Juvenile Justice: Life Without Parole Sentences

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Summary

Some question whether the United States justice system appropriately handles juvenile offenders. Since the late 1960s, the juvenile justice system has undergone significant modifications resulting from U.S. Supreme Court decisions, changes in federal and state law, and the growing perception that juveniles are increasingly involved in more serious and violent crimes. Consequently, at both the federal and state levels, the treatment of juvenile offenders has shifted from a mostly rehabilitative system to a more punitive one, with serious ramifications for juvenile offenders. One of these ramifications, sentencing juvenile offenders to life imprisonment without the possibility of parole, continues to be a source of debate at both the state and national levels. For example, H.R. 2289, the Juvenile Justice Accountability and Improvement Act of 2009, would, if enacted, establish requirements for states to meet in order to retain eligibility for grant funding. Specifically, the bill requires states to provide all juvenile offenders a chance at parole at specified intervals during incarceration. This bill strives to strike a balance between holding juveniles accountable for their actions, while at the same time providing them with an incentive to work toward rehabilitation while in prison.

In addition to the penological, moral, and legislative issues presented by a sentence of life without parole (LWOP) for juvenile offenders, courts are beginning to address the constitutionality under the U.S. Constitution's Eighth Amendment of sentencing juveniles to long prison terms. The Supreme Court's Eighth Amendment jurisprudence has divided Justices for years, resulting in a series of 5-4 decisions. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime. In capital cases, the Court has found the death penalty disproportionate for crimes such as rape and felony murder. In later death penalty cases, the Court shifted from a punishment-crime methodology to a punishment-offender culpability methodology. In finding the death penalty unconstitutional for mentally retarded and juvenile offenders, the Court considered the physical characteristics of the offender and focused the proportionality inquiry on the offender's reduced culpability. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court recognized an established and evolving national consensus that quantifiable behavioral and cognitive limitations diminish the moral culpability of juvenile offenders and, consequently, impact their appropriate punishment. As such, the Court held that the death penalty is unconstitutional for juvenile offenders. One question the Court left open is whether a minor's reduced culpability can be a factor to mitigate additional sentencing options, or whether it applies only in capital cases. Is sentencing a juvenile offender to life without the possibility of parole sufficiently analogous to the death penalty to warrant an extension of *Roper*?

The Supreme Court granted certiorari in two cases that may answer some of these questions. In *Graham v. Florida*, the defendant was earlier convicted of committing an armed robbery and assault. While on probation for these offenses, he committed a home invasion and robbery while in possession of a firearm. Upon revocation of his probation, the defendant was sentenced to LWOP. In *Sullivan v. Florida*, the defendant was 13 when he received the same sentence for a sexual assault committed during a burglary. The Court's resolutions in these cases are likely to have a significant impact on the treatment of juvenile offenders at both the federal and state levels. This report examines Eighth Amendment jurisprudence and the legal issues involved with juvenile LWOP sentences, and will be updated as events warrant.

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Background

As attention continues to focus on juvenile offenders, significant debate has emerged regarding their treatment in the U.S. criminal justice system. The juvenile court was designed to be more than a court for children. The underlying theory behind a separate juvenile court system was that the state has a duty to assume a custodial and protective role over individuals who cannot act in their own best interest.[1] As such, the separate system for juvenile offenders is predicated on the notion of rehabilitation—not punishment, retribution, or incapacitation. Because the juvenile court is focused on protection rather than punishment, the juvenile proceeding was conceptualized as a civil proceeding (not a criminal one), with none of the trappings of an adversarial proceeding.[2]

Since the late 1960s, the juvenile justice system has undergone significant modifications as a result of U.S. Supreme Court decisions, changes in federal and state law, and the growing perception that juveniles are increasingly involved in more serious and violent crimes. As a result, the treatment of juvenile offenders at both the federal and state levels has focused less on rehabilitation and more on punishment, resulting in significant ramifications for these offenders. One of these ramifications is the sentencing of juvenile offenders to life without parole (LWOP) sentences.

Life imprisonment has been the most severe punishment available since 2005, when the Supreme Court held in *Roper v. Simmons* [3] that the Eighth Amendment prohibits the execution of juvenile offenders. Every state now allows for life sentences for these offenders when tried as adults.[4] However, there is significant statewide variation in the imposition of these sentences. Some states allow parole after a specified period for certain offenses, while other states have life imprisonment without the possibility of parole.[5] In Ohio, offenders convicted of aggravated murder face a sentence of LWOP or life with parole after 20, 25, or 30 years, depending on specific facts and circumstances. For example, offenders convicted of murder (under O.R.C. § 2903.02) with a sexual motivation or a sexually violent predator specification are subject to mandatory LWOP.[6]

There are generally three methods by which juvenile offenders are subjected to the possibility of a LWOP sentence: (1) a direct filing by the prosecutor in adult court, (2) a mandatory transfer from juvenile to adult court, or (3) a discretionary transfer out of juvenile court.[7] Juvenile

[1] *See, Kent v. United States*, 383 U.S. 541, 555 (1966) (stating that theory supporting the state's juvenile court is "rooted in social welfare philosophy rather than in corpus juris.").

[2] For a historical account of the early efforts toward juvenile reform, see Mennel, "Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquent," 18 CRIME AND DELINQ. 68 (1972); See generally, *Ex parte Sharp*, 96 P. 563 (Idaho 1908).

[3] 543 U.S. 551 (2005).

[4] Some states expose 13- and-14-year olds to LWOP. See, e.g., Fla. Stat. Ann. §§ 775.082, 985.557, 985.56(1) (allowing LWOP sentences for 13 year olds for offenses including carjacking, burglary, and aggravated sexual assault); Ohio Rev. Code Ann. §§ 2152.10, 2929.03 (allowing LWOP sentences for 14 year olds).

[5] See, e.g., Ohio Rev. Code Ann. § 2967.13 (establishing eligibility for parole and defining LWOP for those convicted of enumerated crimes). Even when a sentence specifically denies the possibility of parole, government officials may have some form of executive clemency including amnesty, reprieves, or commutation of a sentence to time served.

[6] Ohio Revised Code § 2971.03.

[7] For a 50-state survey on transfers/waivers of juvenile court jurisdiction, refer to CRS Report RL30822, *Juvenile* (continued...)

offenders of federal criminal law are primarily the responsibility of state juvenile court authorities.[8] However, federal law permits federal delinquency proceedings under limited circumstances: (1) if the state courts are unwilling or unable to assume jurisdiction; (2) if the state lacks adequate treatment plans; or (3) the juvenile is charged with a crime of violence or drug trafficking or smuggling and there is substantial federal interest in the case.[9] Under 18 U.S.C. § 5032, a juvenile offender is subject to a mandatory transfer to adult court in the case of a violent felony, drug smuggling or trafficking, or arson if he or she is 16 years or older and has previously been found to have committed comparable misconduct.[10]

State direct filing laws permit prosecutors to file charges against an alleged juvenile offender directly in adult court. Direct filing laws cover an array of offenses. For example, under Arkansas law, prosecutors may file charges in adult court against 14- and 15-year-olds for offenses such as kidnapping and first-degree battery, and against juvenile offenders who are 16 and older for any felony.[11] Michigan's direct filing law grants criminal courts jurisdiction over juveniles for offenses including carjacking, escape from a juvenile facility, and a variety of drug offenses.[12] Also, in Florida, the direct filing statute permits prosecutors to charge 14- and 15-year-olds in adult court for specified offenses, including grand theft of a motor vehicle or committing a lewd action in front of a minor; when the juvenile is 16 or older, the statute permits direct filing for any crime.[13]

Mandatory waiver laws require juvenile court judges to relinquish jurisdiction if an alleged juvenile offender meets certain criteria, such as being charged with a particular crime. For example, Connecticut's mandatory waiver statute requires juvenile offenders as young as 14 to be transferred to adult court when charged with certain felonies.[14]

Once transferred to adult court, whether by a mandatory or discretionary transfer, juvenile offenders face the same sentencing options as their adult counterparts. In some instances, judges have limited sentencing options because state law requires that a life sentence be imposed upon conviction for specified offenses. In such cases, age and/or any other potentially mitigating factor cannot be considered in crafting a sentence.

As the number of juveniles serving LWOP sentences has increased, there has been greater public attention given to this issue. Some argue that when teens commit horrendous crimes, they should spend the rest of their lives in prison. Conversely, others argue that teens' brains are still developing and that even when they kill, their youth alone requires that they be given a chance at

(...continued)

Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters, by Charles Doyle.

[8] It is worth noting that conduct which violates federal criminal law is usually contrary to state law also.

[9] 18 U.S.C. § 5032.

[10] 18 U.S.C. § 5032(4). The prior offense may be either a conviction as an adult or a finding of delinquency based on conduct that would be felonious if committed by an adult.

[11] See Ark. Code Ann. § 9-27-318(c).

[12] Mich. Comp. Laws § 600.606.

[13] Fla. Stat. § 985.557.

[14] See Conn. Gen. Stat. § 46b-127(a)(providing for mandatory transfer for any child charged with the commission of a capital, class A, or class B felony). Examples include capital murder, felony murder, aggravated sexual assault of a person under 16, kidnapping, arson, burglary, robbery, and rioting at a correctional institution.

rehabilitation. To this end, legislators at both the federal and state levels are addressing the appropriateness of and necessity for juvenile LWOP sentences.

Congressional Authority to Legislate Juvenile Justice Issues

Enumerated Powers: Spending Clause

Generally, states assert jurisdiction over law enforcement for crimes committed within their borders.[15] However, Congress may legislate in the state law enforcement or juvenile justice arenas under certain constitutionally permissible circumstances, for instance where it finds it necessary and proper to carry into execution federal authority.[16] Article I, Section 8, of the Constitution, the enumerated powers clause, limits congressional authority to act by specifying general subject categories where federal action is permissible. Under this clause and the Tenth Amendment,[17] categories other than those enumerated in Section 8 or elsewhere are reserved for state action. Enumerated powers encompass those topics the Constitution's framers thought could be best handled on the national level; for example, waging war, national defense, interstate and foreign commerce, coinage and currency, the postal system, bankruptcies, copyrights, and the federal judicial system.

In instances in which Congress lacks a direct justification for federal legislation, it often relies on its enumerated spending power. Article I, Section 8, clause I empowers Congress "to lay and collect Taxes ... to provide for the ... general Welfare." There is a general consensus that Congress has expansive powers to attach conditions to grants of federal money, including grants to states. In *South Dakota v. Dole*,[18] the Supreme Court considered a federal law that required the Secretary of Transportation to withhold 5% of a state's federal highway dollars if the state allowed persons less than 21 years of age to purchase alcoholic beverages. South Dakota, which allowed 18-year-olds to make such purchases and which was in a position to lose federal funds for highway construction, sued, arguing that the highway funding law was not related to setting a national drinking age. In upholding the federal law, the Court announced a four-part test for evaluating the constitutionality of conditions attached to federal spending programs: (1) the spending power must be exercised in pursuit of the general welfare; (2) the grant conditions must be clearly stated; (3) the conditions must be related to a federal interest in the national program or project; and (4) the spending power cannot be used to induce states to do things that would themselves be unconstitutional.[19]

[15] Federal law prefers state law treatment of juveniles accused of federal crimes. 18 U.S.C. § 5032 provides limited circumstances in which juveniles may be tried in U.S. district courts. For a discussion of federal delinquency law, refer to CRS Report RL30822, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters*, by Charles Doyle.

[16] U.S. Const. Art. I, §8, Cl. 18.

[17] The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[18] 483 U.S. 203 (1987).

[19] *Id.* at 207-208.

Juvenile Justice Delinquency and Prevention Act (JJDPA)

Congress has acted pursuant to its spending power to create grant programs intended to influence states' juvenile justice systems. For example, the Juvenile Justice Delinquency and Prevention Act (JJDPA), first passed by Congress in 1974, has three main components: a set of institutions within the federal government dedicated to coordinating and administering federal juvenile justice efforts; grant programs to assist the states with setting up and running their juvenile justice systems; and core mandates that states must adhere to in order to be eligible to receive grant funding.[20] The JJDPA authorizes the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) to make formula grants to states, which can be used to fund the planning, establishment, operation, coordination, and evaluation of projects for the development of more effective juvenile delinquency prevention programs and improved juvenile justice systems. The State Formula grant program is one of four major grant programs under the purview of the JJDPA.

Juvenile Accountability Block Grant (JABG)

Also, the Juvenile Accountability Block Grant (JABG) Program[21] authorizes the Attorney General to make grants to states and units of local government to strengthen their juvenile justice systems and foster accountability within their juvenile populations. Under the JABG program, states must begin to implement a system of graduated sanctions[22] in order to be eligible for funding—signifying a movement away from emphasizing juvenile rehabilitation and toward the idea that juveniles need to be punished for their crimes.

Pending Legislation

H.R. 2289 (111th Congress, First Session), entitled the Juvenile Justice Accountability and Improvement Act of 2009, would, if enacted, influence how states handle juvenile offenders. H.R. 2289, as introduced, establishes requirements for states to meet to retain eligibility for grant funding. Specifically, the bill requires states to provide all juveniles sentenced to LWOP an opportunity for parole or supervised release at least once during the first 15 years of imprisonment and at least once every subsequent three years. H.R. 2289 would arguably provide youthful offenders an incentive to work toward by demonstrating their rehabilitation in prison. Access to a parole hearing or another form of meaningful review could provide a juvenile offender with a chance to earn release from prison through rehabilitation. Parole hearings could assess a youth offender's progress and would also provide an opportunity for victims and their families to be heard.

[20] For additional information on the JJDPA, refer to CRS Report RL33947, *Juvenile Justice: Legislative History and Current Legislative Issues*, by Kristin M. Finklea.

[21] JABG was codified within the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796ee). For additional information on JABG, see CRS Report RL33947, *Juvenile Justice: Legislative History and Current Legislative Issues*, by Kristin M. Finklea.

[22] Graduated sanctions should be designed so that sanctions are imposed on a juvenile for each delinquent offense, and escalated in intensity with each subsequent, more serious, offense. There should be "sufficient flexibility" to allow for individualized sanctions and services for juvenile offenders. Additionally, "appropriate consideration" should be given to public safety and the victims of the crime. 42 U.S.C. §3796ee-2(d).

Eighth Amendment Jurisprudence

In addition to the penological, moral, and legislative issues presented by juvenile LWOP sentencing, courts are beginning to address the constitutionality of such laws. The Supreme Court found the death penalty unconstitutional for juvenile offenders in *Roper v. Simmons*.[23] Some question whether LWOP sentences may also violate the Eighth Amendment's ban on cruel and unusual punishment. Opponents of such practices argue that the lack of a chance of rehabilitation makes a LWOP sentence analogous to the death penalty.

The Eighth Amendment, applicable to the federal government and to the states through the Due Process Clause of the Fourteenth Amendment, bars the use of "excessive sanctions" in the criminal justice system.[24] It states specifically that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[25] Underlying this provision is the fundamental "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense."[26] The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime.[27] As such, the Court has applied a proportionality analysis in both capital and non-capital cases.

The Court generally considers several factors in determining whether a sentence is sufficiently disproportionate to violate the Eighth Amendment. These factors include (1) whether the sentence would serve a legitimate penological purpose, with due deference to legislative enactments; (2) a comparison of the gravity of the offense with the harshness of the punishment imposed; and (3) a comparison of the sentence imposed to evolving standards of decency as reflected in the laws and practices of the states and, sometimes, the international community.[28] In recent cases, in examining whether a sentence is grossly disproportionate, the Court has also focused on offender characteristics, such as age or mental ability.

Proportionality Analysis in Death Penalty Cases

The standards for the Eighth Amendment's proportionality analysis continue to divide Justices on the Court, as demonstrated by several 5-4 decisions. It appears that the Court's proportionality

[23] 543 U.S. 551 (2005).

[24] *Robinson v. California*, 370 U.S. 660 (1962) (finding that a California law authorizing a 90-day jail sentence for being addicted to narcotics violated the Eighth Amendment). This is the first case in which the Court applied the Eighth Amendment to the states via the Fourteenth Amendment.

[25] U.S. Const. Amend. VIII.

[26] *Weems v. United States*, 217 U.S. 349, 367 (1910)(holding that the Eighth Amendment's Cruel and Unusual Clause requires that punishment for a crime be proportioned to its severity).

[27] *Solem v. Helm*, 463 U.S. 277 (1983).

[28] *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651-2658 (2008); *Roper v. Simmons*, 543 U.S. at 561, 564-567, 575-578; *Harmelin v Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy J., concurring in part and concurring in judgment); *Ewing v. California*, 538 U.S. 11, 23-24 (plurality opinion) (adopting Justice Kennedy's *Harmelin* concurrence); *Solem v. Helm*, 463 U.S. 277, 290-291 (1983)(citing *Enmund v. Florida*, 458 U.S. 782, 797-799 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)(plurality opinion).

analysis differs if a capital sentence is involved.[29] Generally speaking, the Court has held that death penalty cases require extra procedural protections.[30]

Crime-to-Punishment Analysis

In earlier death penalty cases, the Court employed its proportionality analysis by weighing the punishment against the crime. For example, in *Coker v. Georgia*,[31] *Enmund v. Florida*,[32] and *Tison v. Arizona*,[33] the Court limited the death penalty for offenders of certain non-homicide crimes such as rape and felony murder.[34] In *Enmund*, the Court found the death penalty disproportionate "for one who neither took life, attempted to take life, nor intended to take life." The Court found Enmund to be a participant in a robbery, rather than a robber and murderer, based on the record before it.[35] Next, the Court compared the gravity of robbery to murder. Although it agreed that robbery was a serious offense, the Court concluded that "it does not compare with murder.... The murderer kills; the [robber], if no more than that, does not."[36] Finally, looking at other punishment-to-crime proportions in the state of conviction, Florida, the Court found that Enmund, who had acted without intent to kill, was punished as harshly as the robbers who intended to kill. As such, the Court found that the Eighth Amendment prohibits the imposition of the death penalty under such circumstances. By implication, the Court seemed to say that for a crime to be proportional to the punishment of death, the crime committed must cause death.

Most recently, in *Kennedy v. Louisiana*,[37] the Court weighed the punishment to the crime and found that the death penalty is disproportionate when a defendant commits a non-homicide child rape.[38] The Court rested its decision on several rationales. First, it found a national consensus against the imposition of the death penalty for child rape. Second, evolving standards of decency require that the categories of capital offenses not be expanded, but rather be reserved for the most heinous crimes. Lastly, imposition of capital punishment for the crime of non-homicide child rape does not fulfill the death penalty's social purposes of retribution and deterrence. After reviewing the history of the death penalty for other non-homicide crimes against individuals, state

[29] *See Roper*, 543 U.S. at 561 (applying the "evolving standards" test to find that the juvenile death penalty is facially unconstitutional); *Harmelin*, 501 U.S. at 1001 (applying the "gross disproportionality" test to find that LWOP as applied to the offender did not violate the Constitution).

[30] *See, Herrera v. Collins*, 506 U.S. 390, 405 (1993)(stating that "the Eighth Amendment requires increased reliability of the process …").

[31] 433 U.S. 584 (1977)(holding that the death penalty is a disproportionate punishment for the crime of rape of an adult woman).

[32] 458 U.S. 782 (1982)(holding that the death penalty is a disproportionate punishment for the crime of felony murder).

[33] 481 U.S. 137 (1987)(holding that *Enmund's* culpability mandate could be satisfied where the offender engages in major participation in a felony and demonstrates reckless indifference to human life).

[34] Generally, felony-murder occurs when a victim dies accidently or without specific intent during the course of an applicable felony.

[35] *Id.* at 798.

[36] *Id.* at 797 (internal citations omitted).

[37] 128 S.Ct. 2651, 554 U.S. ___ (2008)(holding that the death penalty was unconstitutionally excessive for the rape of a child which does not result in the victim's death).

[38] The Court distinguished child rape from other death-eligible crimes because it is a crime against an individual. It ruled that the death penalty should not be permitted when the victim's life was not taken. However, the Court did not address, and consequently left open, the possibility of imposing the death penalty for non-homicide crimes against the state, such as treason, espionage, terrorism, and drug kingpin activity. *Id.* at 2665.

legislative enactments, and jury practices since 1964, the Court concluded that there is a national consensus against the imposition of capital punishment for the crime of child rape.[39]

While the Court acknowledged that rape is a heinous crime causing traumatic and long-lasting anguish which is exacerbated when the victim is a child, it "does not follow though, that capital punishment is a proportionate penalty for the crime." The Court reasoned that the evolving standards of decency require restraint in the application of capital punishment. Capital punishment should be reserved for a narrow category of crimes and/or offenses. In determining whether to include non-homicide rape, the majority looked at the possible implications of such a decision. The majority felt that allowing capital punishment has additional negative implications, such as removing a strong incentive for the rapist to spare the victim's life. After weighing the aforementioned factors, the Court concluded that the Eighth Amendment prohibits capital punishment for adult offenders who commit non-homicide crimes against individuals.

Culpability-to-Punishment Analysis

In both *Atkins v. Virginia*[40] and *Roper v. Simmons*,[41] the Court narrowed the category of offenders eligible for capital punishment to exclude the mentally retarded and juvenile offenders. In doing so, the Court temporarily shifted its proportionality focus from a punishment-to-crime to a punishment-to-culpability analysis. In these cases, the Court found that the death penalty, when applied to these specific classes of offenders, was disproportionate according to "evolving standards of decency." This principle appears to be a flexible rule of construction intended to evolve with societal norms as they develop so that the Court may reflect these norms in its constitutionality review. In these cases, the Court employed a three-part analysis to determine whether, under "evolving standards of decency," imposing the death penalty would be so disproportionate as to be cruel and unusual under the Eighth Amendment. In both cases, the Court first looked for a national consensus as evidenced by the acts of state legislatures.[42] It then assessed the proportionality of the punishment to the relevant crimes, considering whether the death penalty was being limited, as required, to the most serious classes of crimes and offenders, and whether its application would serve the goals of retribution and deterrence.[43] Lastly, the Court looked to international opinion to inform its analysis.[44]

In *Atkins*, the Court recognized an established and evolving national consensus that quantifiable and cognitive limitations diminish the moral culpability of offenders with mental retardation and, consequently, impact the appropriate punishment. Therefore, it held that those classes of offenders deserve a categorical exemption from the punishment.[45]

Following a similar analysis, the Court found the death penalty unconstitutional for juvenile offenders. In *Roper*, the Court pointed to three "general differences" between juveniles and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst

[39] *Id.*

[40] *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

[41] *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

[42] *See*, 543 U.S. at 609-11; 536 U.S. at 343-48.

[43] *See*, 543 U.S. at 560-64; 536 U.S. at 311-13.

[44] *See*, 543 U.S. at 575-78; 536 U.S. at 318 n.21.

[45] *Atkins*, 536 U.S. at 318.

offenders."[46] First, juveniles' immaturity and susceptibility to irresponsible behavior make their irresponsible conduct less morally reprehensible than that of adults.[47] Second, juveniles are more vulnerable to negative environmental influences and pressures, including peer pressure.[48] Finally, juvenile personalities are not fully developed. The signature qualities of youth are transient, leaving open the possibility of maturity and personal growth.[49] After weighing these factors, the Court concluded the Eighth Amendment requires a categorical ban on the application of capital punishment to juvenile offenders. However, the Court did not address whether reduced culpability should be applied in other sentences involving juvenile offenders.

Proportionality Analysis in Non-Capital Cases

"It is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[50] In this spirit, the Eighth Amendment "succinctly prohibits 'excessive' sanctions," and the Supreme Court has "repeatedly applied this proportionality precept."[51] Although proportionality analysis is more robustly applied in death penalty contexts, the Supreme Court long ago clarified that this precept has application to the length of prison terms because, "as a matter of principle[,] a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[52] The Court has used this proportionality analysis in a variety of contexts, such as mandatory life sentences (with and without the possibility of parole) and recidivist sentences (including three-strikes laws).

Proportionality analysis in cases involving life sentences is less clear than in cases involving the death penalty. Beginning in the 1980s, the Court attempted to clarify whether or when a proportionality analysis is applicable in non-capital cases.

Recidivist and "Three-Strikes" Laws

States use recidivist laws to impose harsher sentences on repeat offenders. Three-strikes laws generally require courts to impose a mandatory and/or extended period of incarceration to individuals convicted of three or more felonies. Defendants have challenged such laws as violative of the Eighth Amendment's prohibition on cruel and unusual punishments.

Rummel v. Estelle

In *Rummel v. Estelle*,[53] the Court affirmed a mandatory life sentence (with the possibility of parole) for the non-violent theft of less than $230.[54] The Court held that Texas had a significant

[46] *Id.* at 569-70.

[47] *Id.*

[48] *Id.* at 570.

[49] *Id.* at 569-70.

[50] *Weems v. United States*, 217 U.S. 349, 367 (1910).

[51] *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

[52] *Solem v. Helm*, 462 U.S. 277, 290 (1983).

[53] 445 U.S. 263 (1980).

[54] Rummel's two prior offenses were a 1964 felony for "fraudulent use of a credit card to obtain $80 worth of goods or services," and a 1969 felony conviction for "passing a forged check in the amount of $28.36." His triggering offense was a conviction for felony theft "obtaining $120.75 by false pretenses." *Id.* at 265-66.

interest in dealing in a harsher manner with those who by repeated criminal acts have demonstrated an inability to conform to societal norms. The Court noted that the proportionality analysis had only been employed in capital punishment cases and *Weems v. United States*,[55] in which the Court found specific conditions of imprisonment, including being chained from the wrist to the ankle, constituted cruel and unusual punishment.[56] In addition, these cases involved punishments different in nature from those in *Rummel*.

Solem v. Helm

In *Solem v. Helm*,[57] the Court held that incarceration, standing alone, could constitute cruel and unusual punishment if it were "disproportionate in duration with respect to the offense." Defendant Helm was convicted for writing a check from a fictitious account; it was his seventh nonviolent felony conviction since 1964. Under South Dakota law at that time, he was sentenced to a mandatory sentence of life imprisonment with no parole. The Court overturned the sentence, finding that it was disproportionate and consequently "cruel and unusual." The Court rejected the state's argument that proportionality analysis does not apply to terms of imprisonment. The Court identified three objective factors for courts to consider when analyzing proportionality: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals (for more and less serious offenses) in the same jurisdiction; and (3) sentences imposed (for the same offense) in other jurisdictions.[58]

Lockyer v. Andrade and Ewing v. California

The Supreme Court upheld two cases involving California's three-strikes law, which provides for the possibility of parole. In *Lockyer v. Andrade*,[59] the Court upheld a 50-years-to-life sentence with the possibility of parole imposed under California's three-strikes law when the defendant's third conviction was for shoplifting videotapes worth a total of $150. The Court held that while precedent clearly established that the proportionality principle applied to sentences for terms of years, the principle was unclear as to the precise parameters and applied only in the "exceedingly rare and extreme case."[60]

Similarly, in *Ewing v. California*,[61] an adult was sentenced to 25 years to life under California's three-strikes law.[62] Ewing was charged with and convicted of felony grand theft of personal

[55] 217 U.S. 349, 367 (1910).

[56] Weems was an acting disbursing officer of the Bureau of the Coast Guard and Transportation of the United States Government of the Philippine Islands who had been convicted of falsifying official records of the United States Coast Guard, which resulted in the government being defrauded 612 pesos. Weems was sentenced to 15 years imprisonment with hard labor as well as *cadena temporal*, which required him to be constantly in chains from the wrists to the ankles.

[57] 463 U.S. 277 (1983).

[58] *Id.* at 292.

[59] 538 U.S. 63 (2003).

[60] *Id.* at 72. As this case was an appeal from a federal habeas petition, the Court could not grant relief unless the state courts' decisions to uphold Andrade's sentence were contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). *See also*, *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) (stating that a state court's decision is "contrary to" clearly established law if it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially distinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent").

[61] 538 U.S. 11 (2003).

property for stealing three golf clubs worth $399 each. Writing for the Court, which affirmed the sentence, Justice O'Connor noted that "federal courts should be reluctant to review legislatively mandated terms of imprisonment and that successful challenges to the proportionality of particular sentences should be exceedingly rare."[63] Specifically, she concluded:

> We do not sit as a "superlegislature" to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons advances the goals of its criminal justice system in any substantial way.... To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.

Harmelin v. Michigan[64]

In *Harmelin v. Michigan*,[65] the Court upheld an LWOP sentence mandated by a Michigan law criminalizing the possession of more than 650 grams of cocaine. The defendant was a first-time offender convicted of possession of 672 grams of cocaine, enough for possibly as many as 65,000 doses. Harmelin contended that the sentence violated the Eighth Amendment. Although the Court found that the sentence was not cruel and unusual punishment, the Justices disagreed whether and to what extent the Eighth Amendment imposes a proportionality requirement in non-capital sentencing proceedings. Justice Scalia introduced historical evidence in support of his argument that the Eighth Amendment imposes no proportionality requirement at all. Instead, the proportionality principle was an aspect of the Court's death penalty jurisprudence.[66] Justice Kennedy argued in favor of a vague proportionality principle that allowed the Court to uphold Harmelin's sentence. Justice White argued that Harmelin's sentence was the sort of "excessive" sentence forbidden by the Eighth Amendment.

The Court's consideration of the constitutionality of LWOP in *Harmelin* provides little clarification of the applicable standards. A majority of the Court rejected the petitioner's claim that LWOP was an unconstitutional sentence for the offense committed. Two members of the majority, however, held that proportionality analysis should not apply outside the context of death penalty cases. Three justices (concurring separately) disagreed with this conclusion. Applying the first prong of *Solem*, these justices held that LWOP was not grossly disproportionate because of the severity of the crime; that is, the pernicious effects of the drug epidemic in this country … demonstrate that the … legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence to the serious crimes the petitioner had committed.[67]

(...continued)

[62] Ewing had an extensive criminal record dating back to 1984 that included felony and misdemeanor convictions for theft, battery, firearms possession, robbery, and burglary.

[63] *Ewing*, 538 U.S. at 22 (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982)(per curiam)).

[64] 501 U.S. 957 (1991).

[65] *Id.*

[66] 501 U.S. at 994.

[67] *Id.* at 1003.

The other two factors (intrajurisdictional and interjurisdictional comparisons), they held, applied only in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." The four dissenting justices agreed that the Eighth Amendment contains a proportionality requirement and found that it had been violated by the petitioner's life sentence.

Despite disagreement among the justices, the decision in *Harmelin* establishes the proposition that a majority of the Court found that the Eighth Amendment's proportionality analysis applies to capital and non-capital cases.[68]

Challenges to Life Without Parole Sentences for Juvenile Offenders in Federal Courts

Challenges to sentences of LWOP for juvenile offenders have met with limited success in state courts and even less success in federal court.[69] State juvenile offenders can petition for federal habeas review. Federal habeas corpus review is a procedure under which a federal court may review the legality of a state or federal prisoner's conviction and/or sentence. Most federal courts have adopted a restrictive view when comparing the crime committed and the sentence imposed (the first factor of the *Solem* test), focusing almost exclusively on the seriousness of the offense committed without considering offender culpability and individual mitigating circumstances. In *Harris v. Wright*,[70] the Ninth Circuit Court of Appeals upheld a mandatory life sentence for a 15-year-old convicted of murder, finding that "youth has no obvious bearing" on a proportionality analysis.[71] It also held that although capital punishment must be treated specially, "mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences."[72] Therefore, the court declined to apply the same scrutiny to a LWOP sentence as it would in a capital case.

Similarly, in *United States v Feemster*,[73] the Eighth Circuit Court of Appeals addressed a downward departure based on juvenile conduct. Feemster was convicted of two counts of distributing crack cocaine. The sentencing range, including the applicable career enhancement due to Feemster's extensive criminal record (including both juvenile adjudications and adult convictions), was 360 months to life imprisonment. However, the U.S. district court imposed a sentence of 120 months imprisonment and eight years supervised release. The trial court based its downward variance on Feemster's troubled youth, noting that Feemster had five juvenile adjudications and three convictions as a minor. The government appealed, arguing that the district court gave excessive, and thus unreasonable, weight to the juvenile adjudications. However, the defendant argued that *Roper* stands for the proposition that convictions obtained before and after

[68] *See, Ewing v. California*, 538 U.S. 11 (2003). In *Ewing*, a majority of the Justices agreed that the proportionality principle applied in non-capital cases. Three Justices opined that the principle should be narrow for non-capital punishments, whereas four Justices opined that it should be broad.

[69] *See, e.g., Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998); *Harris v. Wright*, 93 F.3d 581, 583-85 (9th Cir. 1996); *Rodriguez v. Peters*, 63 F.3d 546, 566-67 (7th Cir. 1995).

[70] 93 F.3d 581 (9th Cir. 1996).

[71] *Harris*, 93 F.3d at 585. *See also, Rodriguez v. Peters*, 63 F.3d 546, 568 (7th Cir. 1995)(refusing to consider age of 15-year-old offender in challenge of life sentence's constitutionality).

[72] *Harris*, 93 F.3d at 585.

[73] 483 F.3d 583 (8th Cir. 2007).

a defendant reaches majority should be treated differently. The Eighth Circuit disagreed with the defendant's reading of *Roper*. It found that *Roper* should be interpreted narrowly and limited to the capital cases involving juveniles. Thus, the court vacated the district court's sentencing and remanded the case, mandating that Feemster's age be given less weight in the sentencing decision.

Challenges to Life Without Parole Sentences in State Courts

Juvenile offenders challenging LWOP sentences have met with mixed results in state courts. In *Wallace v. Delaware*,[74] the Delaware Supreme Court held that a defendant's sentence of LWOP did not constitute cruel and unusual punishment, even though the defendant was less than 16 years old at the time he committed murder. Following a bench trial, the defendant was found "guilty but mentally ill"[75] of murder in the first degree, and possession of a deadly weapon during the commission of a felony. Pursuant to state law, the defendant was sentenced to LWOP on the murder conviction and to an additional five years imprisonment for the weapon conviction.

Relying on earlier precedent,[76] the state supreme court rejected the defendant's claim that a sentence of LWOP violated the Eighth Amendment's prohibition on cruel and unusual punishment. In applying *Roper*, the state court took notice of the U.S. Supreme Court's conclusion that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders."[77] The Supreme Court in *Roper* acknowledged the brutal crimes that some juvenile offenders have committed, but observed that "when a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[78] In addition, *Roper* stated that "it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[79] Thus, the Delaware Supreme Court concluded that *Roper* implicitly recognizes a sentence of LWOP as an acceptable alternative to death as a punishment for a juvenile who commits intentional murder in the first degree. Therefore, the Delaware Supreme Court found such a punishment did not constitute cruel and unusual punishment.

Conversely, some state courts have held that juvenile life without the possibility of parole violates the U.S. and/or state constitution.[80] In *Naovarath v. State*,[81] the Nevada Supreme Court held that life without the possibility of parole for a 13-year-old convicted of murdering a man who

[74] 956 A.2d 630 (Del. Supr. 2008).

[75] *Id.* at 661.

[76] *See, e.g., Torres v. State*, 1992 WL 53406, at *1 (Del. Supr.)(sentencing a 15-year-old convicted of eight counts of murder in the first degree to eight consecutive terms of life imprisonment without possibility of probation, parole, or any other reduction); *Dickerson v. State*, 1993 WL 541913, at *1 (Del. Supr.)(sentencing a 17-year-old drug dealer who contracted to have a rival killed to LWOP); *State v. Wonnum*, 2006 WL 280814, *1 (Del. Super. Ct., Sept. 22, 2006)(upholding mandatory life sentence given to a 17-year-old convicted of felony murder); *Jones v. State*, 940 A.2d 1 (Del. 2007)(sentencing a 17-year-old to multiple natural life sentences for murder of a man and his fiancee).

[77] *Roper*, 543 U.S. at 572.

[78] *Id.* at 574.

[79] *Id.* at 572.

[80] *See, Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968); *Naovarath v. State*, 779 P.2d 944, 948-49 (Nev. 1989).

[81] 779 P.2d 944, 948049 (Nev. 1989).

molested him was cruel and unusual punishment under the state and federal constitutions.[82] The judge stated, "To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder."[83] The judge questioned whether sentencing children to life imprisonment without parole measurably contributes to the intended objectives of retribution, deterrence, and segregation from society.[84] As to retribution, the judge found that children do not deserve the degree of retribution represented by life without the possibility of parole, given their lesser culpability and greater capacity for growth, and given society's special obligation to children.[85] The judge also concluded that the objective of deterrence fails, given children's lesser ability to consider the ramifications of their actions, and that segregation is unjustified.[86] Other state supreme courts have overturned LWOP punishments or excessively long prison sentences under their state constitutions.[87]

Pending Supreme Court Cases

The first post-*Roper* case testing the Eighth Amendment as it applies to long sentences for youth, *Pittman v. South Carolina* (07-8436), was turned aside by the Court.[88] The case involved a 12-year-old convicted of a double murder. He was given a 30-year prison sentence, without the possibility of parole. It appeared that the Court was unwilling to address the issue of a lengthy sentence in a case where the juvenile was convicted of a homicide. However, the Court has recently granted certiorari in two cases, discussed below, that may answer some questions regarding the constitutionality of LWOP sentences for juvenile offenders who commit non-homicide crimes. While the cases present some similarities, the differences may be sufficient to warrant different outcomes. In one, the defendant was a 13-year-old first-time offender convicted of rape. In the other, the defendant was a 17-year-old convicted of robbery. However, the lower court imposed his LWOP sentence after finding that he violated his parole. Both defendants challenged their sentences, arguing that they violate the Eighth Amendment's ban on cruel and unusual punishment. Specifically, both defendants contend that the Court should extend its holding in *Roper* to cover these non-capital crimes. It is unclear whether the Court will extend its *Roper* holding to non-capital crimes or whether it will analyze these cases using its previous proportionality analysis in non-capital cases. It is important to note that neither case involves a victim's death. For that reason, the Court's rulings may be narrowly tailored to address non-homicide and/or non-recidivist crimes.

[82] *Id.* at 948-49, 949 n.6.

[83] *Id.* at 947.

[84] *Id.*

[85] *Id.* at 948.

[86] *Id.*

[87] *See, People v. Miller*, 781 N.E.2d 300, 310 (Ill. 2002); *Trowbridge v. State*, 717 N.E. 2d 138, 150 (Ind. 1999); *Workman*, 429 S.W.2d at 378.

[88] *Pittman v. South Carolina,* 647 S.E. 2d 144 (SC 2007) *cert. denied*, 128 S.Ct. 1872 (2008).

Graham v. Florida[89]

In *Graham*, the defendant challenges his LWOP sentence as unconstitutional under the Eighth Amendment. Terrance Graham was 16 when he and three other accomplices committed an armed robbery and assault. The state prosecutor exercised her discretion and filed charges against Graham and two of the accomplices in the Circuit Court, Duval County (adult court). Graham pleaded guilty to armed burglary with assault or battery and attempted armed robbery. He was subsequently sentenced to three years of probation. The plea agreement and the order of probation imposed multiple conditions, including that Graham attend school; refrain from violating the law; obey his parents; abide by a 10 p.m. curfew; and refrain from possessing firearms or associating with persons engaged in criminal activity.

On December 6, 2004, Graham's probation officer filed an affidavit alleging that Graham had violated his probation. The alleged violations included (1) possession of a firearm; (2) violations of the law (home invasion robbery and fleeing and attempting to elude a law enforcement officer); and (3) association with persons engaged in criminal activity. The court subsequently held a hearing on the alleged violations. At the hearing, Graham admitted that he had violated his probation by fleeing and attempting to elude a law enforcement officer. The court advised Graham that his admission, by itself, could expose him to a sentence of life imprisonment. Graham continued to admit to fleeing but denied the other violations, including the home invasion robbery. After hearing the evidence, the trial court found, by a preponderance of the evidence,[90] that Graham had violated his probation, not only by committing a home invasion robbery, but also by possessing a firearm and associating with persons engaged in criminal activity. The court reiterated that Graham had admitted a violation by fleeing and attempting to elude a law enforcement officer, and imposed a sentence of LWOP for the underlying armed burglary and 15 years for the underlying attempted armed robbery.

On appeal, the Florida First District Court of Appeal found that the imposition of a life sentence without the possibility of parole does not violate either the federal or state prohibitions against cruel and unusual punishment. As to the petitioner's facial challenge, the court determined that *Roper* should be construed narrowly, to apply only in capital cases. In addition, it rejected the claim that sentencing a juvenile to life imprisonment is cruel and unusual in all circumstances.

The lower court also rejected the petitioner's as-applied challenge, i.e., that his life sentence was grossly disproportionate to his offense, noting that the petitioner had already received the benefit of a lenient sentence for the commission of a life felony. The court noted that, based on the petitioner's subsequent behavior, he had squandered his opportunity. The court also factored the youth's age in its decision, noting that "[t]hese offenses were not committed by a pre-teen, but a seventeen-year-old.... " After weighing the facts and circumstances, the court found that the life sentence, as applied, did not violate the federal or state prohibition on cruel and unusual punishment.

The Supreme Court granted certiorari to determine whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility

[89] 982 So. 2d 43 (Fla. App. 1 Dist 2008), *cert. granted*, 129 S.Ct. 2157 (2009) (No. 08-7412).

[90] While the applicable standard in criminal proceedings is "guilty beyond a reasonable doubt," "preponderance of the evidence" is used in parole revocation hearings. It is worth noting that the defendant did not raise the issue of receiving a life sentence based on the lesser standard.

of parole as punishment for the juvenile's commission of a non-homicide felony (armed burglary).

Sullivan v. Florida[91]

Joe Harris Sullivan was given a sentence of LWOP in Florida after a conviction for sexual battery, a crime committed when he was 13 years old. On the day of the crime in 1989, the defendant and two other boys participated in a burglary. One of the boys took money and jewelry. The victim was sexually assaulted in her home. One of the defendants claimed Sullivan committed the sexual battery. The two older boys received shorter sentences in juvenile detention. Sullivan was charged and tried in adult court pursuant to Florida law. He was convicted and sentenced to life imprisonment without parole.

His appointed appellate counsel filed an *Anders* brief asserting that there were no issues to consider on appeal, and withdrew from the case.[92] The state district court of appeal affirmed the conviction without opinion,[93] and the Supreme Court of Florida likewise dismissed review without opinion.[94] After the U.S. Supreme Court decided *Roper*, petitioner's counsel filed a motion for post-conviction relief under state law. The trial court dismissed the motion with prejudice. Upon appeal, the district court of appeal summarily affirmed without opinion.[95]

In its order and judgment dismissing Sullivan's post-conviction motion, the trial court found the motion untimely based on a conclusion that it did not raise a valid constitutional claim. As in *Graham*, the Florida court declined to extend the *Roper* ruling to non-capital cases. Hence, the court held that the Eighth Amendment claim was procedurally barred. Sullivan's petition contends that younger children are more fully shielded by the Eighth Amendment than older teenagers. However, Sullivan raises a separate issue: is he entitled to a ruling on his Eighth Amendment challenge years after his conviction? Sullivan was sentenced nearly 20 years ago, and now is unable or very unlikely to be able to get a lower court to review his claim. For the Court to address Sullivan's Eighth Amendment claim, it must find that his claim is not procedurally barred.

Conclusion

Since the late 1960s, the juvenile justice system has undergone significant modifications resulting from U.S. Supreme Court decisions, changes in federal and state law, and the growing belief that juveniles are increasingly involved in more serious and violent crimes. Consequently, at both the federal and state levels, the treatment of juvenile offenders arguably has shifted from a mostly rehabilitative one to a more punitive one, with serious ramifications for juvenile offenders.

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[91] 987 So. 2d 8308-7621.

[92] *See, Sullivan v. State*, No. 1D90-190 (Fla. 1st Dist. Ct. App.) (docket entry for Dec. 4, 1990). By filing an *Anders* brief, counsel asserted that there were no issues worth raising on appeal. *Anders v. California*, 386 U.S. 738, 744 (1967).

[93] *Sullivan v. State*, No. 1D90-190, 580 So. 2d 755 (Table) (Fla. 1st Dist. Ct. App. May 22, 1991).

[94] *Sullivan v. State*, No. 78050, 583 So. 2d 1037 (Table) (Fla. June 12, 1991).

[95] *Sullivan v. State*, No. 1D07-6433, 987 So. 2d 83 (Table), 2008 WL 2415314 (Fla. 1st Dist. Ct. App. June 17, 2008) (per curiam).

Legislators at both levels continue to grapple with ways to strike a balance between holding juveniles accountable for their actions, while at the same time providing an incentive to work toward rehabilitation in prison.

While states generally assert jurisdiction over law enforcement authority within their borders, Congress may legislate, pursuant to its spending or other enumerated powers, sentencing options for juveniles. Alternatively, Congress may elect to adopt a wait-and-see approach, pending the resolution of the cases before the U.S. Supreme Court that may have an impact on the sentencing of juveniles to LWOP sentences.

As the Court takes up cases considering the constitutionality of sentencing juveniles to LWOP for non-homicide crimes, it is likely to rely on its rulings in *Kennedy* and *Roper*. In *Roper*, the Court held that the Eighth Amendment prohibits capital punishment for juvenile offenders. In so doing, the Court recognized an established and evolving national consensus that quantifiable behavioral and cognitive limitations diminish the moral culpability of juvenile offenders. Does reduced culpability apply to LWOP as a sentencing option for a juvenile offender?

As a result of *Roper*, the toughest punishment currently applicable to juvenile offenders is LWOP. Does this suggest that the harshest punishment should only be available to juvenile offenders who commit homicide crimes? In *Kennedy*, the Court held that capital punishment is disproportionate in cases where an adult offender commits a non-homicide rape. In reaching its conclusion, the Court noted that although rape is a heinous crime, it cannot be compared to murder in terms of "severity and irrevocability." In addition, the Court opined that punishing child rape with death may remove a strong incentive for the rapist to spare the victim's life. Will the Court apply this reasoning to sentences for juvenile offenders who commit non-homicide crimes? Arguably, inflicting the same punishment for juvenile offenders who commit either type of crime (homicide or non-homicide) may result in an increased number of victims' deaths, if indeed offenders perceive that killing a victim will eliminate a potential witness, and the prospective punishment is no worse.[96]

It is also unclear whether the Court will extend its capital punishment jurisprudence to non-capital cases, as the Court has historically treated capital cases differently. The Court may elect to use its non-capital proportionality analysis, which generally defers to legislative enactments as they pertain to recidivists. However, such an analysis may not be applicable in *Sullivan*, as the defendant was a first-time offender. It is also unclear whether Sullivan's youth (13 years old) at the time he committed the non-homicide crime will have any bearing or impact on the Court's ruling. The outcomes of *Sullivan v. Florida* and *Graham v. Florida* may have a profound impact on the future of juvenile sentencing on both the state and federal levels.

[96] It is worth noting that some contend that perpetrators do not consider any possible punishment before committing a crime.

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