Juveniles have an increased propensity for change and are more influenced by their surroundings then adults. Both factors make it incredibly difficult to actually judge when a juvenile is incorrigible. In a similar way to life without parole, lengthy minimum parole requirements, make an extreme judgment about the juvenile. Furthermore, juveniles who did not commit homicide show less of an inclination towards the depravity needed to judge a juvenile as incorrigible. For

78 *Graham*, 560 U.S. at 21.

79 *Id.* at 21.

80 *Id.* at 22.

this reason, "even if the States judgment…were later corroborated… the sentence [is] still disproportionate because the judgment was made at the outset."[81]

Lastly the Court considers rehabilitative justifications. In both *Graham* and *Miller*, the analysis on this point is easy. There is no opportunity for the juvenile to be released if they are sentenced to LWOP, so this "penalty forswears altogether the rehabilitative ideal."[82] This question deserves more consideration when the parole option is available but only after a lengthy amount of time. The punishment does not appear to so bluntly forswear the rehabilitative ideal at first glance, but upon closer inspection the same tenets emerge. Rehabilitation engenders a respect for those that are incarcerated, and that respect and hope enables change. If a juvenile cannot expect even an opportunity for release until they are in their late-fifties or later, how can that motivate change? They will not be motivated to pick up meaningful skills as they will be passed the age to start a career. They will not be encouraged to change for the potential of a family because they are past the standard age for marriage and kids. They will not be encouraged to change because they are given so little of their lives to demonstrate that change. More than that, they never had a chance for that life to begin with. Unlike adult offenders who already had a chance for an education and a career and a family, juvenile offenders often go to prison without even having a chance to complete a high school education. At fifteen or sixteen or seventeen they are put into prison until they are almost sixty, and what are their chances then? The Court recognized the impact of these types of sentences on rehabilitation in *Graham* when they wrote: "A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual."[83] Sentences with high minimum parole requirements for juveniles cannot be justified by rehabilitative arguments.

Lengthy parole requirements are not justified under retributivism, deterrence, incapacitation, or rehabilitation. This means that

81 *Id.* at 22.

82 *Id.* at 23.

83 *Id.* at 28.

these sentencing schemes serve no practical penological purpose. Given that the Court held in *Graham* that "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense", it becomes clear that lengthy parole requirements are cruel and unusual.[84]

F. Meaningful Opportunity for Release

The Court also articulated one other concern regarding sentencing for juveniles. Due to a juvenile's unique status, a juvenile must be allowed a meaningful opportunity for release. To be clear, this does not mean that a state is required to "guarantee eventual freedom to a juvenile offender."[85] Instead, the Court ruled that states are required to "give defendants like *Graham* a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[86] If a juvenile's first chance of release is in their late fifties, how can that be considered a meaningful opportunity for release? These juveniles lack skills that would be acquired outside prison. They also will have a very hard time entering the workforce upon release. They will have a criminal record, few marketable skills, and less time to devote to the workforce. They will have missed the traditional time to build a family. Even if they had a kid before going to prison, that child would be forty by the time they were released and they would have missed all chances to see their child grow up. They also would have no conception of the outside world. Consider all the technological and social changes that have occurred in the last forty years. Jimmy Carter was the President of the United States forty years ago. Those who truly should not be released because they are incorrigible, are not guaranteed release. They have to meet parole standards much like any other offender. All this rule would do is "forbid states from making the judgment at the outset that those offenders never will be fit to reenter society.[87] It gives them a chance to change and to have

84 *Id.* at 17.

85 *Id*. at 24.

86 *Id*. at 24.

87 *Id*. at 24.

that change translate into a meaningful opportunity for a life beyond the mistakes they made when they were a child.

IV. A Categorical Solution

Given that lengthy parole requirements for juvenile non-homicide offenders are unconstitutional, the Court could implement a variety of solutions. The Court should adopt a categorical rule against sentencing schemes that allow juveniles first chance of parole to be after thirty years of time served for non-homicide offenses. As stated in *Graham*, where the Court also adopted a categorical rule against LWOP for juveniles, "This clear line is necessary to prevent the possibility that… sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment."[88] That is not to say that a categorical rule has no problems. In *Graham*, the Court also recognized that "Categorical rules tend to be imperfect" nonetheless, they held that "one [was] necessary."[89] The fact that categorical rules are imperfect does not justify their exclusion as a solution. Instead, following the pattern of the Court, we have to look at the categorical rule in relation to other solutions.

One solution is to allow the Court to consider age as a mitigating factor in determining sentencing. Florida argued in *Graham* that this type of consideration met the standards of treating juveniles as different that was set out in *Roper*.[90] The Court held that while statutes that see age as a mitigating factor are praise-worthy, they are "nonetheless, by themselves insufficient to address the constitutional concerns at issue" because nothing in the "laws prevent[ed] the courts from sentencing a juvenile non-homicide offender to life without parole based on a subjective judgment" that the juvenile had "an irretrievably depraved character."[91] In lengthy minimum parole

88 *Id*. at 24.

89 *Id*. at 25.

90 *Id*. at 25

91 *Id*. at 17.

requirements for juvenile non-homicide offenders, the sentencing court must make a similar judgement. They must say that these people are so depraved that the earliest they should be released is at almost sixty years old. Also, this judgment is subjective because of juveniles' unique characteristics. It is very difficult to determine who is incorrigible. As stated in *Graham*, these discretionary rules are insufficient because they do not "prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability."[92] Namely, these rules do not do enough to protect juveniles from these unconstitutional sentences when they are not justified.

There is also the case-by-case approach in which the Court would give states strong guidance against the practice, but still allow it to be used based on a set of standards. In *Graham*, the Court also considered this approach, but ultimately concluded that even a case-by-case basis "must be confined by some boundaries."[93] Even if we assumed that there were cases where juveniles had sufficient maturity and sufficient depravity to warrant these severe sentences, it is not clear that courts could "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[94] Here again the analysis remains the same regarding lengthy minimum parole requirements for non-homicide offenses. There are likely the few that would deserve such an extreme sentence with no serious hope of rehabilitation, but as the Court noted there is no trustworthy way for courts to determine this at sentencing. Moreover, barring lengthy minimum parole requirements does not guarantee release of the more incorrigible offenders. It just provides juveniles who do demonstrate change and rehabilitation a meaningful chance for release. The Court acknowledged this in *Graham* when writing that "a categorical rule gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform."[95]

92 *Id*. at 26.

93 *Id*. at 27.

94 *Id*. at 27.

95 *Id*. at 28.

The last concern is unique to an inquiry into lengthy minimum parole requirements. Namely, why should the Court choose thirty as the cut off for the categorical rule? This test would be what is known as a bright-line standard where there is a clearly applicable standard that can be applied to all cases. The Court has ruled that when considering bright-line standards, the Court must weigh the costs and benefits of such an approach.[96] With lengthy minimum parole requirements for non-homicide juvenile offenders, the line must be set somewhere. For the Court to simply suggest a prohibition for lengthy minimum parole requirements with no clearly applicable standard, the issue would likely end up before the Court again later as lower courts differed on how to interpret the issue without a clear standard. Furthermore, as states crafted laws, they would have little to no guidance in how to avoid litigation on their statutes. By setting the line at thirty, both states and lower courts would have clear guidelines to follow.

The solution is not perfect. What if a state decided to set the minimum parole requirement at twenty-nine years, thus satisfying the bright-line rule? This does not seem to substantially differ from a law with a thirty-year requirement, but one would be perfectly legal and the other would be unconstitutional. This is a legitimate problem, and one would hope that states acting in good faith would not adopt these types of statutes. That being said, by choosing thirty as the line, the Court could mitigate some concerns. Thirty is at the lower end of a minimum parole requirement. A juvenile sentenced at seventeen would have their first chance for release at forty-seven. While this reflects the concerns raised above, it is not as serious as some of the forty or higher minimums allowed where release is offered when the same juvenile would be offered release at almost sixty. By picking the lower end of the scale, the Court could minimize the concerns with lengthy minimum parole requirements.

96 See e.g. Montego v. Louisiana, 566 U.S. 57, (2009) (the Court weighing the costs and benefits of the bright line rule in *Michigan v Jackson* which they determine to overrule).

V. CONCLUSION

The Court has now articulated in at least three different cases that juvenile offenders are constitutionally different and that this must be reflected in how courts sentence them. Lengthy minimum parole requirements for non-homicide juvenile offenders fail to adequately reflect juveniles' unique status. This sentencing scheme is also not nationally supported. In fact, only three states explicitly promote this type of sentencing for juveniles. Additionally, because of juvenile's unique status, the Supreme Court recognized that non-homicide juvenile offenders are categorically less culpable. Furthermore, this type of sentencing is also very severe. Under this sentencing scheme, a juvenile's earliest possibility for parole could be into their late fifties. This is well past the traditional time to have a family, get a career, or find their way in the world. This sentencing denies juveniles the hope that motivates change. Also, severe punishment, under the *Graham* and *Miller* reasoning, serves no practical penological purpose. Considering all of these facts together, it is clear that this type of sentencing denies juveniles the ability to change 'without giving hope of restoration."[97] Subsequently, the Court should hold that lengthy minimum parole requirements for non-homicide juvenile offenders are unconstitutional.

If lengthy minimum parole requirements for non-homicide juvenile offenders are unconstitutional, what guidance should the Court give lower courts in honoring this principle? The Court should adopt a categorical rule because it prevents the possibility that this unconstitutional sentence will be imposed on juveniles. A categorical rule works where a case-by-case approach would not because juveniles are uniquely hard to classify as the type of incorrigible offenders that warrant this type of extreme sentencing. A categorical rule prevents this faulty judgement from denying juveniles their constitutional rights. Furthermore, a categorical rule does not mean that incorrigible offenders are guaranteed release. If the parole board decides that they did not demonstrate meaningful change, they would still not be released. Thus, the categorical rule protects juveniles' rights

97 *Graham,* 560 U.S. at 19.

while still allowing for incorrigible juveniles to be held accountable. Setting the line at thirty gives a specific sentencing structure for lower Courts. Though not perfect, picking the lower end of the scale for lengthy minimum parole requirements still mitigates the constitutional concerns raised in sentencing.

The United States is unique in its juvenile sentencing. It is one of the few countries that has not ratified the Convention on the Rights of the Child set forth by the U.N. in 1989, and even with the Court's limitations, the United States is the only country that still allows for offenders under the age of 18 to be sentenced to life in prison without parole.[98] How a society treats children says important things about who they are. By holding that lengthy minimum parole requirements for juvenile non-homicide offenders are unconstitutional, the Court would honor children in a way that is constitutionally relevant.

98 Karen Attitah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?,* Wash. Post (Nov. 21, 2014), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?noredirect=on&utm_term=.c652c4c55a10.