

CRYING MERCY: LIFE WITHOUT PAROLE FOR FOURTEEN-YEAR-OLD OFFENDERS IN *MILLER V. ALABAMA* AND *JACKSON V. HOBBS*

KATHRYN MCEVILLY*

I. INTRODUCTION

The Supreme Court's method for defining juveniles' Eighth Amendment rights is a lesson in incremental decision-making. Just seven years ago, in *Roper v. Simmons*,¹ the Court held that juveniles (those under the age of eighteen) cannot be sentenced to death.² And just two years ago, in *Graham v. Florida*,³ the Court held that juveniles convicted of non-homicide crimes cannot be sentenced to life without the possibility of parole.⁴ In *Miller v. Alabama*⁵ and *Jackson v. Hobbs*,⁶ the Court will decide a third related issue: whether fourteen-year-old offenders convicted of capital murder may be sentenced to life without the possibility of parole.⁷

* 2013 J.D. Candidate, Duke University School of Law. I am grateful to Professor Theresa Newman for her valuable guidance and dedication to my work. I thank Ed Boehme, Kara Duffle, Claire Fong, Andrew Hand, Allison Jaros, Aaron Johnson, Sarah Naseman, Boris Rappoport, and Mike Villegiante for their helpful comments and thorough editing.

1. 543 U.S. 551 (2005).

2. *See id.* at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

3. 130 S. Ct. 2011 (2010).

4. *See id.* at 2034 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

5. *Miller v. Alabama*, No. 10-9646 (U.S. argued Mar. 20, 2012).

6. *Jackson v. Hobbs*, No. 10-9647 (U.S. argued Mar. 20, 2012).

7. These two cases were argued together before the Supreme Court on March 20, 2012. *See October Term 2011*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2011/> (last visited Apr. 7, 2012). Mr. Bryan A. Stevenson of the Equal Justice Initiative represented both defendants. Stephen Wermiel, *SCOTUS for Law Students: Defining the Contours of the*

Seventy-three juvenile offenders are currently serving life sentences for crimes they committed when they were fourteen years old or younger.⁸ Evan Miller and Kuntrell Jackson are two such offenders, and they challenge their sentences under the Eighth Amendment's prohibition of cruel and unusual punishment.⁹ The Court's decision will turn on what carries more constitutional weight: the youth of these defendants or the severity of their crimes.

II. FACTS

A. *Evan Miller*

Evan Miller is currently serving a sentence of life without the possibility of parole for a murder he committed when he was fourteen years old. On the night of the incident, Miller and his sixteen-year-old friend, Colby Smith, visited Miller's older neighbor, Cole Cannon.¹⁰ Miller, Smith, and Cannon smoked marijuana and played drinking games until Cannon passed out, at which point Miller and Smith stole \$300 from Cannon's wallet.¹¹ As Miller placed the wallet back into Cannon's pocket, Cannon awoke and grabbed Miller by the throat.¹² Miller struck Cannon repeatedly with a baseball bat.¹³ Miller then placed a sheet over Cannon's head and said, "I am God. I've come to take your life."¹⁴ Miller and Smith set fire to Cannon's trailer,¹⁵ and Cannon, conscious but unable to move,¹⁶ died of smoke inhalation.¹⁷

Eighth Amendment, SCOTUSBLOG (Nov. 11, 2011, 4:40 PM), <http://www.scotusblog.com/2011/11/scotus-for-law-students-defining-the-contours-of-the-eighth-amendment/>.

8. Petition for Writ of Certiorari at 3, *Miller*, No. 10-9646 (citing EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 20 (2007), available at <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>). Since the publication of this report, a handful of offenders have obtained relief, but a few new sentences have been imposed. The figure remains relatively constant at just over seventy people. *Id.* at 3 n.1.

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

10. *Miller v. State*, 63 So. 3d 676, 683 (Ala. Crim. App. 2010), cert. granted, 132 S. Ct. 548 (2011) (No. 10-9646).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See *id.* (noting that Smith saw Cannon "[j]ust laying there" and heard Cannon ask, "Why are y'all doing this to me?" as they were leaving the burning trailer).

17. See *id.* at 685 (noting the pathologist's findings that Cannon died of "inhalation of products of combustion").

Trying Miller as an adult, the Circuit Court of Alabama convicted Miller of capital murder.¹⁸ Under Alabama law, a person convicted of capital murder must be sentenced to death or life without the possibility of parole.¹⁹ Because Miller was not eligible for the death penalty,²⁰ the trial court had no choice but to sentence Miller to life without the possibility of parole.²¹ The Alabama Court of Criminal Appeals affirmed Miller's conviction and sentence,²² and the Alabama Supreme Court denied *certiorari*.²³

B. Kuntrell Jackson

Kuntrell Jackson is also currently serving a sentence of life without the possibility of parole for a crime he committed when he was fourteen years old. While walking through a housing project, Jackson and two older boys discussed robbing a video store.²⁴ On their way to the store, Jackson discovered that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve.²⁵ When the three boys arrived at the video store, Jackson initially waited outside the store but entered after Shields pointed his shotgun at the clerk and demanded that she "give up the money."²⁶ When the clerk replied that she had no money, Shields made his demand five or six more times, and each time the clerk refused.²⁷ After the clerk mentioned calling the police, Shields shot the clerk in the face.²⁸ All three boys fled without taking any money.²⁹

18. *Id.* at 682–83. Miller was eligible for a capital murder conviction because he committed murder in the course of an arson. *See* ALA. CODE § 13A-5-40(a)(9) (West 2012). In exchange for testifying against Miller, Smith pled guilty to felony murder and was sentenced to life with the possibility of parole. Petition for Writ of Certiorari, *supra* note 8, at 7.

19. *See* § 13A-5-39(1) (defining "capital offense" as "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole").

20. *See* *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (prohibiting death sentences against those who were under the age of eighteen when their crimes were committed).

21. *See* *State v. Miller*, No. CC 2006-68, 2006 WL 6627054, at *1 (Ala. Cir. Ct. Oct. 20, 2006) ("[T]he only possible punishment that the defendant may be subjected to is life without the possibility of parole."), *aff'd*, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

22. *Miller*, 63 So. 3d at 682.

23. Petition for Writ of Certiorari, *supra* note 8, at 1.

24. *Jackson v. Norris*, 2011 Ark. 49, at 7 (Danielson, J., dissenting), *cert. granted sub nom.* *Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

25. *Id.* at 7–8.

26. *Id.* at 8.

27. *Id.*

28. *Id.*

29. *Id.*

Tried as an adult,³⁰ Jackson was convicted of capital murder and aggravated robbery.³¹ Although Jackson did not personally shoot the clerk, he was nevertheless eligible for a capital murder conviction under Arkansas's felony murder statute.³² The trial court sentenced Jackson to life without the possibility of parole,³³ a mandatory sentence in Arkansas for juveniles convicted of capital murder.³⁴ Both the Court of Appeals³⁵ and the Supreme Court of Arkansas³⁶ affirmed Jackson's sentence.

III. LEGAL BACKGROUND

Miller and Jackson both assert two constitutional challenges to their sentences: first, that the Eighth Amendment categorically prohibits sentencing fourteen-year-old offenders to life without the possibility of parole and, second, that the Eighth Amendment prohibits a mandatory sentence of life without the possibility of parole for juveniles generally. The legal background of the two challenges is discussed below.

A. Categorical Prohibition under the Eighth Amendment

The Eighth Amendment is not static, but rather “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁷ In determining whether the Eighth Amendment categorically prohibits a particular sentence against a class of people, the Court applies a two-step analysis.³⁸ First, the Court determines whether there is a “national consensus against the sentencing practice,” looking to legislative enactments and state

30. *Id.*

31. *Id.* at 1 (majority opinion).

32. *Id.* at 8 (Danielsen, J., dissenting).

33. *Id.* at 1 (majority opinion).

34. *Id.* at 6 (Brown, J., concurring); *see also* ARK. CODE ANN. § 5-4-602(3)(B)(ii) (West 2011) (stating that if a defendant is convicted of capital murder and the death penalty is not sought, then the “trial court shall sentence the defendant to life imprisonment without parole”).

35. *Jackson v. State*, No. CA 02-535, 2003 WL 193412, at *3 (Ark. Ct. App. Jan. 29, 2003) *aff'd sub nom* *Jackson v. Norris*, 2011 Ark. 49, *cert. granted sub nom.* *Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

36. *Jackson*, 2011 Ark. at 1.

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

38. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2017–18 (2010) (prohibiting life without the possibility of parole for juvenile non-homicide offenders); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (prohibiting death sentence for all juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (prohibiting death sentence for mentally handicapped offenders).

practices for guidance.³⁹ In finding a national consensus, the Court generally gives greater weight to legislative enactments than to state practices,⁴⁰ but state practices are nevertheless important.⁴¹ Next, the Court determines, “in the exercise of its own independent judgment[,] whether the punishment in question violates the Constitution.”⁴² In making an independent judgment, the Court considers three factors: “the culpability of the offenders,” “the severity of the punishment in question,” and “whether the challenged sentencing practice serves legitimate penological goals.”⁴³

In applying this two-step analysis in *Graham*, the Court held that the Eighth Amendment categorically prohibits sentencing juveniles to life without the possibility of parole for non-homicide crimes.⁴⁴ First, the Court found a national consensus against the practice.⁴⁵ Although thirty-nine jurisdictions permitted the sentence, only eleven jurisdictions actually imposed it.⁴⁶ Second, the Court found independent justification for prohibiting the sentence. Regarding the offenders’ culpability, the Court reasoned that non-homicide juvenile offenders had “twice diminished moral culpability,” once for their age and again for the non-homicide nature of the crime.⁴⁷ Regarding the severity of the punishment, the Court reasoned that life without the possibility of parole was the “second most severe penalty permitted by law”⁴⁸ and was “especially harsh for a juvenile offender who will on average serve more years and a greater percentage of his life in prison than an adult.”⁴⁹ Finally, the Court reasoned that no penological

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

40. *See Atkins*, 536 U.S. at 312 (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

41. *See Graham*, 130 S. Ct. at 2023 (“Actual sentencing practices are an important part of the Court’s inquiry into consensus.”).

42. *Id.* at 2022. In making an independent judgment, the court will be “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.’” *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)).

43. *Id.* at 2026.

44. *See id.* at 2034 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

45. *Id.* at 2026.

46. *See id.* at 2023–24 (noting that thirty-seven states and the District of Columbia permit the sentence and that the federal government permits the sentence for juveniles as young as thirteen). At the time the Court decided *Graham*, only 123 juvenile offenders were serving sentences of life without parole for non-homicide offenses. *Id.* at 2024.

47. *Id.* at 2027.

48. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

49. *Id.* at 2028.

goal—including retribution, deterrence, incapacitation, and rehabilitation—adequately justified life without the possibility of parole for juvenile non-homicide offenders.⁵⁰

In finding juveniles less culpable than adults, the *Graham* Court relied on three characteristics of juveniles that were relevant in *Roper*: (1) juveniles have a “lack of maturity and an underdeveloped sense of responsibility;” (2) they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and (3) their characters are “not as well formed.”⁵¹ A question remains as to whether juveniles ages fourteen and younger exhibit these three characteristics to a greater degree, and if so, whether that makes them a distinct class of offenders eligible for special constitutional protection.⁵² Juveniles ages fourteen and younger were once a distinct class of offenders. At the time the Bill of Rights was adopted, the common law had established the rebuttable presumption that juveniles ages fourteen and younger lacked the capacity to commit felonies, which were punishable by death.⁵³ Juveniles in this age range remained a distinct class of offenders until *Roper*, which extended protection against the death penalty to all juveniles.⁵⁴

The *Graham* Court expressly limited its holding to non-homicide crimes, noting that “[t]here is a line ‘between homicide and other serious violent offenses against the individual.’”⁵⁵ The Court gave special status to the non-homicide offenders’ state of mind, noting that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of punishment than are murderers.”⁵⁶

B. Mandatory Sentencing under the Eighth Amendment

A mandatory sentence is a sentence that a court must impose, regardless of mitigating circumstances. In both Alabama and

50. *Id.* at 2030 (“In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.”).

51. *Id.* at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

52. See discussion *infra* Part IVA.2 (discussing arguments in favor of finding a categorical prohibition).

53. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989).

54. See *Roper*, 543 U.S. at 555–56 (“This case requires us to address . . . whether it is permissible . . . to execute a juvenile offender who was . . . younger than 18 when he committed a capital crime. In [*Stanford v. Kentucky*], a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group.”).

55. *Graham*, 130 S. Ct. at 2027 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)).

56. *Id.*

Arkansas, the states in which Miller and Jackson were sentenced, life without the possibility of parole is a mandatory sentence for juvenile offenders convicted of capital murder.⁵⁷ While mandatory sentencing ensures that offenders convicted of the same crime receive the same punishment, it may nevertheless be cruel and unusual (and thus unconstitutional) insofar as mitigating circumstances, such as extreme youth, cannot be considered.

Unlike death sentences, sentences of life without the possibility of parole can be mandatory, at least for adult offenders. In *Harmelin v. Michigan*,⁵⁸ the Court affirmed a mandatory sentence of life without the possibility of parole for an adult offender, holding that individualized sentencing is required only for death sentences.⁵⁹ The Court found “no comparable [individualized-sentencing] requirement outside the capital context[] because of the qualitative difference between death and all other penalties.”⁶⁰ The death penalty is unique in “its total irrevocability,” “its rejection of rehabilitation,” and “its absolute renunciation of all that is embodied in our concept of humanity.”⁶¹ Acknowledging that life without the possibility of parole can result in extremely long sentences, the Court nevertheless noted that “even where the difference is greatest, [life without the possibility of parole] cannot be compared with death.”⁶²

Graham, however, while not a case about mandatory sentencing, was decided after *Harmelin* and stressed the importance of considering an offender’s age. The Court noted that “[a]n offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”⁶³ Merely considering a defendant’s age in the defendant’s transfer from juvenile court to adult court is potentially insufficient under *Graham*, because legislators may not have intended juvenile offenders to receive the same punishment as adult offenders.⁶⁴

57. ARK. CODE ANN. § 5-4-602(3)(B)(ii) (West 2011); ALA. CODE § 13A-5-39(1) (West 2012).

58. 501 U.S. 957 (1991).

59. *Id.* at 996.

60. *Id.* at 995.

61. *Id.* at 995–96 (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

62. *Id.* at 996.

63. *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

64. *See id.* at 2025 (“[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many

IV. ARGUMENTS REGARDING THE CATEGORICAL PROHIBITION

As in *Graham*, the Court in *Miller* and *Jackson* will likely apply its two-step analysis to determine whether the Eighth Amendment categorically prohibits sentencing fourteen-year-old offenders convicted of capital murder to life without the possibility of parole. Arguments for and against this categorical prohibition are discussed below.

A. Arguments for a Categorical Prohibition

1. National Consensus

The two-step analysis begins with identifying a national consensus. Although thirty-six states permit sentencing fourteen-year-old offenders to life without the possibility of parole,⁶⁵ only eighteen states have ever imposed this sentence,⁶⁶ and ten of these states have only imposed it once or twice.⁶⁷ Moreover, only seventy-three offenders are currently serving sentences of life without the possibility of parole for crimes they committed when they were fourteen years old or younger.⁶⁸ This number is remarkably low, considering that it reflects nearly all juvenile offenders who have received a life-without-the-possibility-of-parole sentence stretching back many decades.⁶⁹

Evidence of a national consensus against a sentence is “not undermined” by the fact that most states legislatively allow that sentence.⁷⁰ Although thirty-six states allow life without the possibility

States intended to subject such offenders to life without parole sentences.”). Depending on the state, a juvenile court may transfer a juvenile to the district court in the case of certain major crimes and where the juvenile is of a certain age. *See, e.g.*, ARK. CODE ANN. § 9-27-318(c)(2)(A), (E), (G) (West 2011) (permitting a fourteen-year-old offender to be transferred to the district court if he or she committed capital murder, rape, or a terrorist attack). In determining whether to grant the transfer, the juvenile court generally considers the seriousness of the crime and the maturity of the offender. *See e.g.*, ALA. CODE. § 12-15-203(d)(1), (5) (2012) (listing as factors “the nature of the present alleged offense” and “the extent and nature of the physical and mental maturity of the child”); ARK. CODE ANN. § 9-27-318(g)(1), (6) (listing as factors “the seriousness of the offense” and “the sophistication or maturity of the juvenile”).

65. *Miller v. State*, 63 So. 3d 676, 687 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

66. Petition for Writ of Certiorari, *supra* note 8, at 3.

67. *Id.*

68. *Id.*

69. *See Graham*, 130 S. Ct. at 2024 (“It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades.”).

70. *See id.* at 2023, 2025 (finding a national consensus against sentencing juvenile non-

of parole for fourteen-year-old offenders, in most of these states, the legislatures never expressly authorize life-without-the-possibility-of-parole sentences for fourteen-year-old offenders.⁷¹ Rather, legislatures lower the requirements for transferring juveniles to adult court, and courts then directly charge juveniles as if they were adults.⁷² That a majority of states allow life without the possibility of parole for fourteen-year-old offenders shows that these states consider these offenders to be “old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*”⁷³

2. Independent Justification

The two-step analysis concludes with the Court’s “own independent judgment,”⁷⁴ which is influenced by the offenders’ culpability, the severity of the sentence, and whether the sentence serves legitimate penological goals.⁷⁵

First, under the *Roper* standard, fourteen-year-old offenders have less culpability than other juveniles. Recent scientific research shows that young juveniles, as compared to older juveniles, are (1) less mature and experience an “increase in reward seeking” at puberty;⁷⁶ (2) more susceptible to peer pressure, which reaches “an all-time high in eighth grade,” particularly in boys;⁷⁷ and (3) in earlier stages of developing their character, giving them a “great[er] capacity for change.”⁷⁸

homicide offenders to life without the possibility of parole despite the fact that thirty-nine jurisdictions legislatively allowed this sentence).

71. Petition for Writ of Certiorari, *supra* note 8, at 3.

72. *See id.* (“[S]uch sentences are a byproduct of legislation expanding the susceptibility of juveniles to adult prosecution.”).

73. *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.24 (1988) (plurality opinion); *see also Graham*, 130 S. Ct. at 2025 (“[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.”).

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

75. *Id.* at 2026.

76. Petition for Writ of Certiorari, *supra* note 8, at 15 (quoting Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 DEV. PSYCHOL. 1764, 1764 (2008)).

77. *Id.* at 16 (citing Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 846, 848 (1986)).

78. *Id.* at 18 (citing, among other sources, Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 28 (2009)).

Second, life without the possibility of parole is too severe a punishment for fourteen-year-old offenders. While the crime of murder is especially serious, the punishment in question is very harsh—this younger subset of juveniles “will on average serve more years and a greater percentage of [their] li[ves] in prison” than juveniles ages fifteen to seventeen.⁷⁹

Third, no penological goal justifies life without the possibility of parole for fourteen-year-old offenders. The Court in *Graham* found that no penological goal—including retribution, deterrence, incapacitation, and rehabilitation—justified life without the possibility of parole for non-homicide offenders.⁸⁰ As the difference between homicide and non-homicide offenses can turn on as little as whether a victim survives, and not on the offender’s actions or state of mind,⁸¹ the only penological goal that is potentially furthered in homicide offenses, but not in many non-homicide offenses, is retribution.⁸² A retribution rationale, however, requires “that a criminal sentence . . . be directly related to the personal culpability of the criminal offender.”⁸³ As fourteen-year-old offenders have at least several characteristics that make them less culpable, their level of culpability is insufficient to justify a sentence of life without the possibility of parole based solely on a retribution rationale.

B. Arguments against a Categorical Prohibition

1. No National Consensus

In finding a national consensus, the Court generally gives greater weight to legislative enactments than to state practices.⁸⁴ Here, thirty-six states legislatively permit sentencing fourteen-year-old offenders

79. See *Graham*, 130 S. Ct. at 2028 (noting that life without the possibility of parole is a harsher sentence for juveniles than for adults).

80. *Id.*

81. See, e.g., MODEL PENAL CODE § 5.01(1)(b) (“A person is guilty of attempt to commit a crime if . . . he . . . does or omits to do anything with the purpose of causing or with the belief that it will cause such result *without further conduct on his part.*” (emphasis added)).

82. For example, an offender who shoots and misses is theoretically just as culpable and dangerous as an offender who shoots and connects, so both offenders are in equal need of deterrence, incapacitation, and rehabilitation. But if the shooter’s victim dies, then the victim’s family and community may demand retribution to a greater extent than if the victim had never been harmed. Thus, retribution is the only goal that turns in part on the crime’s result, and not solely on the offender’s conduct or state of mind.

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

84. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

to life without the possibility of parole.⁸⁵ Although most of these states do not expressly authorize this punishment for fourteen-year-old offenders, the Court presumes that legislators are “aware of existing law when [they] pass[] legislation.”⁸⁶ To claim that legislators “do not know the consequences of their actions in light of the entire legal framework” would allow courts to invalidate and rewrite any legislation in accordance with what they believe is a proper legal framework.⁸⁷ If the legislators did not intend to sentence fourteen-year-old offenders to life without the possibility of parole, they would have expressly carved out such an exception, as some state legislators have done.⁸⁸

2. No Independent Justification

No independent justification exists for a categorical prohibition against sentencing fourteen-year-old offenders to life without the possibility of parole. First, although juveniles have less culpability given their age, those juveniles who commit *homicide* offenses lack the “twice diminished moral culpability” found in *Graham* because the nature of their crimes is far more serious.⁸⁹ Also, same the author of the research showing diminished culpability in younger juveniles warned that “[w]hen lawmakers focus on juvenile justice policy, the distinction between adolescence and adulthood, rather than that between childhood and adolescence, is of primary interest.”⁹⁰

Second, a sentence of life without the possibility of parole, while severe, is proportional to the crime of capital murder. As Chief Justice Roberts explained in the concurring opinion in *Graham*, “there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of

85. *Miller v. State*, 63 So. 3d 676, 687 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

86. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (referring to Congress and not legislators generally).

87. *See* Brief of Respondent in Opposition to Petition at 17–18, *Miller v. Alabama*, No. 10-9646 (U.S. June 1, 2011) (“This assumption goes directly counter to this Court’s assumption that legislatures understand the consequences of the interplay of specific acts with the surrounding legal landscape.”).

88. *See, e.g.,* COLO. REV. STAT. ANN. § 17-22.5-104(IV) (West 2012) (prohibiting life without the possibility of parole for any juvenile).

89. *See Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (“The age of the offender and the nature of the crime each bear on the analysis.”).

90. Brief of Respondent in Opposition to Petition, *supra* note 87, at 20–21 (quoting Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 47, 53 (2009)).

such sentences depends on the particular crimes for which they are imposed.”⁹¹ Focusing on Miller’s crimes, for example, the Court of Criminal Appeals of Alabama noted that “such a sentence is not overly harsh,”⁹² especially in light of the “intentional and horrendous crime.”⁹³

Third, sentencing a fourteen-year-old offender to life without the possibility of parole serves at least one penological goal: retribution. Although this goal is inadequate with respect to non-homicide offenders,⁹⁴ “death is different.”⁹⁵ When a victim dies, the community generally feels a greater sense of outrage and sadness than if a victim survives. Retribution can be viewed as providing a service that ameliorates the suffering of the community and, in particular, the homicide survivors.⁹⁶ To rebalance the moral scale, the state imposes the second harshest sentence for one of the worst crimes.⁹⁷

V. ARGUMENTS REGARDING MANDATORY SENTENCING

Should the Court find against a categorical prohibition, then Miller and Jackson argue in the alternative that juveniles facing life without the possibility of parole are constitutionally entitled to individualized sentencing, a right afforded to adults facing the death penalty.⁹⁸ In other words, Miller and Jackson argue that a mandatory sentence of life without the possibility of parole for juvenile offenders is unconstitutional. Arguments for and against finding such mandatory sentences unconstitutional are discussed below.

A. Arguments that Mandatory Sentencing is Unconstitutional

In Alabama and Arkansas, when a juvenile is convicted of capital murder, the juvenile is automatically sentenced to life without the possibility of parole.⁹⁹ This mandatory sentencing means that the court

91. *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring).

92. *Miller v. State*, 63 So. 3d 676, 690 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

93. *Id.* at 689.

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

95. *Id.* at 2046 (Thomas, J., dissenting).

96. Marilyn Peterson Amour & Mark S. Umbreit, *The Ultimate Penal Sanction and ‘Closure’ for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 394 (2007).

97. *Miller*, 63 So. 3d at 690–91.

98. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“[A]n individualized decision is essential in capital cases.”).

99. ARK. CODE ANN. § 5-4-602(3)(B)(ii) (West 2011); ALA. CODE § 13A-5-39(1) (West 2012).

cannot consider any mitigating circumstances, including the juvenile's age. Although the *Harmelin* Court upheld a mandatory sentence of life without the possibility of parole, the *Graham* Court subsequently stressed the importance of considering a defendant's age in sentencing: "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."¹⁰⁰ Considering a juvenile's age in transferring juveniles to adult court is insufficient under *Graham* because legislators may not have intended that all transferred juveniles receive the same punishment as adults. Legislators may have simply recognized that some juveniles are "too old to be dealt with effectively in juvenile court."¹⁰¹

Since *Graham*, several state court judges have expressed concern about imposing mandatory life sentence on juvenile offenders. Dissenting in Jackson's case on appeal, Judge Danielson, joined by Judge Corbin, stated that he would find Jackson's sentence unconstitutional in part because "the circuit court could not consider the defendant's age or any other mitigating circumstances—the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole."¹⁰² Likewise, in a dissent in *State v. Andrews*,¹⁰³ Judge Wolff concluded that Missouri's sentencing mandate violates the Eighth Amendment, reasoning that "[t]he imposition of a life sentence without parole—without consideration of Andrews' age—fails to ensure that Andrews' sentence is proportional to his crime."¹⁰⁴

B. Arguments that Mandatory Sentencing is Constitutional

The Court has already held that a mandatory sentence of life without the possibility of parole is constitutional under the Eighth Amendment. In *Harmelin*, the Court upheld a mandatory sentence of life without the possibility of parole imposed on an adult offender, finding that the Eighth Amendment does not require individualized sentencing or consideration of mitigating circumstances except in death penalty cases.¹⁰⁵ Though the defendant in *Harmelin* was an

100. *Graham*, 130 S. Ct. at 2031.

101. *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1988) (plurality opinion).

102. *Jackson v. Norris*, 2011 Ark. 49, at 10–11 (Danielson, J., dissenting), *cert. granted sub nom. Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

103. 329 S.W.3d 369 (Mo. 2010) (en banc).

104. *Id.* at 388 (Wolff, J., dissenting).

105. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying

adult, the Court noted that even very long sentences of life without the possibility of parole are different than the death penalty: “[i]n some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment But even where the difference is the greatest, it cannot be compared with death.”¹⁰⁶ At least one circuit has upheld a mandatory sentence of life without the possibility of parole against a juvenile offender,¹⁰⁷ and no circuit has held that this mandatory sentence is unconstitutional.¹⁰⁸

V. DISCUSSION

Miller and Jackson’s best hope for relief lies in the Court finding a categorical prohibition. If the Court applies the two-step analysis in *Miller* and *Jackson* as it did in *Graham*, then it will likely find that the Eighth Amendment categorically prohibits sentencing fourteen-year-old offenders to life without the possibility of parole. Should the Court not find a categorical prohibition, however, then Miller and Jackson might remain in prison for the rest of their natural lives. The Court will likely uphold mandatory sentences of life without the possibility of parole for juvenile offenders, leaving individualized sentencing in the realm of public policy.

A. Categorical Prohibition

1. National Consensus

Regarding the first step of the two-step analysis, the Court will likely find a national consensus against sentencing fourteen-year-old offenders to life without the possibility of parole. The figures supporting a national consensus here are similar to the figures in *Graham*, which persuaded the Court that “[t]he sentencing practice [then] under consideration [was] exceedingly rare.”¹⁰⁹ At the time *Graham* was decided, thirty-nine jurisdictions allowed sentences of life without the possibility of parole for juvenile non-homicide offenders, but only eleven jurisdictions actually imposed the

the ‘individualized capital sentencing doctrine’ have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.”).

106. *Id.* at 996.

107. *Rodriguez v. Peters*, 63 F.3d 546, 568 (7th Cir. 1995).

108. See Brief of Respondent in Opposition to Petition, *supra* note 87, at 24 (“Miller has asserted no split on this issue . . .”).

109. See *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (finding that the sentence of life without the possibility of parole for juvenile non-homicide offenders was “exceedingly rare”).

sentence.¹¹⁰ Here, thirty-six jurisdictions allow fourteen-year-old offenders to be sentenced to life without the possibility of parole,¹¹¹ but only eighteen jurisdictions have actually imposed this sentence.¹¹² Also, in *Graham*, 123 offenders were serving the sentence,¹¹³ as compared to only 73 offenders here.¹¹⁴ Thus, as compared to the sentence considered in *Graham*, sentencing fourteen-year-old offenders to life without the possibility of parole is allowed in fewer states and has impacted fewer offenders. And although more states have actually imposed this sentence, ten of these states have imposed it no more than twice.¹¹⁵ Presented with figures similar to those in *Graham*, if not more compelling, the Court will likely find a national consensus.

2. Independent Justification

Regarding the second step of the two-step analysis, the Court will likely find an independent justification for a categorical prohibition. First, fourteen-year-old offenders are less culpable than older juveniles in the three constitutionally relevant ways described in *Roper*.¹¹⁶ Recent scientific research shows that young juveniles, as compared to older juveniles, are less mature, more susceptible to peer pressure, and in earlier stages of developing their character.¹¹⁷ With distinctly lessened culpability, fourteen-year-old offenders may again be considered a distinct class of offenders, as they were before *Roper*.¹¹⁸

Second, the Court will likely hold that a sentence of life without the possibility of parole is too severe for fourteen-year-old offenders convicted of capital murder. While the crime before the Court is more

110. *Id.* at 2023–24.

111. *Miller v. State*, 63 So. 3d 676, 687 (Ala. Crim. App. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

112. Petition for Writ of Certiorari, *supra* note 8, at 20.

113. *Graham*, 130 S. Ct. at 2024.

114. Petition for Writ of Certiorari, *supra* note 8, at 3 (citing EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 20 (2007), *available at* <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>).

115. *Id.*

116. *See Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (noting that juveniles are less culpable than adults because they lack maturity, are susceptible to peer pressure, and have developing characters); *see also supra* text accompanying note 51 (listing *Roper*'s three characteristics verbatim).

117. Petition for Writ of Certiorari, *supra* note 8, at 15–16, 18.

118. *See supra* text accompanying notes 53–54 (providing a brief history of the age-fourteen threshold).

serious than that in *Graham*, the punishment before the Court is also harsher—the class of offenders is younger and thus “will on average serve more years and a greater percentage of [their] li[ves] in prison” than the juveniles in *Graham*.¹¹⁹ At the very least, the severity of the punishment in light of the crime is comparable to that in *Graham*, especially given that the difference between a homicide and a non-homicide conviction can turn on as little as whether the victim survives.¹²⁰

Third, the Court will likely find that no penological goal justifies life without the possibility of parole for fourteen-year-old offenders. Again, the difference between a homicide and a non-homicide conviction can turn on factors unrelated to the offender’s actions or state of mind. Because deterrence, incapacitation, and rehabilitation turn on the offender’s actions and state of mind (and not the crime’s result), these goals are just as inadequate as they were in *Graham*.¹²¹ To illustrate, the facts of *Graham* are not very different from the facts in *Jackson*, except that the victim in *Graham* survived. While Graham and his accomplice were robbing a restaurant, the accomplice struck the restaurant manager twice in the back of the head with a metal bar.¹²² Graham and his accomplice then fled without taking any money.¹²³ Given that “Jackson’s involvement in the robbery was no more, if not less than, Graham’s involvement,”¹²⁴ the Court cannot justify sentencing Jackson to life without the possibility of parole while denying the same sentence for Graham, especially while relying on goals that turn only on the offender’s actions or state of mind.

The only remaining penological goal at issue before the Court, then, is retribution. Retribution is different from the other three goals because it is rooted, in part, in the crime’s result. Retribution provides an avenue for the victim’s family and community to express outrage and sadness over the crime, so the need for retribution correspondingly increases or decreases depending upon the crime’s

119. *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

120. *See supra* notes 81–82 and accompanying text (discussing the minimal difference between homicide and non-homicide crimes with respect to the offender’s actions and state of mind).

121. *See supra* notes 81–82 and accompanying text (discussing how deterrence, incapacitation, and rehabilitation turn on the offender’s actions and state of mind rather than on the crime’s result).

122. *Graham*, 130 S. Ct. at 2018.

123. *Id.*

124. *Jackson v. Norris*, 2011 Ark. 49, at 10 (Danielson, J., dissenting), *cert. granted sub nom. Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

severity.¹²⁵ But because “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender,”¹²⁶ retribution cannot stand alone as an adequate justification. Certainly, the crime before the Court is more serious than the crime considered in *Graham*. In *Graham*, the restaurant manager only needed stitches¹²⁷ whereas here, one victim died of smoke inhalation¹²⁸ and the other died of a gun wound to the head.¹²⁹ But the offenders here were only fourteen at the time of their wrongdoing and almost certainly less culpable than the older offender in *Graham*. This should weigh heavily against any need to exact retribution. At the very least, the role of retribution is comparable to its role in *Graham*, and the Court may safely find that retribution alone does not adequately justify the sentence.

B. Mandatory Sentencing

Should the Court find against a categorical prohibition, however, it must then address Miller and Jackson’s argument in the alternative, that a mandatory sentence of life without the possibility of parole against juvenile offenders violates the Eighth Amendment. This argument will likely prove unsuccessful.

The Court has “drawn the line of required individualized sentencing at capital cases, and [has seen] no basis for extending it further.”¹³⁰ The Court has expressly recognized that sentences of life without the possibility of parole can be very long and has still never required individualized sentencing.¹³¹ Instead of regarding individualized sentencing as a constitutional requirement, the Court has regarded it as a matter of public policy, an issue to be decided by

125. See *Amour & Umbreit*, *supra* note 96, at 394 (describing how retribution could be viewed as “provid[ing] a service that ameliorates suffering for homicide survivors”).

126. *Petition for Writ of Certiorari*, *supra* note 8, at 23 (quoting *Graham*, 130 S. Ct. at 2028).

127. *Graham*, 130 S. Ct. at 2018.

128. *Miller v. State*, 63 So. 3d 676, 685 (Ala. Crim. App. 2010) (noting the pathologist’s findings that Cannon died of “inhalation of products of combustion”), *cert. granted*, 132 S. Ct. 548 (2011) (No. 10-9646).

129. *Jackson*, 2011 Ark. at 8 (Danielson, J., dissenting).

130. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

131. See, e.g., *id.* (“[E]ven where the difference is the greatest, [life without the possibility of parole] cannot be compared with death.”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment, *no matter how long*, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment” (emphasis added)).

the states according to their needs and views.¹³² Judge Brown recognized this deference in his concurring opinion in *Jackson*, in which he sought recourse with the General Assembly of Arkansas rather than finding a violation of the Constitution.¹³³

The Court may hesitate to further extend *Graham*'s requirement that age be taken into account in criminal procedure laws. *Graham* was not a case about mandatory sentencing, and this requirement contradicts many cases that are.¹³⁴ Moreover, *Graham* only requires that criminal procedure laws not "fail to take defendants' youthfulness into account at all."¹³⁵ Taking a defendant's youthfulness into account in the transfer from juvenile court to adult court arguably satisfies this minimal requirement.

While sound public policy reasons exist for granting individualized sentencing to juveniles facing life without the possibility of parole, the Court will not likely hold that this is a constitutional requirement, even for fourteen-year-old offenders. For the state legislators that choose not to create individual sentencing requirements, the Court will rely on the fact that, unlike a death sentence, life without the possibility of parole does not foreclose all avenues for reducing a sentence, "since there remain the possibilities of retroactive legislative reduction and executive clemency."¹³⁶

VI. CONCLUSION

For the foregoing reasons, the Court will likely create a new categorical prohibition on sentencing fourteen-year-old offenders to

132. See *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) ("We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes."); see also *Rodriguez v. Peters*, 63 F.3d 546, 568 (7th Cir. 1995) ("[W]e live in a world where juvenile offenders are committing violent crimes with increasing frequency. . . . [Illinois] took an affirmative step toward deterring violent juvenile offenders in its state We refuse to substitute our judgment for that of the Illinois legislature.").

133. See *Jackson v. Norris*, 2011 Ark. 49, at 7 (Brown, J., concurring) ("The General Assembly should examine this part of the criminal code to determine whether a sentencing hearing is appropriate before a mandatory sentence of life without parole is imposed on [a juvenile offender] and when the basis for the conviction is not premeditated murder but felony murder."), *cert. granted sub nom.* *Jackson v. Hobbs*, 132 S. Ct. 548 (2011) (No. 10-9647).

134. See, e.g., *Harmelin*, 501 U.S. at 996 (upholding a mandatory sentence of life without the possibility of parole due to the dissimilarity between this sentence and a death sentence); see also *supra* text accompanying notes 105–08 (discussing the facts and holding of *Harmelin*).

135. *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

136. *Harmelin*, 501 U.S. at 996.

life without the possibility of parole. If it does not, however, then Miller and Jackson may very well be imprisoned for the rest of their natural lives. To Miller and Jackson's detriment, the Court will likely uphold mandatory sentences of life without the possibility of parole for juvenile offenders.

The Court has defined juveniles' Eighth Amendment rights through incremental decision-making. What kind of cases can we expect to come before the Court after *Miller* and *Jackson*? An issue left undecided here is whether juveniles ages fifteen to seventeen also deserve protection against sentences of life without the possibility of parole. With a slow but steady shift in national consensus, this issue will undoubtedly present itself before the Court in time. And in this way, slowly and step-by-step, the Court will continue to define (or expand) the boundaries of juveniles' Eighth Amendments rights.