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CRUEL AND UNUSUAL: CLOSING THE DOOR ON JUVENILE *DE FACTO* LIFE SENTENCES

Thomas Garrity[+]

It 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.[1]

- Justice Anthony M. Kennedy

The precise moment when a person becomes an "adult" has been, is, and will likely continue to be a topic of heated debate in American society. Oft-repeated talking points revolve around the proper age for those activities that society deems to be "adult" in nature: drinking, smoking, voting, driving, gun ownership, contracting—the list goes on *ad infinitum*. In general, though, the United States Government, as well as the American people, assign a special weight to achieving the age of eighteen. Eighteen is the age of enfranchisement, and, if male, the age at which one must sign up for the draft. It is unlikely that the choosing of age eighteen as the turning point for "adulthood" is an endorsement by the government, or other institutions, of any theory that there is a special significance to arrival at that age. Rather, out of sheer practicality, there *must* be a point at which a line is drawn. The consensus, at least in the United States, places that line at age eighteen.[2] But what effect does this concept have when merged into the context of American Constitutional law, particularly the Eighth Amendment's prohibition on cruel and unusual punishments?

The Framers of the United States Constitution, out of a particular trepidation towards powerful national government, paid special attention to the protection of the people from unreasonable governmental intrusion or governmental restriction of individual liberty.[3] Integral in this endeavor was the debate over

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[+] J.D., Magna Cum Laude, The Catholic University of America, Columbus School of Law, 2020; B.A., Magna Cum Laude, University of Pennsylvania, 2016. I would like to thank Assistant United States Attorney Susan "Zeke" Knox for her invaluable expertise and help in drafting of this Comment. I would also like to thank the editors and staff of the Catholic University Law Review for their review and preparation of this paper for publication.

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

2. *See Determining the Legal Age to Consent to Research*, WASHINGTON UNIVERSITY IN ST. LOUIS (July 26, 2012), https://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf. Note that the legal age of majority is also eighteen in the lion's share of other countries listed within this document. *Id.* Additionally, those U.S. states and countries that do not place the age of majority at eighteen often place their chosen age of majority within one to two years of age eighteen. *Id.*

3. Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 785 (1994).

the bill of rights and the amendments contained therein. For the purposes of this Comment, the Eighth Amendment to the Constitution shall be the sole focus.

The language of the Eighth Amendment is short and deceptively simple. It reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[4] Narrowing in further, the final six words of the Amendment give rise to a litany of interpretive challenges. Foremost among them and bearing strongly on the issue studied in this Comment, is the methodology by which the ban on cruel and unusual punishments is bent and molded to accommodate the state imposition of "adulthood"—at least "adulthood" as a matter of law.

A circuit split has arisen from recent Supreme Court decisions in *Roper v. Simmons*,[5] *Graham v. Florida*,[6] and *Miller v. Alabama*.[7] These cases hold that capital punishment and life without parole (LWOP) are cruel and unusual as applied to juvenile nonhomicidal offenders categorically and as applied to juvenile homicidal offenders without consideration of youth as a mitigating factor. The issue is that the Supreme Court has failed to provide guidance as to whether a *de facto* life sentence without parole—one in which the defendant is sentenced to "[a] term-of-years sentence without parole that meets or exceeds [his] life expectancy"—qualifies as cruel and unusual for Eighth Amendment purposes.[8] Of the federal circuits that have addressed it, the majority have resolved this issue by stating that a *de facto* life sentence without parole is the functional equivalent of standard LWOP sentences, thereby invoking *Graham* and *Miller* and holding them unconstitutional.[9] However, other courts have held that *de facto* LWOP stands as an exception to the categorical ban on LWOP for juveniles found in *Graham* and the presumption against such sentences found in *Miller*.[10] Until the circuit split is resolved, the chance that a juvenile offender may be released before his life expectancy has run its course depends largely on where he was standing when the offense was committed.

This circuit split has real-world implications, and with newly-appointed Justices Gorsuch and Kavanaugh, the issue stands ripe for review. Speaking at

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4. U.S. CONST. amend. VIII.

5. 543 U.S. 551 (2005).

6. 560 U.S. 48 (2010).

7. 567 U.S. 460 (2012).

8. United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018).

9. *See id.* at 146 ("[T]he Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders that are not incorrigible."); *see also* Moore v. Biter, 725 F.3d 1184, 1186, 1191 (9th Cir. 2013) (holding that a sentence of 254 years and four months without parole eligibility until having completed a total of 127 years and two months is the functional equivalent of LWOP and is irreconcilable with Supreme Court precedent banning juvenile LWOP); Budder v. Addison, 851 F.3d 1047, 1050, 1059 (10th Cir. 2017) (holding that a 155 year sentence without parole until eighty-five percent completion (131.75 years) for a juvenile violates the Eighth Amendment).

10. *See* United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016) (holding that a 600-month sentence for a juvenile offender is *not* proscribed by Supreme Court precedent and within the discretionary sentencing power of the District Courts).

a purely practical level, without guidance on the proper methodology for sentencing, judges across the country may be crafting sentences for juvenile offenders that will later become vulnerable to collateral attack—potentially clogging the courts with years' worth of appeals or re-sentencing hearings. Public perception of inconsistency within the courts, especially on an issue as emotionally charged as placing a juvenile in prison for the remainder of his or her lifetime, plants the seeds for claims of overreaching and advantageous use of "loopholes," threatening judicial legitimacy. In such politically tumultuous times as today, the chance to provide clarity and affirm the legitimacy of the courts lends itself to the importance of resolving this split.

This Comment presents a solution to the circuit split based upon concerns of practicality and closure of a loophole, arguing for the majority approach. This approach is framed mostly away from a stance of morality and will not try to tug at the reader's heartstrings; rather, this Comment seeks to propose a solution to a problem now-existing, grounded in a context of practicality and consistency. The Comment will proceed as follows. Part II will outline the string of decisions that gave rise to the distinction between adult and juvenile offenders under the Eighth Amendment. Part III will detail the circuit split and the merits of each approach taken by the minority and the majority of the circuits, offering review and critique of each. Part IV will advocate a resolution of the split and suggest that the Supreme Court should close the door on *de facto* life sentences without parole, reinforcing its own legitimacy and the legitimacy of the courts below. Part V will offer a brief conclusion.

I. BOTTOM OF THE EIGHTH: CARVING OUT THE JUVENILE NICHE

A. The First Brick in the Wall: Capital Punishment

The Supreme Court's first foray into the realm of creating a categorical standard for juvenile sentencing under the Eighth Amendment's cruel and unusual punishment clause was during the early 2000s with its decision in *Roper v. Simmons*.[11] Up until this point, challenges to sentences of death were reviewed on an individual basis under a proportionality test.[12] In the 2005

11. 543 U.S. 551 (2005). Simmons was charged with several nonhomicidal and homicidal offenses committed while he was a juvenile. *Id.* at 557. "The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree." *Id.* "The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty." *Id.* at 558. After the Supreme Court decided Atkins v. Virginia, 536 U.S. 304 (2002), which held that capital punishment was unconstitutional under the Eighth Amendment as applied to the mentally retarded, Simmons sought postconviction relief under a theory that Atkins' rule should be applicable also to juveniles due to similar concerns over mental capacity and development. *Id.* at 559.

12. Mark T. Freeman, Comment, *Meaningless Opportunities:* Graham v. Florida *and the Reality of de Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 965 (2013). Freeman outlines this test as follows:

opinion, drafted by Justice Kennedy, the Court established a categorical ban on capital punishment for juveniles, regardless of the underlying criminal charge.[13] Justice Kennedy, including in his opinion reference to various psychological and sociological studies on adolescent development, drew out three distinctions between juveniles and adults that justified the need for a categorical ban.[14] The distinctions are as follows: first, juveniles tend to lack maturity and are much more prone to reckless behavior than their adult counterparts; second, juveniles are more vulnerable to peer pressure and bad influences than adults; third, juveniles have not had a sufficient amount of time to develop character.[15] These are the same distinctions that Court would later go on to cite in the majority opinions of both *Graham v. Florida*[16] and *Miller v. Alabama*.[17]

Justice Kennedy was, and in a way remains, the most influential justice in the area of juvenile sentencing. He authored the majority opinions of both *Roper* and *Graham* and voted in the majority of *Miller*.[18] More importantly, though, Justice Kennedy was the deciding vote in two of these cases, as well as the only conservative Justice to agree with the Court's reasoning in *Graham*.[19] Justice Kennedy's willingness to step away from the conservative block of the Court on this issue gave him the singular power to mold precedent. He set the groundwork in *Roper*, but *Roper* was only the first step in a chain of cases that gradually curtailed state police power and judicial discretion with regard to juvenile sentencing.

B. The Wall Gets Higher: Expanding Eighth Amendment Prohibition to LWOP

Rounding out the first decade of the twenty-first century came the Court's next step in differentiating juvenile sentencing requirements under the Constitution. Building off the framework laid by *Roper*, the Court, in deciding *Graham*, expanded its categorical ban to include not only capital punishment, but also "a life without parole sentence on a juvenile offender who did not commit homicide. A State . . . if it imposes a sentence of life . . . must provide

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> First, the Court compares the "gravity of the offense and the severity of the sentence." Next, if the Court draws an "inference of gross disproportionality," it compares the defendant's sentence with those sentences "received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." Finally, if this comparison "validates an initial judgment that [the] sentence is grossly disproportionate," the sentence violates the Eighth Amendment.

Id. at 964–965.

13. *Roper*, 543 U.S. at 578–79.
14. *Id.* at 569–70.
15. *Id.*
16. 560 U.S. 48, 68 (2010).
17. 567 U.S. 460, 471 (2012).
18. *See Miller*, 567 U.S. at 463; *Graham*, 560 U.S. at 52; *Roper*, 543 U.S. at 555.
19. *See Miller*, 567 U.S. at 463; *Graham*, 560 U.S. at 52; *Roper*, 543 U.S. 551.

him or her with some realistic opportunity to obtain release[.]"[20] Again relying on the distinctions laid out in *Roper*, the Court found that LWOP sentences for juvenile nonhomicide offenders did not mesh with the Eighth Amendment. In addition to these distinctions, however, the Court also was keen to note that, at the time of its decision, the United States was the only nation that imposed LWOP on juvenile nonhomicide offenders.[21] Traditionally, the Court has taken global consensus into account when assessing Eighth Amendment questions and the Court did so again here.[22] The Court noted that the United States was joined only by Somalia in its refusal to sign Article 37(a) of the United Nations Convention on the Rights of the Child, which "prohibits the imposition of 'life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.'"[23]

Unwilling to announce a ban on juvenile LWOP altogether, the Court restricted its ruling to cover only those juvenile offenders who were convicted for nonhomicidal crimes. There was a clear recognition that juveniles were different, at least as far as culpability and sentencing proportionality were concerned, but there was trepidation as to where to draw the line. The Court would provide more guidance two years later, this time addressing the issue left for a different day in *Graham*: what to do with those juveniles who *were* convicted of a homicidal crime.

C. Where It Stands Today: The Current Last Word on Juvenile LWOP

The most recent case to which the Supreme Court granted review, which addressed the issue of juvenile sentencing and the Eighth Amendment, was *Miller v. Alabama*.[24] Drawing on its decisions in *Roper* and *Graham*, the *Miller* Court used a two-part approach to extend its Eighth Amendment precedent.[25] "[O]n one hand, *Miller* relied on existing rationale that juveniles are constitutionally different from adults; on the other hand, the Court used adult death penalty jurisprudence as a comparative springboard to mandate

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20. *Graham*, 560 U.S. at 82.

> Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause . . . .

Id. at 48.

21. *Id.* at 81.

22. *Id.* at 80.

23. *Id.* at 81.

24. 567 U.S. at 465.

25. Amanda Huston, Comment, *Jurisprudence vs. Judicial Practice: Diminishing* Miller *in the Struggle Over Juvenile Sentencing*, 92 DENV. U. L. REV. 561, 564 (2015).

individualized consideration of youthfulness when imposing the harshest sentences, such as life without the possibility of parole."[26] The ultimate holding of *Miller* was that juvenile status *must* be taken into account as a mitigating factor when sentencing a juvenile homicide offender, and that mandatory sentencing guidelines that require LWOP for such offenders are unconstitutional.[27] The Court extended its rationale to include not only the ultimate sentence handed down by a judge, but also the process followed in reaching that sentence and the guidelines to which the judge adhered during said process.[28]

Miller's holding was comparatively narrow in scope relative to *Roper* and *Graham* and did not offer a sweeping categorical ban; however, it did lay the groundwork for how courts should interpret disputes over juvenile sentencing in general.[29] The path that the Court was taking should have become clear. With each decision, the Court was curtailing the severity of sentences meted out to juvenile defendants and questioning the legitimacy of one of the harshest sentences in the states' toolbox that was still available for use: LWOP sentences. However, the issues left unaddressed by the Court in *Miller* have caused—and continue to cause—disagreement among the federal circuits and the various States.[30] One area of particular disagreement is in the area of "virtual" or "*de*

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26. *Id.* Huston goes on to comment about the broader applicability of *Miller*'s holding stating,

> [w]hile Miller's narrow holding only invalidated mandatory life without parole as applied to juveniles, the Court's broader rationale is applicable in most juvenile sentencing hearings. If juveniles are categorically less culpable than adults, sentencing structures *must* reflect this principle; an offender's youthful status should be used to mitigate on behalf of the juvenile sentence.

Id. at 564–565 (emphasis added).

27. *Miller*, 567 U.S. at 489.

28. *Id.* The full language of the Court's holding is as follows:

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id.

29. Huston, *supra* note 25, at 564–65.

30. *See* Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3441–42 (2014). Scavone notes that,

> [S]tate courts have dealt with the question of lengthy term-of-years sentences given to both nonhomicide and homicide juveniles that are essentially synonymous with LWOP sentences, given the young age of the offenders. These lengthy term-of-years sentences constitute virtual or de facto LWOP sentences that may pose the same constitutional questions for juveniles as mandatory LWOP sentences.

Id. See also Huston, *supra* note 25, at 565. Huston comments that:

facto" life sentences—those term-of-years sentences of such a length as to place the defendant behind bars beyond the average life expectancy.

D. The Dissenters

The dissenters to the majority rules in *Roper*, *Graham*, and *Miller* have remained markedly consistent. Outside of Justice Robert's concurrence in the judgement in *Graham*, and save that of Justice Kennedy, the conservative block of the Supreme Court has voted against any curtailing of the sentencing power of the courts based upon juvenile status.[31] The strongest arguments against the majority holdings were penned by Justices Scalia and Thomas. Dissenting in *Roper*, Justice Scalia was quick to point out that the majority relied heavily on the global consensus against capital punishment for juvenile offenders.[32] Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, staunchly claimed that comparison to international law has no place in American jurisprudence.[33] Weighing heavily on the premise of this Comment is the fact that this staunchest of dissenters is no longer available to participate in the debate due to his untimely

> Despite Miller's broad applicability, courts have found numerous ways to limit the application of Miller's rationale. In any given case, state and circuit courts will make multiple, incremental decisions that appear reasonable in-and-of-themselves, but which produce unreasonable, even absurd results in light of Miller's broad rationale. The effect of this incremental decision making is a slow dilution of Miller's profound contribution to juvenile sentencing jurisprudence. And the practical outcome of diminishing Miller is that post-Miller courts will continue to make juvenile sentencing indistinguishable from that of adults.

Id.

31. *See Miller*, 567 U.S. at 463; Graham v. Florida, 560 U.S. 48, 51 (2010); Roper v. Simmons, 543 U.S. 551, 551–55 (2005). Of note is Justice Alito's dissent in *Graham*. There, he highlights the very focus of this comment: "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham*, 560 U.S. at 124 (Alito, J., dissenting). However, when making this point, Justice Alito cites to a sentencing term that falls outside the respective definition of de facto LWOP. *Id.* He states, "[i]ndeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." *Id.* Forty years is simply not long enough to implicate a de facto LWOP sentence. Though the number is hard to pin down, life expectancy for a defendant will likely require a sentence far longer than forty years to properly implicate de facto LWOP, thereby rendering Justice Alito's point here relatively moot for the purposes of his argument.

32. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) ("[F]undamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."). This dissent attempts to take the legs out from under one of the most compelling data points offered by the majority in support of its decision—that the United States stands among little company in the international community in terms of the severity of punishment meted out upon juveniles, a point upon which Justice Kennedy places much weight. *Graham*, 560 U.S. at 80–81.

33. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

death in 2016.[34] Much can be speculated as to how the Court, with its two new members, will address this issue on the next pass.[35]

II. THE DOOR OPENS: THE CIRCUIT SPLIT TAKES SHAPE

In the murky waters left after the *Miller* decision, a circuit split has developed and continues to widen.[36] This split is not one within which the sides are playing fair—there is a clear majority and minority; however, all it takes is one dissenter to form a split and many of the circuits have not yet weighed in on the matter. This holds open the potential for further disparity. The majority "team" consists of those circuits that seek to preserve consistency and close the door on the loophole that has developed through the use of *de facto* LWOP, and the minority consists of a single hold-out circuit that clings strongly to the rationale of the dissent in *Miller*.[37]

A. Those in Favor: Circuits Advocating Consistency

The Ninth, Tenth, and the Third Circuits have approached this issue from a position of consistency with Supreme Court case law, each arriving at the conclusion against *de facto* LWOP in much the same manner.

1. The Ninth Circuit Weighs In

In *Moore v. Biter*,[38] the Ninth Circuit was the first of the federal circuits to approach the question of *de facto* LWOP as the functional equivalent of LWOP.

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34. Amy Brittain & Sari Horwitz, *Texas Sheriff's Report Reveals More Details on Supreme Court Justice Scalia's Death*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/world/national-security/texas-sheriff-releases-report-on-supreme-court-justice-scalias-death/2016/02/23/8c0bdb0c-da82-11e5-891a-4ed04f4213e8_story.html?utm_term=.2125259c8f3d.

35. *See infra* Part IV B.

36. *See infra* Part III A, B.

37. *See infra* Part III A, B.

38. 725 F.3d 1184 (9th Cir. 2013). Moore was convicted of sexually assaulting four women on four separate occasions. *Id.* at 1186. Of the counts against him, he was found guilty of twenty-four in total. *Id.* These included:

> [N]ine counts of forcible rape, seven counts of forcible oral copulation, two counts of attempted second degree robbery, two counts of second degree robbery, forcible sodomy, kidnaping with the specific intent to commit a felony sex offense, genital penetration by a foreign object, and the unlawful driving or taking of a vehicle. The jury found that Moore also used a firearm while committing his crimes.

Id. The California Department of Youth Authority provided the trial court with reports detailing Moore's psychological profile and his potential for rehabilitation:

> One staff psychologist, Dr. Mahoney, found that "there is no reason to believe that [Moore] would not continue to be dangerous well into the future." The rest of the clinical staff, however, concluded that: "[Moore] does not appear to be fixed in his antisocial value system as he displays a sense of motivation to change in overcoming his delinquent lifestyle." A casework specialist found that Moore was "severely depressed with a history of impulsivity and some immaturity" and has "expressed a willingness to change."

The case centered around a defendant who was convicted of a multitude of nonhomicide crimes committed while age sixteen.[39] Upon conviction he was sentenced to 254 years and four months in prison.[40] Key to the reasoning of the Court was that the defendant would not be eligible for parole until he served half of his sentence, or 127 years and two months.[41] This sentence effectively constituted a life sentence without parole, because, as the court noted, "[defendant] will spend his life in prison because he would have to live to be 144 years old to be eligible for parole."[42] The Ninth Circuit's two-part holding is doubly impactful for the purposes of this Comment.

For the defendant's sentence—which finalized in 1993— to be attacked using the new holding from *Graham* in 2010, the rule must be held to be retroactive and available for use to attack collaterally the prior sentencing practice.[43] Not all new rules of constitutional criminal procedure are automatically retroactively applicable.[44] The rules must fit into an exception to be allowed to have retroactive effect.[45] Rules that categorically ban a punishment for a class of defendants fit into this exception.[46] The Ninth Circuit concluded that the rule announced in *Graham* did fall under this exception as it: 1) applies to a class (juvenile nonhomicide offenders), and 2) categorically prohibits a punishment (LWOP).[47] It can be fairly said that the rule in *Graham* is the exact class of rule that the Supreme Court had in mind when carving out the above exception. Confirming this analysis is the Supreme Court's holding in *Montgomery v. Louisiana*,[48] which stated that *Miller*'s remarkably similar ban on mandatory LWOP sentences for juvenile homicidal offenders was a substantive rule of constitutional law that has retroactive effect.[49] Of import for this Comment is the potential retroactive application of a ban on *de facto* LWOP along the same lines as that applied above.[50]

Id. The trial court relied on Dr. Mahoney's report in coming to its sentence. *Id.* at 1187.

39. *Id.* at 1186–87.

40. *Id.*

41. *Id.* at 1187.

42. *Id.*

43. *Id.* at 1190–91.

44. Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

45. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)) ("[A] new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[.]'").

46. *Moore*, 725 F.3d at 1190 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

47. *Id.* at 1191.

48. 136 S. Ct. 718 (2016).

49. *Id.* at 736 ("The Court now holds that *Miller* announced a substantive rule of constitutional law. The conclusion that *Miller* states a substantive rule comports with the principles that informed *Teague*.").

50. *See infra* Part IV A.

Having established the legitimacy of *Graham*'s application to the case before it, the court moved on to the more substantive matter of deciding whether the defendant's sentence was "materially indistinguishable" from a LWOP sentence.[51] The court approached the issue from the perspective of the effect on the defendant rather than the label attached to the sentence.[52] The court stated that "we cannot ignore the reality that a seventeen year-old sentenced to life without parole and a seventeen year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence. Both sentences deny the juvenile the chance to return to society."[53] Following this reasoning, it cannot be said that any term-of-years sentence, without the possibility of parole, that holds a defendant behind bars beyond average life expectancy is not, for all intents and purposes, a LWOP sentence. This approach to the issue, if and when it arrives before the Supreme Court, is likely to be one of the most effective at achieving the common-sense outcome espoused by this Comment.

2. The Tenth Circuit Joins the Fray

The next circuit to accept review of a case concerning *de facto* LWOP was the Tenth Circuit in *Budder v. Addison*.[54] The defendant in *Budder* was convicted of several nonhomicide crimes that were perpetrated while he was a juvenile (sixteen years old).[55] The defendant's ultimate sentence, after a modification by the Oklahoma Court of Criminal Appeals, was 155 years.[56] Due to the functioning of Oklahoma law, the defendant would not be eligible for parole until 85% of his sentence had completed, or 131.75 years.[57] This sentence, while technically falling into the category of life with the possibility of parole, was functionally a life sentence; the court, quoting *Graham*, stated that "[t]his sentence means denial of hope . . . . [T]he sentence alters the

51. *Moore*, 725 F.3d at 1191.

52. *Id.* at 1192.

53. *Id.*

54. 851 F.3d 1047 (10th Cir. 2017).

55. *Id.* at 1049. Budder was convicted of assaulting, both physically and sexually, a seventeen-year-old girl. *Id.* The jury found him guilty on four counts: "two counts of first degree rape, one count of assault and battery with a deadly weapon, and one count of forcible oral sodomy." *Id.* For his crimes, Budder was given two LWOP sentences, a sentence of life with parole eligibility, and a twenty-year sentence to all run consecutively. *Id.* After the decision in *Graham* came down, Budder's two LWOP sentences were modified to life with parole eligibility to accommodate for the new categorical ban against LWOP for juvenile nonhomicide offenders. *Id.* at 1050. Pursuant to Oklahoma law, "a prisoner must serve 85% of his sentence before he will be eligible for parole. For purposes of parole, a life sentence is calculated as 45 years. Thus, Budder's sentences are considered to total 155 years, and he must serve 131.75 years before he will be eligible for parole." *Id.* (internal citations omitted).

56. *Id.* at 1050.

57. *Id.*

offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration."[58]

The Tenth Circuit's reasoning very closely mirrors that of the Ninth Circuit's above. Again, the court here calls out the courts below as attempting to rely on semantics for justification of their sentencing practices.[59] The court put it rather bluntly by stating that

> [W]e cannot read the [Supreme] Court's categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as "life without parole." The Constitution's protections do not depend upon a legislature's semantic classifications.[60]

The Tenth Circuit went a step further, though, and identified the possibility of an exploitable loophole that must be closed—a proposition that this Comment seeks to assert as well. The court continued, "[l]imiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life.' The Constitution's protections are not so malleable."[61] Employing harsher and more critical language than its counterpart in the Ninth Circuit, the court said that "[defendant] received a *life sentence* [and] . . . [defendant]'s sentence does not provide him a realistic opportunity for release; he would be required to serve 131.75 years in prison before he would be eligible for parole. No fair-minded jurist could disagree with these conclusions."[62]

The court identified *de facto* LWOP for what it is, an attempt to circumvent the decisions of the Supreme Court and avoid constitutional challenges by relying on a semantical loophole. The reasoning behind this approach is sound, at least in this author's mind, and will likely be persuasive when brought before the Supreme Court in due time.

3. The Newcomer: The Third Circuit

The most recent circuit to enter the discussion of de facto LWOP was the Third Circuit in *United States v. Grant*.[63] The defendant was convicted of various nonhomicidal and homicidal crimes committed before he achieved the age of eighteen.[64] His ultimate sentence was set at sixty-five years without the

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58. *Id.* at 1056 (internal citations omitted) (quoting Graham v. Florida, 560 U.S. 48, 69–70 (2010)).

59. *Id.*

60. *Budder*, 851 F.3d at 1056.

61. *Id.* For further discussion of *de facto* LWOP sentences as a semantical loophole *see infra* Part IV A, B.

62. *Id.* at 1059 (emphasis added).

63. 887 F.3d 131 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018).

64. *Id.* at 135–36. Grant was convicted of conspiracy and racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), of various drug related charges, as well as a

possibility of parole.[65] Given his age at the time of sentencing, the earliest possibility for release, with good time credit applied, would have been when the defendant was seventy-two, an age that the defendant considered to be concurrent with his life expectancy.[66]

Much of what the Third Circuit discussed in its opinion was aligned with the reasoning of the Ninth and Tenth Circuits; however, the court took a detour when considering what is meant by "meaningful opportunity for release" and how to determine what is truly "meaningful" in terms of release as relative to life expectancy.[67] Before addressing this detour, it is important to note that the court in *Grant* unquestioningly confirmed the reasoning of the Ninth and Tenth Circuits, even going as far as to call out the Eighth Circuit as the only holdout.[68] The Court stated:

> The weight of authority supports our conclusion that the Eighth Amendment prohibits de facto LWOP sentences for juvenile offenders that are not incorrigible. Here, the District Court found that [defendant] is capable of reform . . . . Under *Miller* and our holding today, the District Court's finding therefore categorically forecloses a sentence of LWOP, whether de jure or de facto, and requires the District Court to sentence . . . in a manner that allows for some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[69]

The court did not limit its holding to these issues, though. Choosing to dive deeper into the requirement for meaningful release, the Third Circuit read into the *Graham* and *Miller* conglomerate an additional consideration that builds off the idea of life expectancy.[70] The Third Circuit currently stands alone in this approach.

The court pointed to the national consensus that retirement should occur at age sixty-five.[71] This closely mirrors another nationally-recognized line-

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firearms charge. *Id.* at 134. "The jury returned a partial verdict finding him guilty of the RICO conspiracy, racketeering, and drug and gun possession counts (Counts 1, 2, 4, 5, 6, and 11), and—as predicates for the racketeering charge—found that he murdered Mario Lee and attempted to murder Dion Lee." *Id.* at 136. Grant was originally sentenced to "LWOP on the two RICO counts, a concurrent forty-year term of imprisonment on the drug-trafficking counts, and a five-year consecutive term of imprisonment on the gun possession count." *Id.* Due to the decision handed down in *Miller*, which required sentencing to take into account juvenile status, Grant was re-sentenced as to the two RICO counts, which resulted in his ultimate sentence of sixty-five years without parole. *Id.* at 137.

65. *Id.*

66. *Id.*

67. *Id.* at 145–47, 149.

68. *Id.* at 145–46.

69. *Grant*, 887 F.3d at 146 (internal quotations omitted).

70. *Id.* at 152.

71. *Id.* at 151–52 (noting that they, "[w]ithout definitively determining the issue, . . . consider sixty-five as an adequate approximation of the national age of retirement to date").

drawing exercise discussed above; namely, the acknowledgment of "adulthood" at age eighteen.[72] With this age in mind, the court imputed an additional requirement for sentencing non-incorrigible juvenile offenders within its circuit: that these individuals "be afforded an opportunity for release before the national age of retirement."[73] This requirement is not to be hard and fast, rather, it is categorized by the court as a rebuttable presumption.[74] The court noted that the rebuttable presumption is unlikely to be rebutted with any frequency.[75] This retirement age release presumption is by far the most tenuous of the holdings espoused by the majority circuits, and will likely not be able to withstand scrutiny in the Supreme Court.

B. Those Against: The Outlier Circuit Throwing the Wrench

As of the drafting of this Comment, only one circuit has advocated the minority position of differentiation between actual and *de facto* LWOP sentences. In *United States v. Jefferson*, the Eight Circuit upheld a sentence of 600 months (50 years) for a defendant convicted of various nonhomicidal and homicidal crimes.[76] In the shortest of the opinions so far addressed in this Comment, the Court in *Jefferson* pursued a rather hardline approach to its rationale, arguing that because the *Miller* court did not place a categorical ban on LWOP for juvenile homicidal offenders, that the district courts should be free to sentence as they please, even if only nominally taking into account the mitigating factors of youth when meting out their sentences.[77] It is important to note that, procedurally in this case, the defendant was re-sentenced—the life sentence originally handed down was replaced with the one at issue: a 600 month sentence.[78] It can easily be understood that the court, in handing down this sentence, was aware that the sentence was not changing in actual effect, but rather only in name/categorization.

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72. *See Determining the Legal Age to Consent to Research*, *supra* note 2.

73. *Grant*, 887 F.3d at 152.

74. *Id.*

75. *Id.* (noting that the court "believe[d] that such instances will be rare and unusual").

76. 816 F.3d 1016, 1017–18 (8th Cir. 2016). Jefferson was convicted of conspiracy to commit as well as the actual commission of various drug related offenses and with various murders. *Id.* at 1017. "[A] federal jury convicted Jefferson of conspiracy to distribute cocaine and crack cocaine; two substantive drug trafficking offenses in 1997; the firebombing murder of five young children in February 1994, when Jefferson was sixteen; and the drive-by shooting of a drug debtor and an innocent bystander in February 1995, when Jefferson was seventeen." *Id.* Jefferson was originally sentenced to life in prison under mandatory sentencing guidelines, but after the Supreme Court's decision in *Miller*, his sentence was vacated, and he was re-sentenced to the 600-month term at issue in the instant case. *Id.* at 1017–18.

77. *Id.* at 1018–19. The court specifically notes that "the Supreme Court in *Miller* did not categorically bar discretionary decisions to impose life sentences on juveniles, the Court ruled that a sentencing court must make 'individualized sentencing decisions' that take into account 'the distinctive attributes of youth' before it imposes a life-without-parole sentence on a juvenile." *Id.* at 1019 (quoting Miller v. Alabama, 567 U.S. 460, 470, 472 (2012)).

78. *Id.* at 1018.

By relying on the minutiae and particularities of the *Miller* opinion and allowing the sentence to stand, the Eighth Circuit, here, chose to ignore the greater theme that has emerged from recent Supreme Court jurisprudence. There is a very clear movement toward lowering sentencing harshness and accounting for, as Justice Kennedy put it, the "unfortunate yet transient immaturity" that accompanies youth and actions taken thereby.[79] The Eight Circuit places itself out in the cold, standing alone against a growing majority that has found and implemented the crux of the motivation behind *Roper*, *Graham*, and *Miller*: "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[80]

III. CLOSING THE DOOR: ADVOCATING FOR AN END TO THE *DE FACTO* LWOP LOOPHOLE

A. Practically Speaking

In advocating the majority approach, this Comment seeks to separate the emotive from the pragmatic. While there is much to be said about societal values and the horrors that can be conjured up by setting the scene of throwing away the key, much can also be said about the genuine, hard-numbers costs and burdens that this circuit split is causing, as well as the potential for further costs were the minority view to take hold.

Delving first into the topic of the potential burden on the court system, every court that enacts a *de facto* LWOP sentence is opening the door to the possibility of appeal and for further hearings before the court or other state bodies. Key to its decision in *Moore*, the Ninth Circuit performed a *Teague* analysis to determine whether the rule announced in *Graham* was retroactively applicable.[81] In order to fall under the *Teague* exception, as explained by the court in *Moore*, the new substantive constitutional law must apply to a class of defendants and place a particular punishment out of reach.[82] If one were to imagine that the Supreme Court has espoused the majority opinion with regard to *de facto* LWOP and identified it as materially indistinguishable from LWOP for Eighth Amendment purposes, one can see that the new rule would fit quite comfortably into the *Teague* framework. To begin with, as the Court announced in both *Graham* and *Miller*, the rule would be applicable to a class—namely: juvenile nonhomicidal offenders, juvenile homicidal offenders, or both.[83] Next, the rule

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

80. *Miller*, 567 U.S. at 461–62.

81. Moore v. Biter, 725 F.3d 1184, 1190 (9th Cir. 2013).

82. *Id.* (citing Teague v. Lane, 489 U.S. 288, 311 (1989); Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

83. *Miller*, 567 U.S. at 489 ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that *all children convicted of homicide* receive lifetime incarceration without possibility of parole, regardless of their age and age-related

would either prohibit the legislature from enacting mandatory sentencing guidelines requiring *de facto* LWOP or remove the availability of those sentences from a judge's discretion, thereby foreclosing a punishment from "criminal law-making authority."[84] Having determined that any new rule announced with regard to *de facto* LWOP would be retroactively applicable, it is not a leap to imagine the great burden and financial cost that such a rule would have in those jurisdictions that have embraced the minority approach.

Juvenile offenders would (metaphorically) flock in droves to the gates of the courts that have handed down now-unconstitutional *de facto* LWOP sentences. Restricting the scope of the argument to the federal system, there is still potential for huge costs, both on the private party making the appeal and the government's defense thereof. While there is no way to pin down an actual number for the costs of an appeal in these type of cases, appellate review can give rise to an increase in cost.[85] This places a burden on the appellant as well as the taxpayer who is footing the bill for the cost of the government's defense of the appeal.

This is not to mention the strain on the already-overburdened dockets of the courts.[86] Those jurisdictions that subscribe to the minority approach are opening

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characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.") (emphasis added); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding "[t]he Constitution prohibits the imposition of a life without parole sentence on a *juvenile offender who did not commit homicide*") (emphasis added).

84. *Moore*, 725 F.3d at 1190 (citing Teague v. Lane, 489 U.S. 288, 311 (1989)).

85. Solomon L. Wisenberg, *Federal Criminal Appeals*, SOLOMAN L. WISENBERG, https://www.wisenberglaw.com/White-Collar-Criminal-Defense/Federal-Criminal-Appeals.shtml (last visited June 4, 2020). As this FAQ points out, the costs of a federal criminal appeal are very case specific, and the complexity of each case has a large impact on both the amount of time and resources required for the appeal. *Id.* There are a few costs that can be expected at the outset, such as the filing fee of $455 as well as the transcript which costs, not uncommonly, over $5000. *Id.* Add to this the cost of retaining counsel and the billable hours and the numbers continue to grow. *Id.*

86. Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015, 2:15 PM), https://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b. The author explains the current situation in the federal court system as to the surplus of vacancies and the chronic overworking that is plaguing many federal judges:

> For many district and circuit court judges, going to work means doing their job—plus the jobs of other judges who are supposed to be there, but aren't. That's because federal courts are full of vacancies that aren't being filled by the Senate, and Congress hasn't created new judgeships in many states for decades, despite skyrocketing caseloads.
>
> Litigants are waiting years for their civil cases to be heard because criminal cases take precedence. Judges are struggling with burnout. And many courts are relying on semi-retired judges just to stay afloat.

Id. The author goes on to explain that the national average caseload for a federal judge is between 500-600 cases per year; however, there are some districts where the average rises as high as 1000 per year per judge. *Id.* These numbers are unsustainable now and adding the potential for a huge influx of new criminal appeals or re-sentencing hearings is throwing fuel on an already out of control blaze.

themselves up to the potential of swelling their dockets with new criminal matters—matters that could have been settled previously through issuing sentences aligned with trending Supreme Court case law—at the expense of their civil dockets.[87]

The Supreme Court has attempted to quell concerns about this very issue. In *Montgomery v. Louisiana*, Justice Kennedy, writing for the majority, argued that retroactive applicability of *Miller* would not cause an "onerous burden on the States."[88] It can be argued, though, that this claim overly minimized the actual costs associated with retroactive applicability. Justice Kennedy suggested that the States can remedy the issue "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."[89] He then cited a Wyoming statute that permits juvenile homicide offenders to be eligible for parole after twenty-five years as an example.[90] Important though is that passing of legislation by the states is still a procedure that places costs on the taxpayer.[91] Additionally, what is to prevent a legislature from passing a law that comports with the requirements of the Eighth Amendment, but still puts the prospect of release at such a long distance away (say Justice Alito's chosen forty years) that the juvenile offender chooses to appeal anyway? There is no way to know this for certain, but the thought exercise remains relevant.

From a practical perspective, the minority position adopted by the Eighth Circuit carries the risks outlined above, while the majority approach does not. In jurisdictions where the judges themselves have determined the functional equivalency of *de facto* and *de jure* LWOP, state legislatures need not concern themselves with new legislation and juvenile offenders have already been provided with the hope for meaningful release that drives those in the minority jurisdictions to appeal.

B. A Consistent and Legitimate Approach

Today, society in America is perhaps more fractured than it has been for quite some time, but this is nothing new to the American people.[92] The courts, by their very nature, ought to be a bastion of stability among the current turbulent

87. *Id.* The author provides a poignant quote from Judge Morrison England Jr., the chief judge of the U.S. District Court for the Eastern District of California: "What happens is you have to keep pushing civil cases further out. They've already been waiting sometimes three to four years . . . I get concerned when cases are so old. Memories are fading; people are no longer around. It's not serving anyone trying to get justice." *Id.* Adding to this already astounding backup with superfluous cases is serious cause for pause when considering the merits of the minority approach.

88. 136 S. Ct. 718, 725, 736 (2016).

89. *Id.* at 736.

90. *Id.*

91. *See* Jake Griffin, *Why Legislators Rarely Know Cost of Laws They Pass*, DAILY HERALD (Feb. 8, 2012, 5:31 AM), https://www.dailyherald.com/article/20120208/news/702089933/.

92. *See* Joanne B. Freeman, *The Violence at the Heart of Our Politics*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/opinion/sunday/violence-politics-congress.html.

sea of political animosity.[93] Splits in the federal circuits—particularly on issues that the average American can readily relate to—pose a great risk to the perception of the courts as legitimate, stability-enhancing institutions. It is not untoward to imagine that issues such as life sentences for juveniles, and the manner in which they are imposed, are more readily available as a topic to the average American than say imprudent behavior of a fiduciary as it relates to loss under ERISA to a plan participant.[94] Juvenile life sentences feel more tangible than the latter.

The Supreme Court has, for nearly three decades, been marching forward with the curtailment of the sentencing power of judges and legislatures as relates to juvenile offenders.[95] Those courts that have chosen to ignore this development and have allowed the usage of *de facto* LWOP sentences can be argued to be detracting from the legitimacy of the courts, at the very least in the eyes of the public. John C. McCoid, II, observed in a 1991 article on the topic of inconsistent judgements that "[i]t is sometimes argued that, when inconsistency reveals the occurrence of error, that manifestation of fallibility saps public confidence in the adjudicatory process and that inconsistency is thus harmful simply because of its signal."[96] This "signal" created by error is strengthened

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93. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 431–32 (1988). Judge Easterbrook is keen to point out that more recent decisions by the Court in constitutional matters are not as impactful as those that are longstanding, but this does not foreclose on their impact entirely. *Id.* He says of these decisions:

> They still have widespread effects on planning. Take *Miranda v. Arizona*, which the court unanimously reaffirmed a few years ago even though a majority of the sitting Justices probably would not have thought the doctrine attractive as a matter of first principles. *Miranda* has become a structural decision on which other doctrines and institutions depend. For example, to the extent *Miranda* makes it harder to obtain convictions, courts respond by increasing the sentences of those who are convicted, so as to keep general deterrence constant. The higher sentence levels are built into the guidelines that control sentencing in federal courts, and into the penalty structures of state law. One could not change Miranda without being prepared to rethink criminal sentences.

Id. One can hope that this is the approach followed by the Court when it gets its next pass on juvenile sentencing reform—while the new Justices may not have agreed with the doctrine had they been seated upon first review of the issue, the engraining of the Court's holding has taken place and reaffirming would likely seem to be a necessity at this point in time.

94. *See generally* Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018). This case is brought up only for use in the hypothetical presented in the body of the text.

95. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012); Graham v. Florida, 560 U.S. 48, 52–53, 82 (2010); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

96. John C. McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488 (1991). There is an argument to be made that the public is more willing to accept honest mistakes and errors than many commentators have espoused in their research, and one such argument is made by McCoid in his article. *See id.* at 488–91. However, the basis of McCoid's claim is that the errors were perceived by the public as "honest mistakes" and "failures" with no reference to deliberate choice to ignore precedent. *Id.* at 488. This fundamental difference in the type of error and the

when the error is not one of mere fallibility, but one of wanton disregard for the precedent laid down by the Supreme Court. Consistency is key to the function of our court system.[97] McCoid went on to frame the issue in the following way: "Like cases should be treated alike: This formula of Aristotle is widely accepted as a core element of egalitarian moral and social philosophy . . . . That is, consistency prescribes like treatment for successive cases governed by the same rule of law or morality."[98] How can it be that the location in which an offender was standing while he committed his crimes can be allowed to be the deciding factor in whether he will have a chance for release? This, though, is the current reality of the juvenile offender in the federal system and will remain so until this circuit split is resolved.

In resolving this split, the Supreme Court should continue to honor its own precedent, but that outcome is nowhere near certain. Since the last pass at the issue of juvenile sentencing in *Miller*, the composition of the court has changed markedly. Justice Scalia, one of the most ardent dissenters in the juvenile sentencing cases referenced in this Comment, has unfortunately passed; his vacancy on the Court has been filled by Justice Gorsuch.[99] In addition, Justice Kennedy, the swing voter on this issue, has retired and been replaced by Justice Kavanaugh.[100] How these two new Justices will weigh in on this issue cannot yet be determined with any certainty, but there are some indications that Justice Kavanaugh may follow in the footsteps of his predecessor.[101] For the sake of consistency and maintaining legitimacy in the public eye, this Comment suggests that Justice Kavanaugh do so.

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signal that it sends to the public renders McCoid's analysis about public perception inapplicable to the inconsistency created by the circuit split on de facto LWOP sentences.

97. This is not to say that every judgement handed down by a trial judge must maintain perfect parity in every case for every defendant convicted of the same crime. Sentencing is a highly nuanced practice that considers specific mitigating and aggravating factors, unique to each defendant. *See* John E. Coons, *Consistency.*, 75 CALIF. L. REV. 59, 87 (1987) (noting, "[t]he appeal to the values of individual judges is a reality of advocacy at every level of litigation"). Rather, the type of consistency espoused in this comment is for the overarching theme of the law. At the heart of the issue of this comment is not whether the defendant was sentenced to sixty-five years and another to seventy, the focus is that *de facto* LWOP should be classified as materially indistinguishable from *de jure* LWOP because to fail to do so would provide trial judges with access to a loophole—a loophole that opens the door to the type of inconsistency that threatens judicial legitimacy. *See id.* at 87–88, 92.

98. *Id.* at 59–60.

99. Adam Liptak and Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supremecourt.html.

100. Sheryl Gay Stolberg, *Kavanaugh is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

101. *See* Rory Little, *Judge Kavanaugh's Record in Criminal Cases*, SCOTUSBLOG (Aug. 27, 2018, 1:53 PM), http://www.scotusblog.com/2018/08/judge-kavanaughs-record-in-criminal-cases/. Of particular interest are Kavanaugh's stances on federal sentencing guidelines and his often "pro-defense" opinions. *Id.*

As Judge Easterbrook notes in his article on stability in judicial decisions, readiness to overrule constitutional cases threatens the very process of constitutional change.[102] He states that such overruling "reduces the stability of governmental institutions, denying the polity the benefit . . . of continuity. Not coincidentally, it saps the drive for change in the constitutional text. People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive . . . ."[103] Additionally, such action has far-reaching impact outside of just the constitutional context. For example:

> [I]t does not take much argument to demonstrate that ready alteration of constitutional rules makes the effects of statutes and private bargains less predictable. So although I do not quarrel with the proposition that the Court ought to inter recent mistakes before they do serious damage, I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be harder to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings.[104]

It can be argued that such effects will not be lost on Justice Kavanaugh, and this author, for one, hopes that they are not.

IV. CONCLUSION

Rather than turning its back on thirty years of development around juvenile sentencing, it is time for the Supreme Court to honor its precedent. When the issue of *de facto* LWOP presents itself before the Court—either in a juvenile homicidal offender or juvenile nonhomicidal offender context—the Court should resolve the split in the manner most conducive to consistency and legitimacy while also keeping an eye on pragmatic concerns. The majority opinion amongst the circuits—that *de facto* LWOP is materially indistinguishable from *de jure* LWOP for Eighth Amendment purposes—is exactly that. Each approach has its merits, but the majority circuits have the

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102. Easterbrook, *supra* note 93, 430–31.

103. *Id.* at 430. Judge Easterbrook counsels that constitutional overruling relies more on moral judgments than on strictly legal analysis. *Id.* at 432. He states, "a constitutional overruling depends on moral and prudential judgments more than strictly legal ones. On the legal side, we can tell that a given rule has been eroded, but the erosion usually marks a moral or prudential problem." *Id.* The collective morals of the Court, the nation, and the world have spoken on juvenile sentencing, and these moral judgments speak against overruling Supreme Court case law espousing the same. *See infra* notes 105, 106, 107.

104. Easterbrook, *supra* note 93, at 431.

stronger case. Theirs is the one that meshes most soundly with national and global consensus in juvenile sentencing practice.

As was noted at the outset, determination of the exact moment of adulthood is a guessing game at best. Many unknowable factors combine to create what society would deem an "adult." But the Court need not concern itself with this form of speculation or line-drawing. Let it suffice to say that, wherever that line ultimately lands, those under the age of eighteen are different and should be treated as such under the law. This notion has been definitively determined by the Supreme Court,[105] by the American people,[106] and by the international community.[107] For the sake of consistency, for the sake of practicality, in keeping with the legitimacy of the courts, now is not the time to undo all that has been done before.

Close the loophole. Close the door.

105. *See Miller*, 567 U.S. at 489; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578; *Thompson*, 487 U.S. at 838.

106. *Graham*, 560 U.S. at 62–67. The Court here noted that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 62 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)). The Court concluded that at the time *Graham* was decided, "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite statutory authorization." *Id.* at 64. Justice Kennedy pointed to these numbers to espouse a national consensus against the use of LWOP on juvenile nonhomicidal offenders. *Id.* at 64–65.

107. *Id.* at 80. The Court cited to a study which concluded: "only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only 2 of them, the United States and Israel, ever impose the punishment in practice. . . ." *Id.* Additionally, the United States was an outlier when it came to juvenile LWOP for nonhomicidal offenders. *Id.* at 80–81. The Court notes that "even if Israel is counted as allowing life without parole for juvenile offenders, that nation does not appear to impose that sentence for nonhomicide crimes; all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide or attempted homicide." *Id.*