

An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders.

I. INTRODUCTION

In 2005, the Supreme Court decided the case of *Roper v. Simmons* (2005), which held that the death penalty constituted cruel and unusual punishment when applied to juveniles. This was followed by the recent case of *Graham v. Florida* (2010), which proscribed life imprisonment for non-homicide crimes. This article argues that the abolition of juvenile life without parole in all cases constitutes a logical extension of the analytical framework enumerated in those cases. We make this argument by combining legal interpretation of the relevant Supreme Court precedents with sociological information on the nature of life imprisonment and how it affects juveniles.

In Part I of the article, we review the Supreme Court’s past jurisprudence on the question of the death penalty and life imprisonment, with particular focus on its application to juvenile life without parole and equivalent sentences.¹ We examine the reduced culpability of juveniles for their crimes and the similarities between the death penalty and LWOP as applied to juveniles. It is argued that the reasons used to invalidate the death penalty for juveniles are equally applicable to LWOP. Part II attacks the “death is different” rationale articulated in capital punishment jurisprudence as an untenable justification for the disparate treatment of juvenile LWOP cases. In both the death penalty and LWOP (sometimes called “death by incarceration”²), death is the

¹ We recognize that very long sentences—some sentences are effectively beyond the human lifespan—are the functional equivalent of life without paroles sentences. Our focus on sentences of life without parole is meant to capture all sentences that effectively preclude release from prison.

² See, for example, Johnson and McGunigall-Smith, 2008.

end result; that death, moreover, is in both instances hastened by the actions of the state. The question is whether the differences in these state actions is sufficient to support a distinction in the use of these sanctions with juveniles. Part III examines juvenile life without parole in an Eighth Amendment context by reviewing the criteria by which the Supreme Court determines the Constitutionality of a given punishment and applying these criteria to LWOP. We present a definition of what it means to be a human being, and use that definition to give concrete meaning to general Court pronouncements about punishment and human dignity. We conclude in Part IV by evaluating LWOP's comportment in light of the four legally recognized justifications for punishment: deterrence, retribution, incapacitation, and rehabilitation. We argue that subjecting juveniles to life imprisonment without the possibility of parole does not serve any penological justification other than retribution. The article concludes by weighing the retributive benefits of juvenile life without parole sentences against the loss of potential rehabilitative benefits, arguing that life without parole is an unduly harsh and hence cruel and unusual sanction when applied to juveniles.

II. JURISPRUDENTIAL OVERVIEW AS APPLIED TO JUVENILE LIFE WITHOUT PAROLE

A. Graham v Florida

In *Graham v. Florida*³ (2010), now the controlling Supreme Court case addressing sentencing juveniles to life without parole, the Court held that a juvenile cannot be sentenced to life imprisonment for a non-homicide crime. The case involved a juvenile who was sentenced to

³ 560 U.S. 832 (2010).

life imprisonment based on an armed robbery conviction. The Court found that juveniles were inherently immature and therefore less culpable for their criminal behavior. Furthermore, juveniles were recognized as malleable beings, whose characters had not been fully formed. The Court explicitly states that as compared to adult offenders, a "greater possibility exists that a minor's character deficiencies will be reformed."⁴ Clearly, this finding influenced the Justices to hold that a juvenile cannot be sentenced to life imprisonment for a nonhomicide crime. However, the severity of the crime committed does not change the nature of the finding: juveniles who commit homicides are still juveniles. A court cannot conclude that a given population, in this case juveniles, is capable of reform and then allow some of them to receive a punishment—life without parole—that precludes any possibility of reform. This is especially true since the Court noted in the same case that prisons often deny offenders sentenced to life without parole the opportunity to participate in any sort of rehabilitation programs.⁵ The Court thus cannot claim to be oblivious to the realities of life imprisonment, among which are the paucity of rehabilitative programs, especially for prisoners sentenced to life and other lengthy terms of confinement. By allowing a juvenile to be sentenced to life imprisonment, even for a narrow variety of crimes, we are essentially saying that society's interest in punishing a certain group of immature and hence marginally culpable people outweighs any efforts at rehabilitation, even when the odds of success are strong.

B. Past Jurisprudence Regarding Juvenile Culpability

⁴ *Id.* at 842.

⁵ *Id.* at 848.

Dating back to the 1982 case, *Eddings v. Oklahoma*⁶, the Court has observed that “(Y)outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”⁷ The Court expanded on this theme in *Roper v. Simmons*⁸ (2005). It declared that juveniles manifest “a lack of maturity and an underdeveloped sense of responsibility.”⁹ The Court acknowledged that juveniles are more vulnerable, and hence susceptible to negative outside influences.¹⁰ Most importantly, the Justices found that the actions of juveniles are not the result of depravity. Writing for the Majority in *Roper*, Justice Kennedy stated that

“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”¹¹

This body of jurisprudence supports the conclusion that juveniles “cannot with reliability be classified among the worst offenders,”¹² and formed the basis for a decision exempting juveniles from the death penalty. Such arguments apply with equal force to the sentence of life imprisonment. This is particularly true since the Court has made findings about life imprisonment as applied to juveniles that indicate the comparability of the sanctions.

⁶ 455 U.S. 104 (1982).

⁷ *Id.* at 115.

⁸ 543 US. 551 (2005).

⁹ *Id.* at 569.

¹⁰ *Id.* at 598.

¹¹ *Id.* at 570.

¹² *Id.* at 569.

C. Relevant Similarities Between Death and Life Imprisonment

In *Graham*, the Justices observed that the “sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration.”¹³ Typically, “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”¹⁴ For many juveniles, this can mean spending sixty to seventy years behind bars. Thus, an irrevocable life sentence is more accurately described by Johnson and Tabriz as “death by incarceration.”¹⁵ In both death by incarceration and death by execution, Johnson and Tabriz contend,

“death is the intended and expected outcome of the sentence. With both sanctions, death is untimely because it is hastened by the actions of the state. These deaths are also undignified, occurring with the stigma of dying in the intrinsically degrading conditions of America’s maximum security prisons.”¹⁶

The emphasis on irrevocability mimics the “death is different” rationale that is offered in support of limitations on the death penalty. Life sentences for juveniles are akin to a death sentence because these sentences halt the juveniles’ development before their characters are formed to the point that they can meaningfully take responsibility for their crimes. Note that in *Roper*, the death penalty was precluded because execution prevents the juvenile from achieving “a mature understanding of his own humanity” before he is put to death.¹⁷ Similarly, a life sentence essentially precludes any chance of molding offenders into productive human beings

¹³ *Graham, supra*, at 842.

¹⁴ *Id.* at 843.

¹⁵ Robert Johnson and Sonia Tabriz, *Death By Incarceration As A Cruel and Unusual Punishment When Applied To Juveniles: Extending Roper To Life Without Parole, Our Other Death Penalty*, UNIVERSITY OF MARYLAND LAW JOURNAL OF RACE, RELIGION, GENDER, AND CLASS 9, 2 (2010).

¹⁶ *Id.* at 248.

¹⁷ *Roper, supra* at 574.

who have a mature understanding of their own humanity, given the destructive and often adolescent quality of prison life. As Johnson and Tabriz have observed,

“Prisons are not settings of forgiveness. Nor are they settings in which young persons can mature into responsible, moral adults. Prisons are monuments to punishment and exclusion, and the code of life in prison embodies the exact sort of immaturity, impulsivity, and aggression that the Court in *Roper* claims that juveniles may overcome if given suitable punishments.”¹⁸

Furthermore, even within the pool of life sentence inmates, the Court has found that juveniles are treated more harshly than their adult counterparts because of the disproportionate amount of time that they actually spend in prison.¹⁹ This means that the longest sentences are given to those with the greatest chance of contributing to the world beyond the confines of prison. In essence, *Graham* stands for the proposition that juvenile offenders must be given some meaningful chance to demonstrate reform.²⁰ Life sentences do not allow for this chance. Furthermore, unlike adults, juveniles have not had the benefit of extensive maturing life experiences in the free world. They often have far more years ahead of them than an adult prisoner convicted of a comparable crime. Yet, their sentence is still measured by the yardstick of life. The added severity of LWOP when applied in these circumstances was explicitly recognized by the Court. In *Graham*, the Justices observed that

“Life without parole is an especially harsh punishment for a juvenile. 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. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”²¹

¹⁸ Johnson and Tabriz, *supra*, at 251.

¹⁹ *Graham*, *supra*, at 842.

²⁰ *Graham*, *supra*, at 845.

²¹ *Graham*, *supra*, at 844.

With the abolition of parole in the federal system and most state systems²², a life sentence truly does mandate a life of punitive and oppressive incarceration. While it is theoretically possible to alter the terms of a life sentence, those facing such a punishment lack avenues of mandatory appellate review currently available to death penalty recipients. This remains true even though death by incarceration is currently the most severe punishment available for juvenile offenders. Moreover, studies cited by Johnson and Tabriz demonstrate that when life without parole sentences are reviewed on appeal, they are modified far less frequently than are death sentences.²³ Thus, they are quite right to describe life sentences as “a civil death,”²⁴ by which juvenile “prisoners are slated to spend the remainder of their natural lives behind bars, gaining release only upon their deaths.”²⁵

III. “DEATH IS DIFFERENT” IS A MISNOMER: LIFE IMPRISONMENT WITHOUT PAROLE AND THE DEATH PENALTY ARE COMPARABLY SEVERE

While the Supreme Court has consistently differentiated between the protections accorded those sentenced to death and those sentenced to life imprisonment on the basis of the rationale that “death is different,” this phrase is a misnomer. Whether one receives a death sentence or a sentence of life without the possibility of parole, death will be the ultimate result.

²² Petersilia, J. (2003). *When prisoners come home: Parole and prisoner reentry*. New York, NY: Oxford University Press, pages 65 (widespread abolition of parole in the states); page 68 (federal parole abolition).

²³ JAMES S. LIEBMAN, JEFFREY FAGEN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITALCASES, 1973-1995*, ii-iii (2000).

²⁴ Johnson and Tabriz, *supra*, at 245.

²⁵ *Id.*

Furthermore, in both instances, death is caused by the percipient actions of the State. As Johnson and Tabriz have observed, “Offenders sentenced to death by incarceration, like prisoners condemned to death by execution, experience a final and irrevocable sentence that culminates in deaths that are untimely and undignified.”²⁶ Thus, the result of death does not demarcate the difference between these punishments. The more accurate statement is that “execution is different.” When given a sentence of life without parole, death will inevitably result. However, only with death sentences does the State affirmatively undertake to execute a person. Therefore, the relevant question is whether this distinction constitutes a sufficient difference to allow the imposition of a life without parole sentence, based on the assertion that it is a lesser punishment, solely because the convict is not executed.

This view was expressed as recently as 2010 in *Graham*. Chief Justice Roberts castigated his colleagues for abandoning the position taken in *Roper*, which justified disallowing the death penalty for juveniles, partially on the ground that less severe punishments, such as life imprisonment, would remain available. Though writing in concurrence with the judgment, Roberts opposed the imposition of a categorical rule against life without parole in non-homicide cases.

“(T)reating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that ‘the death penalty is different from other punishments in kind rather than degree.’ It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are ‘less severe than death’ despite involving ‘forfeiture of some of the most basic liberties.’ 543 U. S., at 573–574. Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders. *Id.*, at 572.”²⁷

²⁶ Johnson and Tabriz, *supra*, at 246.

²⁷ *Graham*, *supra*, at 856.

Yet, research by Johnson and McGunigall-Smith demonstrates that the suffering experienced by those sentenced to life without parole is at least comparable and often worse than that experienced by those sentenced to death.²⁸ By its very terms, the sentence requires a permanent loss of liberty. Yet, it entails pain on a much deeper level than a loss of freedom. Prison deprives its occupants of the autonomy to make even the simplest choices that might influence the course of their lives. Freedom from prison is the central goal and aspiration of life-sentence prisoners, yet nothing they do in prison can in any way make the attainment of that goal possible. Beyond that fundamental insult to their autonomy, the essentials of daily life are regimented in prison, captured in a routine that never changes, preventing prisoners from doing anything of consequence with their profoundly circumscribed lives. Johnson and McGunigall-Smith's research suggest that lifers live in an existential vacuum. Without the hope of joining the larger society—tellingly called “the real world” by many life-without-parole prisoners²⁹—their lives are denied larger meaning or purpose.³⁰ Lifers are usually kept in maximum security or super max prisons that are devoid of any sort of vocational opportunities. Indeed, the building of skills must seem superfluous if one is never to see the outside world. According to Johnson and McGunigall-Smith, a central feature of a prison's oppressive reality is one of unceasing loneliness.

"The prisoner is permanently separated from his family and other loved ones, and with this separation comes a profound and growing sense of loss..."³¹ Lifers know that family ties are apt

²⁸ Robert Johnson and Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, THE PRISON JOURNAL 88, 2 (2008).

²⁹ See, for example, Erin George, *A Woman Doing Life* (Oxford University Press, 2010) at page 230; and Victor Hassine, *Life Without Parole: Living and Dying in Prison Today* (Oxford University Press, 2011; forthcoming) at page 75.

³⁰ *Johnson and McGunigall-Smith, supra.* at 336-339.

³¹ *Id.* at 337.

to wither over time and that family members, notably their parents, are likely to die while they are still alive in prison. Loss of a parent can be a terrible blow...³² The life sentence inmate must face the painful fact that one day he may be entirely alone, bereft of outside support or concern.”³³

There is little or no opportunity for mental or emotional development because the prison routine does not provide for anything other than perpetual confinement, punctuated by degrading bodily searches. This is particularly troublesome if the sheer fact of a prisoner’s young age has rendered it impossible for him to fully develop in the first place. Johnson and McGunigall-Smith provide a chilling summary of the essence of the prison experience:

“Prisons are experienced by inmates as settings of deprivation. Locking people up means locking them away from the free world with its variety and opportunity that is now replaced with a deadening routine of lock-ins and lock-outs, of group feedings and group movements; it means locking people away from loved ones who are now replaced by strangers and keepers, few of whom even know their names let alone care about them; it means locking prisoners away from the many simple things we all enjoy, like good food eaten in good company and moments of treasured privacy. The life of the lifer is made up of many small losses, which accumulate and leave the prisoner with a sense that he (or she) has no dignity or worth as an individual...³⁴ All prisoners, not only lifers, are held in a kind of suspended animation, the social equivalent of a coma, while the rest of the world changes and evolves. The free world is dynamic, the prison world static.”³⁵
The cumulative effect of all this is often too much for prisoners.

The profoundly stultifying effects of imprisonment are evidenced by the fact that of the 1,099 people executed in this country, 123 of them, or 11%, "volunteered" to be executed by dropping their appeals.³⁶ For this sizeable minority, death in the execution chamber is preferable to life on death row. This is true despite Johnson and McGunigall-Smith’s finding that many death rows

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 339.

³⁵ *Id.*

³⁶ *Id.* at 333.

actually offer better conditions of confinement, or at least living conditions that are no worse, the traditional, maximum security environments of those sentenced to life imprisonment.³⁷

Those sentenced to life in prison without parole do not have any legal means of alleviating their suffering, even if they conclude, as did the execution volunteers, that death is preferable to their current existence.

It should also be noted that all of the foregoing research findings were written in the context of adult prisoners. The ramifications of life imprisonment are doubtless even greater for juveniles, who lack the emotional maturity or capabilities necessary to cope. Furthermore, their youth means that they have much less experience of life in the outside world with which to compare their incarceration. Any juvenile sentenced to life imprisonment without the possibility of parole has no hope of release. They are guaranteed to spend more time in prison than they did in the outside world. Since some juveniles are as young as thirteen when they are incarcerated, the passage of years may mean that prison is all they can clearly remember. For the juvenile who serves long years of confinement as a lifer, prison becomes life as he or she knows it.

³⁷ *Id.* This is the case because death rows tend to be small, highly controlled, and insulated from the pressures of overcrowding that afflict other settings not limited by purpose to a given population of prisoners, as is true of death rows, which are by definition and practice limited to condemned prisoners. See McGunigall-Smith and Johnson (2009) for a discussion of death rows and comparable restrictive housing units in prison. [Escape from Death Row: A Study of “Tripping” as an Individual Adjustment Strategy Among Death Row Prisoners SANDRA MCGUNIGALL-SMITH, ROBERT JOHNSON. 6 *Pierce Law Review* 3. 533-545.

IV. JUVENILE LIFE WITHOUT PAROLE IN AN EIGHTH AMENDMENT CONTEXT

From the very first relevant death penalty case of *Furman v. Georgia*³⁸ (1972), the Court has stated that the meaning of the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"³⁹ (*Weems v. United States*). Furthermore, the Court has steadfastly endorsed Chief Justice Warren's conclusion in *Trop v. Dulles* (1958), that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁰ In *Atkins v. Virginia*⁴¹ (2002), the Court stated that these conceptions of decency are to be judged not by historical standards, but rather by "those that currently prevail."⁴²

When assessing standards of decency, it is helpful to refer to conclusions drawn by the Justices in past cases. In his opinion in *Furman*⁴³, Justice Brennan cites *Trop*⁴⁴ in holding that

³⁸ 408 U.S. 238.

³⁹ 217 U.S. 349, quoted in *Furman* at 242.

⁴⁰ 356 U.S. 86, quoted in *Furman* at 242.

⁴¹ 536 U.S. 304.

⁴² *Id.* at 311.

⁴³ *Furman v. Georgia* was the first case to find the death penalty unconstitutional. There was no majority opinion. Instead, each Justice wrote a separate opinion. Several of these opinions articulated broad themes regarding the legitimacy of the death penalty, the legitimate goals of punishment, and the proper method of analyzing punishments under the Eighth Amendment. While these opinions did not have controlling weight in this particular case, many of the themes articulated therein would reemerge in later Eighth Amendment jurisprudence.

⁴⁴ In *Trop*, the Supreme Court ruled that loss of citizenship was an unconstitutionally cruel and unusual punishment for desertion of the Armed Forces during wartime. The Court ruled that a punishment may be cruel and unusual simply by being disproportionate to the crime for which it is given. This case also definitively established that the concept of "cruel and unusual punishments" is not static. Rather, the applicability of the phrase to a given punishment must be judged according to "evolving standards of decency." This criteria is still used today.

the Eighth Amendment constitutes a broad prohibition against “inhumane treatment”⁴⁵ as manifested in “inhuman and uncivilized”⁴⁶ punishments. These prohibitions are animated by “nothing less than the dignity of man.”⁴⁷ This inherent dignity undergirds the conviction that “the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”⁴⁸ This intrinsic worth protects humans from punishments that are “degrading”⁴⁹ to their dignity. When analyzing whether a punishment runs afoul of these prohibitions, Justice Brennan enumerates two guidelines that are especially useful in the context of evaluating a life imprisonment sentence. He states that “a punishment may be degrading simply by reason of its enormity.”⁵⁰ Tied to this is his conclusion that “if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary, and therefore excessive.”⁵¹ This finding is certainly applicable when the State chooses to inflict a final, and as a practical matter, irrevocable punishment on a marginally culpable convict, rather than providing a punishment that serves the legitimate purpose of evincing moral disapproval of criminal conduct without barring all opportunities for rehabilitation.

Future cases put forth similar themes. The majority in *Roper* stated that “[By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the

⁴⁵ *Furman*, *supra*, at 270.

⁴⁶ *Id.* at 282.

⁴⁷ *Id.* at 270.

⁴⁸ *Id.*

⁴⁹ *Id.* at 271.

⁵⁰ *Id.* at 273.

⁵¹ *Id.* at 280.

government to respect the dignity of all persons.”⁵² As recently as last year, in *Graham*, the Court observed that the State had a duty to “respect the human attributes”⁵³ in everyone. Thus, prior precedent makes quite clear that even those who commit the worst crimes imaginable do not forfeit the right to respect for their inherent worth and dignity as human beings. By basing decisions regarding punishment upon this fact, the Court is implicitly acknowledging the truth of Justice Brennan's contention that the Eighth Amendment is a shield protecting the dignity of even the worst among us.

Yet, although the Court frequently makes Eighth Amendment determinations based upon findings regarding “decency” or “the dignity of man,” it has not defined these terms, nor cited a definition that it considers authoritative. Therefore, it is difficult to apply the terms as definable legal concepts. Some guidance may be found in Johnson's definition of humanity enunciated in his book, *Death Work*.⁵⁴ Johnson divides humanity into several components. Specifically, Johnson’s claim is that “the essence of personhood or humanity is a sense of self that conveys the capacity and moral right to make choices and hence be self-determining. Self-determination, in turn, both finds expression in and presupposes... some degree of (1) autonomy, defined as the capacity to influence one’s environment and hence shape one’s fate; (2) security, defined as the capacity to find or create stability in one’s world and hence shelter oneself from harm; and (3)

⁵² *Roper, supra*, at 560.

⁵³ *Graham, supra*, at 835.

⁵⁴ Robert Johnson, *Death Work: A Study of the Modern Execution Process (Contemporary Issues in Crime and Justice)* (1996).

relatedness to others, defined as the capacity to feel for oneself and others and hence to have caring and constructive relationships.”⁵⁵

Johnson draws these dimensions from seminal works in the humanities and social sciences. Such distinguished philosophers as Ernst Cassirer and Herbert Morris “have identified the capacity to reason and hence to be responsible for ourselves as the *sine qua non* of personhood.”⁵⁶ Abraham Maslow and other existential psychologists “have seen security as the essential psychological precondition to the unfolding of human nature, observing that without stability and safety in one’s world, self-determination would give way to determination by external forces.”⁵⁷ A host of scholars, including such luminaries as philosopher John Dewey and anthropologist Lewis Mumford “have seen relatedness to others—to things outside ourselves and, more specifically, to other people—as basic to our nature as social animals that exercise self-determination through self-defining transactions with the world.”⁵⁸ Autonomy, security, and relatedness to others develop “in interaction with one another as individuals become persons.”⁵⁹ In a sense, “[E]ach individual makes over the life-course of the [human] species and achieves a character and becomes a person. The more fully he organizes his environment [autonomy], the more skillfully he associates in groups [security], the more constantly he draws on his social

⁵⁵ *Id.* at 204.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Johnson, *supra*, at 204-205.

⁵⁹ Johnson, *supra*, at 205.

heritage [relatedness], the more does the person emerge from society as its fulfillment and perfection.”⁶⁰

Clearly, to create conditions antithetical to the exercise of these characteristics cannot be considered "decent" or demonstrative of respect for the "dignity of man," because to create such conditions is essentially to deny and suppress a person's humanity. The effect of such conditions was demonstrated empirically by the social scientist Hans Toch. Toch studied the experiences of hundreds of inmates who endured psychological breakdowns in various types of prison settings across the country. He found that the absence of the aforementioned dimensions of humanity, "that is, impotence instead of autonomy, fear instead of security, and isolation instead of relatedness—interacted with one another so as to provoke 'existential questions' that influenced 'crises of every kind in every setting' and ultimately represented 'universal motives' associated with human despair.”⁶¹ This demonstrates that the manner in which we treat prisoners in highly restrictive settings, such as those faced by lifers, create circumstances that are neither decent nor dignified⁶².

V. JUVENILE LIFE WITHOUT PAROLE IS NOT JUSTIFIED BY LEGITIMATE PENOLOGICAL GOALS

With the Court's words as a guide, one must consider whether sentencing juveniles to life imprisonment can ever accord with our prevailing sense of decency. All of the cases relating to

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² For a detailed discussion of what a decent prison would look like, see Robert Johnson's *Hard Time: Understanding and Reforming the Prison* (Wadsworth, 2002; 3rd edition), especially chapter one.

criminal sanctions make clear that they must serve one or more of the four legitimate ends of punishment in order to abide by the Eighth Amendment. These ends are retribution, incapacitation, deterrence, and rehabilitation. LWOP fails on three of these fronts.

One need not expend any effort to realize that the punishment of life imprisonment serves the end of retribution. On its face, the punishment also serves the goal of incapacitation. Yet, previous punishments defended on the grounds of incapacitation have been struck down on the basis of findings that a lesser punishment would serve that goal equally well.⁶³ In order to justify incapacitation as the reason for a life sentence in the case of a juvenile, one must accept the premise that he or she is so depraved as to be beyond the curative efforts of rehabilitation.⁶⁴ In *Roper* and *Graham*, the Court has explicitly acknowledged that the immaturity and vulnerability of juveniles impede the full formation of their characters and render it impossible to determine whether their crimes are the product of true depravity. As Johnson and Tabriz note, “juveniles are immature through no fault of their own; their personalities are works in progress.”⁶⁵ All of this has led to judicial recognition that juveniles are categorically less culpable than adults who committed similar crimes. Most importantly, juveniles have been proven to be more receptive to rehabilitation than their older counterparts.⁶⁶ Given these findings, it seems impossible to conclude that juveniles are so irredeemable that draconian measures are justified in order to ensure their permanent confinement.

Clearly, the interest of deterrence is only effective if it will prevent a convict from committing future crimes and will inspire others to abstain from the commission of crimes. Yet,

⁶³ *Roper, supra*, at 572.

⁶⁴ *Graham, supra*, at 844.

⁶⁵ Johnson and Tabriz, *supra*, at 244.

⁶⁶ *Graham, supra*, at 845. (citing Brief for J. Lawrence Aber et al. as *Amici Curiae* 28-31).

the Court has accepted the assertion that juveniles suffer from greater impulsivity than their adult counterparts and often demonstrate a profound inability to exercise reasoned judgment and anticipate the consequences of their actions. In fact, when analyzing the legitimacy of the State's deterrence interest in *Roper*, the Court endorsed the proposition that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”⁶⁷ With this finding, the Court acknowledges that juveniles will not experience the benefits of any deterrent effect that a punishment might have. Indeed, as Johnson and Tabriz note, when compared to the death penalty, “[d]eath by incarceration involves a death in prison that will be, in many cases, even more distant in time, and hence more abstract and psychologically remote to juveniles than death by execution.”⁶⁸

Finally, a deterrence justification also fails. This is not because juveniles are so evil that they are consciously willing to disregard any potential deterrent effect of a punishment, but rather because juveniles suffer from deficiencies of maturity. A person who has not had the opportunity to fully live life cannot be blamed for being underdeveloped. Indeed, some of this underdevelopment is an expression of incomplete neurological development, for which no person is culpable. Yet, it is this lack of development that renders juveniles categorically unable to conduct a rational calculus and be deterred from crime as the result of some cost-benefit analysis. An exceedingly severe punishment will lack any deterrent effect upon either the juveniles who suffer said punishment, or future potential juvenile criminals who may hear of it. Thus, deterrence cannot be offered as a defense for life imprisonment in the case of juveniles.

⁶⁷ 487 U.S. 815, quoted in *Roper*, at 572.

⁶⁸ Johnson and Tabriz, *supra*, at 249.

This leaves retribution as the sole interest served by a sentence of life imprisonment for juveniles. The utility of retribution does not stem from any positive affects upon convicts. Retribution does nothing to reform a convict. It is limited to the service of the public. The best defense of retribution was offered in the case of *Gregg v. Georgia*⁶⁹ (1976), which affirmed the constitutionality of the death penalty. In that case, a majority of the Court concluded that retribution was a legitimate means of expressing moral condemnation of criminal conduct and channeling the natural human instinct toward revenge in a manner that prevents vigilantism.⁷⁰ Thus, retribution is a palliative to the irrational excesses of emotion. Giving massive sentences makes people feel better. Retributive sentencing will do nothing for the convict, unless it can be coupled with a strong deterrent effect. Yet, the Court has found that juveniles are not susceptible to the positive effects of deterrence. More importantly, the Court has emphatically stated that retribution is insufficient as a justification for punishment of those whose culpability and moral blameworthiness are significantly lessened. Juveniles have already been spared the death penalty based upon an explicit finding of reduced culpability and blameworthiness. In short, when applied to juveniles, society is far less justified in the sense of rage and moral indignity that it feels upon the commission of a crime. Therefore, the question becomes whether the mere act of placating a disgruntled citizenry is sufficient to deprive a juvenile of any chance to develop into a full human being, benefit from rehabilitation, and atone for his crime through future contributions to his fellow man.

To answer this question, one must understand what is lost by denying juveniles any chance of rehabilitation. When they commit crimes, these children do not have the benefit of a

⁶⁹ 428 U.S. 153.

⁷⁰ *Id.* at 187.

fully formed character. In this condition, the crime cannot be said to be the product of an incurably depraved person. Rather, juveniles are inherently malleable. That is what makes them more amenable to rehabilitation. Rehabilitative efforts still retain the potential to mold a juvenile's character in a positive manner. Many juveniles end up in prison precisely because they have never been exposed to positive role models or influences. Rehabilitative efforts in a prison setting, when they materialize, may very well be the first time that juveniles meet people dedicated to constructively addressing their deficiencies and nurturing their positive attributes. Yet, as Johnson and Tabriz state, "Prisons are monuments to punishment and exclusion and the code of life in prison embodies the exact sort of immaturity, impulsivity, and aggression that the Court in *Roper* claims that juveniles may overcome if given suitable punishments."⁷¹

These conditions would be traumatic for anyone. Yet, they are much worse for juveniles sentenced to life without parole. Juveniles serving LWOP have no hope of ever experiencing any positive consequences of maturation, or gaining a feeling of remorse. Their fate is sealed before they have even fully grown up. More importantly, the existence of a life sentence is the dispositive factor in determinations of whether a prisoner is eligible for rehabilitative services. By establishing this unilateral distinction, society ensures that even a hardened adult recidivist serving a lengthy sentence short of life will have a better chance of positive growth by virtue of their access to rehabilitative services than will a juvenile serving a life term without the possibility of parole⁷². Juvenile lifers will never receive such access, no matter how much they may deserve it by virtue of age or capacity to mature.

The very circumstances of life imprisonment preclude the possibility of personal

⁷¹ Johnson and Tabriz, *supra*, at 251.

⁷² John Irwin examines the reformatory power of hope among lifers who are eligible for parole. See John Irwin, *Lifers: Seeking Redemption in Prison* (Routledge, 2009)

development for juveniles, much less their rehabilitation. Without rehabilitative efforts, it is impossible for juveniles to mature and grow. Their development as human beings essentially ceases upon their entrance into prison. Johnson and Tabriz have provided a vivid description of the emotional impact of a life sentence upon juvenile offenders.

“As they age, juveniles serving life without parole can become more emotionally stable within the highly structured routine of prison life, but they typically do not become more emotionally mature and autonomous; if anything, lifers become less emotionally mature and autonomous and more dependent on prison routine to manage their daily existence. They live on the surface of things, by routine and rote; their lives are superficial, which is why lifers seem not to mature emotionally as the years pass. They typically get through each day on ‘automatic pilot,’ with little thought or reflection. Prisons can be compared to a deep freeze in the sense that personal autonomy—the capacity for mature self-management—stops at the point of entry into prison.”⁷³

In *Roper* and *Graham*, the Supreme Court has recognized that juveniles are capable of reform and rehabilitation. Yet, life imprisonment denies them this opportunity.

This most severe punishment literally gives up on a human being who faces diminished culpability and has yet to fully mature. More than simply abandoning juveniles on the basis of retribution, the government does not even take precautions to shield them from the population of hardened adult criminals. Like all of those sentenced to life imprisonment, most juveniles facing this penalty are placed directly into adult prisons⁷⁴. All of this can prove the assertion that

⁷³ Johnson and Tabriz, *supra*, at 251-252.

⁷⁴ [75] Adult lifers are placed directly into maximum-security prisons as a matter of course. There is no research published to date on the security level of the prisons to which juvenile serving LWOP are placed. As a practical matter, these juveniles would go to maximum- or medium-security institutions (escape from minimum-security institutions is simply too easy, precluding their use with lifers). Ironically, juveniles may be safer in maximum-

denying juveniles rehabilitative services in this context will not only fail to help them, it will relegate them to an environment in which they will be surrounded by negative influences. This will virtually ensure that they will become the very sort of incurable, depraved criminals who allegedly deserve retributive sentences in the first place.

All of these facts must be balanced against the benefits of using retributive sentences as a balm to calm the citizenry. In his dissent in *Gregg v. Georgia*, Justice Marshall stated that the “mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty.”⁷⁵ The same can be said for life imprisonment. While this view was expressed in dissent, it reflects the discomfort felt by a majority of the Justices for punishments based solely upon retribution. However, in this context, retribution is the only ground offered in support of life imprisonment. Moreover, retribution must contend with numerous counter factors that argue for an increased emphasis on rehabilitation. Outside of the criminal context, the State recognizes the immaturity and vulnerability of juveniles by the assertion of broad powers in support of a duty to ensure their welfare. A strictly retributive approach is not consonant with this duty. A societal need to express moral disapproval is insufficient to justify abandoning a child and denying them means for reform before they have ever had the chance to gain life experience and maturity. This purely punitive approach fails to acknowledge the dignity of these uniquely fragile human beings and subjects them to the kind of

security prisons since those settings, though oppressive, tend to be highly controlled. Medium-security prisons, by contrast, often feature dormitory housing (maximum-security prisons feature cells) and fairly fluid movements of prisoners within their secure perimeters (movement is sharply restricted in maximum-security prisons). Dorm living and prisoner movement can make medium-security prisons hard to control and may subject juveniles to more predation than they would experience in the higher security institutions. For a wide-ranging discussion of differing prison environments and their effects on adjustment, see Robert Johnson, *Hard Time: Understanding and Reforming the Prison* (Wadsworth; 3rd edition) (2002), especially the section on “Living in Prison.”

⁷⁵ *Gregg, supra*, at 240.

“pointless infliction of suffering”⁷⁶ (*Furman*) that is proscribed by the Eighth Amendment. The Court has explicitly found that juveniles are less culpable and more capable of change. The State cannot give force to this truth by subjecting its most vulnerable citizens to a punishment that presupposes mature culpability and an inability to change.

VI. CONCLUSION: JUVENILE LIFE WITHOUT PAROLE SHOULD BE PROSCRIBED IN ALL CASES

Life imprisonment for juveniles is incompatible with the Supreme Court's own findings as described herein. These findings have been deemed sufficient to proscribe the death penalty for juveniles and the imposition of life imprisonment in non-homicide cases. No empirical evidence is available to demonstrate why these findings should not underpin a rationale for the elimination of life imprisonment for juveniles in all cases. The nature of the crime does not change the fact that a juvenile's character is not fully formed, that they suffer from unique impairments that reduce their culpability, and that they remain able to change with rehabilitation. When addressing life imprisonment for nonhomicide crimes, the Court endorsed the need for rehabilitation by stating that

“{t}he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation⁷⁷” (*Graham*).

The severity of a juvenile's crime does not vitiate the truth of this statement. The Court in *Graham* seems to imply that life sentences might be appropriate for those who are convicted

⁷⁶ *Furman*, *supra*, at 312.

⁷⁷ *Graham*, *supra*, at 848.

of the crime of murder, a uniquely serious crime that the Court appeared to view as a marker of depravity.⁷⁸ The crime of homicide is a uniquely serious crime, to be sure, but as made clear by Johnson and Tabriz, there is no empirical evidence supporting the claim that the crime of murder, in and of itself, is an indicator of depravity for juveniles.⁷⁹ Juveniles convicted of murder, as noted above, remain juveniles.

The Court has previously manifested distrust for the corruptive power of retributive influences, creating a categorical rule against application of the death penalty to juveniles rather than allowing juries to weigh mitigating evidence on a case-by-case basis. The Court should follow the same course of action with regard to life imprisonment. This represents a logical application of the findings they have already made, as discussed at length in this article.

No life can be fully judged on the basis of less than 18 years. No child deserves to be abandoned. Every juvenile offender must be given the opportunity to demonstrate positive change. To “deny them even the opportunity to be heard by a parole board,” state Johnson and Tabriz, “is to ignore the most basic premise upon which the Court in *Roper* ruled.”⁸⁰ That premise—simple, clear, and compelling—is this: “When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”⁸¹ Life imprisonment abruptly closes the book before the final chapter has been written.

⁷⁸ Robert Johnson and Sonia Tabriz, *No Child Convict Left Behind: Reflections on Graham v. Florida*, Legal Commentary For Prison Reform (2010), available at <http://www.endjlwop.org/voices/perspectives>

⁷⁹ *Ibid*, page 2

⁸⁰ Johnson and Tabriz, *supra*, at 251.

⁸¹ *Roper*, *supra*, at 574. Quoted in Johnson and Tabriz, *supra*, at 251.

