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Meaningless Opportunities: Graham v. Florida and the Reality of de Facto LWOP Sentences

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Comments

Meaningless Opportunities: *Graham v. Florida* and the Reality of de Facto LWOP Sentences

Mark T. Freeman*

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I. INTRODUCTION

Every year, thousands of American teenagers are arrested and tried as adults.¹ In 2011, state prisons across the country housed almost two thousand juvenile offenders.² Many of these young offenders serve for only a few years.³ But Victor Mendez was not so lucky.⁴ In 2007, when he was sixteen, Mendez and other members of the Los Angeles Blythe Street Gang carjacked a green Chevrolet Lumina and took it for a spin.⁵ Mendez parked the car, threatened some bystanders with a gun, and took their wallets.⁶ A jury ultimately convicted Mendez of carjacking, assault with a firearm, and “seven counts of second degree robbery.”⁷ The trial court sentenced Mendez to state prison—for eighty-four years.⁸

Mendez’s lengthy prison sentence raised Eighth Amendment concerns.⁹ Notably, the Supreme Court of the United States had recently ruled in *Graham v. Florida* that a state could not sentence juvenile offenders who committed nonhomicide crimes to life imprisonment without the possibility of parole (LWOP).¹⁰ Justice Kennedy, writing for the majority, also explained that a state must give defendants “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹¹

While Mendez had not received an *actual* LWOP sentence, he argued that because his decades-long sentence exceeded his natural lifespan, it was a *de facto* LWOP sentence, one that was functionally equivalent to the kind of sentences condemned by the Supreme Court.¹² A California appellate court agreed and held that Mendez’s *de facto* LWOP sentence was cruel and unusual punishment

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1. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 33 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (on file with the *McGeorge Law Review*).

2. *Id.*

3. From 1985 to 1997, the average juvenile offender served a minimum of five years, and the average maximum sentence for violent crime was eight years. KEVIN J. STROM, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF STATE PRISONERS UNDER AGE 18, 1985–97, at 1 (2000).

4. See *California v. Mendez*, 114 Cal. Rptr. 3d 870, 873 (Ct. App. 2d Dist. 2010) (discussing Mendez’s lengthy sentence).

5. *Id.*

6. *Id.* at 874.

7. *Id.* at 873.

8. *Id.*

9. *Id.*

10. 130 S. Ct. 2011, 2030 (2010).

11. *Id.*

12. *Mendez*, 114 Cal. Rptr. 3d at 882.

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because he did not have a meaningful opportunity to seek release during his lifetime.¹³

Mendez and a few other juvenile offenders successfully challenged their de facto LWOP sentences by invoking *Graham*'s general principles.¹⁴ But most juvenile offenders who have sought relief from their lengthy sentences under *Graham* have failed.¹⁵ Indeed, as this Comment goes to press, only a handful of courts, including the California Supreme Court in 2012, have held that de facto LWOP sentences for juveniles who commit nonhomicide offenses are cruel and unusual.¹⁶

This Comment argues that de facto LWOP sentences for juveniles who commit nonhomicide offenses categorically violate the Eighth Amendment's ban on cruel and unusual punishment. For purposes of this Comment, I define a "de facto LWOP sentence" as a term-of-years sentence that serves as the "functional equivalent of a life without parole term,"¹⁷ in effect, a sentence that offers the possibility of parole in name only. Part II provides a brief overview of the Supreme Court's Eighth Amendment jurisprudence and how lower courts have responded to *Graham*. Part III explains why de facto LWOP sentences for juveniles who commit nonhomicide crimes fail the Supreme Court's traditional Eighth Amendment tests and argues for a categorical ban against these sentences.

13. *Id.* at 886.

14. *See, e.g.*, *California v. Nuñez*, 125 Cal. Rptr. 3d 616 (Ct. App. 3d Dist. 2011) (invalidating a 175-year-long sentence for a juvenile who committed aggravated kidnapping); *California v. J.I.A.*, 127 Cal. Rptr. 3d 141 (Ct. App. 4th Dist. 2011) (holding unconstitutional a juvenile's de facto LWOP sentence for various sex offenses).

15. *See* Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 425 n.91 (2011) (discussing cases in which juvenile offenders have attempted to use *Graham* to challenge their sentences but have largely failed).

16. Generally, state supreme courts that have confronted *Graham* have mostly dealt with actual LWOP, not de facto LWOP sentences. *See, e.g.*, *Angel v. Virginia*, 704 S.E.2d 386, 402 (Va. 2011) (holding that *Graham* did not apply to a juvenile defendant who was sentenced to three life sentences for various sex offenses); *Missouri v. Andrews*, 329 S.W.3d 369, 377 (Mo. 2010) (en banc) (holding that a fifteen-year-old who committed first-degree murder cannot invoke *Graham*); *Wisconsin v. Ninham*, 797 N.W.2d 451, 474, 478 (Wis. 2011) (holding that an actual LWOP sentence for a fourteen-year-old who committed first-degree murder was not cruel and unusual punishment); *Bonilla v. Iowa*, 791 N.W.2d 697, 700–01 (Iowa 2010) (holding that a mandatory LWOP sentence for a juvenile nonhomicide offender was unconstitutional). The state supreme courts that have faced a de facto LWOP sentence for a minor have not reached the merits of its constitutionality. *See, e.g.*, *Adams v. Georgia*, 707 S.E.2d 359 (Ga. 2011) (upholding a juvenile's twenty-five year to life sentence and declining to apply *Graham* without commentary); *Rogers v. Nevada*, 267 P.3d 802 (Nev. 2011) (holding that the district court abused its discretion when it declined to appoint counsel for a juvenile offender in the post-conviction phase, but leaving the issue of de facto LWOP sentences unresolved). As of publication, only one federal circuit had addressed, and rejected, a challenge to a de facto LWOP sentence based on *Graham*'s general principles. *Bunch v. Smith* 685 F.3d 546 (6th Cir. 2012). *But see* *California v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding that de facto LWOP sentences for juvenile nonhomicide offenders violate the Eighth Amendment).

17. *Caballero*, 282 P.3d at 297. De facto LWOP sentences, by their nature, do not provide the offender a meaningful opportunity for release. *See Mendez*, 114 Cal. Rptr. 3d at 882 ("[C]ommon sense dictates that a juvenile who is sentenced at the age of eighteen and who is not eligible for parole until after he is expected to die does not have a meaningful . . . opportunity for release.").

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Part IV discusses the practical implications of this Comment and whether juvenile offenders will see any meaningful change if courts adopt a categorical ban. Part V concludes that courts should embrace the spirit of *Graham*'s holding and provide a *meaningful* opportunity for individuals like Victor Mendez to experience life outside of prison before they die.¹⁸

II. *GRAHAM V. FLORIDA* AND ITS APPLICATION

This Part analyzes *Graham v. Florida* and its reception in the lower courts.¹⁹ Section A provides a brief overview of the Supreme Court's tests for cruel and unusual punishment. Section B discusses *Graham* itself and its new categorical rule. Section C discusses the application of *Graham* in lower courts and uses California as an example. Section D examines the Supreme Court's post-*Graham* jurisprudence, including the California Supreme Court's rejection of de facto LWOP sentences.

A. *When Is a Punishment "Cruel and Unusual"? An Overview of the Supreme Court's Eighth Amendment Jurisprudence*

The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁰ The Supreme Court has examined the Eighth Amendment in light of "the evolving standards of decency that mark the progress of a maturing society."²¹ Thus, as American society evolves, so too does the Court's definition of what is cruel and unusual.²² Traditionally, the Supreme Court analyzed Eighth Amendment challenges under two separate analytical frameworks, depending on the type of case: (1) in non-death penalty cases, whether a defendant's individual sentence is grossly disproportionate to his or her crime and (2) in death penalty cases, whether any special categorical rules apply.²³

Under the first framework, defendants on a case-by-case basis argue that their sentences are excessive in relation to their crimes.²⁴ To determine whether the length of a sentence is unconstitutional, the Court must apply a three-step test.²⁵ First, the Court compares the "gravity of the offense and the severity of the

18. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

19. *See infra* Part II.B–C (discussing *Graham* itself and its aftermath).

20. U.S. CONST. amend. VIII.

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

22. *See id.* (elaborating on this point).

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

24. *Id.* at 394–95.

25. *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010).

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sentence.”²⁶ Next, if the Court draws an “inference of gross disproportionality,” it compares the defendant’s sentence with those sentences “received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.”²⁷ Finally, if this comparison “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence violates the Eighth Amendment.²⁸

The second analytical framework involves several categorical rules involving the death penalty.²⁹ These rules typically prevent a state from imposing the death penalty in certain cases.³⁰ The Court has divided these categorical rules into two types: cases involving the “nature of the offense” and cases involving the “characteristics of the offender.”³¹ In nature-of-the-offense cases, the Court held that courts cannot sentence defendants to death for nonhomicide crimes.³² In characteristics-of-the-offender cases, the Court held that the death penalty is inappropriate for juvenile offenders³³ or people “whose intellectual functioning is in a low range.”³⁴

In 2005, in *Roper v. Simmons*, the Court announced a categorical rule prohibiting courts from sentencing juvenile offenders to death.³⁵ The Court’s decision included an extensive discussion about juvenile culpability.³⁶ Justice Kennedy, writing for the majority, explained that juveniles differ from adult offenders in three ways: juveniles are less mature, “are more vulnerable or susceptible to negative influences . . . including peer pressure,” and lack a fully developed character.³⁷ Justice Kennedy went on to suggest that “[f]rom 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.”³⁸ Justice Kennedy’s argument about the “diminished culpability of juveniles” would later resurface in *Graham v. Florida*.³⁹

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

27. *Id.*

28. *Id.* (alterations in original) (quoting *Harmelin*, 501 U.S. at 1005) (internal quotation marks omitted).

29. Momose, *supra* note 23, at 396–400.

30. *See infra*, text accompanying notes 35–38 (discussing specific types of categorical rules).

31. *Id.* at 2022.

32. *Id.* (citing *Enmund v. Florida*, 458 U.S. 782 (1982)).

33. *See generally Roper*, 543 U.S. at 551 (holding that the death penalty cannot be imposed on defendants under eighteen years of age); *see also infra* text accompanying notes 35–38 (discussing *Roper* in detail).

34. *Graham*, 130 S. Ct. at 2022 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

35. *Roper*, 543 U.S. at 551.

36. *Id.* at 569–70.

37. *Id.*

38. *Id.* at 570.

39. *Id.* at 571; *see also Graham*, 130 S. Ct. at 2026 (discussing how juvenile culpability is a factor in creating a categorical ban against actual LWOP sentences for nonhomicide offenders).

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When the Court adopts a categorical rule, it undertakes a two-step analysis.⁴⁰ First, the Court considers whether there is a “national consensus against the sentencing practice.”⁴¹ Second, if such a consensus exists, the Court “must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.”⁴² When exercising its independent judgment, the Court considers factors such as the culpability of the offender and whether the sentence furthers legitimate penological goals.⁴³

B. *Graham’s Categorical Rule*

The Court adhered to its established analytical frameworks for determining whether a sentence constitutes cruel and unusual punishment until it decided *Graham v. Florida* in 2010.⁴⁴ For the first time, the Court adopted a categorical rule outside of the death penalty context.⁴⁵ Justice Kennedy, writing for the majority, held that actual LWOP sentences for juveniles who commit nonhomicide offenses violated the Eighth Amendment.⁴⁶ Moreover, the Court noted that a state should “give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁴⁷

The defendant, Terrance Jamar Graham, was sixteen years old when he committed attempted burglary.⁴⁸ Six months after he pleaded guilty, police again arrested Graham for robbery.⁴⁹ The sentencing judge believed Graham was irredeemable because he had quickly returned to a life of crime.⁵⁰ The judge ordered Graham to serve a life sentence.⁵¹

The Supreme Court applied its two-step categorical rule test to Graham’s actual LWOP sentence.⁵² The Court found that a national consensus against

40. *Graham*, 130 S. Ct. at 2022.

41. *Id.* (citing *Roper v. Simmons*, 541 U.S. 551, 572 (2005)).

42. *Id.*

43. *Id.* at 2028.

44. *Graham*, 130 S. Ct. 2011.

45. *See id.* at 2046 (Thomas, J., dissenting) (arguing that the Court’s new categorical rule “eviscerates” the distinction between death and other sentences). In contrast, some have argued that the *Graham* Court did not destroy this distinction, but merely created a heightened standard of review for LWOP sentences under the Eighth Amendment. *See generally* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010) (articulating this point).

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

47. *Id.*

48. *Id.* at 2018.

49. *Id.*

50. *Id.* The trial judge believed that Graham was a danger to the community. *Id.* Notably, the trial judge gave the maximum sentence, while the prosecution had argued for just a thirty year sentence. *Id.* at 2019–20.

51. *Id.* at 2020. This sentence was effectively an actual LWOP sentence because Florida had abolished its parole system. *Id.*

52. *Id.* at 2022–23. “This case implicates a particular type of sentence as it applies to an entire class of

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sentencing juveniles to LWOP for nonhomicide crimes existed.⁵³ Justice Kennedy explained that although thirty-seven states allowed juveniles to serve LWOP sentences for nonhomicide offenses, “nationwide there are only 109 juvenile offenders serving [LWOP] for nonhomicide offenses.”⁵⁴ The Court then exercised its independent judgment in creating a categorical rule.⁵⁵ In so doing, the Court looked at two factors: the lessened culpability of juvenile offenders in general and the fact that LWOP sentences in this context did not further legitimate penological goals.⁵⁶

Justice Kennedy explained that a categorical rule—as opposed to a case-by-case approach—was necessary for several reasons.⁵⁷ First, existing state law protections did not prevent judges from imposing these sentences on juveniles.⁵⁸ Second, Justice Kennedy doubted that “courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”⁵⁹ Third, the case-by-case approach may prevent a juvenile from receiving a proper defense because “[j]uveniles mistrust adults and have limited understandings of the criminal justice system”⁶⁰ As a result, they “are less likely than adults to work effectively with their lawyers”⁶¹ Finally, Justice Kennedy argued that a categorical rule would give juvenile offenders a chance to start over:

[A] categorical rule gives *all* juvenile nonhomicide offenders a chance to demonstrate maturity and reform. . . . [LWOP sentences give] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. . . . 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. . . . A categorical rule against [LWOP] for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.⁶²

offenders who have committed a range of crimes. As a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis. Here . . . the appropriate analysis is the one used in cases that involved the categorical approach” *Id.*

53. *Id.* at 2023.

54. *Id.*

55. *Id.* at 2026.

56. *Id.* at 2026–30.

57. *Id.* at 2030–33.

58. *Id.* at 2031.

59. *Id.* at 2032.

60. *Id.*

61. *Id.*

62. *Id.* (emphasis added).

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Several Justices disagreed with the majority.⁶³ Chief Justice Roberts concurred in the judgment but argued that a categorical rule was unnecessary.⁶⁴ Justices Alito⁶⁵ and Thomas⁶⁶ wrote separate dissenting opinions. Justice Alito rejected the majority holding and argued it did not apply to lengthy term-of-years sentences.⁶⁷ Justice Thomas did not believe a national consensus existed—“[t]hat a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed.”⁶⁸

C. *The Golden State Is Split: Graham Divides California’s Appellate Districts*

The Court’s holding in *Graham* is quite narrow—it only applies to actual LWOP sentences for juveniles who commit nonhomicide offenses.⁶⁹ Nonetheless, in subsequent lower-court cases, juvenile offenders have argued that Justice Kennedy’s language about a meaningful opportunity for release should apply to de facto LWOP sentences as well.⁷⁰ The offenders’ argument is simple. First, the Supreme Court in *Graham* banned actual LWOP sentences for juvenile offenders who did not commit homicide.⁷¹ Second, de facto LWOP sentences are the functional equivalent of actual LWOP sentences because neither provides juveniles with a meaningful opportunity for release during their lifetime.⁷² Thus, if a juvenile who commits a nonhomicide crime receives a term-of-years sentence that exceeds his or her natural lifespan, that sentence violates the Eighth Amendment. Unfortunately, most lower courts that have confronted this question have refused to apply *Graham* outside of its narrow holding.⁷³

However, some California appellate courts extended *Graham* to include de facto LWOP sentences.⁷⁴ The leading case is *California v. Mendez*, in which the California Second District Court of Appeal held unconstitutional a juvenile’s sentence of eighty-four years to life for carjacking.⁷⁵ Mendez argued that, under

63. See *infra* notes 64–68 and accompanying text (discussing the opinions of Chief Justice Roberts, Justice Alito, and Justice Thomas).

64. *Graham*, 130 S. Ct. at 2036 (Roberts, C.J., concurring).

65. *Id.* at 2058–59 (Alito, J., dissenting).

66. *Id.* at 2051–58 (Thomas, J., dissenting).

67. *Id.* at 2058 (Alito, J., dissenting).

68. *Id.* at 2051 (Thomas, J., dissenting).

69. *Id.* at 2030 (majority opinion).

70. See Hechinger, *supra* note 15, at 435 n.91 (describing cases in which juvenile defendants used *Graham* to challenge their de facto LWOP sentences).

71. See *Graham*, 130 S. Ct. at 2030 (stating the holding).

72. See *California v. Mendez*, 114 Cal. Rptr. 3d 870, 882–83 (Ct. App. 2d Dist. 2010) (articulating this point).

73. See, e.g., Hechinger, *supra* note 15, at 425 n.91 (describing the lower court decisions that have declined to extend *Graham* beyond its holding).

74. See *infra* text accompanying notes 78–86 (discussing these cases).

75. 114 Cal. Rptr. 3d at 883; see also *supra* Part I (discussing the case). Mendez challenged his sentence under the federal and state constitutions, though the court only discussed the former. *Mendez*, 114 Cal. Rptr. 3d

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his sentence, he would not be eligible for parole until he was eighty-eight years old, while the national life expectancy for a typical American male is seventy-six years.⁷⁶ A panel of California's Second District Court of Appeal agreed that Mendez's sentence was "materially indistinguishable" from an LWOP sentence.⁷⁷ Notably, the panel did not expressly apply *Graham*, but did adhere to the case's general principle that states must provide juveniles a meaningful opportunity for release.⁷⁸ The panel noted that "a state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime, [but *Graham* does require] that a state 'must' give a juvenile" a meaningful opportunity for release.⁷⁹ Subsequently, some California appellate panels have followed Mendez's reasoning.⁸⁰ Notably, the California Third District Court of Appeal explained why juvenile nonhomicide offenders who commit multiple crimes or injure multiple victims can still challenge a de facto LWOP sentence:

A distinction premised on the multiple offenses or victims that often underlie a de facto LWOP [sentence] is also unpersuasive. The distinction finds no traction in *Graham*, given the juvenile there was a recidivist offender sentenced on multiple felonies, including separate instances of armed commercial burglary and home invasion robbery. . . . Nevertheless the de facto LWOP [sentence] imposed there did not survive constitutional scrutiny, based on the lesser culpability of juveniles measured against the severity of a sentence denying any possibility of release. . . . While the sum of [the defendant's] conduct is more serious because he committed multiple offenses, and he is accordingly more culpable than a defendant who commits only a single offense, under *Graham* his culpability remains diminished as a juvenile.⁸¹

In short, the court explained that *Graham*'s rationale applies to *all* juvenile nonhomicide offenders, regardless of how many victims or offenses are

at 882–83.

76. *Id.* at 882. The life expectancy for a typical American female is 81.1 years. DONNA L. HOYERT & JIAQUAN XU, CENTERS FOR DISEASE CONTROL AND PREVENTION, DIVISION OF VITAL STATISTICS, DEATHS: PRELIMINARY DATA FOR 2011, 2 (2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf (on file with the *McGeorge Law Review*).

77. *Mendez*, 114 Cal. Rptr. 3d at 882 (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)).

78. *Id.* at 882–83.

79. *Id.* at 883 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)) (emphasis added, internal quotations omitted).

80. See, e.g., *California v. Nuñez*, 125 Cal. Rptr. 3d 616, 627 (Ct. App. 3d Dist. 2011) (holding that a sentence of 175 years to life for a fourteen-year-old defendant was cruel and unusual punishment); *California v. J.I.A.*, 127 Cal. Rptr. 3d 141, 149 (Ct. App. 4th Dist. 2011) (holding that a fifty-years-to-life sentence for a fourteen-year-old defendant was cruel and unusual punishment because the defendant was ineligible for parole until age seventy). In *J.I.A.*, the court also relied on California's equivalent to the Eighth Amendment to strike down the de facto LWOP sentence. 127 Cal. Rptr. 3d at 150–53.

81. *Nuñez*, 125 Cal. Rptr. 3d at 624.

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involved.⁸² Each juvenile offender, due to the virtue of his or her age, must receive a meaningful opportunity for release, even if the state ultimately does not set that offender free.⁸³

A few months after the *Mendez* decision, a different panel of the Second District Court of Appeal upheld a 110-year sentence for a sixteen year old who committed attempted murder.⁸⁴ In that case, *California v. Caballero*, the court expressly refused to apply *Graham*'s general principles.⁸⁵ The court instead noted that there are only two ways a juvenile defendant in California can receive a sentence that exceeds his or her lifespan: (1) "commit crimes against multiple victims during separate incidents," or (2) "commit certain enumerated offenses, discharge a gun, and inflict great bodily injury upon at least two victims."⁸⁶ The court reasoned that, although the combined sentences exceeded the defendant's life expectancy, the overall sentence was constitutional because each individual sentence was commensurate to the defendant's crimes.⁸⁷ Subsequently, other panels of the California Second District Court of Appeal followed *Caballero*'s reasoning.⁸⁸ In 2012, the California Supreme Court rejected the *Caballero* line of cases.⁸⁹

D. *Post-Graham Developments: The High Court Clarifies Graham in Miller v. Alabama and the California Supreme Court Rejects de Facto LWOP Sentences*

Shortly after deciding *Graham*, the Court, in *Miller v. Alabama*, took up the question of whether the case's categorical ban on LWOP sentences for juvenile nonhomicide offenders applied to juvenile homicide offenders as well.⁹⁰ While the Court did not categorically ban all such sentences, it held that mandatory LWOP sentences for juvenile homicide offenders violated the Eighth

82. *Id.*

83. *Id.* at 624–25.

84. *California v. Caballero*, 119 Cal. Rptr. 3d 920, 927 (Ct. App. 2d Dist. 2011).

85. *Id.* at 926.

86. *Id.*

87. *Id.* "Following *Mendez*'s reasoning, an individual who shot and severely injured any number of victims during separate attempts on their lives could not receive a term commensurate with his or her crimes if all the victims had the good fortune to survive their wounds, because the sentence would exceed the perpetrator's life expectancy. *Graham* does not purport to compel such a result." *Id.* *But see Nuñez*, 125 Cal. Rptr. 3d at 624 (arguing that the number of crimes or victims involved is irrelevant because the defendant is a juvenile).

88. *See, e.g., California v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Ct. App. 2d Dist. 2011) (holding that a sentence of 120 years to life for a juvenile defendant who committed attempted murder was constitutional). *But see id.* at 166–71 (Manella, J., dissenting) (arguing that *Graham* applies and that the defendant's sentence is unconstitutional).

89. *California v. Cabellero*, 282 P.3d 291, 293, 295 (Cal. 2012).

90. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

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Amendment.⁹¹ The Court reasoned that “none of what [the *Graham* court] said about children . . . is crime specific. . . . *Graham*’s reasoning implicates *any* life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.”⁹²

Just a few months after *Miller*, the California Supreme Court addressed the appellate split on de facto LWOP sentences for juvenile nonhomicide offenders.⁹³ In a brief, unanimous opinion, the California Supreme Court in *California v. Cabellero* reversed the lower court and held that “sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.”⁹⁴ The court explained that *Miller* “made it clear that *Graham*’s ‘flat ban’ on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of . . . how a sentencing court structures the life without parole sentence.”⁹⁵ Because *Graham* applies to any LWOP sentencing regime for juvenile nonhomicide offenders, the California Supreme Court explained it also applies to a “term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.”⁹⁶ At the end of its opinion, the Court reiterated that new sentences must “not violate the defendant’s Eighth Amendment rights and must provide him or her a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ under *Graham*’s mandate.”⁹⁷

III. APPLYING THE TESTS FOR CRUEL AND UNUSUAL PUNISHMENT TO DE FACTO LWOP SENTENCES

This Part explains why de facto LWOP sentences will fare poorly under the Supreme Court of the United States’ tests for cruel and unusual punishment. Section A briefly discusses the grossly disproportionate test. Section B discusses how de facto LWOP sentences for juveniles who commit nonhomicide crimes satisfy the two elements of the categorical rule test; first, it explains why a national consensus against these sentences exists and second, why in a court’s

91. *Id.* at 2475.

92. *Id.* at 2465 (emphasis added). Chief Justice Roberts, in dissent, argued that the Court’s opinion might invite a future Court to take dramatic measures: “Unless confined, the only stopping point for the Court’s analysis would be never permitting juvenile offenders to be tried as adults.” *Id.* at 2481 (Roberts, C.J., dissenting).

93. *Cabellero*, 282 P.3d at 293; *see also supra* Part II.C (detailing the facts of this case and the lower court’s opinion).

94. *Cabellero*, 282 P.3d at 295.

95. *Id.* at 294.

96. *Id.* at 295.

97. *Id.* at 295–96.

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independent judgment, the practice violates the Constitution. That section also discusses opposing arguments. Section C explains how *Graham*'s general principle—that states must offer juvenile defendants a meaningful opportunity for release—applies to de facto LWOP sentences.

A. *The Grossly Disproportionate Test*

Juvenile offenders can challenge their sentences as grossly disproportionate to the offense committed.⁹⁸ In this situation, a juvenile offender must first argue that the severity of a de facto LWOP sentence is grossly disproportionate to the gravity of the offense.⁹⁹ A court “can consider a particular offender’s mental state” when evaluating this argument.¹⁰⁰ Juvenile offenders could argue that, because a person’s “culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity,”¹⁰¹ and because a de facto LWOP sentence is so severe that it denies the offender all hope and renders “good behavior and character improvement . . . immaterial,”¹⁰² the sentence is unconstitutional.

Assuming a court agrees, the defendant must next argue that a de facto LWOP sentence is more severe than those imposed on other offenders “in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.”¹⁰³ In general, juveniles who receive de facto LWOP sentences constitute a small minority of the juveniles who serve lengthy sentences.¹⁰⁴ This Comment estimates that only seventy-one juvenile offenders nationwide are serving de facto LWOP sentences.¹⁰⁵ In contrast, the historical average prison sentence for a juvenile offender who committed a violent crime was only eight and one-half years.¹⁰⁶ These numbers are instructive because they reveal how rare a de facto LWOP sentence is. Thus, a juvenile offender who receives a de facto LWOP sentence must serve a punishment that is harsher than what most of his or

98. Momose, *supra* note 23, at 395–96.

99. See *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)) (discussing the first element of the test).

100. *Id.* at 2037 (Roberts, C.J., concurring) (citing *Solem v. Helm*, 463 U.S. 277, 290–91 (1983)).

101. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

102. *Graham*, 130 S. Ct. at 2027 (quoting *Naovarath v. Nevada*, 779 P.2d 944 (Nev. 1989)) (internal quotation marks omitted).

103. See *id.* at 2022 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)) (discussing the second element of the test).

104. See *infra* Part III.B.1 (discussing the national consensus against de facto LWOP sentences and the assumptions behind this estimate).

105. *Id.* The Sentencing Project, a group that gathers information from state correctional departments about prisoner demographics, provides some additional information on this point. *Interactive Map*, SENTENCING PROJECT, <http://sentencingproject.org/map/map.cfm#map> (last visited Mar. 23, 2012) (on file with the *McGeorge Law Review*).

106. See STROM, *supra* note 3, at 1 (stating that average maximum sentence of a violent juvenile offender in 1985 was 109 months and in 1997 was 98 months).

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her peers receive.¹⁰⁷ Although successful challenges are “exceedingly rare” under this proportionality argument,¹⁰⁸ juvenile offenders are more likely to raise inferences of gross disproportionality due to their age.¹⁰⁹ Because juveniles serving de facto LWOP sentences can satisfy the elements of the test, courts may strike down their sentences.¹¹⁰ However, because the test is fact-specific, not all defendants will successfully challenge their de facto LWOP sentence.¹¹¹

B. Building a Categorical Rule

Because a case-by-case approach will not fully protect juveniles from de facto LWOP sentences, courts should impose a categorical ban on this sentencing practice. In order to impose a categorical ban, a court must find that (1) a national consensus against imposing LWOP sentences exists, and (2) in the court’s independent judgment, the sentence violates the Eighth Amendment.¹¹² When deciding the second element, a court can rely on factors such as the culpability of the defendant¹¹³ and whether the sentence furthers legitimate penological goals.¹¹⁴

1. A National Consensus Exists Against Imposing de Facto LWOP Sentences on Juveniles Who Commit Nonhomicide Offenses

To determine whether a national consensus exists, a court looks to enacted legislation and “[a]ctual sentencing practices.”¹¹⁵ Thus, a court can see how many states allow the sentencing practice or, alternatively, how often states actually impose that sentence.¹¹⁶ In *Graham*, the Supreme Court noted that thirty-seven states—a supermajority—permitted LWOP sentences for juveniles who commit nonhomicide offenses, but found that “an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted . . . discloses a consensus against its use.”¹¹⁷ Indeed, Justice Kennedy wrote that “sentences of life without parole for juvenile nonhomicide offenders . . . are most

107. See *infra* Part III.B.1 (discussing the rarity of de facto LWOP sentences).

108. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

109. See *Graham v. Florida*, 130 S. Ct. 2011, 2039 (2010) (Roberts, C.J., concurring) (arguing that the Court could invalidate *Graham*’s sentence under the grossly disproportionate test and that “[t]here is no reason why an offender’s juvenile status should be excluded from the [proportionality] analysis.”).

110. *Id.* at 2022, 2039.

111. *Id.*

112. *Id.* at 2022 (quoting *Roper v. Simmons*, 541 U.S. 551, 572 (2005)).

113. *Id.* (citing *Roper*, 541 U.S. at 568) (stating that the Court can consider whether the defendant was under the age of eighteen or mentally handicapped).

114. *Id.* at 2028.

115. *Id.* at 2023.

116. *Id.* at 2023–24.

117. *Id.* at 2023.

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infrequent.”¹¹⁸ The Court explained that a national consensus existed because there were “only 109 juvenile offenders serving [LWOP sentences] for nonhomicide offenses.”¹¹⁹ Thus, even if a supermajority of states allow a sentencing practice, the Court will find a national consensus against that practice if the states rarely use it.¹²⁰

Currently, there is no data regarding how many juvenile offenders serve de facto LWOP sentences for nonhomicide offenses. However, there is data regarding how many juveniles serve life sentences in general, and the types of crimes these juvenile offenders committed.¹²¹ The rest of this section uses a conservative hypothetical to illustrate why a national consensus exists. This hypothetical takes the following steps: (1) it lists the number of juvenile offenders currently in state prisons, (2) it calculates the number of juvenile offenders who were convicted of murder and other crimes not relevant to this analysis and then excludes them, and (3) it estimates the number of remaining juveniles serving de facto LWOP sentences for nonhomicide offenses.

In 2011, state prisons nationwide housed 1,790 juvenile offenders.¹²² Of those offenders, the prisons admitted approximately 125 (seven percent) for murder convictions and a combined 251 (fourteen percent) for drug offenses (nine percent) and public order offenses (five percent).¹²³ Those 376 individuals are excluded from this analysis.¹²⁴

118. *Id.* (emphasis added).

119. *Id.* Justice Thomas argued that no national consensus existed because a supermajority of states allowed the practice. *Id.* at 2049 (Thomas, J., dissenting). According to Justice Thomas, the Court’s reliance on the infrequent usage of the sentence was “nothing short of stunning.” *Id.* “[T]he Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit.” *Id.* Justice Thomas later added that “[b]ased on its rarity of use, the Court proclaims a consensus against the practice . . . [but just because] a sentence is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed.” *Id.* at 2051.

120. *See id.* at 2023 (discussing how the Court determined a national consensus).

121. *See* CARSON & SABOL, *supra* note 1, at 20 (listing the number of juvenile offenders that state prisons housed in 2011); HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 238 (2006) (listing the types of crimes that the incoming juvenile offenders committed); *see also* ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 17–18 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf (on file with the *McGeorge Law Review*) (providing additional data regarding juvenile life sentences in general).

122. CARSON & SABOL, *supra* note 1, at 33. This analysis uses the most recent juvenile admittance data available, but estimates the number of juveniles who committed homicide and other crimes based on percentages from 2002. While this latter data set is older, it is safe to assume that the percentage of juveniles admitted for various crimes has remained relatively stable. *Compare* JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JUVENILES IN ADULT PRISONS AND JAILS 7 (2000) (listing the number of juveniles who committed homicide offenses in 1997 as seven percent of all juvenile offenders admitted to state prison), *with* SNYDER & SICKMUND, *supra* note 121, at 238 (using 2002 figures, but showing that the number of juvenile offenders who committed homicide, as a percentage of juveniles admitted to state prison, remained at seven percent).

123. SNYDER & SICKMUND, *supra* note 121, at 238.

124. This Comment excludes these juvenile offenders because it focuses on nonhomicide offenses that

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Of the 1,414 juvenile offenders remaining, it is safe to assume that only a small percentage of them received a de facto LWOP sentence¹²⁵—a multi-decade long sentence that exceeds their natural life span. Indeed, from 1985 to 1997, the average maximum sentence for a juvenile offender who committed a violent crime was only eight and one-half years.¹²⁶ In addition, there are only a few circumstances in which juvenile offenders can receive a de facto LWOP sentence.¹²⁷ In California, for example, a juvenile offender can only receive a de facto LWOP sentence if he or she commits: (1) “crimes against multiple victims during separate incidents,” or (2) “certain enumerated offenses, discharge[s] a gun, and inflict[s] great bodily injury upon at least two victims.”¹²⁸

Assuming conservatively that five-percent of these 1,414 individuals received a de facto LWOP sentence, seventy-one juveniles remain. The majority of these seventy-one individuals probably received their sentences in the five states with the largest concentration of juveniles serving life sentences: California, Texas, Pennsylvania, Florida, and Nevada.¹²⁹

Thus, because only an estimated seventy-one juveniles are serving de facto LWOP sentences for nonhomicide offenses nationwide, and because it is likely that many of these individuals are serving these sentences in only five states,¹³⁰ courts should find that states rarely impose these types of sentences.¹³¹ Because states rarely impose these sentences, and because the Supreme Court has stated that a national consensus exists when states rarely use a sentencing practice,¹³² courts should find that a national consensus against sentencing juveniles to de facto LWOP sentences for nonhomicide offenses exists.

might incur de facto LWOP sentences. *See, e.g.*, *California v. Mendez*, 114 Cal. Rptr. 3d 870 (Ct. App. 2d Dist. 2010) (reversing a de facto LWOP sentence for carjacking); *California v. Nuñez*, 125 Cal. Rptr. 3d 616, 627 (Ct. App. 3d Dist. 2011) (invalidating a 175-year-long sentence for a juvenile who committed aggravated kidnapping); *California v. J.I.A.*, 127 Cal. Rptr. 3d 141 (Ct. App. 4th Dist. 2011) (holding unconstitutional a de facto LWOP sentence for various sex offenses). Given that most of these cases involved serious crimes against people, it seems unlikely that drug offenders or public order offenders would receive a de facto LWOP sentence. *See, e.g., id.; Nunez*, 125 Cal. Rptr. 3d at 627; *J.I.A.*, 127 Cal. Rptr. 3d at 144.

125. *See* NELLIS & KING, *supra* note 121, at 17 (discussing the rarity in sentencing trends).

126. STROM, *supra* note 3, at 1.

127. *See infra* text accompanying note 128 (discussing California as an example).

128. *California v. Caballero*, 119 Cal. Rptr. 3d 920, 926 (Ct. App. 2d Dist. 2011). California’s numbers are important because the state houses the largest number of juveniles serving life sentences. NELLIS & KING, *supra* note 121, at 17–18.

129. *See* NELLIS & KING, *supra* note 121, at 16 (ordering these five states by largest juvenile life offender population). For comparison, the juvenile offenders who served actual LWOP sentences for nonhomicide offenses were concentrated in only three states, with the majority in Florida. PAOLO G. ANNINO ET AL., FL. ST. UNIV., JUVENILE LIFE WITHOUT PAROLE FOR NONHOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 15 (2009).

130. *See* NELLIS & KING, *supra* note 121, at 17 (listing California, Texas, Pennsylvania, Florida, and Nevada).

131. *See supra* text accompanying notes 96–102 (discussing the statistics behind this conclusion).

132. *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010).

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2. *Exercising Independent Judgment, Part I: Juvenile Offenders as a Whole Lack the Culpability to Receive a de Facto LWOP Sentence*

After determining a national consensus exists, a court would use its independent judgment to determine whether a categorical rule is appropriate.¹³³ While making this independent judgment, a court can look to the culpability of the offender in question.¹³⁴ In the context of this Comment, a court would look to the culpability of juvenile criminal offenders as a class.¹³⁵ The Supreme Court, in *Roper v. Simmons*, established that juveniles, when compared to adults, generally are immature, lack a strong sense of responsibility and fully formed characters, and are vulnerable to peer pressure.¹³⁶ Thus, a juvenile defendant is not as culpable as an adult who commits the same offense.¹³⁷ Indeed, advances in neuroscience and psychology reveal that a juvenile's brain is less developed than an adult's.¹³⁸ Overall, juvenile transgressions are “not as morally reprehensible as [those] of an adult.”¹³⁹

The Supreme Court in *Graham* recognized that “[l]ife 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.”¹⁴⁰ The Court explained that actual LWOP sentences are inappropriate for juveniles who commit nonhomicide offenses because, “when compared to an adult murderer, [juvenile offenders] who did not kill or intend to kill [have] a twice diminished moral culpability.”¹⁴¹ Likewise, de facto LWOP sentences are just as severe as actual LWOP sentences because in both situations the offender will die in prison.¹⁴² But it is arguable that juveniles whose sentences allow for the possibility of parole (even if they may never receive it in their lifetimes) are even less morally culpable than people who receive actual LWOP sentences.¹⁴³ Given the severity of a de facto LWOP

133. *Id.* at 2022 (quoting *Roper v. Simmons*, 541 U.S. 551, 572 (2005)). In theory, the Court could still determine that a punishment is cruel and unusual even without a national consensus. *See id.* at 2026 (noting that the Court will give strong deference to community consensus, but that consensus “is not itself determinative” of whether an Eighth Amendment violation has occurred).

134. *Id.* at 2022.

135. *Id.* at 2026.

136. *Id.*; *Roper*, 543 U.S. at 569–70.

137. *Graham*, 130 S. Ct. at 2026–27.

138. *Id.* at 2026. *See generally* Natalie Pifer, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495 (2010) (describing the scientific advances).

139. *Graham*, 130 S. Ct. at 2026 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)) (internal quotations omitted).

140. *Id.* at 2028.

141. *Id.* at 2027.

142. *See California v. Caballero*, 119 Cal. Rptr. 3d 920, 925 (Ct. App. 2d Dist. 2011) (noting that a de facto LWOP sentence is the functional equivalent of an actual LWOP sentence).

143. *See* Brief for Petitioner at 8, *California v. Caballero*, 250 P.3d 179 (2011) (No. B 217709), 2011

sentence, and that juvenile offenders (especially those who committed nonhomicide crimes) are less morally culpable than those who receive an actual LWOP sentence, courts in their independent judgment should establish a categorical ban on de facto LWOP sentences.

3. *Exercising Independent Judgment, Part II: De Facto LWOP Sentences for Juveniles Do Not Further Legitimate Penological Goals*

Courts should also look to whether a particular sentence furthers legitimate penological goals when deciding if a categorical ban is appropriate.¹⁴⁴ In *Graham*, the Supreme Court determined that LWOP sentences for juvenile nonhomicide offenders did not further traditional penological goals of retribution, rehabilitation, deterrence, and incapacitation.¹⁴⁵ This section explains why de facto LWOP sentences do not further any of these goals.¹⁴⁶

First, de facto LWOP sentences do not further the goal of retribution.¹⁴⁷ The Supreme Court described this punishment theory as a way for society to restore “the moral imbalance caused by the offense.”¹⁴⁸ Simply, retribution means that “a criminal sentence must be directly related to the personal culpability of the criminal offender.”¹⁴⁹ In *Graham*, Justice Kennedy described how LWOP sentences imposed on juveniles who committed nonhomicide crimes do not reflect the lessened culpability of juveniles in general.¹⁵⁰ The Court explained that “retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.”¹⁵¹

Likewise, de facto LWOP sentences do not further the goal of retribution because they are the functional equivalent of “the second most severe penalty” in

WL 2357944 at *17 (“Under *Graham*, however, minors who did not commit homicide, but cannot be paroled, are entitled to release because they have twice-diminished moral responsibility. . . . It therefore follows that juveniles who are sentenced to life with the possibility of parole are less culpable still.” (internal citation omitted)).

144. *Graham*, 130 S. Ct. at 2028.

145. *Id.* at 2028–29. States are free to choose which goal they want their penal system to represent. *Id.* at 2028. California, for example, has chosen retribution. CAL. PENAL CODE § 1170(a)(1) (West 2004 & Supp. 2013).

146. Justice Werdegar’s concurring opinion in the California Supreme Court’s *Caballero* decision also discusses these points, albeit briefly. *California v. Caballero*, 282 P.3d 291, 297–98 (Cal. 2012) (Werdegar, J., concurring).

147. See *infra* notes 148–159 and accompanying text (explaining how de facto LWOP sentences do not effectively punish an offender for punishment’s sake).

148. *Graham*, 130 S. Ct. at 2028.

149. *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)) (internal quotations omitted).

150. *Id.* See generally *supra* Part III.B.2 (discussing how juveniles are less culpable than adults in general).

151. *Graham*, 130 S. Ct. at 2028. See generally Pifer, *supra* note 138 (describing juvenile psychology and differences with adults).

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the American justice system.¹⁵² Moreover, when states imprison juveniles based on principles of retribution, they often overlook the offenders' personal background.¹⁵³ But a juvenile offender's background might explain why he or she turned to crime in the first place. He or she might come from a broken home,¹⁵⁴ suffer from mental illness,¹⁵⁵ or commit crime due to other personal tragedies that shaped his or her outlook on life.¹⁵⁶ Thus, because de facto LWOP sentences tend to ignore a juvenile offender's personal history, they do not further the goal of retribution, which aims to reflect the defendant's culpability.¹⁵⁷

In addition, de facto LWOP sentences do not further the goal of rehabilitation.¹⁵⁸ While "the concept of rehabilitation is imprecise," it involves, at some level, a "meaningful opportunity to obtain release."¹⁵⁹ A de facto LWOP sentence keeps juvenile offenders effectively imprisoned for life and thus "forswears altogether the rehabilitative ideal."¹⁶⁰ Moreover, juvenile nonhomicide offenders, as a class, have a "capacity for change," but cannot take advantage of any positive changes in their personality or moral character because "the State [made] an irrevocable judgment about that person's value and place in society."¹⁶¹ A de facto LWOP sentence, like an actual LWOP sentence, "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."¹⁶² De facto LWOP sentences—which offer the possibility of parole in name only—deny the juvenile offender any hope for personal improvement.¹⁶³ Indeed, these sentences deprive "the convict of the most basic

152. *Graham*, 130 S. Ct. at 2028; *see also* *California v. Mendez*, 114 Cal. Rptr. 3d 870, 882 (Ct. App. 2d Dist. 2010) (describing the defendant's de facto LWOP sentence as "materially indistinguishable" from an actual LWOP sentence).

153. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 20 (2011).

154. *See Graham*, 130 S. Ct. at 2018–20 (discussing how Graham's parents "were addicted to crack cocaine [and that Graham] began drinking alcohol and using tobacco at age nine and smoked marijuana at age thirteen.").

155. *See California v. Caballero*, 119 Cal. Rptr. 3d 920, 921 (Ct. App. 2d Dist. 2011) (noting that Caballero suffered from schizophrenia at the time of his crimes).

156. *See California v. J.I.A.*, 127 Cal. Rptr. 3d 141, 146 (Ct. App. 4th Dist. 2011) (noting how the defendant, who sexually abused his victims, was himself sexually abused).

157. *See* Brief for Petitioner at 8, *California v. Caballero*, 250 P.3d 179 (2011) (No. B 217709), 2011 WL 2357944, at *17 ("Under *Graham*, however, minors who did not commit homicide, but cannot be paroled, are entitled to release because they have twice-diminished moral responsibility. . . . It therefore follows that juveniles who are sentenced to life with the possibility of parole are less culpable still.").

158. *See infra* text accompanying notes 159–165 (discussing how a de facto LWOP sentence is the farthest thing from rehabilitation).

159. *Graham*, 130 S. Ct. at 2028, 2030. *See generally* Green, *supra* note 153, at 1 (arguing that the states must reform or implement rehabilitative programs to comply with *Graham*).

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

161. *Id.*

162. *Id.* at 2028.

163. *Id.* at 2027.

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liberties without giving hope of restoration.”¹⁶⁴ Because de facto LWOP sentences do not offer any meaningful opportunity for release, they do not further the goal of rehabilitation.¹⁶⁵

De facto LWOP sentences also do not further the goal of deterrence.¹⁶⁶ According to the deterrence theory of punishment, criminal sentences “may serve to prevent *future* crime.”¹⁶⁷ But the *Graham* Court suggested that juveniles, as a class, “will be less susceptible to deterrence”¹⁶⁸ because they tend to lack maturity and a sense of responsibility, and may engage in “impetuous and ill-considered actions and decisions.”¹⁶⁹ Indeed, de facto LWOP sentences do not appear to deter juvenile crime because courts tend to impose the sentence only on juveniles who commit a series of crimes.¹⁷⁰ Moreover, Justice Kennedy observed that actual LWOP sentences probably did not deter juvenile offenders from committing crimes because states rarely imposed the sentence.¹⁷¹ Likewise, judges impose de facto LWOP sentences only in rare circumstances.¹⁷² Because de facto LWOP sentences for juveniles do not prevent these offenders from committing multiple crimes and because states rarely impose the sentence, de facto LWOP sentences do not further the goal of deterrence.¹⁷³

Finally, the goal of incapacitation does not justify de facto LWOP sentences. The incapacitation theory of punishment suggests that a state should imprison some criminals so that those individuals do not commit more crimes.¹⁷⁴ Admittedly, supporters of de facto LWOP sentences would point to this goal to justify punishing juvenile offenders.¹⁷⁵ They would explain that juvenile

164. *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)).

165. *See supra* text accompanying notes 159–165 (explaining how a de facto LWOP sentences fail to serve a rehabilitative purpose).

166. *See infra* text accompanying notes 170–172 (discussing how de facto LWOP sentences will not prevent future crimes).

167. Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 853 (2002).

168. *Graham*, 130 S. Ct. at 2028 (quoting *Roper v. Simmons*, 543 U.S. 551, 571 (2005)) (internal quotations omitted).

169. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotations omitted).

170. *See, e.g.*, *California v. Caballero*, 119 Cal. Rptr. 3d 920, 926 (Ct. App. 2d Dist. 2011) (noting how California only imposes de facto LWOP sentences on offenders who commit multiple crimes or injure multiple victims); *California v. Nuñez*, 125 Cal. Rptr. 3d 616, 624 (Ct. App. 3d Dist. 2011) (explaining that multiple victims or crimes often “underlie” de facto LWOP sentences).

171. *Graham*, 130 S. Ct. at 2028–29.

172. *See supra* Part III.B.1 (describing how courts only impose de facto LWOP sentences on rare occasions).

173. *See supra* text accompanying notes 168–172 (discussing how de fact LWOP sentences do not serve the deterrence theory of punishment).

174. *See Graham*, 130 S. Ct. at 2029 (discussing the limits of incapacitation theory as an explanation for LWOP sentences).

175. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2490 (2012) (Alito, J., dissenting) (“If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world.”).

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offenders like Rodrigo Caballero—who the state charged with three counts of attempted murder—should remain in prison because they committed serious crimes.¹⁷⁶ But the Supreme Court repeatedly explains in *Graham* that juveniles are less culpable than adult offenders, especially in the nonhomicide context.¹⁷⁷ While the Court is aware that juveniles who commit nonhomicide crimes should receive some punishment, it has strong words for those who believe such offenders should be locked up for life:

To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . As one court concluded in a challenge to a life without parole sentence for a 14-year-old, “incorrigibility is inconsistent with youth.”¹⁷⁸

Although certain juvenile offenders do commit serious nonhomicide crimes, de facto LWOP sentences carry the same effect as actual LWOP sentences—the juvenile offender will never again step foot outside of prison. While incapacitation may be a worthy goal in some contexts, de facto LWOP sentences deny “the juvenile offender a chance to demonstrate growth and maturity.”¹⁷⁹ Moreover, if a state imposes de facto LWOP sentences for incapacitation purposes on nonhomicide juvenile offenders, it will violate *Graham*’s central premise that juvenile nonhomicide offenders *must* receive a meaningful opportunity for release.¹⁸⁰ Thus, incapacitation does not justify de facto LWOP sentences.¹⁸¹ Because de facto LWOP sentences do not further any legitimate penological goals, courts should adopt a categorical rule banning these sentences for juvenile offenders.

4. *Dissenting Voices: Responding to Chief Justice Roberts and Justice Alito*

The previous three subsections explained why courts should adopt a categorical rule banning de facto LWOP sentences for juvenile nonhomicide offenders. But supporters of de facto LWOP sentences have some allies on the

176. *California v. Caballero*, 119 Cal. Rptr. 3d 920, 921 (Ct. App. 2d Dist. 2011); *see also Graham*, 130 S. Ct. at 2029 (noting that “[r]ecidivism is a serious risk to public safety. . . .”); *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring) (discussing specific instances of juvenile cruelty).

177. *See supra* Part III.B.2 (discussing the Court’s analysis of juvenile culpability).

178. *Graham*, 130 S. Ct. at 2029 (quoting *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)).

179. *Id.*

180. *Id.* at 2030.

181. *See also infra* Part III.B.4 (addressing arguments by Justice Alito and Chief Justice Roberts that suggest juveniles who committed terrible crimes are irredeemable).

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Supreme Court.¹⁸² Justice Alito's dissent¹⁸³ and Chief Justice Roberts' concurrence¹⁸⁴ in *Graham* provide arguments for de facto LWOP supporters.¹⁸⁵

Justice Alito's dissent flatly rejects the idea of banning de facto LWOP sentences.¹⁸⁶ "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole," he writes.¹⁸⁷ Indeed, Graham's attorney conceded that a sentence of forty years without parole would probably not violate the Eighth Amendment.¹⁸⁸ But a juvenile who received a forty-year sentence at age seventeen would be eligible for parole at age fifty-seven, and thus might be released before his or her life expectancy. A true de facto LWOP sentence deprives the juvenile offender of all hope because there is no meaningful possibility of release. Rodrigo Caballero, for example, was sentenced to 110 years in prison.¹⁸⁹ Victor Mendez received an eighty-four year sentence.¹⁹⁰ In light of such sentences, and the fact that states must give juvenile nonhomicide offenders a meaningful opportunity for release, it is difficult to justify Justice Alito's reasoning.

In contrast to Justice Alito, Chief Justice Roberts offers a compromise.¹⁹¹ He argues that Graham's sentence was cruel and unusual under the grossly disproportionate test,¹⁹² but a categorical rule banning actual LWOP sentences in this context is unnecessary.¹⁹³ The Chief Justice argues that courts require flexibility when sentencing defendants, and points to cases where juveniles committed horrific nonhomicide crimes.¹⁹⁴

A ban against de facto LWOP sentences would indeed allow juvenile offenders who commit heinous nonhomicide crimes to possibly obtain release before the end of natural life expectancy. But the majority opinion in *Graham* anticipated these problems: "A state is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime."¹⁹⁵ Moreover, those "who commit truly horrifying crimes as juveniles may turn out to be

182. See *infra* text accompanying notes 186–194 (discussing the opinions of Chief Justice Roberts and Justice Alito).

183. *Graham*, 130 S. Ct. at 2058–59 (Alito, J., dissenting).

184. *Id.* at 2036–42 (Roberts, C.J., concurring).

185. But see *California v. Caballero*, 282 P.3d 291, 297 (Cal. 2012) (Werdegar, J., concurring) ("Characterization by the Graham dissenters of the scope of the majority opinion is, of course, dubious authority . . .").

186. *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting).

187. *Id.*

188. *Id.*

189. *California v. Caballero*, 119 Cal. Rptr. 3d 920, 920–21 (Ct. App. 2d Dist. 2011).

190. *California v. Mendez*, 114 Cal. Rptr. 3d 870, 870 (Ct. App. 2d Dist. 2010).

191. See *infra* text accompanying notes 192–194 (discussing Chief Justice Roberts' reasoning).

192. See *supra* Part II.A (discussing the "grossly disproportionate" framework).

193. *Graham*, 130 S. Ct. at 2036 (Roberts, C.J., concurring).

194. See *id.* at 2041 ("But what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill?").

195. *Id.* at 2030 (majority opinion).

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irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.”¹⁹⁶

Indeed, if states ban de facto LWOP sentences, they must provide juvenile offenders a *meaningful* opportunity for release.¹⁹⁷ This language means that states should give all nonhomicide juvenile offenders a chance to grow and prove that they deserve to reenter civilized society.¹⁹⁸ But juvenile offenders must also accept personal responsibility for their actions and work hard for redemption; the state is not obligated to hand them a get-out-of-prison-free card.¹⁹⁹

C. *The General Principle Test*²⁰⁰

Instead of creating a separate categorical rule, courts could alternatively rely on *Graham*'s general principle, that juvenile nonhomicide offenders must receive a meaningful opportunity for release,²⁰¹ and strike down sentences on a case-by-case basis. The court in *California v. Mendez* did just that.²⁰² From a conceptual standpoint, this test is simple to administer—a court would examine a juvenile nonhomicide offender's life expectancy and compare it with the length of the sentence. The court could take into consideration the offender's life experiences²⁰³ and the nature of the crime.²⁰⁴ If the sentence exceeds the

196. *Id.*

197. *Id.*

198. *See id.* at 2032 (“Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.”).

199. *See supra* text accompanying notes 78–79 (explaining the state's obligation to give juvenile offenders a mere opportunity for release, not a guarantee). Even if a juvenile offender receives this opportunity for release, he might not necessarily receive parole, especially if the state has expressed concern for crime victims. Thus, those juvenile offenders who commit heinous nonhomicide crimes and show no sign of rehabilitation are less likely to walk free. The key is that the state gave them an opportunity to change. *See, e.g.*, CAL. CONST. art. I, § 28 (providing a comprehensive list of rights to crime victims including the right to appear at parole proceedings).

200. *See California v. Mendez*, 114 Cal. Rptr. 3d 870, 882–83 (Ct. App. 2d Dist. 2010) (discussing the application of *Graham*'s general principles).

201. *Graham*, 130 S. Ct. at 2030; *California v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (“Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.”).

202. 114 Cal. Rptr. 3d at 882–83 (discussing the application of *Graham*'s general principles). The California Supreme Court did not apply the general principle test when it struck down de facto LWOP sentences for juvenile nonhomicide offenders, but instead extended *Graham* to include these sentences. *See California v. Caballero*, 282 P.3d 291, 295 (2012) (“*Miller* therefore made it clear that *Graham*'s ‘flat ban’ on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.”).

203. *See, e.g., Graham*, 130 S. Ct. at 2018 (discussing the defendant's personal history).

204. *See supra* note 189 (discussing certain instances of juvenile cruelty).

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offender's life expectancy, the court can choose to strike it down.²⁰⁵ The general principle test would give courts flexibility and allow sentencing judges to punish juveniles who commit particularly heinous nonhomicide offenses.²⁰⁶ However, like the grossly disproportionate test, this general principle test would apply on a case-by-case basis, and thus some juvenile offenders would inevitably receive unjust de facto LWOP sentences.²⁰⁷ While the general principle test has some benefits, a categorical rule is superior because it prevents judges from imposing these sentences in the first place, protects all juvenile nonhomicide offenders, and encourages states to reform their juvenile justice systems.²⁰⁸

IV. IMPLICATIONS FOR JUVENILE OFFENDERS

This Part discusses the consequences of imposing a categorical ban on de facto LWOP sentences for juveniles. Section A examines whether a categorical rule will actually help juvenile offenders or whether judges will merely grant lengthy but barely constitutional sentences. Section B examines policy implications of such a rule, including whether states need to rethink their sentencing practices.

A. *A Chance for Hope or No Hope at All?*

If states ban de facto LWOP sentences, they will have to develop new sentencing regimes that address juvenile offenders who commit nonhomicide crimes. One obstacle to implementing such a system is that sentencing law is notoriously complicated and legislatures tend to grant sentencing judges a healthy amount of discretion.²⁰⁹ Unfortunately, this means that some prosecutors and judges might pursue sentences that are just short of an unconstitutional de facto LWOP sentence.²¹⁰ If the average life expectancy of a typical American

205. In theory, prosecutors might ask for a sentence that falls just short of a defendant's life expectancy so they could argue it does not run afoul of *Graham*'s general principles. See *Mendez*, 114 Cal. Rptr. 3d at 882–83 (discussing the application of *Graham*'s general principles). Courts that apply this test should be wary of arguments that attempt to elevate form over substance.

206. See *supra* note 194 (describing an instance of a nonhomicide offense).

207. See generally *Mendez*, 114 Cal. Rptr. 3d at 882 (applying the general principle test as applied to *Mendez*'s sentence only).

208. See *infra* Part IV.A (discussing possible reforms).

209. See, e.g., *Mendez*, 114 Cal. Rptr. 3d at 882 n.8 (discussing in detail how *Mendez*'s eighty-four-year sentence was calculated). Another obstacle is that juvenile nonhomicide offenders who are already serving de facto LWOP sentences will have to navigate the labyrinth of habeas corpus proceedings in order to obtain release, which is no easy task. See generally, Theresa Hsu Schriever, Comment, *In Our Own Backyard: Why California Should Care About Habeas Corpus*, 45 MCGEORGE L. REV. __ (forthcoming) (discussing at length the serious obstacles prisoners face when attempting to overturn wrongfully imposed sentences).

210. See, e.g., Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 367–68 (2011) (describing at least one case in which a judge sentenced a minor to a ninety-year sentence, but the judge's reasoning constituted a "transparent disregard for the *Graham*

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male is seventy-six years,²¹¹ it is plausible that some courts might sentence juvenile offenders to a term of years that falls just short, and thus avoid constitutional scrutiny.

In Florida, for example, juveniles have received little relief despite *Graham*.²¹² Although the Court prohibited juveniles from serving actual LWOP sentences, Florida courts circumvented the Court's holding by sentencing juveniles who committed nonhomicide crimes to de facto LWOP sentences instead.²¹³ For example, a thirteen-year-old juvenile offender—who may have received an actual LWOP sentence before *Graham*—received a sixty-five-year de facto LWOP sentence after committing “a series of robberies and rapes.”²¹⁴ Thus, the Florida courts continue denying juvenile offenders a meaningful opportunity for release, which is contrary to *Graham*'s rationale.²¹⁵ Courts that seek to follow the Supreme Court's holding—that states must provide a meaningful opportunity for release—should be careful not to elevate form over substance.

Assuming courts implement categorical bans against de facto LWOP sentences for juveniles who commit nonhomicide offenses, state legislatures may need to confront a vexing question—how exactly does one provide a meaningful opportunity for release? As Justice Kennedy admits, categorical rules “tend to be imperfect.”²¹⁶ But state legislatures can make up for the inherent deficiencies in categorical rules—and avoid unjust sentencing practices—by developing specific sentencing schemes that address juvenile offenders who commit nonhomicide crimes.²¹⁷ There are a few solutions for legislatures, though no solution is perfect. First, a legislature could adopt conditional release statutes that allow certain individuals—typically those who have reached the age of sixty-five and have already served at least ten years of their sentence—to petition for release.²¹⁸ While these broad statutes would allow juvenile offenders to seek relief from

decision.”).

211. *Mendez*, 114 Cal. Rptr. 3d at 882.

212. See *infra* text accompanying notes 213–15 (discussing Florida's use of de facto LWOP sentences).

213. Lloyd Dunkelberger, *Juvenile Offenders Still Get Near-Life Terms*, SARASOTA HERALD-TRIBUNE, Nov. 21, 2010, at A1.

214. *Id.*

215. See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (requiring states provide juvenile offenders a meaningful opportunity for release). Could some of these sentences be the result of bad lawyering? Some advocates argue courts should allow juveniles to challenge their sentences based on ineffective assistance of counsel claims if their attorney failed to offer mitigating evidence. Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391 (2012).

216. *Id.*

217. See *California v. Caballero*, 282 P.3d 291 n.5 (Cal. 2012) (“We urge the California State Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.”).

218. See, e.g., MISS. CODE ANN. § 47-5-139 (2000); VA. CODE ANN. § 53.1-40.01 (2009) (allowing certain offenders to petition for conditional release).

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lengthy sentences, a juvenile might still spend several decades in prison, while an adult offender could take advantage of the statute sooner. A legislature could also cap the number of years that juvenile offenders can serve in prison, for example at twenty-five years. While this method would allow juveniles an earlier opportunity to petition for release, it would also prevent judges from awarding harsher sentences to juveniles who commit nonhomicide, but nonetheless horrific, offenses.²¹⁹ Finally, a legislature could pass a statute that allows courts to consider whether the juvenile offender has demonstrated a desire to reform after the offense was committed; such factors could include participation in educational, vocational, or counseling programs.²²⁰ Regardless of what method a state chooses, it must always keep in mind that it *must* offer juvenile offenders a meaningful opportunity for release.²²¹

B. Additional Policy Implications

In addition to the statutory solutions mentioned above, states might want to experiment with a more radical option—reducing the number of juveniles charged as adults.²²² Instead of sending these juvenile offenders through the court system, states could implement rehabilitative programs, or reform their existing juvenile justice systems to meet the needs of juvenile offenders who might reoffend if they were released.²²³ As one juvenile justice advocate argues, “[t]he States must give credence to the Court’s conclusions by providing juveniles with sufficient opportunity for personal development. Otherwise, the opportunity for personal growth will effectively become a non-opportunity as incarcerated juveniles learn to become seasoned criminals while subjected to the highly criminogenic adult prison culture.”²²⁴

219. See *Graham*, 130 S. Ct. at 2036 (Roberts, C.J., concurring) (discussing specific instances where juvenile offenders committed serious nonhomicide offenses).

220. Gerard Glynn & Ilona Vila, *What States Should do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV., 310, 346–48 (2012).

221. *Graham*, 130 S. Ct. at 2036 at 2030 (majority opinion).

222. JUVENILE JUSTICE IN CALIFORNIA, CAL. DEP’T OF JUSTICE 47 (2011), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/misc/jj11/preface.pdf> (on file with the *McGeorge Law Review*) (stating that in 2011, California probation departments reported 912 transfers to the adult system).

223. See generally Green, *supra* note 153 (discussing various ways that rehabilitative principles conform with *Graham*’s holding).

224. *Id.* at 12. In addition to introducing rehabilitative programs, a state may also have to reform its parole system to give juvenile offenders a meaningful opportunity for release. See Michelle Marquis, *Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 282–87 (2011) (discussing how compliance with *Graham* will also implicate changes to state parole boards). In California, for example, the State’s Realignment plan may offer an opportunity to implement such changes. See generally Andrew M. Ducart, Comment, *Go Directly to Jail: How Misaligned Subsidies Undermine California’s Prisoner Realignment Goals and What Is Possible to Maximize the Law’s Potential*, 44 MCGEORGE L. REV. 481 (2013); Steven Thomas Fazzi, Comment, *A Primer on the 2011 Corrections Realignment: Why California Placed Felons Under County Control*, 44 MCGEORGE L. REV. 423 (2013) (analyzing the implementation of California’s Realignment plan).

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Unfortunately, introducing rehabilitative elements into existing state criminal justice systems is easier in theory than in practice. For example, “adult court sentencing practices are largely based upon punitive considerations,” which is often a disadvantage to juvenile offenders.²²⁵ For instance, when the California Second District Court of Appeal sentenced Victor Mendez, who had committed his crimes at age sixteen, to eighty-four years in prison, it did not take into account “Mendez’s personal and family life and upbringing.”²²⁶ Indeed, when a Florida court sentenced Terrance Graham, the sentencing judge focused more on his repeat offender status than the fact that Graham’s parents “were addicted to crack cocaine [and that] Graham began drinking alcohol and using tobacco at age nine and smoked marijuana at age thirteen.”²²⁷

Moreover, even if a state does offer rehabilitative programs, those programs may fall victim to budget cuts. For example, at one point California threatened budget cuts to the state’s Department of Juvenile Justice, which would further strain an already burdened system.²²⁸ “Under the budget reduction enacted [in December 2011], the agency will cease to exist unless counties pony up \$125,000 a year per youth offender.”²²⁹ In a situation like this, the worst-case scenario is that prosecutors may start charging juvenile offenders as adults instead of sending them to the endangered department, which might expose these juvenile offenders to unconstitutional *de facto* LWOP sentences.²³⁰ Although the cuts were later rescinded,²³¹ difficult fiscal times might threaten juvenile justice institutions again. States determining whether to cut their juvenile justice agencies will have to weigh the long-term goals of reforming juvenile offenders against any short-term fiscal gains.

V. CONCLUSION

Graham v. Florida offers hope for juvenile justice advocates. The Court’s decision to create a categorical rule outside the context of the death penalty—and directly aimed at juveniles—suggests that it will start taking a hard look at how

225. Green, *supra* note 153, at 20.

226. California v. Mendez, 114 Cal. Rptr. 3d 870, 884 (Ct. App. 2d Dist. 2010).

227. See *Graham*, 130 S. Ct. at 2018–20 (quoting the sentencing judge as saying, “And I don’t understand why you would be given such a great opportunity to do something with your life and why you would throw it away.”).

228. Marisa Lagos, *Juvenile Offenders: Cuts Put Counties on the Spot*, S.F. CHRON., Dec. 26, 2011, at A1.

229. *Id.*

230. See *id.* (noting that some opponents of the budget cuts warn that “[i]f prosecutors do not believe there is a safe, affordable place to house juvenile criminals, they may be more likely to charge more of them as adults, and subject them to state prison.”).

231. Rina Palta, *Brown Backs Off Plan to Shut Down Youth Prisons*, 89.3 KPCC (May 16, 2012), <http://www.scp.org/blogs/news/2012/05/16/6146/division-juvenile-justice/> (on file with the *McGeorge Law Review*).

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states punish young offenders. But because the lower courts have largely resisted extending *Graham*'s general principles, most juvenile offenders serving de facto LWOP sentences for nonhomicide crimes have had little success challenging their sentences.²³² While the California Supreme Court's *Caballero* decision is a victory for juvenile justice advocates, it is unclear whether other courts will construe *Graham* to include de facto LWOP sentences.²³³

The solution is for the courts to adopt a categorical rule inspired by, but completely separate from, *Graham*.²³⁴ A categorical rule will force state legislatures to develop new statutory schemes that will address the deficiencies of the current systems. These statutory schemes may involve conditional-release programs, a maximum sentence for all juvenile nonhomicide offenders, or perhaps a greater focus on rehabilitation.²³⁵ Such arrangements would also allow states to comply with the Court's command that juvenile offenders receive a meaningful opportunity for release. Advocates for a categorical rule should expect a tough fight, especially given the lower courts' reluctance to extend *Graham* in general.²³⁶ However, this Comment provides an initial framework for advocates because an examination of government data suggests that states rarely impose de facto LWOP sentences on juveniles who commit nonhomicide offenses.²³⁷

The actions of the United States and California Supreme Courts should inspire further conversation about how juveniles are punished and rehabilitated. This conversation is worth having because the status quo is untenable. Fortunately, the United States Supreme Court appears to recognize this problem. Advocates should be encouraged that the Court has expressly considered the mindset of the typical juvenile offender in *Roper* and *Graham*; and in both cases, the juvenile offender's relative lack of mental development and maturity convinced the Court to alter longstanding sentencing practices.²³⁸ In a sign of how far the Court has come, the *Miller v. Alabama* Court altered longstanding sentencing practices, even though the juvenile offenders were convicted of

232. Hechinger, *supra* note 15, at 425 n.91.

233. Admittedly, California's approach avoids the difficulty in determining the existence of a national consensus. But as Justice Werdegar notes, "we are extending the high court's jurisprudence to a situation that court has not had occasion to address." *California v. Caballero*, 282 P.3d 291, 296 (Cal. 2012) (Werdegar, J., concurring). Indeed if courts analyze de facto LWOP sentences under the traditional Eighth Amendment framework as opposed to extending *Graham*, then they will still have to find evidence of a national consensus. *See supra* Part II.A (discussing this framework).

234. *See supra* Part III.B (discussing the framework for a categorical ban).

235. *See supra* Part IV.A (discussing potential solutions for state legislatures if confronted with a new categorical ban on these sentences).

236. *See* Hechinger, *supra* note 15, at 425 n.91 (noting that most defendants who rely on *Graham* to challenge de facto LWOP sentences are unsuccessful).

237. *See supra* Part III.B.1 (discussing the statistical evidence suggesting a national consensus exists).

238. *See supra* Part III.B.2 (discussing why juvenile offenders who are sentenced to life with the possibility of parole are less culpable than those sentenced to LWOP).

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homicide.²³⁹ When the Court next hears an Eighth Amendment case involving juveniles, it will likely consider the offender's personal background and hardships.²⁴⁰ The fact that the Court has taken a strong interest in juvenile offender cases suggests now is a perfect time to challenge de facto LWOP sentences for juvenile nonhomicide offenders. As the California Supreme Court showed in *California v. Caballero*, this is a fight that can be won.

239. See 132 S. Ct. 2455 (2012) (holding that the Eight Amendment bars mandatory LWOP sentence for juveniles convicted of homicide).

240. See *Graham v. Florida*, 130 S. Ct. 2011, 2018 (2010) (describing Terrance Graham's difficult upbringing in the second paragraph of the case); *Miller*, 132 S. Ct. at 2468 (noting that one of the juvenile offenders had a tragic family history: "Both his mother and his grandmother had previously shot other individuals.").