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CONTINUING EVOLUTION OF JUVENILE SENTENCING LAWS

Misty Wilson Borkowski[*]

I. INTRODUCTION

The United States Supreme Court has historically been more adaptable to "evolving standards of decency"[1] than state courts have, perhaps because the nature of its jurisdiction better positions the Court to have its finger on the national pulse. One indicator of the Court's adaptability has been its willingness to consider novel scientific findings in reaching its decisions. For example, in *Brown v. Board of Education*, the Court relied on the findings of numerous psychologists and psychiatrists to determine that segregation has a detrimental psychological effect upon African American school children.[2] Obviously, many state courts across the country opposed the ruling, maybe in symbolic opposition to centralized federal power (that old "States' Rights" song and dance) or, maybe, because those states were slower to embrace the scientific findings relied on by the Court. Some combination of both most likely played a role in the states' opposition.

The modern Court has been no less adaptable, as evidenced by recent reforms to juvenile sentencing law.[3] However, as was the case with *Brown*, state courts have been reluctant to follow suit. As a result, state courts have been able to subvert the Supreme Court by way of the de facto life sentences. These de facto life sentences run counter to the character and spirit of the Supreme Court's juvenile sentencing reforms and the Court should issue a ruling to cure the subversion tactics.

This article sets out these recent juvenile sentencing reforms as case studies of the Court's adaptability as well as the effect that innovations and new findings in the mental health field have had on the Court's reasoning.

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1. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 469 (2012); Graham v. Florida, 560 U.S. 48, 58 (2010); Roper v. Simmons, 543 U.S. 551, 561 (2005).
2. Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing to numerous articles and studies regarding the psychological effects of racial segregation).
3. *See infra* Part III.

Part II of this article provides a brief, general history of juvenile sentencing law in the United States.[4] Part III focuses on modern reforms to juvenile law with respect to capital punishment, life without parole for non-homicide offenders, and life without parole for homicide defenders.[5] Part III also addresses the seminal cases in each of these areas, and examines the way those cases have been applied (or not applied) by the states, focusing on Arkansas in particular.[6] Last, Part IV argues that the United States Supreme Court should issue a new ruling to prohibit the practice of de facto life sentencing.[7]

II. BACKGROUND

This section focuses on the law with respect to sentencing juvenile offenders. It briefly covers the history of juvenile sentencing before discussing modern reforms and the seminal cases that shaped today's standards. This section also discusses the way those reforms have played out in Arkansas and other states.

Drawing a line between juvenile and adult offenders has been a part of the modern legal system for nearly 250 years.[8] However, for much of U.S. history, children between the ages of seven and eighteen were virtually treated as adults.[9] Consider the example of James Arcene, a local case.[10] Arcene, a Cherokee, was hanged in Fort Smith in 1885 for participating in a murder when he was ten years old.[11]

These standards evolved through the nineteenth century. This is when the first set of reforms in modern juvenile treatment arose—the establishment of juvenile courts.[12] In the early twentieth century, the United States Children's Bureau recommended an age limit of eighteen for juvenile state courts.[13] Because "it was felt at the outset that . . . the new [juvenile court] system would help rather than punish juvenile defendants," the new system did not provide the same due process rights to juveniles as the regular court

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4. *See infra* Part II.
5. *See infra* Part III.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See* Scott Lenahan, *A New Era in Juvenile Justice: Expanding the Scope of Juvenile Protections Through Neuropsychology*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 92, 94 (2014).
9. *Id.*; *See also* Kimberly Larson et. al., *Miller v. Alabama: Implications for Forensic Mental Health Assessment at the Intersection of Social Science and the Law*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 319, 320 (2013).
10. *See* Rob Warden & Daniel Lennard, *Death in American Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 214 (2018).
11. *Id.*
12. Lenahan, *supra* note 8, at 94.
13. Lenahan, *supra* note 8, at 94.

system did to adults.[14] By the 1960s, the Supreme Court had begun building up juvenile due process, culminating with *In re Gault*.[15] *In re Gault* marked a turning point in juvenile jurisprudence, recognizing the differences between juvenile and adult culpability as well as inserting due process rights that were originally left out of many juvenile court systems around the country.[16] The Court was largely silent on the issue of juvenile due process for the next thirty or forty years until, in the 1990s, "widespread public perception of a juvenile crime wave led to legislative and other changes that resulted in youth being treated more harshly both within the juvenile and adult [court] systems."[17]

III. MODERN REFORMS

A. Capital Punishment

One of the first major juvenile sentencing issues taken up by the Court was capital punishment. In *Roper v. Simmons*, the question of whether an individual could be executed for capital crimes committed under the age of eighteen landed squarely before the Court.[18] In a 5-4 decision, the Supreme Court held that execution of juvenile homicide offenders is prohibited by the Eighth Amendment and the Fourteenth Amendment.[19]

Specifically, the Court addressed whether a juvenile who committed a capital crime between the ages of fifteen and eighteen could be executed,[20] a question it had answered in the affirmative about sixteen years earlier in *Stanford v. Kentucky*.[21] Between the *Stanford* decision and *Roper*, five states did away with the juvenile death penalty.[22] The Court saw this as a significant change, indicating a building national consensus against the juvenile death penalty.[23]

The *Roper* Court ultimately held that a juvenile could not be sentenced to death for a capital crime, basing its decision in part on the fact that "differences between juvenile and adult offenders are too marked and well un-

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14. Larson, *supra* note 9, at 321.
15. *Id.* at 322.
16. *Id.*
17. *Id.*
18. 543 U.S. 551, 555–56 (2005).
19. *Id.* at 578.
20. *Id.* at 555–56.
21. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989). Interestingly, in a plurality opinion from the previous year, the Court found that the Eighth Amendment prohibited the execution of any offender "under 16 years of age at the time of his or her offense." *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).
22. Roper v. Simmons, 543 U.S. 551, 565 (2005).
23. *Id.* at 565–66.

derstood to risk allowing a youthful person to receive the death penalty despite *insufficient culpability*."[24] Specifically, the Court focused on three general differences:[25] first, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decision;"[26] second, "[j]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;"[27] and third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[28] "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[29]

The Court noted that these are general differences that "any parent knows,"[30] but also based its reasoning on the "scientific and sociological studies respondent and his *amici* cite[d] . . . ."[31] Those amici included briefs from numerous medical and social organizations, including the American Psychological Association and the American Medical Association.[32]

The *Roper* court noted that the *Thompson* court relied on many of these same factors in determining that juvenile offenders under the age of sixteen were not eligible for the death penalty, and incorporated that reasoning to hold that the same logic applied to all juvenile offenders under eighteen.[33] In addressing what would become one of the major concerns of those that oppose the rule set out in *Roper*, the Court reasoned that a categorical ban on juvenile death penalties was necessary precisely *because* "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[34]

The petitioners raised this uncertainty as an argument *against* a categorical ban.[35] What if a juvenile actually is mature enough and depraved

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24. *Id.* at 572–73 (emphasis added).
25. *Id.* at 569.
26. *Id.*
27. *Id.* (citing Johnson v. Texas, 509 U.S. 350 (1993)).
28. *Roper*, 543 U.S. at 570.
29. *Id.*
30. *Id.* at 569.
31. *Id.*
32. *See* Brief for American Psychological Association et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (No. 03-633), 2004 WL 1636447; *see* Brief for American Medical Association et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (No. 03-633), 2004 WL 1633549.
33. *Roper*, 543 U.S. at 570–71.
34. *Id.* at 573.
35. *Id.* at 572.

enough to warrant the death penalty? Should not a jury determine whether an offender has exhibited diminished culpability? Again, the Court reasoned that the "differences between juvenile and adult offenders are too marked" to allow a jury to decide the matter.[36]

In short, the Court decided that, because *some* juvenile offenders are less mature (and therefore less culpable) than adults, no juvenile offenders could lawfully be executed.[37] Objecting to this categorical rule, Justice O'Connor inverted the Court's logic, arguing that because *some* juvenile offenders are as mature as adults (and therefore sufficiently culpable), juries should be able to decide their fate.[38]

B. Life Without Parole for Non-Homicide Offenses

Five years after the Court decided *Roper*, the Court took up the issue of life without parole sentences for juveniles, specifically, for non-homicide offenses. In *Graham v. Florida*, the Court held that juvenile, non-homicide offenders were not eligible for life without parole sentences under the Eighth Amendment.[39] In *Graham*, the defendant committed the crimes for which he was sentenced at the age of seventeen and was sentenced at age nineteen.[40] *Graham* marked the first time that the Supreme Court considered a categorical ban to a term-of-years sentence.[41]

Beginning its analysis with "objective indicia of national consensus," the Court determined that such a consensus had developed against the sentencing practice of life without parole for juvenile non-homicide offenders.[42] The Court focused on and compared jurisdictions in countries that do and do not allow life without parole for non-homicide juvenile offenders in reaching this determination.[43]

The Court's second analytical step required it to consider "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question."[44] As far as culpability goes, the Court incorporated the same reasoning that the *Roper* court relied on.[45]

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36. *Id.*
37. *Id*. at 573–74
38. *See Roper*, 543 U.S. at 587–607 (O'Connor, J. dissenting).
39. 560 U.S. 48, 82 (2010).
40. *Id.* at 58.
41. *Id.* at 61.
42. *Id.* at 62–67.
43. *Id.* at 62 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").
44. *Id.* at 67.
45. *Graham*, 560 U.S. at 68 ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles.").

Again, the Court pointed to research from the American Medical Association and the American Psychological Association to back its determination of diminished culpability of juveniles.[46] Specifically, the Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," citing the American Medical Association's amicus brief and its showing that behavioral control centers in the brain continue maturing through late adolescence.[47]

The Court's determination that juvenile offenders are less culpable informed its reasoning that a sentence of life without parole for non-homicide juvenile offenders cannot be justified by any legitimate penological reasons (retribution, deterrence, incapacitation, or rehabilitation).[48] Importantly, the Court noted that "while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life."[49]

Finally, as in *Roper*, the Court observed sentencing practices around the world for "support for its independent conclusion that a particular punishment is cruel and unusual."[50] It should be noted that Chief Justice Roberts, in his concurring opinion, disapproved of incorporating *Roper*'s reasoning into *Graham* to support a categorical rule proscribing life without parole for non-homicide, juvenile offenders.[51] However, Chief Justice Roberts *did* value *Roper* for its conclusions that juveniles have diminished culpability.[52] Rather than adopting a new categorical ban on life sentences without parole for non-homicide, juvenile offenders, Chief Justice Roberts would have preferred the Court applied *Roper*'s conclusions to the Court's existing, case-specific analysis.[53]

C. Life Without Parole for Homicide Offenses

Where the *Graham* court left open the question of juvenile life without parole for homicide offenders, the Court answered this question in 2012.[54] *Miller v. Alabama* reaffirmed the reasoning of both *Roper* and *Graham*, finding that the differences between adults and juveniles "both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by

46. Larson, *supra* note 9, at 327.
47. *Graham*, 560 U.S. at 68.
48. *Id.* at 71–75.
49. *Id.* at 75.
50. *Id.* at 80.
51. *Id.* at 89–90 (Roberts, C.J. concurring).
52. *Id.*
53. *Graham*, 560 U.S. at 89–90.
54. Miller v. Alabama, 567 U.S. 460, 489 (2012).

and neurological development occurs, his 'deficiencies will be reformed.'"[55] The Court recognized that *Roper* and *Graham* were limited in scope to juvenile capital punishment and life without parole for non-homicide juvenile offenders, respectively, but it concluded that "*Graham*'s reasoning implicates *any* life without parole sentence imposed on a juvenile, even as its categorical bar relates only to non-homicide offenses."[56]

At first glance, *Miller* seems to proscribe the imposition of life without parole on juvenile homicide offenders entirely. However, *Miller* is slightly more nuanced than *Graham* because the Court held that "the *mandatory*-sentencing scheme[]" of life without parole for juvenile homicide offenders violated the Eighth Amendment.[57] That is, the Court did not categorically ban life without parole for such offenders, but rather the Court imposed a requirement that the sentence "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[58]

The Court took issue with the fact that the mandatory sentencing scheme does not enable the sentence to consider a juvenile's age as a mitigating factor.[59] The Court listed as the "hallmark features" of a juvenile offender's age: "immaturity, impetuosity and failure to appreciate risks and consequences."[60]

D. Juvenile Sentencing in Arkansas

This section discusses the way in which the modern iterations of juvenile sentencing law have manifested in the Arkansas court system. It focuses both on cases that have resulted in reversals and vacated sentences as well as those that have remained unaffected by the trio of Supreme Court holdings. In this way, this section shows that Arkansas (as well as other states) takes advantage of a "loophole" of sorts in the form of de facto life sentences without parole for juvenile offenders (homicide and non-homicide alike).

1. *Jackson v. Norris*

Jackson v. Norris was originally a companion case to *Miller*, and the way the Arkansas Supreme Court handled the case on remand from the Su-

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55. *Id.* at 472.
56. *Id.* at 473 (emphasis added). *See also id.* ("Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.").
57. *Id.* at 489.
58. *Id.* at 479–480.
59. *Id.* at 477–478.
60. *Miller* 567 U.S. at 477.

preme Court is particularly important.[61] Kuntrell Jackson was convicted of capital murder and aggravated robbery for crimes he committed as a fourteen-year-old.[62] Pursuant to the Arkansas sentencing scheme at the time, Jackson's capital murder conviction carried a mandatory sentence of life imprisonment.[63] The Arkansas Supreme Court took up the issue of Jackson's sentence after the United States Supreme Court held that the Arkansas sentencing scheme violated the Eighth Amendment in *Miller*.

Unsurprisingly, the Arkansas court reversed the original denial of Jackson's petition for writ of habeas corpus, but the court still had to remand the case to the original sentencing court, and it had to decide what instructions to give that court.[64] The Arkansas Supreme Court instructed the circuit court to hold a new sentencing hearing "where Jackson [could] present for consideration evidence that would include his 'age, age-related characteristics, and the nature of his crime.'"[65] The circuit court was also instructed to sentence Jackson to a term-of-years between ten and forty years, or life, as the Arkansas Supreme Court determined that juvenile homicide offenses would be sentenced in accordance with Class Y felonies.[66]

Although Jackson continued to argue that he could not be sentenced to life under the Eighth Amendment (pursuant to *Miller*), the court disagreed, reasoning that a Class Y felony did not *mandate* a sentence of life imprisonment, and that the sentencing court would be required to consider Jackson's age.[67]

2. *Hale v. Hobbs*

Bobby Ray Hale pleaded guilty to a count of first-degree murder for crimes he committed in October of 1977.[68] He was sixteen years old when he committed the crimes.[69] Hale received a sentence of life imprisonment for the first-degree murder charge, as well as a life sentence for aggravated robbery charges and a twenty-year sentence for battery.[70] In 2013, Hale filed a writ of habeas corpus, arguing (in part) that "his life sentences for both aggravated robbery and first-degree murder were unconstitutional because he

61. *See* Jackson v. Norris, 2013 Ark. 175, 426 S.W.3d 906.
62. *Id.*, at 1, 426 S.W.3d at 907.
63. *Id.*, at 2, 426 S.W.3d at 907.
64. *Id.*, 426 S.W.3d at 907.
65. *Id.*, 426 S.W.3d at 907 (quoting *Roper*, 543 U.S. at 570).
66. *Id.*, 426 S.W.3d at 907.
67. *Jackson*, 2013 Ark. 175, at 9, 426 S.W.3d at 911.
68. Hale v. Hobbs, 2014 Ark. 405, at 1, 443 S.W.3d 533, 533.
69. *Id.*, at 1 n.1, 443 S.W.3d at 533 n.1.
70. *Id.*, at 1–2, 443 S.W.3d at 533–34.

was a juvenile when he received them."[71] The Lee County Circuit Court denied Hale's petition on May 1, 2013.[72]

On appeal, Hale argued that his four sentences to life without parole for the aggravated robbery (i.e. non-homicide) charges violated the Eighth Amendment under the Supreme Court's ruling in *Graham*.[73] He also argued that his life sentence for the homicide charge violated the Eighth Amendment under *Miller*.[74] The court did not reach Hale's *Graham* or *Miller* argument, though, finding instead that the Pulaski County Circuit Court (the court that originally sentenced Hale) "exceeded its statutory authority by sentencing Hale to terms of imprisonment of life with the possibility of parole . . . ."[75]

3. *Hobbs v. Turner*

Hobbs v. Turner is curious in that it represents a case where the state court rejected state officials' attempts to create a loophole through the *Graham* decision.[76] In *Turner*, the offender was sentenced to life imprisonment without the possibility of parole for a kidnapping he committed when he was under the age of eighteen.[77] Following the *Graham* decision, Turner filed a petition for a writ of habeas corpus, arguing that his sentence was unconstitutional.[78]

Interestingly, the State conceded that the Turner's sentence was unconstitutional, but not because of its duration; rather, because Turner was not eligible for parole.[79] Turner argued that his sentence should be reduced to between ten and forty years, while the State argued that the court should sever the parole statute and that Turner's sentence should remain a life sentence.[80]

The circuit court determined that it could not sever the parole statute without violating Arkansas sentencing statutes and thus sentenced Turner to forty years.[81] In doing so, the circuit court found that the original sentencing court intended to sentence Turner to the maximum sentence available for

71. *Id.*, at 2–3, 443 S.W.3d at 534.
72. *Id.*, at 3, 443 S.W.3d at 534.
73. *Id.*, 443 S.W.3d at 534.
74. *Hale*, 2014 Ark. 405, at 3, 443 S.W.3d at 534.
75. *Id.*, at 5, 443 S.W.3d at 535.
76. *See* Hobbs v. Turner, 2014 Ark. 19, 431 S.W.3d 283.
77. *Id.*, at 1, 431 S.W.3d. at 284.
78. *Id.*, at 2, 431 S.W.3d at 284.
79. *Id.*, at 2–3, 431 S.W.3d at 284–85.
80. *Id.*, at 3, 431 S.W.3d at 285.
81. *Id.*, at 4, 431 S.W.3d at 285.

kidnapping.[82] This informed the court's reasoning for the forty-year sentence.[83]

The Arkansas Supreme Court affirmed the circuit court's ruling and set out an important rule for similar subsequent cases. The court held that "*Graham* does not mandate a resentencing procedure that takes into account a juvenile offenders age."[84] According to the court, Turner's "youth at the time of his offense and evidence concerning what brain science and psychology have to say about youthful offenders [had] already been taken into account through his categorical exemption from an otherwise legislatively authorized life-without-parole sentence under *Graham*."[85]

4. *Bramlett v. Hobbs*

Bramlett v. Hobbs provides an example of *Graham* working to commute a sentence of life without parole.[86] In 1979, Steven Wayne Bramlett was sentenced to life imprisonment for an attempted capital murder he committed when he was seventeen years old.[87] Bramlett filed a complaint for declaratory relief in 2011, arguing that, under *Graham*, his life sentence was unconstitutional.[88]

The circuit court, in granting the State's motion for summary judgment, held that *attempted* capital murder should be categorized as a "homicide offense" and therefore *Graham* did not apply.[89] The Arkansas Supreme Court reversed, holding that attempted capital murder is *not* a homicide offense, as it does not result in the death of another individual.[90] Accordingly, the case was remanded to the circuit court in order for Bramlett to be resentenced to a term of years.[91]

5. *Proctor v. Kelley*

Despite the categorical rule set forth in *Graham*, and despite that case's effectiveness in overturning sentences in some cases (as evidenced by *Bramlett*), Arkansas courts have still found a way around even its least ambiguous rule.[92] In 1982, Terrance Proctor, age seventeen, committed a num-

82. *Hobbs*, 2014 Ark. 19, at 4, 431 S.W.3d at 285.
83. *Id.*, 431 S.W.3d at 285.
84. *Id.*, at 11, 431 S.W.3d at 289.
85. *Id.*, at 13–14, 431 S.W.3d at 290.
86. *See* Bramlett v. Hobbs, 2015 Ark. 146, at 1, 463 S.W.3d 283.
87. *Id.*
88. *Id.*, at 2, 463 S.W.3d at 284.
89. *Id.*, at 5, 463 S.W.3d at 286.
90. *Id.*, at 5–8, 463 S.W.3d at 286–288.
91. *Id.*, at 10, 463 S.W.3d at 288–89.
92. *See* Proctor v. Kelley, 2018 Ark. 382, 562 S.W.3d 837.

ber of robberies.[93] In 1983, he pleaded guilty to eleven different counts, both for aggravated robbery and for robbery.[94] The Pulaski County Circuit Court sentenced Proctor to life imprisonment for one of the aggravated robberies and 200 years imprisonment for his other counts.[95]

Proctor first petitioned for a writ of habeas corpus following the *Graham* decision in 2014.[96] His writ was granted and his life sentence was reduced to forty years.[97] However, Proctor's sentences were ordered to run consecutively, so he was effectively sentenced to 240 years imprisonment.[98]

Proctor again requested a writ of habeas corpus in 2017, arguing that "the 240-year sentence he is now serving is a de facto life sentence in violation of the holding of *Graham*."[99] Importantly, Proctor acknowledged that he *would* be eligible for parole, but not until he was eighty-seven years old.[100] Proctor argued that, because his life expectancy fell short of eighty-seven years, his sentence offered no "meaningful opportunity for release as required by *Graham*."[101]

The parties presented the court with two options: "extend *Graham* to prohibit sentences for juveniles when the cumulative time to serve before parole eligibility exceeds the individual's life expectancy" or do not extend *Graham* because it "applies only to life-without-parole sentences imposed for non-homicide offenses."[102] The court chose to read *Graham* narrowly, distinguishing it from Proctor's case in several ways.[103] In finding that *Graham* did not apply to Proctor's case, the court pointed to the fact that Proctor was subject to multiple sentences ("any one of which would not amount to a life sentence") for multiple offenses, whereas Graham was sentenced for a *single* non-homicide offense.[104]

Justice Josephine Hart wrote a concurring opinion in which she agreed that the court applied the current law correctly, but she opined that the law's current application runs counter to the character of the Supreme Court's

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93. *Id.*, at 1, 562 S.W.3d at 839.
94. *Id.*, 562 S.W.3d at 839.
95. *Id.*, at 1–2, 562 S.W.3d at 839.
96. *Id.*, at 2, 562 S.W.3d at 839.
97. *Id.*, 562 S.W.3d at 839. ("The circuit court concluded that, pursuant to our decision in *Hobbs v. Turner,* 2014 Ark. 19, 431 S.W.3d 283, the remedy for a *Graham* violation is to reduce the petitioner's life sentence to the maximum term-of-years sentence available for the crime at the time it was committed.").
98. *Proctor*, 2018 Ark. 382, at 2, 562 S.W.3d at 839.
99. *Id.*, 562 S.W.3d at 839.
100. *Id.*, at 4, 562 S.W.3d at 840.
101. *Id.*, at 4–5, 562 S.W.3d at 840.
102. *Id.*, at 6, 562 S.W.3d at 841.
103. *See id.*, at 6–7, 562 S.W.3d at 841–42.
104. *Proctor*, 2018 Ark. 382, at 6–7, 562 S.W.3d at 841–42.

decisions in *Graham* and *Miller*.[105] Justice Hart, relying on *Roper*, *Graham*, and *Miller*, reasoned that Proctor's sentence was unconstitutional.[106] While she acknowledged that the Arkansas court properly followed precedent, Justice Hart argued that doing so could mean putting Arkansas "on the wrong side of history."[107]

6. *Early v. Kelley*

In *Early v. Kelley,* the petitioner asserted claims under both *Graham* and *Miller*, but his *Miller* argument was abandoned on appeal.[108] Reginald Early was sentenced to life imprisonment for a first-degree murder and aggravated robbery he committed as a minor.[109] While Early did abandon his *Miller* argument, the court briefly addressed it, finding that *Miller* only applied if Early's life sentence was mandatory.[110]

Interestingly, the court also found Early's *Graham* argument without merit. Early argued that, under *Graham*, the life sentence he received for his aggravated robbery charge—a non-homicide offense—was unconstitutional.[111] The court concluded that *Graham* did not apply to Early's life sentence for aggravated robbery because Early *also* committed a homicide offense.[112]

Justice Hart dissented.[113] She reasoned that Early's convictions stood separately and that his sentences for those convictions should have been treated similarly.[114] According to Justice Hart:

> [R]ather than scouring *Graham* for dicta, the majority should have employed the following syllogism. *Graham* banned life sentences for juvenile offenders who commit nonhomicide offenses. Early committed aggravated robbery as a juvenile and received a life sentence for that crime. Aggravated robbery is a nonhomicide offense. Therefore, Early's life sentence for aggravated robbery is illegal on its face.[115]

These cases show that Arkansas courts have been reluctant to expand the Supreme Court's decisions in *Graham* and *Miller*. This is not to say that these decisions have been inoperative in the state. In fact, between July 2016 and November 2018, *Miller* affected at least fifty-eight Arkansas cases in

105. *Id.*, at 9–13, 562 S.W.3d at 842–45. (Hart, J., concurring).
106. *Id.*, 562 S.W.3d at 842–45.
107. *Id.*, at 9–10, 562 S.W.3d at 842–43.
108. Early v. Kelley, 2018 Ark. 364, at 1–2, 562 S.W.3d 205, 206.
109. *Id.*, at 1, 562 S.W.3d at 206.
110. *Id.*, at 2, 562 S.W.3d at 206–07.
111. *Id.*, at 1, 562 S.W.3d at 206.
112. *Id.*, at 2, 562 S.W.3d at 207.
113. *Id.*, at 3–4, 562 S.W.3d at 207–208.
114. *Early*, 2018 Ark. 364, at 3–4, 562 S.W.3d at 207–208. (Hart, J., dissenting).
115. *Id.*, at 4, 562 S.W.3d at 208.

which an individual was sentenced for committing capital murder as a minor. A large number of those cases have resulted in life without parole sentences being reduced to forty year sentences,[116] forty years being the maximum term of years for a Class Y felony under Arkansas law.[117] A smaller number of Arkansas cases have seen life sentences reduced to fewer than forty years.[118] In some even more rare instances, where a reduced sentence was combined with time served, *Miller* resulted in the release of inmates from state custody.[119] However, despite the apparent success of *Miller* in Arkansas, it is important to remember that nearly eight years after the decision, a large number of cases remain unresolved. The broader takeaway is that Arkansas is still reluctant to expand (or even apply) *Graham* and *Miller*, and it may be using delay tactics to avoid doing so.

E. Juvenile Sentencing in Other States

Arkansas is not the only state that has construed the Supreme Court's juvenile sentencing reform cases narrowly, a fact Justice Courtney Goodson

116. *See Nunc Pro Tunc* Amended Sentencing Order, *State v. Brandon Isbell* (No. 01CR-94-273) (Oct. 25, 2018); *Nunc Pro Tunc* Amended Sentencing Order, *State v. William Paul Smith* (No. 60CR-89-2371) (Aug. 9, 2018); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Wallace Allen* (No. 60CR-97-2911) (July 12, 2018); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Charles Jackson* (No. 60CR-89-1723) (July 2, 2018); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Mervin Jenkins* (No. 60CR-98-1416) (June 26, 2018); Sentencing Order, *State v. Tyrone Duncan* (No. 60CR-98-3414) (June 25, 2018); Order to Reduce Sentence, *State v. Damarcus Jordan* (No. 60CR-01-1084) (June 21, 2018); Order to Reduce Sentence, *State v. Brandon Hardman* (No. 60CR-00-1457) (June 20, 2018); Sentencing Order, *State v. Dheaslee Wright* (No. 47BCR-96-387) (Sept. 1, 2017); Sentencing Order, *State v. Julius Yankaway* (No. 47CR-02-224) (July 26, 2017); Amended Sentencing Order, *State v. Richard Hill* (No. 52CR-97-216) (June 14, 2017); Amended Sentencing Order, *State v. William Davis* (No. 14CR-00-38) (June 8, 2017); Sentencing Order, *State v. Seanell Moore* (No. 35CR-94-462A) (Feb. 27, 2017); Sentencing Order, *State v. Benjamin McFarland* (No. 05CR-96-300) (Jan. 18, 2017); Sentencing Order, *State v. Kevin Lloyd* (No. 58CR-95-511) (Nov. 16, 2016); Order to Reduce Sentence, *State v. Detric Franklin* (No. 60CR-91-1995) (Sep. 12, 2016).

117. Ark. Code Ann. § 5-4-401(a)(1) (Westlaw through 2019 Reg. Sess.).

118. *See Nunc Pro Tunc* Amended Sentencing Order, *State v. Lemuel Whiteside* (No. 60CR-09-1183) (Nov. 13, 2018) (sentence reduced to ten years); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Edward Little* (No. 60CR-80-1104) (Oct. 12, 2018) (sentence reduced to twenty years); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Prince Johnson* (No. 60CR-90-1307) (Aug. 9, 2018) (sentence reduced to thirty-five years); Sentencing Order, *State v. Derrick Shields* (No. 47BCR-01-107) (Oct. 20, 2017) (sentence reduced to twenty-eight years); Sentencing Order, *State v. Brandon Flowers* (No. 35CR-98-559C) (Feb. 8, 2017) (sentence reduced to twenty-five years); *Nunc Pro Tunc* Amended Sentencing Order, *State v. Nakia Davis* (No. 35CR-93-541B) (Jan. 20, 2017) (sentence reduced to twenty-five years).

119. *See e.g.* Order, *State v. Dennis Lewis* (No. 72CR-74-96) (Oct. 25, 2016).

pointed out in *Proctor*.[120] Virginia and Colorado also provide clear examples of state supreme courts refusing to extend the holdings.

1. *Vasquez v. Commonwealth*

In *Vasquez v. Commonwealth*, two Virginia defendants were convicted of numerous felonies for crimes they committed at the age of sixteen.[121] The aggregate sentences of each, after accounting for their suspended sentences, were 133 years and 68 years, respectively.[122] Both men argued that their sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment and urged the court to expand *Graham* to "non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders."[123] Relying in part on Justice Alito's dissent in *Graham*, the Supreme Court of Virginia declined, holding that *Graham* applied *solely* to life without parole sentences for non-homicide juvenile offenders.[124]

2. *Lucero v. People*

The Colorado Supreme Court has reached a similar conclusion.[125] In *Lucero v. People*, the petitioner was convicted of a number of non-homicide offenses in connection with a drive-by shooting.[126] His sentences, in the aggregate, amounted to eighty-four years.[127] Following the *Graham* decision, Lucero appealed his sentence, arguing that it amounted to a sentence of life without parole.[128] The trial court denied Lucero's motion and the court of appeals affirmed, holding that the sentence was constitutional under *Graham* and *Miller*.[129] The Colorado Supreme Court affirmed the court of appeals ruling, but not because Lucero's sentence satisfied *Graham* or *Miller*.[130] Instead, the court held that neither of those cases applied to an aggregate term-of-years sentence.[131] By the court's logic, "the U.S Supreme Court held unconstitutional a life without parole sentence imposed on a juvenile for a single nonhomicide offense," "[l]ife without parole is a specific sentence, distinct from sentences to terms of years," "Lucero was not sentenced

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120. 2018 Ark. 382, at 7, 562 S.W.3d at 841.
121. 781 S.E.2d 920, 922 (2016).
122. *Id.* at 924.
123. *Id.* at 925.
124. *Id.*
125. *See* Lucero v. People, 349 P.3d 1128, 1134.
126. *Id.*, 349 P.3d at 1129.
127. *Id.*
128. *Id.*, 349 P.3d at 1129.
129. *Id.*, 349 P.3d at 1129.
130. *Id.*, 349 P.3d at 1130.
131. *Lucero*, 349 P.3d at 1130.

to life without parole," "[t]herefore, *Graham* and *Miller* [were] inapplicable to, and thus do not invalidate, Lucero's aggregate sentence."[132]

IV. ARGUMENT

This section argues that the United States Supreme Court should issue a new ruling that prohibits de facto life sentences. After a brief discussion of the "spirit" of the Supreme Court's juvenile sentencing jurisprudence, this section discusses problems with the current application of *Graham* as well as problems with the proposed rule of barring terms-of-years sentences based on life expectancy. Finally, this section proposes a method for rectifying the loopholes left open by the *Graham* decision while reconciling that method with concerns raised by state courts that have chosen to read *Graham* narrowly.

A. The "Spirit" of *Roper*, *Graham*, and *Miller*

Before pointing out problems with the way juvenile sentencing law is currently applied, a clearer picture of the Supreme Court's reasoning in the three major juvenile sentencing cases is necessary.[133] The linchpin of the Court's reasoning in *Roper*,[134] *Graham*,[135] and *Miller*[136] was the diminished culpability of a juvenile. The Court was willing to view evidence presented by various scientific associations regarding the mental development of minors and was willing to use that evidence in concluding that minors could not be held to the same culpability standard as adults.

A number of courts have taken the "spirit of the trilogy" to mean that they are required to read *Graham* much more broadly than those discussed in the previous section. For example, in *Johnson v. State*, the Florida Supreme Court held that a petitioner's one-hundred year sentence most likely exceeded his life span and did not "provide him a meaningful opportunity for early release . . . ."[137] Interestingly, the petitioner was originally sentenced to six back-to-back life sentences, but those were set aside by the trial court on the petitioner's request following the *Graham* decision.[138] In

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132. *Id.*

133. Some have called this the "spirit of the trilogy," referring to the three seminal juvenile sentencing cases, and that term is used throughout this section. *See generally* Daniel Jones, Note, *Technical Difficulties: Why a Broader Reading of* Graham *and* Miller *Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN'S L. REV. 169, 171 (2016).

134. *See* Roper v. Simmons, 543 U.S 551, 565–573 (2005).

135. *See* Graham v. Florida, 560 U.S. 48, 67–68 (2010).

136. *See* Miller v. Alabama, 567 U.S. 460, 472 (2012).

137. 215 So. 3d 1237, 1244 (2017).

138. *Id.* at 1239.

holding that *Graham* also applied to (and barred) the petitioner's one-hundred year sentence, the Florida Supreme Court focused not "on the length of the sentence imposed, but the status of the offender and the possibility that he or she [would] grow into a contributing member of society."[139] According to the Florida court, *Graham* operated to create a "special class of citizens . . . juvenile nonhomicide offenders,"[140] a broader reading than just applying *Graham* to the specific life-without-parole sentence.

Courts like the *Johnson* court have recognized that the "spirit of the trilogy" means more than just prohibiting the specific sentences those cases involved;[141] it means treating cases of juvenile offenders in a measured, fact-specific way. Perhaps this meaning is best stated by the Iowa Supreme Court:

> In light of our increased understanding of the decision making of youths, the sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adult conduct. At the core of all of this also lies the profound sense of what a person loses by beginning to serve a lifetime of incarceration as a youth.
>
> In the end, a government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight.[142]

The *Johnson* decision out of Florida underscores another key aspect of the "spirit of the trilogy," one that the diminished culpability of juveniles informed. The Supreme Court made clear that sentencing a juvenile non-homicide offender satisfies none of the traditional penological goals.[143] "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," and the *Graham* court reasoned a sentence of life without parole for juvenile non-homicide offenders was so lacking.[144]

This same lack of justification, as well as the diminished culpability of juveniles, should operate to bar de facto life sentences for juvenile non-

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139. *Id.*

140. *Id.*

141. Jones, *supra* note 133, at 190 (quoting State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013) (internal quotations omitted)) ("Courts that employ this approach recognize that the spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure parole is possible.").

142. *Ragland*, 836 N.W.2d at 121 (emphasis added). The court went on to hold that "*Miller* applies to sentences that are the functional equivalent of life without parole." *Id.* at 121–22.

143. *See* Graham v. Florida, 560 U.S. 48, 71–75 (2010).

144. *Id.* at 71.

homicide offenses as well. While the *Graham* court was careful to limit its holding to life without parole sentences (a fact that states like Arkansas and Virginia are quick to point out), de facto life sentences operate just like life sentences. The "spirit of the trilogy" is, in part, that life sentences are the "second most severe penalty permitted by law"[145] and such sentences are disproportionately severe as applied to juvenile non-homicide offenders. Accordingly, the Supreme Court should issue a new ruling that prohibits the practice.

B. Issues with *Graham*'s Current Application

The Supreme Court has other reasons than the ideological for issuing a new ruling with regard to life sentences for non-homicide juvenile offenders. The states need guidance. While the *Miller* case resolved a number of its issues, the *Graham* ruling was unclear on a number of issues, leaving the door open for opposition states to develop the de facto life sentence loophole.

First, the biggest question left open by the *Graham* court was, as some commentators have put it, whether the ruling meant "death is different" or "kids are different."[146] If *Graham* meant the latter, a reasoning that the Iowa Supreme Court adopted,[147] then to what else could that reasoning be applied?[148] Second, the *Graham* decision also provided little guidance as to what a "meaningful opportunity to obtain release"[149] entailed. The Supreme Court imposed this requirement on the states but said little else on the subject. Finally, partly because of *Graham*'s narrow holding, "what was left unresolved is the application of the trilogy to de facto life sentences."[150]

Another example illustrates just how backwards the current *Graham* application operates.[151] Say that two juvenile offenders are convicted of a non-homicide offense in some state that applies *Graham* narrowly. For whatever reason (perhaps a court found one offender more culpable than the other), one offender receives a life without parole sentence, and the other receives a term-of-years sentence of ninety years. All courts, applying *Graham*, would find that the first offender had not and would not receive the "meaningful opportunity for release" required by *Graham*. Therefore, the

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145. *Id.* at 69.

146. Jones, *supra* note 133, at 179.

147. State v. Ragland, 836 N.W.2d 107, 119 (Iowa 2013).

148. The *Miller* court seems to have resolved at least this first question. *See* Miller v. Alabama, 567 U.S. 460, 472 (2012).

149. Graham v. Florida, 560 U.S. 48, 123 (2010).

150. Jones, *supra* note 133, at 182.

151. This example is borrowed from Jones, *supra* note 133, at 194, but several figures have been changed for the sake of simplicity.

first offender would likely receive a resentencing hearing. However, the second offender would be out of luck because he or she was not specifically sentenced to life without parole. Does it make sense that the only offender to receive a resentencing hearing would be the offender who received the harsher sentence in the first place?

C. Issues with Proposed Rules

Petitioners looking to have their sentences reduced under *Graham*, or those seeking a resentencing hearing at least, have been fairly consistent in proposing a rule for applying *Graham* to aggregate terms-of-years sentences. In *Proctor*, the petitioner argued that, because he would not be eligible for parole until the age of eighty-seven, and because his life expectancy fell short of that number, his sentence amounted to one of life without parole.[152] Proctor urged the court to expand *Graham* to cover scenarios such as his.[153] Similarly, the petitioners in *Vasquez* urged the Virginia Supreme Court to adopt the same rule, that "non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders" are unconstitutional.[154]

While several jurisdictions have adopted this approach,[155] it raises serious issues of practicality. While some cases are (and will be) clearer than others, it is not easy for a court to determine whether a term-of-years sentence will outlast an offender's life expectancy. For example, suppose a seventeen-year-old is sentenced to a term-of-years (whether for one offense or multiple offenses) of seventy years. Ignoring, for the moment, the offender's parole eligibility (if any), the offender would not be released until he or she is eighty-seven. For *Graham* to apply to this sentence, under the proposed "life expectancy" rule, a court would have to determine whether that offender would live to be eighty-seven or beyond. This would mean assessing the offender's age, race, sex, family background, medical history, etc. That is hardly a bright-line rule.

D. A New Juvenile Sentencing Ruling

Undoubtedly, many of the cases, especially those arising out of states that read *Graham* narrowly, have been appealed to the Supreme Court. However, the questions raised by the trilogy remain largely unanswered. A new ruling clearing up those ambiguities would go far to eliminate the prac-

152. Proctor v. Kelly, 2018 Ark. 382, at 4–5, 562 S.W.3d 837, 839–840.
153. *Id.*, at 4–5, 562 S.W.3d at 841.
154. Vasquez v. Commonwealth, 781 S.E.2d 920, 925 (2016).
155. *See, e.g.*, United States v. Cobler, 748 F.3d 570, 575–77 (4th Cir. 2014); Johnson v. State, 215 So. 3d 1237, 1239 (2017); State v. Moore, 76 N.E.3d 1127, 1141 (Ohio 2014); State v. Ragland, 836 N.W.2d 107, 114–15 (Iowa 2013).

tice of de facto life sentences for juvenile non-homicide offenders, in compliance with the "spirit of the trilogy."

However, the Supreme Court should not merely affirm the approach proffered by the petitioners and courts advocating for the "life expectancy" rule. Doing so would perpetuate the issues associated with estimating an individual offender's life span. Rather, the Supreme Court should issue guidance to state courts (and possibly state legislatures) in the form of age limits on terms-of-years sentences for non-homicide juvenile offenders. At the very least, the offender should be eligible for parole at a certain age, unrelated to the term of the offender's actual sentence.

This rule, like any rule, would not be perfect. It is quite possible that even an age-limited term-of-years could extend beyond an offender's life expectancy, but technically *any* term of imprisonment could extend beyond an individual's life expectancy. Tomorrow is promised to no one. But limiting a non-homicide juvenile offender's sentence to a certain age or requiring that offender to be eligible for parole by a certain age would provide that offender with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[156]

V. CONCLUSION

The law is allowed to change. Specifically, the interpretation of the Eighth Amendment is allowed to change.[157] This country no longer subjects offenders to being tarred and feathered, broken on the rack, stoned, or hanged. Nor does this country allow juvenile offenders to be put to death, even for capital offenses.[158] The law has been shaped by empirical, scientific data, as evidenced by the weight the Supreme Court has placed in the medical findings of psychologists and psychiatrists, dating back to the 1950s (at least).

The Supreme Court has established that juvenile offenders are different than adult offenders. Accordingly, sentencing schemes for juveniles should differ from adults. Imposing age limits on the amount of time a non-homicide juvenile offender may spend incarcerated comports with the "spirit" of the Supreme Court's juvenile sentencing jurisprudence and protects courts from having to make life expectancy determinations.

156. Graham v. Florida, 560 U.S. 48, 75 (2010).

157. Roper v. Simmons, 543 U.S 551, 560–61 (2005) ("[W]e have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual.'" (quoting Trop v. Dulles, 356 U.S. 86, 100–101 (1958)).

158. *See supra* Part III.