

DEATH BEHIND BARS: EXAMINING JUVENILE LIFE WITHOUT PAROLE IN *SULLIVAN V. FLORIDA* AND *GRAHAM V. FLORIDA*

LAUREN FINE*

I. INTRODUCTION

As of 2005, over 2,000 Americans were serving life sentences for offenses they committed as children.¹ Approximately fifty-nine percent serve this time for a first and only criminal conviction; sixteen percent of those sentenced to life terms committed their crime(s) between ages thirteen and fifteen.² Moreover, the imposition of these sentences within the U.S. varies greatly: several states mete out juvenile life without parole (“JLWOP”) prison terms at three to seven-and-a-half times the national average, while other states have no children serving the sentence.³

2011 J.D. Candidate, Duke University School of Law. The author also contributed to the Brief of Juvenile Law Center as Amicus Curiae Supporting Petitioners, *Sullivan v. Florida* (No. 08-7621) and *Graham v. Florida* (No. 08-7412).

1. *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, (Hum. Rights Watch/Amnesty Int'l, New York, N.Y.), 2005 [hereinafter *The Rest of Their Lives*]. This Commentary uses the terms juvenile, youth, child and children interchangeably to refer to individuals under the age of eighteen.

2. *Id.*

3. *Id.* at 2. Additionally, the United States is the only country that sentences child offenders to life imprisonment without the possibility of parole. Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F.L. REV 983, 985 (2008). *See id.* at 1044 (listing Tanzania as only other country currently with a child serving LWOP sentence, but specifying Tanzanian government is in process of reforming sentencing code for that and all future child offenders). In addition, the United Nations Convention on the Rights of the Child, ratified by all countries except the United States and Somalia, explicitly prohibits “life imprisonment without possibility of release” for “offenses committed by persons below eighteen years of age.” United Nations Convention on the Rights of the Child (UNCRC), ¶ 37, (Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/crc.htm>. *See* the United Nations Convention on the Rights of the Child (UNCRC), available at <http://www2.ohchr.org/english/law/crc.htm>.

Two cases before the Supreme Court this term address the constitutionality of sentencing juveniles to life in prison for non-homicide offenses. In *Sullivan v. Florida*⁴ and *Graham v. Florida*,⁵ Petitioners argue that JLWOP violates the Eighth Amendment's prohibition of cruel and unusual punishment because the sentence is disproportionately harsh for non-homicide crimes committed by minors. Respondents counter that the sentences are not grossly disproportionate and instead reflect the legitimate penological purposes of protecting society from violent offenders. Respondents also point to the continued statutory validity of the punishment in most states and other objective indicia of a lack of national consensus against the punishment. This commentary will lay out the specific facts of each case, briefly outline the legal background and arguments put forth by each side, and predict how the Court will decide the issue.

II. FACTS

A. *Joe Harris Sullivan*

Joe Harris Sullivan was sentenced to serve a term of life without the possibility of parole in adult prison for an incident that occurred when he was thirteen years old, in 1989.⁶ Two older boys convinced Sullivan to join them in committing a burglary.⁷ The three entered an unoccupied home and one of the older boys took jewelry and money. They then left the premise without further incident.⁸ Some time that afternoon, the occupant of the home, Lena Bruner, was blindfolded, beaten, and raped by an assailant she never saw.⁹ Based on the testimony of the older boys, Joe Sullivan was tried and convicted as an adult for the rape.¹⁰ The State presented no biological evidence.¹¹ At

4. *Sullivan v. Florida*, 987 So.2d 83 (Fla.App. 1 Dist. 2008), *cert. granted*, 129 S. Ct. 2157 (2009).

5. *Graham v. Florida*, 982 So.2d 43 (Fla.App. 1 Dist. 2008), *cert. granted*, 129 S. Ct. 2157 (2009).

6. Petition for Writ of Certiorari at 2, *Sullivan v. Florida*, No. 08-7621 (U.S. Dec. 4, 2008). At that time, the mentally disabled Sullivan endured repeated sexual and physical abuse at home. Brief of Petitioner at 22 n.25, *Sullivan*, No. 08-7621 (U.S. Jul. 16, 2009) [Hereinafter *Sullivan* Brief of Petitioner]. The record does not make clear the extent of his disability.

7. Joint Appendix at 26, *Sullivan*, No. 08-7621, (U.S. Jul. 16, 2009) [Hereinafter Joint Appendix].

8. *Id.*

9. *Id.* See also Brief of Respondent at 5, *Sullivan*, No. 08-7621 (U.S. Jul. 16, 2009) [Hereinafter *Sullivan* Brief of Respondent] (noting that Bruner's assailant put a "black slip" over her head before beating her and raping her both vaginally and orally).

10. *Id.*

11. Joint Appendix, *supra* note 7, at 26.

Sullivan's trial, which lasted less than a day, Bruner testified that Sullivan's voice "sound[ed] like" that of her assailant.¹² The jury convicted Sullivan on five counts: two counts each for burglary of a dwelling and sexual battery, and one count of grand theft.¹³ Because Sullivan had an extensive criminal record, the trial judge treated him as an adult and sentenced him to life in prison on the sexual battery charges.¹⁴

Sullivan's court-appointed appellate counsel filed an *Anders* brief¹⁵ and withdrew from the case.¹⁶ The appellate court affirmed Sullivan's conviction, and the Florida Supreme Court denied review. Neither issued an opinion explaining its ruling.¹⁷

Fourteen years later, the Supreme Court held in *Roper v. Simmons* that sentencing a juvenile to the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment.¹⁸ Relying on that decision, Sullivan filed a motion for post-conviction relief,¹⁹ arguing that the Eighth and Fourteenth Amendments make it unconstitutional to impose a life without parole sentence on a thirteen-year-old convicted of a non-homicide offense.²⁰ The trial court dismissed the motion with prejudice on procedural grounds,²¹

12. Reply Brief in Support of Petition for Certiorari at 6 n.8, *Sullivan v. Florida*, No. 08-7621 (U.S. Mar. 30, 2009) [Hereinafter *Sullivan Reply Brief in Support of Petition for Certiorari*].

13. Sullivan Brief of Respondent, *supra* note 9, at 4–5. Additionally, Sullivan's lawyers maintain that he is actually innocent of the crime, pointing to the fact that Bruner never saw him, identified him only by his voice (without any other voices to which to compare it), and that the older boys who testified against him both received only short sentences in juvenile detention facilities for the burglary, to which all three admitted. Reply Brief in Support of Petition for Certiorari at 3.

14. Sullivan Brief of Respondent, *supra* note 9, at 6.

15. Sullivan Reply Brief in Support of Petition for Certiorari, *supra* note 12, at 7; *Anders v. California*, 386 U.S. 738, 744 (1967) (establishing a standard in which counsel asserts there are no issues worth raising on appeal).

16. See Sullivan Reply Brief in Support of Petition for Certiorari, *supra* note 12, at 7.

16. Joint Appendix, *supra* note 7 at 1.

17. *Id.* at 3. Additionally, in 2007, Sullivan's newly obtained counsel filed a motion for DNA testing, which was denied because the state had destroyed all the related biological evidence related to the case. *Id.* at 2.

18. See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of juveniles under age eighteen when they committed their crimes).

19. This motion was filed under Florida Rule of Criminal Procedure 3.850(b), which provides an exception to a bar on appeals filed more than two years after a final sentence in a noncapital case when "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." Sullivan Brief of Respondent, *supra* note 9, at 2.

20. Joint Appendix, *supra* note 7 at 3, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).

21. *Id.* at 4 (declining to extend *Roper* to a non-capital case). See also Sullivan Brief of

but added that Sullivan's claim was meritless in light of post-*Roper* Florida state court decisions.²²

The First District Court of Appeal of Florida affirmed without opinion and subsequently denied Sullivan's motion for rehearing and/or certification to the Supreme Court of Florida.²³ Because the court of appeal had not issued an opinion, the Supreme Court of Florida could not review his motion.²⁴ Sullivan's subsequent petition for writ of certiorari was granted on May 4, 2009.²⁵ The precise question before the Court is whether the imposition of a life sentence without the possibility of parole on a thirteen-year-old for a non-homicide offense constitutes "cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."²⁶

B. *Terrance Jamar Graham*

At sixteen, Terrance Jamar Graham was convicted as an accomplice to an armed burglary and attempted armed robbery of a restaurant in 2003.²⁷ Though Graham did not engage in violence or take money,²⁸ he was charged in adult court because his codefendant had used a pipe to assault the restaurant owner.²⁹ Graham pled guilty to the charges and received a sentence of one year at a pre-trial juvenile detention facility and, thereafter, three years of probation.³⁰

After serving his sentence, Graham was released on June 25, 2004.³¹ In January 2006, Graham was convicted of violating his parole. The State presented evidence that on December 2, 2004, Graham and two codefendants forcefully entered a man's apartment and robbed him while Graham held him at gunpoint.³² Nineteen at the time,

Respondent, *supra* note 9, at 7.

22. Sullivan Brief of Respondent, *supra* note 9, at 7.

23. Joint Appendix, *supra* note 7, at 74; Sullivan v. Florida, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008).

24. Sullivan Brief of Respondent, *supra* note 9, at 7.

25. *Id.* at 8.

26. Joint Appendix, *supra* note 7, at (i).

27. Graham v. State, 982 So.2d 43, 45 (Fla. App. 1 Dist., 2008). At the time, Graham's parents struggled with crack cocaine, and Graham suffered from long-term depression and ADHD, for which he was prescribed medication but discouraged by his mother from taking it. See Brief of Petitioner at 11, Graham v. Florida, No. 08-7412 (Jul. 16, 2009) [Hereinafter Graham Brief of Petitioner].

28. *Id.* at 12.

29. *Id.* at 12-13.

30. *Id.* at 13-14.

31. *Id.*

32. Graham v. State, 982 So.2d 43, 45 (Fla. App. 1 Dist., 2008); Brief of Respondent at 8, Graham, No. 08-7412 (Jul. 16, 2009) [Hereinafter Graham Brief of Respondent].

Graham had only the one previous conviction, for the restaurant burglary.³³ He was never tried for the home invasion.³⁴ Instead, the trial court convicted him of the parole violation on evidence of firearms found in his car, testimony from the victim, and testimony from one of Graham's accomplices in the home invasion.³⁵ He received Florida's statutory maximum penalty for violating probation—life imprisonment without the possibility of parole.³⁶

Graham filed a post-sentencing motion in the state trial court, which did not rule on his motion within the requisite sixty days, and thus deemed it denied.³⁷ The First District Court of Appeal of Florida rejected Graham's appeal challenging the constitutionality of his sentence under the Eighth Amendment,³⁸ and the Supreme Court of Florida denied discretionary review.³⁹ The United States Supreme Court granted certiorari on May 4, 2009.⁴⁰ Graham's case seeks to answer the slightly broader question of "[w]hether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide."⁴¹

III. LEGAL BACKGROUND

The Eighth Amendment to the United States Constitution bans "cruel and unusual punishments."⁴² The Court has repeatedly recognized that the Amendment's protection "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'"⁴³ In determining what constitutes a cruel and unusual punishment, the Court has refined an analysis of the proportionality of the sentence imposed to the harm committed.⁴⁴

33. *Id.*

34. Graham Brief of Petitioner, *supra* note 27, at 17.

35. Graham Brief of Respondent, *supra* note 32, at 12.

36. *Id.* at 2.

37. *Graham*, 982 So. 2d at 54; Graham Brief of Petitioner, *supra* note 27, at 23.

38. Graham Brief of Petitioner, *supra* note 27, at 23.

39. *Id.* at 24.

40. *Id.*

41. *Id.* at (i).

42. U.S. CONST. amend. VIII. While the Fourteenth Amendment is also implicated in this case, none of the parties or amici questions its relevance (because it is settled that the Fourteenth Amendment incorporates the Eighth Amendment to the states), or engages in any depth of analysis on the topic and it is accordingly omitted from discussion in this Commentary, as are all other legal issues.

43. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910) (finding the death penalty unconstitutional for child rapists)).

44. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 584 (1982) (finding the death penalty grossly

The Court has emphasized the need for objective factors to determine the gravity of the offenses in comparison to the criminal sentences,⁴⁵ in order to assess the constitutionality of those sentences based on “the evolving standards of decency that mark the progress of a maturing society.”⁴⁶ The first step involves analyzing objective indicia of public stances toward the particular punishment, such as state law trends and jury decisions, to determine whether a national consensus indicates what the evolving standards of decency are.⁴⁷ Upon concluding this examination, the Court exercises its judgment to determine whether the punishment is cruel and unusual.⁴⁸ Toward that end, the Court analyzes whether the punishment in question furthers its stated goals, such as retribution and deterrence.

Throughout the last few decades, the Court has established and applied several objective criteria to determine whether sentences are proportional to the crimes for which they are given. The 1983 case of *Solem v. Helm* looked to three factors, “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction. . . ; and (iii) the sentences imposed for the same crime in other jurisdictions.”⁴⁹ If these objective factors indicate that the punishment is “significantly disproportionate” to the crime, the Eighth Amendment prohibits it.⁵⁰ The *Solem* Court emphasized that Eighth Amendment analysis should also examine the “culpability of the offender,”⁵¹ including an assessment of how intentional his conduct was and his motive for acting.⁵²

In *Harmelin v. Michigan*, a plurality of the Court strayed from

disproportionate and excessive for a crime of rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782, 782 (1982) (holding the death penalty disproportionate to the crime of felony murder, when “the defendant did not take or attempt or intend to take life, or intend that lethal force be employed”); *Solem v. Helm*, 463 U.S. 277, 277 (1983) (holding life without parole disproportionate punishment for falsifying a check when the defendant had only relatively minor prior offenses).

45. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991) (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 274–75(1980)).

46. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

47. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 552 (2006) (finding that “the objective indicia of national consensus” including “the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice” mandated invalidating the punishment); *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002) (invalidating the death penalty for mentally retarded defendants as cruel and unusual punishment).

48. See, e.g., *Roper*, 543 U.S. at 563; *Kennedy*, 128 S. Ct at 2650.

49. *Solem*, 463 U.S. at 292.

50. *Id.* at 303.

51. *Id.* at 294.

52. *Id.* at 293–94.

applying the *Solem* factors in favor of employing an originalist analysis of the Eighth Amendment's purpose.⁵³ Justice Scalia, writing for the plurality, concluded that

the Americans who adopted the Eighth Amendment intended its Cruel and Unusual Punishments Clause as a check on the ability of the Legislature to authorize particular *modes* of punishment—*i.e.*, cruel methods of punishment that are not regularly or customarily employed—rather than as a guarantee against disproportionate sentences is demonstrated by the available evidence of contemporary understanding.⁵⁴

Justice Scalia specifically renounced the first two factors elucidated in *Solem* as providing too much room for judges' personal views to influence their constitutional interpretations of the sentences, and the third as "irrelevant to the Eighth Amendment."⁵⁵ The Court ultimately concluded "that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."⁵⁶ Scalia's criticism of the doctrine allowing judges to exercise their own judgment about whether a punishment is cruel and unusual is a minority view on the Court.⁵⁷

In *Harmelin*, Justice Kennedy acknowledged the partial validity of the *Solem* decision in that a sentence may violate the Eighth Amendment in cases that give rise to "an inference of gross disproportionality,"⁵⁸ based on a comparative analysis of the punishment imposed to the crime committed.⁵⁹ Kennedy identified five principles that guide the Court's analysis of whether a punishment establishes such an inference, including the "requirement" that objective factors dictate a sentence's proportionality analysis.⁶⁰ Only if that inference has been established does it become appropriate to compare the sentence to others both

53. See *Harmelin v. Michigan*, 501 U.S. 957, 958 (1991) (holding constitutional life without parole for possession of over 650 grams cocaine).

54. *Id.*

55. *Id.*

56. *Id.* at 965.

57. In *Harmelin*, for example, only Justice Rehnquist joined this portion of Scalia's opinion. *Id.* at 957.

58. *Id.* at 1005 (Kennedy, J., concurring).

59. *Id.*

60. *Id.* at 1001. The other factors are the legislature's "primacy" in establishing crimes and punishments; the acceptability of mandatory and discretionary sentencing schemes; variance among state sentencing schemes and that a sentence need not be strictly proportional to the corresponding crime.

within and outside the particular jurisdiction.⁶¹

Kennedy's Eighth Amendment jurisprudence has shifted from the more conservative approach in cases such as *Harmelin v. Michigan*⁶² and *Ewing v. California*⁶³ to joining the majority in finding a violation in more recent cases such as *Roper v. Simmons*.⁶⁴ In *Roper*, the Court abolished the death penalty for all juveniles under the age of eighteen, finding it a violation of the Eighth Amendment's ban on cruel and unusual punishment.⁶⁵ As the author of the majority opinion, Justice Kennedy invoked language from a 1958 decision⁶⁶ to describe the importance "of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual.'"⁶⁷ While not excusing the crimes committed by juveniles, the Court focused on the important differences between youths and adults; namely, the diminished culpability of youth as a class and children's innate capacity for change.⁶⁸ Juveniles' diminished culpability rests on their lesser developmental capabilities, increased susceptibility to negative influences, and inability to control their surroundings. The Court concluded that those characteristics make youth less deserving of the harshest forms of punishment.⁶⁹

While the two-step test the Court applied in *Roper* provides a standard to judge a sentence's proportionality, the Court has not indicated a process for when the objective indicia are unclear. The

61. *Id.*

62. *Id.* at 957 (holding that mandatory sentence of LWOP for possession of 672 grams cocaine did not violate the Eighth Amendment). *See also id.* at 1001 (Kennedy, J., concurring) (concluding that "Eighth Amendment does not require strict proportionality between crime and sentence").

63. *Ewing v. California*, 538 U.S. 11 (2003) (upholding the constitutionality of life sentence without parole for three non-violent theft-related offenses).

64. *Roper v. Simmons*, 543 U.S. 551 (2005); Sheldon Bernard Lyke, *Lawrence as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633, 647–51 (2009).

65. *See Roper*, 543 U.S. at 551 (extending its previous decision in *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988), which held the death penalty unconstitutional for juveniles under sixteen years old at the time of their crime because "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult").

66. *Trop v. Dulles*, 356 U.S. 86, 78 (1958) (holding unconstitutional as beyond Congress' war powers a statute authorizing expatriation of a soldier convicted by military court martial of deserting the United States army).

67. *Roper*, 543 U.S. at 560–61.

68. *Id.* at 568–76.

69. *Id.* at 569–70.

contrast between the Court's approaches in *Roper*⁷⁰ and in *Harmelin*⁷¹ illustrate the yet unsettled debate over whether courts are free to decide what is morally repugnant and try to predict where the country's moral values are going, or whether judges' opinions have no place in the analysis and thus courts should defer to the states' sentencing schemes.

State courts are split on whether imposing a JLWOP sentence constitutes cruel and unusual punishment.⁷² Forty-two state statutes permit JLWOP,⁷³ while five states and the District of Columbia legislatively prohibit it.⁷⁴ In twenty-seven of the forty-two states that

70. *Id.* at 569–76.

71. *Harmelin v. Michigan*, 501 U.S. 957, 958 (1991).

72. *Compare* *Kentucky* (declaring JLWOP unconstitutional, reasoning that “[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth. . .” *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968), quoted in Brief of Juvenile Law Center as Amicus Curiae Supporting Petitioners at 23, *Sullivan v. Florida*, No. 08-7621, and *Graham v. Florida*, No. 08-7412 (U.S. Jul. 23, 2009) [Hereinafter Brief of Juvenile Law Center]), *Nevada* (finding that life without parole cannot be constitutionally applied to a thirteen year old, reasoning that the “severe penalty” should be reserved for only the “the deadliest and most unsalvageable of prisoners,” which a child necessarily could not be. *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)), *with* *South Carolina* (upholding JLWOP for burglary committed by fifteen-year-old upon finding that it “does not offend evolving standards of decency so as to constitute cruel and unusual punishment. *State v. Standard*, 569 S.E.2d 325, 206 (S.C. 2002)). *Post-Roper, compare* *Ohio* (upholding sentence of life without parole for fifteen-year-old convicted for kidnapping and rape. *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008)) *with* *California* (declaring the practice constitutionally impermissible because “the harshness of an LWOP is particularly evident ‘if the person on whom it is inflicted is a minor, who is condemned to live virtually his entire life in ignominious confinement, stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth.’” *In re Nunez*, 173 Cal. App. 4th 709, 736 (2009)).

73. *The Rest of Their Lives*, *supra* note 1, at 25.

74. *See* D.C. Code. § 22-2104 (a) (2007) (no person who was less than eighteen years of age at the time of committing a murder can be sentenced to LWOP); C.R.S.A. § 17-22.5-104 (2)(d)(iv)(2008) (juveniles charged as adults eligible for parole after forty years); Kan. Stat. Ann. §§ 21-4622, 21-4635 (2007) (No sentence of life without parole for capital murder where defendant is less than eighteen years old); N.Y. Penal Law § 70.00(5) (McKinney 2007) (LWOP available only for first-degree murder), N.Y. Penal Law 70.05 (McKinney 2007) (limiting indeterminate sentencing for youthful offenders), N.Y. Penal Law 125.27(1)(b) (McKinney 2007) (required element of first-degree murder is that the defendant is over eighteen years old); Or. Rev. Stat. §161.620 (prohibiting LWOP for juveniles tried as adults) (2005), *State v. Davilla*, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting §161.620 to bar juvenile LWOP). TX PENAL § 12.31 (2009) (limiting LWOP to forty years before a parole hearing). In addition, the transfer statutes in New Jersey bar the imposition of LWOP on a juvenile by designating maximum sentences for youth transferred to adult court. Two more states legislatively prohibit LWOP for both juveniles and adults. *See* Alaska Stat. § 12.55.125(a), (h), & (j) (LexisNexis 2007) (providing mandatory ninety nine year sentences for enumerated crimes, discretionary ninety year sentence in others, but permitting prisoner serving such sentence to apply once for modification or reduction of sentence after serving half of the sentence; N.M. Stat. Ann. § 31-21-10 (Supp. 2007) (maximum sentence in state has parole eligibility after thirty years).

permit JLWOP, the sentence is mandatory for any person convicted of specific enumerated crimes, without regard to the perpetrator's age.⁷⁵ Federal appellate courts have not yet weighed in on the issue post-*Roper*. While the Court has not considered an Eighth Amendment challenge to any juvenile sentences beyond those imposing death, in other contexts, it has recognized the unique developmental status and diminished culpability of youth both in criminal and civil matters.⁷⁶ As Justice Frankfurter famously noted, "children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."⁷⁷

IV. ARGUMENTS THAT THE SENTENCE IS CONSTITUTIONAL

A. *Objective Indicia Show that JLWOP Does Not Violate the Nation's Evolving Standards of Decency*

A significant factor in the Court's analysis will be its view of the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to" sentences.⁷⁸ In assessing whether there is a national consensus regarding a punishment, the Court considers not only the number of states that explicitly prohibit a specific penalty, but also a set of more nuanced factors, such as the express intent of the legislature and frequency with which the penalty is applied.⁷⁹ In the past, when measuring the

75. *The Rest of Their Lives*, *supra* note 1, at 25. The twenty-seven states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, Washington, and Wisconsin.

76. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (holding that state may require parental consent for minors' reproductive choices because minors often lack capacity to make fully informed decisions independently: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding state's right to restrict minor's work schedule); *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (holding that due to young citizens' immaturity, inexperience, and lack of judgment, the State has a legitimate interest in their welfare).

77. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

78. *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2642 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

79. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The Court has also looked to international trends, but only to buttress what it perceives as a consensus in the United States.

constitutionality of a sentence applied to juveniles, the Court has looked narrowly to state legislatures' affirmative objectives.⁸⁰ In *Thompson*, for example, the Court confined its legislative assessment to those statutes expressly establishing a minimum age for the death penalty.⁸¹ Moreover, review of the relevant data and statutes of each of the states and the District of Columbia indicates JLWOP's overwhelming continued vitality and a lack of nationwide agreement regarding its prohibition.⁸² Unlike the climate leading up to *Roper*,⁸³ no national consensus currently exists on declaring JLWOP sentences unconstitutional.⁸⁴

Further, there is an absence of statistical evidence to establish that Sullivan's and Graham's sentences are actually unusual. Data from Florida indicate that JLWOP is not unusual, particularly for offenders of Graham's age.⁸⁵ In *Harmelin v. Michigan*, the Court put forth the standard that jurisdiction-specific data should guide the constitutionality analysis in the absence of an "inference of gross disproportionality."⁸⁶ Even if that threshold were met here, "7.2% of youth offenders nationwide are serving a life without parole sentence for crimes other than some type of homicide, such as kidnapping, property crimes, sex crimes, and other violent crimes."⁸⁷ Arguably, such numbers do not make JLWOP unusual.

See, e.g., Roper at 577 (observing that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty"). Indeed, "[i]n cases where no legislative trend toward abolition existed among the states, the Court has not explored international law trends." Graham Brief of Respondent, *supra* note 32 at 42 (citing *Ewing v. California*, 538 U.S. 11 (2003) (upholding the constitutionality of life sentence without parole for three non-violent theft-related offenses), *Johnson v. Texas*, 509 U.S. 350 (1993), and *Stanford v. Kentucky*, 492 U.S. 361 (1989)). This means that the Court is unlikely to weigh heavily the fact that the United States remains alone in the world in inflicting this punishment. *See, e.g., de la Vega & Leighton, supra* note 3, at 985.

80. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 822 (1998) (explaining that the Court looks to the work product of state legislatures in determining whether the death penalty constitutes cruel and unusual punishment in certain types of cases).

81. *Id.* at 826.

82. *See supra* note 74 and accompanying text.

83. *See Roper*, 543 U.S. at 564–66 (noting that "the enactments of legislatures that have addressed the question" provide "essential instruction" toward abolishing the practice).

84. Importantly, *Roper* deviates from *Kennedy v. Louisiana*, where the Court explicitly looked past a growing consensus supporting the death penalty for child rapists to conclude it was cruel and unusual. The distinction is simple—one is death; one isn't—but the varied analytical approaches are important notwithstanding the fundamental difference in the sentences considered. *See id.*; *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2642 (2008).

85. Graham Brief of Respondent, *supra* note 32, at 19.

86. *Harmelin v. Michigan*, 501 U.S. 957, 960 (1991).

87. *The Rest of Their Lives, supra* note 1, at 27.

B. Roper Does Not Apply to or Affect Non-Capital Offenses

The only sentence that the Court has categorically banned and for which it has considered the characteristics of the offender in analyzing its validity under the Eighth Amendment is the death penalty.⁸⁸ Prior non-homicide Eighth Amendment jurisprudence has examined an offense as it relates to the punishment only—not the qualities of the offender.⁸⁹ The Court compares the crime committed to its corresponding sentence “to determine whether an inference of gross disproportionality exists.”⁹⁰ The Court has never considered age in determining whether the threshold “gross disproportionality” exists.⁹¹

Further, the Court has specifically declined to extend its underlying analysis from capital cases to those involving other types of punishment. Instead, it has maintained that “[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long,” capital precedent is of “limited assistance” in analyzing the constitutionality of non-capital punishments, no matter how long in length.⁹² In *Caldwell v. Mississippi*, the Court concluded that “the qualitative difference” between the death penalty and any other sentence means that capital sentencing “requires a correspondingly greater degree of scrutiny.”⁹³ More pointedly, the Court in *Roper v. Simmons* specifically pointed to life without parole as a constitutional alternative to the juvenile death penalty’s deterrent effect.⁹⁴ Thus, the Court unambiguously accepted JLWOP’s availability and constitutionality just four years ago.

Further, extending *Roper* to JLWOP would raise difficult “line-drawing” questions.⁹⁵ For example, does a “life” sentence describe only those sentences that specifically impose life imprisonment for one crime, or could it also constitute sentences that run consecutively for “two or more offenses that effectively amount to (or exceed) the actuarial life expectancy of the offender?”⁹⁶ To facially invalidate JLWOP, the Court would need to be untenably specific and contemplate many scenarios usually left to state legislatures.

88. Graham Brief of Respondent, *supra* note 32, at 22.

89. *Id.*

90. *Id.* at 23 (citing *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)).

91. *Harmelin*, 501 U.S. at 1005.

92. *Id.* at 45 n.24 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

93. *Id.* (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)).

94. *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

95. Graham Brief of Respondent, *supra* note 32, at 21.

96. *Id.*

C. *The Criminal Justice System Already Takes Age Into Account.*

Those who perpetrate “[p]articularly heinous acts that stop short of causing death or a series of escalating violent acts” should not be treated differently “simply because of the fortuity that their victims did not die.”⁹⁷ Victims of crimes perpetrated by juveniles do not suffer less simply because of the age of the offenders.⁹⁸ Instead, juvenile offenders’ victims receive fewer rights than the victims of adult offenders.⁹⁹

The American criminal justice system already accounts for the lesser culpability and distinct developmental condition of youthful offenders.¹⁰⁰ Graham did not challenge the process he received (being charged as an adult), which indicates that “his attempt to inject age at the sentencing phase is unwarranted.”¹⁰¹ If Graham’s case succeeded in the Supreme Court, it would undermine the nationwide practice of charging juveniles as adults.¹⁰² Graham never contested being charged and sentenced as an adult, throughout many stages of trial.¹⁰³ His objection to his sentence at this stage can thus be viewed as effectively seeking a constitutional prohibition on states trying and sentencing juveniles as adults.¹⁰⁴

Both the state and federal juvenile justice systems consider a juvenile’s status in sentencing and punishment.¹⁰⁵ In reality, the American criminal justice system already accounts for youth’s differences and reserves transfer from juvenile court to adult court only in the cases of the most heinous crimes. In 2005, fewer than one percent of juvenile court cases were transferred to adult court.¹⁰⁶

D. *Federalism Prevents the Supreme Court from Abolishing JLWOP.*

97. *Id.* at 18.

98. Brief Amici Curiae of National Organization of Victims of Juvenile Lifers in Support of Respondent at 13, *Graham v. Florida*, No. 08-7412, *Sullivan v. Florida*, No. 08-7621 (U.S. Sept. 21, 2009) [hereinafter Brief of Victims of Juvenile Lifers].

99. *Id.* at 18. This “means the criminal justice system treats victims of the same or similar crimes vastly differently solely due to the perpetrator’s age.” *Id.*

100. *See, e.g.*, *Graham* Brief of Respondent, *supra* note 32, at 19.

101. *Graham* Brief of Respondent, *supra* note 32, at 19.

102. *Id.*

103. *Id.* at 50 n.29.

104. *Id.* (quoting *State v. Pittman*, 647 S.E.2d 144, 163 (S.C. 2007) (rejecting an argument similar to Graham’s as outside the scope of the Eighth Amendment, which deals with punishment only)).

105. *Id.* at 150–51.

106. Brief of Victims of Juvenile Lifers, *supra* note 98, at 27 (citing Office of Justice Programs, *Delinquency Cases Waived to Criminal Court, 2005*, U.S. Dep’t of Justice (June 2009)).

Overturing JLWOP would create a slippery slope by interfering with the state's exercise of its police power.¹⁰⁷ The Court has been unwilling to "micro-manage" the states' various sentencing regimes and undermine judges' and prosecutors' discretion.¹⁰⁸ Instead, it has typically accorded deference to legislatures in sentencing and punishment decisions. In *Solem*, the Court expressly emphasized that appellate courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."¹⁰⁹ The Court has very rarely sought to infringe on states' rights to determine their own sentencing schemes.

V. ARGUMENTS THAT JLWOP IS UNCONSTITUTIONAL

A. *Objective Indicia Show that Evolving Standards of Decency Have Rejected JLWOP in Practice.*

1. JLWOP is Unusual Punishment for Sullivan and Graham's Non-Homicide Crimes.

Unusual can describe statistical as well as qualitative classifications. With respect to the statistical side, Sullivan's punishment is unusual because only one other offender in the country, also located in Florida, is serving a life sentence for a non-homicide crime committed at age thirteen.¹¹⁰ The rarity of JLWOP sentences imposed for thirteen-year-old offenders demonstrates a clear societal repudiation of their use in the United States.¹¹¹ Although a majority of states have statutes that would allow JLWOP, almost none of the states that statutorily permit JLWOP have ever actually imposed the sentence on a minor as young as Sullivan.¹¹² Forty-four states, the District of Columbia and the federal government have never sentenced a thirteen-year-old to JLWOP.¹¹³ Currently, only nine

107. Graham Brief of Respondent, *supra* note 32, at 57 (quoting *Rummel v. Estelle*, 445 U.S. 263, 303 (1980) (Powell, J., dissenting)).

108. *Id.* at 59 (quoting *Rummel*, 445 U.S. at 381-82).

109. *Solem v. Helm*, 463 U.S. 277, 290 (1983).

110. Sullivan Brief of Petitioner, *supra* note 6, at (i).

111. *Id.* at 6.

112. *Id.* at 52.

113. *Id.*

Americans are currently serving life without parole sentences for any type of offense committed at age thirteen, and sixty-four others for crimes committed at age fourteen—collectively, they represent the total number of youth of those ages sentenced to LWOP over a thirty-year period.¹¹⁴ In the same thirty-year period, at least a quarter of a million juveniles under age fifteen were arrested for offenses for which they could have received LWOP.¹¹⁵

Graham's sentence is also unusual when compared to other sentences for the same crime in Florida, as well as across the country. The average length of a prison sentence for adults in Florida for armed burglary is under nine years,¹¹⁶ making Graham's punishment a gross deviation from the norm in his state, as applied to adults. Further, only one other state statutorily allows JLWOP for an offender with Graham's specific crime and characteristics, and that state, South Carolina, has never imposed the sentence.¹¹⁷ No juveniles outside of Florida are currently serving life without parole sentences for any sort of burglary, robbery, carjacking, or battery offense.¹¹⁸

Florida deviates from the national trend in its continued imposition of JLWOP for non-homicide offenses.¹¹⁹ Only five other states have juveniles serving LWOP sentences for non-homicides, and each has imposed the sentence at a much lower rate than has Florida.¹²⁰ In almost all JLWOP cases for offenders of any age, the offense was murder.¹²¹ The infrequency of the sentence's imposition provides a much more accurate indicator of the national attitude toward its validity, which is one of repudiation.

2. JLWOP is Cruel Punishment for Sullivan and Graham's Non-Homicide Crimes.

In addition to being unusual, Sullivan and Graham's sentences are cruel in their failure to recognize the influence of each youth's respective family life and upbringing. Because adolescents like

114. *Id.* at 50–51.

115. *Id.* at 51.

116. Graham Brief of Petitioner, *supra* note 27, at 58 (describing the average sentences Florida meted out in 2003–2004 to offenders of any age).

117. *Id.* at 61.

118. *Id.*

119. *Id.* at 63.

120. *Id.* Compare seventy-seven in Florida to one in South Carolina, one in Nebraska, six in Iowa, and four in California (a state whose Supreme Court has since invalidated the practice).

121. Sullivan Brief of Petitioner, *supra* note 6, at 53; *See also* Graham Brief of Petitioner, *supra* note 27, at 64 (citing *The Rest of Their Lives*, *supra* note 1, at 27).

Sullivan and Graham are more easily influenced by their surroundings, and less capable of controlling their home and neighborhood situations, they are more vulnerable to circumstances that may “exert pressure toward crime.”¹²² Moreover, both Sullivan and Graham’s crimes involved co-offenders, which is consistent with psychological research indicating that “juvenile crime is significantly correlated with exposure to delinquent peers”¹²³ and “adolescents are much more likely than adults to commit crimes in groups.”¹²⁴ Both Sullivan and Graham’s JLWOP sentences fail to consider the unique biological characteristics and situational factors caused by their youth that contributed to their criminal behavior. The sentences also do not allow for the capacity to change that characterizes adolescence. Accordingly, “[c]ondemning an immature, vulnerable, and not-yet-fully-formed adolescent to die in prison is a constitutionally disproportionate punishment.”¹²⁵

B. JLWOP is Analogous to the Death Penalty, Which the Court Deemed Unconstitutional for Juveniles in Roper v. Simmons.

The same qualitative characteristics unique to youth that make the death penalty unconstitutional for juvenile offenders make life imprisonment without the possibility of parole impermissible for minors. As *Roper v. Simmons* recognized, because youth are less culpable, less likely to be deterred, and much more likely to be rehabilitated than adults who commit similar crimes, retribution against children is less justified.¹²⁶ Moreover, without the option of parole, a life sentence “is in a very real sense final: it condemns the offender to die in prison without affording him any opportunity to demonstrate a reformed moral character that might warrant release.”¹²⁷ A life sentence without parole is especially inappropriate for a juvenile who will never have the opportunity to live as a free adult¹²⁸ or, in the *Roper* court’s words, realize his “potential to attain a mature understanding of his own humanity”¹²⁹ outside the confines of

122. Brief for the Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 15–16, *Graham v. Florida*, No. 08-7412, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 23 2009) [hereinafter Brief for the Am. Psychological Ass’n].

123. *Id.* at 17.

124. *Id.* at 18.

125. *Id.* at 5.

126. *See id.*

127. *Id.*

128. *Id.*

129. *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

a prison cell. Indeed, for offenders sentenced to life without parole as youth, death can be viewed as a more humane alternative to subsisting with the knowledge that they will spend the remaining decades of their lives within a maximum security prison.¹³⁰

1. Youth have Diminished Culpability as a Class and Have Been Treated Uniquely in the Criminal Justice System

Supreme Court jurisprudence in both civil and criminal matters has demonstrated a longstanding recognition of the unique developmental status of youth. The Court has emphasized that youth “is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹³¹ *Roper* reaffirmed the consistent view that youth are “categorically less culpable than the average criminal.”¹³² Even older adolescents lack the mature judgment faculties of an adult and as a result have a greater propensity toward risky, including criminal, behavior.¹³³ Moreover, even seventeen-year-olds have lower aptitude for understanding long and short-term consequences, and lesser ability to empathize than do adults.¹³⁴ It is not until age twenty-one that individuals experience “tremendous gains in emotional maturity, impulse control and decision making” that continue until the brain

130. Brief of Former Juvenile Offenders Charles S. Dutton, et al. as Amici Curiae in Support of Petitioners, *Sullivan v. Florida* (No. 08-7621) and *Graham v. Florida* (No. 08-7412) at 31 (U.S. Jul. 23, 2009) [hereinafter Brief of Former Juvenile Offenders] (arguing that their own histories as former juvenile offenders who have accomplished and contributed at the highest levels, both nationally and internationally in a variety of fields, illustrates the inherent capacity of youth to change and opportunities for positive change foreclosed by sentences like JLWOP (quoting Charles S. Dutton, who grew up in impoverished Baltimore and served several prison sentences (during which he earned his GED and Associates Degree), before earning an MFA degree from Yale drama school and winning Tony and Emmy awards, “[i]f I know I can never get out of prison, that’s as good as dead to me . . . I would prefer the death penalty to a life sentence without the possibility of parole.”)).

131. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

132. *Roper*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion).

133. Brief for the Am. Psychological Ass’n, *supra* note 122, at 3–4 (Developmental psychology and neuroscience research has found that “juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity.”).

134. *Id.* at 12 (quoting Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 746, 748, 754, tbl. 4 (2000) (citing a study of over 1,000 adults and adolescents)).

becomes fully developed in the mid-twenties.¹³⁵ Recognizing this fact, the Court has sought to ensure ongoing access to a rehabilitative, rather than retaliatory, juvenile justice system,¹³⁶ and has foreclosed constitutional application of the juvenile death penalty.¹³⁷ If the Court views and applies these characteristics unique to youth in the same way as it did in *Roper v. Simmons*, JLWOP will be ripe for abolition.¹³⁸

2. Imposing Life Sentences without the Possibility of Parole Fails to Recognize Youth's Capacity to Change

The Court's conclusion in *Roper* about juvenile culpability was rooted in its appreciation that the personalities of adolescents are "more transitory" and "less fixed" than those of adults.¹³⁹ The Court has consistently demonstrated an understanding that "the signature qualities of youth are transient," which mitigates against juveniles' meriting the harshest punishments because their negative behavioral tendencies may abate.¹⁴⁰ *Roper* further recognized the difficulty that even the foremost psychological experts have in distinguishing between juveniles who commit criminal offenses as a result of "irreparable corruption" and those whose youthful immaturity manifests in making especially poor decisions.¹⁴¹ On the whole, juvenile criminal conduct generally reflects "experimentation with risky behavior" rather than "deep-seated moral deficiency reflective

135. Brief of Juvenile Law Center, *supra* note 72, at 17 n.4 (citing Dr. Paul Thompson et al., *The Child's Developing Brain*, *The New York Times*, Sept. 15, 2008, <http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse> ; Brief for the Am. Psychological Ass'n, *supra* note 122 at 23 ("[T]he brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence.")).

136. See Brief of Juvenile Law Center, *supra* note 72, at 12 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 539–40 (1971)); *In re Gault*, 387 U.S. 1, 15–16 (1967); BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).

137. *Roper*, 543 U.S. at 578.

138. See Brief of Amici Curiae J. Lawrence Aber, et al. in Support of Petitioners, *Sullivan v. Florida* (No. 08-7621) and *Graham v. Florida* (No. 08-7412) at 13 (U.S. Jul. 23, 2009) [hereinafter Brief of J. Lawrence Aber]. These Amici represent an interdisciplinary group of psychologists, psychiatrists, social scientists, and neuroscientists who study adolescent development and behavior and social policy. *Id.*

139. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

140. Brief of Juvenile Law Center, *supra* note 72 at 8 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

141. *Roper*, 543 U.S. at 573 (discussing "the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder").

of 'bad' character."¹⁴²

Roper reflects the Court's unease with inflicting an unalterable sentence on a child who has the capacity to mature and change. The Court determined that equating the mistakes of minors with those of adults is "misguided" because minors have much greater potential to reform,¹⁴³ which makes their reckless conduct less "morally reprehensible."¹⁴⁴ As a result, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."¹⁴⁵ Juveniles who receive professional treatment demonstrate that behavioral reform is possible.¹⁴⁶

VI. DISPOSITION

Incarceration serves several goals within the American criminal justice system: deterrence, retribution, and rehabilitation.¹⁴⁷ JLWOP advances only retribution, which is less justified for youth given their reduced culpability. While it is true that imposing JLWOP promotes the additional aim of protecting society from those who have been incarcerated,¹⁴⁸ the sentence's failure to further other fundamental aims satisfactorily renders it unjustifiable in light of the ethical, social, and legal costs associated with its perpetuation.

Petitioners are not asking for the release of dangerous individuals who have not reformed or proven their remorse. Instead, they merely seek to protect the opportunity for juveniles to demonstrate their unique capacity to change and reform. Certainly, "[i]t is impossible to know what any juvenile offender will grow up to become. But it is also impossible to conclude that any juvenile offender has no redeeming potential, and therefore should be locked away for life without no possibility of parole."¹⁴⁹ Accordingly, the Court should hold sentencing a child to life imprisonment without the possibility of parole

142. Brief for the Am. Psychological Ass'n, *supra* note 122, at 20.

143. *Id.* at 570.

144. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

145. *Id.*

146. Brief of J. Lawrence Aber, *supra* note 138, at 1.

147. See, e.g., *Atiyeh v. Capps*, 449 U.S. 1312, 1314 (1981); *Harmelin v. Michigan*, 501 U.S. 957, at 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2649 (2008).

148. See *Gregg v. Georgia*, 428 U.S. 153, 183 n. 28 (1976) ("Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future").

149. Brief of Former Juvenile Offenders, *supra* note 130, at 4.

unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment.

The Supreme Court, however, is unlikely to declare JLWOP sentences facially unconstitutional in these cases. At best, the Court is likely to find JLWOP sentences unconstitutional as applied to the specific facts of the two cases or, even more likely, as applied only the facts of *Sullivan v. Florida*, where the offender was very young at the time of his conviction.¹⁵⁰ The Court's determination likely will rest on Justice Kennedy's view of the proportionality analysis as applied both to the specific facts of *Sullivan* and *Graham*, and to juvenile life without parole sentences more broadly.

A significant factor in the Court's analysis will be its view of the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to" sentences.¹⁵¹ In assessing whether there is a national consensus regarding a punishment, the Court considers not only of the number of states that explicitly prohibit a penalty, but also a set of more nuanced factors, such as the express intent of the legislature and frequency with which the penalty is applied.¹⁵² In the past, when measuring the constitutionality of a sentence applied to juveniles, the Court has looked narrowly to the express intent of state legislatures.¹⁵³ In *Thompson*, for example, the Court confined its legislative assessment to those statutes expressly establishing a minimum age for the death penalty.¹⁵⁴ Moreover, review of the relevant data and statutes of each of the states and the District of Columbia indicates JLWOP's overwhelming, continued vitality and a lack of nationwide agreement

150. Additionally, Sullivan has been diagnosed as mentally disabled. Sullivan Brief of Petitioner, *supra* note 6, at 22 n.25.

151. *Kennedy*, 128 S.Ct. 2641, 2642 (2008) (quoting *Roper v. Simmons*, 543 U.S. 555, 563 (2005)).

152. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The Court has also looked to international trends, but only to buttress what it perceives as a consensus in the United States. *See, e.g.*, *Roper* at 577 (observing that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty"). Indeed, "[i]n cases where no legislative trend toward abolition existed among the states, the Court has not explored international law trends." *Graham* Brief of Respondent, *supra* note 32, at 42 (citing *Ewing v. California*, 538 U.S. 11 (2003) (upholding the constitutionality of life sentence without parole for three non-violent theft-related offenses), *Johnson v. Texas*, 509 U.S. 350 (1993), and *Stanford v. Kentucky*, 492 U.S. 361 (1989)). This means that the Court is unlikely to weigh heavily the fact that the United States remains alone in the world in inflicting this punishment. *See, e.g.*, *de la Vega & Leighton*, *supra* note 3, at 985 (2008).

153. *See, e.g.* *Thompson v. Oklahoma*, 487 U.S. 815, 822 (1998) (explaining that the Court looks to the work product of state legislatures in determining whether the death penalty constitutes cruel and unusual punishment in certain types of cases).

154. *Id.* at 826.

regarding its prohibition. Unlike the climate leading up to *Roper*,¹⁵⁵ no national consensus currently exists on declaring JLWOP sentences unconstitutional.

Further, in its Eighth Amendment precedent involving proportionality review of prison terms, the Court has almost always upheld protracted sentences for non-homicide offenses.¹⁵⁶ Though not specifically in the context of juvenile offenders, the Court specifically cautioned that “the relative lack of objective standards concerning terms of imprisonment has meant that ‘[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare.’”¹⁵⁷ Ultimately, American society views the death penalty as a lightning rod issue but does not focus in the same way on the duration of incarceration. Indeed, as evidenced by the extreme numbers of incarcerated individuals in our country, it would be fair to say that American society takes comfort in putting “bad” people behind bars, believing that that act affords greater protection against crime.

Though the many goals of incarceration argue against the use of JLWOP sentencing, prior jurisprudence and a concern for the sovereignty of state legislatures in determining criminal sentencing will most likely lead the Court to uphold JLWOP as constitutional or find it unconstitutional only as narrowly tailored to the facts of the *Sullivan* and *Graham* cases.

155. See *Roper*, 543 U.S. at 564–66 (noting that “the enactments of legislatures that have addressed the question” provide “essential instruction” toward abolishing the practice).

156. See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980) (holding a mandatory life sentence imposed for a defendant’s third theft conviction did not constitute cruel and unusual punishment where the total amount stolen amounted to less than \$230 for three thefts); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding a mandatory life sentence without parole, without considering mitigating factors, did not constitute cruel and unusual punishment for possession of more than 650 grams of cocaine).

157. *Harmelin*, 501 U.S. at 1005 (quoting *Solem v. Helm*, 463 U.S. 277, 289–90 (1983)).