A Coffin Was the Only Way Out: Whether the Supreme Court's Explicit Ban on Juvenile Life Without Parole for Non-Homicide Offenses in *Graham v. Florida* Implicitly Bans De Facto Life Sentences for Non-Homicide Juvenile Offenses

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Introduction

Imagine you are reading the New York Times when you come across an article on the criminal trial of a sixteen-year-old juvenile male, John Smith. John was tried and convicted of several crimes, including rape and robbery, and sentenced to 200 years in prison with eligibility for parole after serving 100 years. This sentence means that John would die in prison, because John would not be eligible for parole until he was 116 years-old. On appeal before the Ninth Circuit, John argued that this sentence was in violation of the Eighth Amendment's cruel and unusual punishment provision because the sentence did not provide John any opportunity for release before his death. The Ninth Circuit agreed with John, holding that the Eighth Amendment required juvenile offenders to be provided with a meaningful opportunity for release.[1]

Now imagine, the next day, you open up the New York Times to find another article on the criminal trial of a sixteen-year-old juvenile offender, Sam Brown. Sam, like John Smith, was tried and convicted of multiple crimes including rape and robbery. Sam was sentenced to eighty-nine years in prison for his crimes, and then appealed to the Sixth Circuit, arguing that the sentence was unconstitutional because it would not provide him with the opportunity for release from prison

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[1] This hypothetical is roughly based on *Moore v. Biter*. *See* Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).

before he was 115 years-old. The Sixth Circuit rejected Sam's argument, and affirmed his sentence of eighty-nine years in prison.[2]

These hypotheticals are representative of the confusion lower courts faced after the Supreme Court's decision in *Graham v. Florida*.[3] In *Graham*, the Court established a bright line rule that the Eighth Amendment prohibited non-homicide juvenile offenders from life without parole.[4] Although the Court explicitly declared that life without parole was unconstitutional for juvenile offenders, the Court did not explicitly hold that term-of-year sentences exceeding a juvenile's life expectancy, or de facto life sentences, were unconstitutional.[5] Since that decision, courts have differed in their application of *Graham's* bright line rule.[6] The Sixth Circuit applied a strict reading to the *Graham* decision, holding that juvenile de facto life sentences do not violate the Eighth Amendment's cruel and unusual punishment provision.[7] Conversely, the Ninth Circuit interpreted the *Graham* holding as requiring juvenile offenders to be "provided 'some meaningful opportunity' to reenter society."[8]

This divergence in interpretations of the *Graham* decision means that the length of a sentence for a juvenile offender could vary greatly depending on the where the juvenile is tried.[9] It is important to develop a bright line rule to assist courts in their interpretation of the Eighth Amendment to prevent courts from propounding unconstitutional decisions. This Comment will argue that the Supreme Court should clarify their holding in *Graham* to ensure lower courts' decisions are in compliance with the Eighth Amendment. To do so, the

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2 This hypothetical is roughly based on *Bunch v. Smith*. *See* Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012).

3 *See generally* Graham v. Florida, 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibits imposition of life without parole sentences on juvenile offenders who have not committed homicide and that a state must give these juveniles, sentenced to life without parole, a meaningful opportunity to obtain release).

4 *Id.* at 74.

5 *Id.* at 124 (Alito, J., dissenting).

6 Therese A. Savona, *The Growing Pains of* Graham v. Florida*: Deciphering Whether Lengthy Term-Of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without The Possibility of Parole*, 25 ST. THOMAS L. REV. 182, 197-99 (2013); Leanne Palmer, Comment, *Juvenile Sentencing in the Wake of* Graham v. Florida*: A Look Into Uncharted Territory*, 17 BARRY L. REV. 133, 134 (2011).

7 *See Bunch*, 685 F.3d at 551.

8 Moore v. Biter, 725 F.3d 1184, 1194 (9th Cir. 2013) (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

9 *See Moore*, 725 F.3d 1184; Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012).

Court should adopt the bright line interpretation that the Eighth Amendment dictates, which is supported by the *Graham* and the Ninth Circuit decisions, that the Eighth Amendment prohibits juvenile de facto life sentences.

Part I of this Comment discusses the background and history of the Eighth Amendment in juvenile sentencing. Part II analyzes the split among the courts on the interpretation of the Supreme Court's holding in *Graham v. Florida*. Part III argues that the Supreme Court should adopt the reasoning of the Ninth Circuit because it is most consistent with historical treatment of juveniles and the Eighth Amendment, as well as the Supreme Court's reasoning in *Graham v. Florida*.

I. BACKGROUND: TREATMENT OF THE EIGHTH AMENDMENT IN LEGISLATION AND JUVENILE CASES FROM THE 1980S THROUGH *GRAHAM V. FLORIDA*

The Eighth Amendment of the U.S. Constitution states that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[10] This Comment focuses on the relationship between this constitutional provision and juvenile de facto life sentencing practices. The Court's determination in *Graham v. Florida* on the unconstitutionality of juvenile sentences of life without parole led to confusion over the constitutionality of juvenile de facto life sentences. To understand the rationale behind the Court's decision in *Graham*, it is necessary to review the legislation and historical dealings of juvenile offenders and the Eighth Amendment by the Supreme Court.

A. Thompson v. Oklahoma *and* Stanford v. Kentucky*: Evolving Standards of Decency*

On January 23, 1983, William Thompson, along with several accomplices, murdered Charles Keene.[11] Although Thompson was only fifteen-years-old at the time of the murder, he was tried, convicted, and sentenced to death as an adult.[12] The Supreme Court reversed the death penalty, holding that the imposition of the death

[10] U.S. CONST. amend. VIII.

[11] Thompson v. State, 724 P.2d 780, 782 (Okla. Crim. App. 1986).

[12] Thompson v. Oklahoma, 487 U.S. 815, 819-20 (1988).

penalty for people under the age of sixteen was in violation of the Eighth Amendment's cruel and unusual punishment provision.[13]

The following year, the Court decided a similar issue in the consolidated case *Stanford v. Kentucky*. In the first case, sixteen-year-old Heath Wilkins robbed and murdered a convenience store owner.[14] In the second case, seventeen-year-old Kevin Stanford robbed and raped a gas station attendant.[15] Both Wilkins and Stanford were tried as adults, convicted, and sentenced to death.[16] The Supreme Court upheld the death sentence in both defendants' cases.[17] The Court held that the imposition of the death penalty sentence for defendants sixteen and older did not violate the Eighth Amendment's cruel and unusual punishment provision.[18]

Although these two decisions were only made a year apart, the holdings are in conflict with each other. In *Thompson*, the Court held that it was cruel and unusual punishment to sentence a fifteen-year-old to death, while *Stanford* affirmed the death penalty for both sixteen and seventeen-year-old juvenile offenders.[19] In both *Thompson* and *Stanford*, the basic standard the Court used in their determination was whether the sentence adhered to the "evolving standards of decency that mark the progress of a maturing society."[20] To establish what the standard of decency was for juvenile sentences, the Court looked to legislation on sentencing and societal views on juvenile culpability.[21]

Current state legislation guided the Court in their determination of the current standard of decency for juvenile offenders.[22] At the time of the *Thompson* and *Stanford* decisions, the Court noted that the state provided many examples of the different treatment of juveniles compared to adults in legislation.[23] Specifically, the *Thomp-*

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13 *Id.* at 838.

14 Stanford v. Kentucky, 492 U.S. 361, 366 (1989).

15 *Id.* at 365.

16 *Id.* at 366-67.

17 *Id.* at 380.

18 *Id.*

19 *Id.*; Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

20 Stanford v. Kentucky, 492 U.S. 361, 380 (1989), 492 U.S. at 369, 378 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *Thompson*, 487 U.S. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

21 *Stanford*, 492 U.S. at 369-70; *Thompson*, 487 U.S. at 821-22.

22 *Stanford*, 492 U.S. at 369-70.

23 *See Thompson*, 487 U.S. at 823.

son Court observed that in the Oklahoman juvenile criminal system, juveniles under the age of sixteen were always charged in the juvenile criminal court. That system also provided a method for sixteen and seventeen-year-olds to be charged as adults under certain circumstances.[24] In the Court's survey of the fifty states and the District of Columbia, there was near unanimity in the treatment of juveniles under the age of sixteen as minors.[25] All fifty states also made the maximum age for juvenile court jurisdiction no less than sixteen.[26] The Court concluded that state legislation provided a natural division from the treatment of juvenile offenders under the age of sixteen, and sixteen and seventeen-year-old offenders: that juvenile offenders under the age of sixteen should not be treated the same as adult offenders because state legislatures have decided they are "not prepared to assume the full responsibilities of an adult."[27]

Similarly, in *Stanford*, the Court reviewed the current legislation on juvenile offenders in a survey of the fifty states.[28] Out of the thirty-seven states that had capital punishment, fifteen states did not allow juvenile offenders sixteen years-old and under to be sentenced to death, and twelve did not allow juvenile offenders seventeen years-old and under to be sentenced to death.[29] The Court concluded that the majority of the states that allow capital punishment permitted its use on juvenile offenders sixteen-years-old and over, which indicated a consensus on the constitutionality of that sentence for these offenders.[30] Like the *Thompson* Court, the defendants highlighted several state statutes that provided for the disparate treatment of people over the age of eighteen and eighteen and under.[31] However, the *Stanford* Court pointed out that precedent had dictated that a death sentence must be based on a specific individual, and not a small consensus, which comes from an age limitation on a couple state statutes.[32]

In addition to state legislation, the Court examined societal views on juvenile culpability to assist in their determination of evolving stan-

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[24] *Id.* at 823-24.
[25] *Id.* at 824.
[26] *Id.* at 825.
[27] *Id.* at 825.
[28] Stanford v. Kentucky, 492 U.S. 361, 370 (1989).
[29] *Id.* at 370.
[30] *Id.* at 372-73.
[31] *Id.* at 374.
[32] *Id.* at 374-75 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("In the realm of capital punishment in particular, 'individualized consideration [is] a constitutional requirement.'")).

dards of decency for juvenile offenders.[33] The traditional view of culpability required that the "punishment should be directly related to the personal culpability of the criminal defendant."[34] The *Thompson* Court reasoned that, in general, the culpability of a juvenile offender was less than the culpability of an adult.[35] This position was based upon the theory that juveniles are more susceptible to peer pressure, lack responsibility and maturity, and suffer from diminished judgment, among other characteristics.[36] The *Stanford* Court rejected the reasoning of the *Thompson* Court stating, "[i]f such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary."[37] The Court reasoned that if those factors should be considered by the Court, it is the job of the legislature to tell the court what the factors to be included are, and how they should be used.[38]

B. Roper v. Simmons*: Renewing the Eighth Amendment Debate*

In 2005, the Court in *Roper v. Simmons* reconsidered the issue of whether the Eighth Amendment prohibited issuing a death sentence to a juvenile offender who was older than fifteen, but younger than eighteen years-old.[39] Christopher Simmons, a seventeen-year-old, broke into Shirley Crook's home, tied her up, and then used Crook's minivan to drive to a nearby state park.[40] There, Simmons covered Crook's face in duct tape, and threw her over a bridge into a river.[41] Simmons was tried and convicted of the murder.[42] During the sen-

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33 *Id.* at 369; Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).

34 *Thompson*, 487 U.S. at 834 (citing California v. Brown, 479 U.S. 538, 545 (1987)).

35 *Id.* at 835.

36 *Id.* The Court went on to hold that juvenile offenders under the age of sixteen could not receive the death penalty unless the state legislator added a minimum age clause to the capital punishment statute. *Id.* at 857-58. The Court was concerned over the manner in which the Oklahoman legislature wrote the capital punishment statute and a separate juvenile clause providing for the transfer of the juvenile offender to adult court if tried with a specific crime. *Id.* at 857. The Court stated that there was a risk that the Oklahoman legislature did not realize when they provided a means for a fifteen-year-old offender to be tried in adult court that the offender could also receive the death penalty as a result of that transfer. *Id.*

37 Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

38 *Id.*

39 Roper v. Simmons, 543 U.S. 551, 555-56 (2005).

40 *Id.* at 556.

41 *Id.* at 557.

42 *Id.*

tencing phase, Simmons argued that legislation made distinctions between the rights of juveniles and adults, and therefore a mitigating factor in sentencing should be that Simmons was a minor at the time of the crime.[43] The court rejected this argument, and sentenced Simmons to death.[44]

Simmons appealed this judgment to the Supreme Court, arguing that the Eighth Amendment prohibited sentencing a juvenile to death.[45] The Supreme Court affirmed the Missouri Supreme Court's decision and held that the Eighth Amendment prohibited the execution of offenders under the age of eighteen, which effectively rejected the holding of *Stanford v. Kentucky*.[46] The Court explained their rejection of the *Stanford* holding, reasoning that there was a shift in the societal view on capital punishment.[47] To determine the current societal view, the Court first looked to the number of juvenile executions since the *Stanford* decision.[48] Since *Stanford* in 1989, only six states executed juvenile offenders, and three states executed juvenile offenders between 1995 and the *Roper* decision in 2005.[49] Several states have also abolished juvenile capital punishment since *Stanford*.[50] The Court concluded that the diminishing number of juvenile executions indicated a growing national consensus against juvenile death penalty sentences.[51]

Additionally, the Court relied on reasoning from a previous case where the Court determined there were two penological theories to justify juvenile sentences: retribution and deterrence.[52] In *Atkins v. Virginia*, the Court held that the penological theory of punishment was not served when a mentally ill person was sentenced to death, because the mentally ill cannot comprehend the culpability of their actions.[53] The *Roper* Court analogized this prior reasoning to the culpability of juvenile offenders.[54] Because juvenile offenders suffer

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43 *Id.* at 558.
44 *Id.*
45 Roper v. Simmons, 543 U.S. 551, 559 (2005).
46 *Id.* at 578.
47 *Id.* at 564.
48 *Id.*
49 *Id.* at 564-65.
50 *Id.* at 565.
51 Roper v. Simmons, 543 U.S. 551, 564-65 (2005).
52 *Id.* at 571.
53 *Id.* (*see generally* Atkins v. Virginia, 536 U.S. 304 (2002)).
54 *Id.*

from diminished culpability akin to mentally ill offenders, the Court deduced that penological theory was also not served when the death penalty was applied to juvenile offenders.[55] The Court reasoned that retribution in a juvenile offender's case would not be proportional to the crime because the juvenile offenders would not fully comprehend the culpability of his actions.[56] The Court also noted that deterrence would not be proportional to the juvenile's offense because a juvenile likely would not consider the consequences of his actions prior to committing a crime.[57] Because neither penological theory, retribution, nor deterrence, would be served by punishing a juvenile offender to the death penalty, the Court declared it unconstitutional.[58]

C. Graham v. Florida*: Reforming Existing Law to Comply With Standards of Decency*

On December 2, 2004, Terrance Graham was arrested on multiple charges relating to two robberies.[59] In the first robbery, Graham and two accomplices entered a home and held the residents at gunpoint while they robbed the house.[60] That same evening, Graham and the accomplices attempted another robbery.[61] At the end of Graham's trial, the judge sentenced Graham to life imprisonment.[62] On appeal to the First District Court of Appeal of Florida, the court affirmed the trial judge's decision, reasoning that Graham's past criminal history demonstrated that there was no chance of rehabilitation into society.[63] Graham appealed his decision to the Supreme Court, on the argument that life imprisonment for non-homicide offenses violated the Eighth Amendment.[64]

To determine whether Graham's punishment was in fact unconstitutional, the Court had to resolve whether the punishment was

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55 *Id.*

56 *Id.*

57 Roper v. Simmons, 543 U.S. 551, 571 (2005).

58 *Id.*

59 Graham v. Florida, 560 U.S. 48, 53-54 (2010).

60 *Id.* at 54.

61 *Id.*

62 *Id.* at 57.

63 *Id.* at 58. Graham had been before the court multiple times on serious charges such as attempted robbery with a weapon. *Id.* at 53-58. The judge determined that Graham showed a pattern of behavior which indicated he would not be receptive to rehabilitation. Graham v. Florida, 560 U.S. 48, 58 (2010).

64 *Id.*

extremely cruel or excessive. The Court applied a two-step analysis to determine the constitutionality of the punishment, considering first, the standards of decency for juvenile offenders, and second, the penological theory behind Graham's sentence.[65] Like the *Roper* opinion, the Court began their discussion by looking to societal views on the issue of life without parole for juvenile offenders.[66] A survey of the states revealed that life without parole was a permissible sentence for juvenile offenders in thirty-seven states; however, a study conducted by the Court divulged that only eleven states had juveniles serving life without parole sentences.[67] The disparity between the permissive use of the sentence in states and the actual use of the sentence led the Court to the conclusion that there was no national consensus.[68]

Because the examination of the evolving standards of decency was inconclusive, the Court turned to the second step in its analysis.[69] The Court examined the penological theory behind Graham's punishment, and whether sentencing Graham to the harshest punishment available to American courts, short of death, served one of the goals of punishment.[70] The Court identified retribution and deterrence as the principle rationales of punishment, in addition to the two goals, incapacitation and rehabilitation, that were established in the *Roper* opinion.[71] Reiterating its reasoning in *Roper*, the Court stated that juvenile offenders have lesser culpability than adult offenders and as such merit lesser punishment than adult offenders.[72] The Court emphasized the disproportionality of a sentence of life without parole for an adult offender versus a juvenile offender. The Court noted that in terms of general life expectancy, a juvenile offender, with lesser culpability, would serve more time in prison than an adult offender with greater culpability, because of the juvenile's age at the time of conviction.[73]

The Court determined that a sentence of life without parole for a non-homicide offense could not satisfy the goals of penological theory, and "a sentence lacking any legitimate penological justification is

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65 *Id.* at 48-49 (2010).
66 *Id.* at 62.
67 *Id.* at 62-64.
68 *See id.*
69 Graham v. Florida, 560 U.S. 48, 67 (2010).
70 *Id.* at 71.
71 *Id.* at 71-74.
72 *Id.* at 68.
73 *Id.* at 68, 70-71.

by its nature disproportionate to the offense, violating the Eighth Amendment."[74] Looking at retribution, the Court stated, "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[75] Because the Court previously held that juvenile offenders possess lesser culpability than adults, the Court reasoned that life imprisonment should not be imposed on juvenile offenders because, in the end, they will serve more time in prison than similarly situated adult offenders.[76]

The Court also determined that deterrence did not justify the imposition of life imprisonment on juvenile offenders.[77] In the *Roper* decision, the Court remarked that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."[78] Because juveniles lack the responsibility and maturity to understand their actions, the Court reasoned that juvenile offenders would also lack the capacity to understand the consequences of their actions.[79] The Court concluded that because juvenile offenders were less inclined to consider the possible punishment for their actions before acting, deterrence would have little, if any, effect on their judgment.[80]

The third rationale of punishment the Court considered was incapacitation.[81] There are some offenders who pose such a risk to society that, to preserve public safety, it is safer to keep them incarcerated.[82] Yet, as stated in *Thompson*, juveniles are different compared to adults, and therefore should be treated differently than adult offenders.[83] The Court argued, "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentence to make a judgment that the juvenile is incorrigible."[84] Still the Court noted that there must be some oppor-

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74 *Id.* at 71, 74.

75 Graham v. Florida, 560 U.S. 48, 71 (2010) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

76 *Id.* at 70-71.

77 *Id.* at 72.

78 *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).

79 *Id.* at 72; *see also* Thompson v. Oklahoma, 487 U.S. 815, 834 (1988).

80 *Id.*

81 Graham v. Florida, 560 U.S. 48, 72-73 (2010).

82 *Id.*

83 *See generally* Thompson v. Oklahoma, 487 U.S. 815 (1988).

84 *Graham,* 560 U.S. at 72.

tunity for parole after Graham is no longer a risk to society because "a life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[85] Rehabilitation, the fourth goal of punishment, leads to the assumption that the offender will someday be transformed to be able to re-enter society successfully without risk of recidivism.[86] A sentence of life without parole leaves the offender with no opportunity for release.[87] With no possibility for rehabilitation, a sentence of life without parole does not satisfy the fourth rationale for punishment.[88]

The 6-3 majority in *Graham* held that the Eighth Amendment's cruel and unusual punishment provision prohibited imposing a sentence of life without parole on a juvenile offender for a non-homicide crime.[89] Still, in one of the three dissents, Justice Alito perceived a gaping hole in this holding.[90] Justice Alito pointed out that although the majority held that the Eighth Amendment prohibited sentencing juvenile offenders to life without parole, the majority did not hold unconstitutional the sentencing of juvenile offenders to term-of-year sentences exceeding a juvenile's life expectancy, or de facto life sentences.[91]

D. *Legislation and History of Juvenile Life Without Parole Sentences*

As of 2004, there were at least 2,225 juveniles serving sentences of life without parole, 1,291 of which Amnesty International and Human Rights Watch surveyed.[92] Approximately 84 percent of those juveniles serving life without parole were age sixteen or seventeen at the time of their offense.[93] The other 16 percent of the juveniles serv-

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[85] *Id.* at 73.

[86] BLACK'S LAW DICTIONARY 1398-99 (9th ed. 2009).

[87] *Graham*, 560 U.S. at 74.

[88] *Id.*

[89] *Id.* at 81-82.

[90] *Id.* at 124 (Alito, J., dissenting).

[91] *Id.*

[92] *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, 25-26 (2005) *available at* http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

[93] *Id.* at 26.

ing life without parole were under the age of sixteen at the time of their offense.[94] Of these 1,291 juveniles, approximately 93 percent were convicted of homicide, and the other 7 percent were convicted of various other crimes, including kidnapping, property crimes, sex crimes or other violent crimes.[95] First time offenders made up approximately 59 percent of juveniles serving life without parole.[96] The remaining 39 percent either had prior juvenile adjudications or adult records.[97]

Historically, the number of juvenile offenders sentenced to life without parole was small.[98] From 1962 to 1980, there were only three years where more than two juveniles were sentenced to life without parole.[99] In 1981, this number began to rise until the number peaked in 1996 at 152.[100] After 1996, the number of juveniles serving life without parole decreased, but the numbers never decreased to the pre-1981 amount.[101] Although the actual number of juveniles who were sentenced to life without parole decreased, the overall percentage of juveniles sentenced to life without parole increased.[102] In 1980, 0.14 percent of juveniles were sentenced to life without parole, while in 1996, 7.52 percent of the juveniles sentenced received life without parole.[103]

II. DISPUTES AMONG THE COURTS: CIRCUITS SPLITS

In the three years after the decision in *Graham*, state and federal courts split in their interpretation on the constitutionality of de facto life sentences.[104] The Ninth Circuit followed an expansive reading of *Graham*, and held that juvenile de facto life sentences were unconsti-

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94 *Id.* at 26-27.

95 *Id.* at 27.

96 *Id.* at 28.

97 *Id. at* 28-29.

98 HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, *supra* note 92, at 31.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* at 31-32.

103 *Id.* at 32.

104 *See* Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013); Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012).

tutional.[105] Conversely, the Sixth Circuit held to a strict reading of the *Graham* holding, and allowed juvenile de facto life sentences.[106]

A. *The Sixth Circuit*[107]

The Sixth Circuit followed an expansive reading of the majority opinion in the *Graham* decision, holding that a juvenile de facto life sentence did not violate the Eighth Amendment.[108] In *Bunch v. Smith*, M.K. was robbed at gunpoint outside her work, and then forced into her car while the robber drove.[109] When the car stopped, M.K. was raped repeatedly, while an accomplice robbed her car.[110] Sixteen-year-old Chaz Bunch was arrested, charged and convicted on several charges relating to the offense.[111] Bunch was sentenced to consecutive sentences totaling eighty-nine years imprisonment, which exceeded Bunch's life expectancy.[112]

On appeal, Bunch argued that his eighty-nine year sentence was the "functional equivalent" of life without parole, and therefore unconstitutional as a result of the decision in *Graham v. Florida*.[113] The court, nonetheless, determined that *Graham* did not apply to this case.[114] The court reasoned that there was a distinction between the issuance of a life without parole sentence in *Graham*, and the de facto life sentence in *Bunch*.[115]

Bunch appealed that determination to the Sixth Circuit.[116] The Sixth Circuit affirmed the lower court's decision, holding that *Graham* did not apply to Bunch because the *Graham* Court did not explicitly hold that term-of-year sentences, which exceed an offender's life expectancy, were unconstitutional.[117] The Sixth Circuit established

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105 *See Moore*, 725 F.3d at 1191.

106 *See Bunch*, 685 F.3d at 550.

107 The petition for writ of certiorari for this case was denied on April 22, 2013. Bunch v. Bobby, 133 S. Ct. 1996 (2013).

108 *See Bunch*, 685 F.3d at 552.

109 *Id.* at 548.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 549.

114 Bunch v. Smith, 685 F.3d 546, 549 (6th Cir. 2012).

115 *Id.*

116 *Id.*

117 *Id.* at 550.

that *Graham* determined several facts.[118] First, *Graham* recognized there was a societal view that juvenile offenders should not be sentenced to life without parole for non-homicide offenses.[119] *Graham* also noted that life without parole sentences were disproportionate to the offense, because the juvenile offenders end up serving more time in prison than their adult counterparts.[120] *Graham* acknowledged that penological theory is not satisfied when a juvenile offender is sentenced to life without parole; therefore, it is unnecessary to implement that sentence.[121]

The Sixth Circuit reasoned that the *Graham* case and *Bunch* case were distinguishable.[122] Specifically, the *Graham* Court determined the constitutionality of a sentence of life without parole for a juvenile offender.[123] On the other hand, the Sixth Circuit in *Bunch* determined the constitutionality of a term-of-year sentence.[124] Additionally, the *Graham* court established a lack of opportunity for parole for a juvenile offender sentenced to life without parole was unconstitutional.[125] But the Sixth Circuit established that *Bunch* was distinguishable from *Graham*, and that Bunch's sentence was constitutional because Bunch was sentenced to a de facto life sentence, not life without parole, as was the case in *Graham*.[126] The Sixth Circuit reasoned that "since no federal court has ever extended *Graham's* holding beyond its plain language to a juvenile offender who received consecutive, fixed term sentences, we cannot say that Bunch's sentence was contrary to clearly established federal law."[127]

B. *The Ninth Circuit*

Conversely, the Ninth Circuit interpreted the *Graham* decision to prohibit sentencing juvenile offenders to de facto life sentences.[128] In 2013, the Ninth Circuit addressed this issue in *Moore v. Biter*.[129]

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118 *Id*.
119 *Id.*
120 Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012).
121 *Id.*
122 *Id.* at 550-51.
123 Graham v. Florida, 560 U.S. 48, 72 (2010).
124 *Bunch*, 685 F.3d at 551.
125 *Id.* (citing Graham v. Florida, 560 U.S. 48, 74 (2010)).
126 *Id.* at 551-52.
127 *Id.* at 551.
128 Moore v. Biter, 725 F.3d 1184, 1193-94 (9th Cir. 2013).
129 *Id.* at 1186.

Between February and March, 1991, sixteen-year-old Roosevelt Moore sexually assaulted several females.[130] Moore was arrested, tried, and convicted of multiple offenses resulting from these assaults, including rape and robbery, and was sentenced to 254 years and four months in prison.[131]

On appeal, Moore argued that his sentence was in violation of the Eighth Amendment's cruel and unusual punishment provision, and the *Graham* decision required that his sentence be amended.[132] The Ninth Circuit reiterated the points the *Bunch* case acknowledged were specific to the *Graham* case, but recognized that the *Moore* case and the *Graham* case were indistinguishable.[133] In *Graham*, the juvenile offender was sentenced to life without parole, and in *Moore*, the juvenile offender was sentenced to the functional equivalent of life without parole, because Moore was only eligible for parole after serving 127 years.[134] Both the *Graham* sentence and the *Moore* sentence guaranteed that both offenders would die in prison.[135] The Ninth Circuit, akin to the *Graham* Court, emphasized a lack of penological theory justification for the juvenile offender's sentence, because Moore had no incentive to rehabilitate, as he would not be eligible for parole during his lifetime.[136] The Ninth Circuit held that Moore's sentence was unconstitutional on the basis of the Eighth Amendment's cruel and unusual punishment provision, and the Supreme Court's analysis in *Graham v. Florida*.[137]

III. ANALYSIS

The discussion of the Sixth and Ninth Circuit cases show the need for a Supreme Court ruling on the constitutionality of de facto life sentences. The *Graham* decision led to uncertainty and conflict in the lower courts over whether the holding extended to de facto life

130 *Id.*

131 *Id.* at 1186-87.

132 *Id.* at 1187.

133 *Id.* at 1189-92.

134 Graham v. Florida, 560 U.S. 48, 57 (2010); Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013).

135 *Moore*, 725 F.3d at 1191-92.

136 *Graham*, 560 U.S. at 71; *Moore*, 725 F.3d at 1191.

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

sentences for non-violent offenders.[138] The most logical and reasonable reading of the Graham decision means that the punishment given by the Sixth Circuit was unconstitutional. The Supreme Court should adopt the Ninth Circuit's reading that de facto life sentences are unconstitutional because it is consistent with the Court's two-step analysis in *Graham*.[139] In *Graham*, the Court first looked to societal standards, expressed in a survey of legislation of the fifty states.[140] Second, the Court looked to their past interpretation of Eighth Amendment issues, and evaluated the facts of the case in light of penological theory.[141] Since a determination on the constitutionality of life without parole for juvenile offenders led to a categorical rule applying to all non-violent juvenile offenders, the same analysis performed in *Graham* should be applied to juvenile de facto life sentences.[142]

Section A of this Part analyzes the first step of the *Graham* test, arguing that current state legislation on juvenile life without parole, although not determinative, supports the conclusion that de facto life sentences are unconstitutional. Section B of this Part analyzes the second part of the *Graham* test: whether de facto life sentences are not justified by the rationales of penological theory, and therefore violate the Eighth Amendment's prohibition of excessive or extreme punishment.

A. *Societal Views, As Expressed in States' Legislation, Support the Unconstitutionality of De Facto Life Sentences in Light of the Eighth Amendment*[143]

The first step of the *Graham* analysis involves determining the current standard of decency for juvenile offenders by ascertaining whether there is a majority view on the length of juvenile sentencing practices.[144] In past decisions, the Supreme Court examined states'

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138 *See generally Moore*, 725 F.3d 1184; Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012). This Comment deals solely with de facto sentences for non-homicide offenses.

139 *Graham*, 560 U.S. at 61-62.

140 *Id.*

141 *Id.*

142 *See id.* at 61-62.

143 Since this article was written, several other states have enacted legislation on juvenile de facto life sentences. *See* H.B. 2116, 2014 Leg., Reg. Sess. (Haw. 2014) (enacted); S.B. 319, 2014 Leg., Reg. Sess. (Mich. 2014) (enacted); H.B. 4210, 2014 Leg., Reg. Sess. (W.Va. 2014) (enacted).

144 Graham v. Florida, 560 U.S. 48, 67 (2010).

legislation to establish the current societal standards.[145] As such, keeping in line with the analysis of cases such as *Thompson*, *Stanford*, and *Graham*, the current standards of decency for juvenile sentences should come from an examination of the legislation on sentencing and societal views on juvenile culpability.[146] Current standards of decency dictate that juvenile offenders be provided with an opportunity for parole.[147]

A survey of current state level legislation supports the unconstitutionality of juvenile offender de facto life sentences.[148] Although these statistics represent data on life without parole sentences, they are applicable to de facto life sentences, because de facto life sentences are "materially indistinguishable from a life sentence without parole."[149] As of 2008, thirty-one states allowed juveniles to be sentenced to life without parole for certain crimes, including homicide.[150] Breaking this number down, seven of these states will only allow life without parole if the juvenile offender was convicted of homicide.[151] The *Graham* Court, in their survey, found only 123 juveniles serving life without parole for non-homicide offenses.[152] Florida had the highest number of juveniles serving life without parole sentences in their state, with the remaining seventy-seven juvenile offenders serving life without parole in only ten other states.[153] With the hundreds of thousands of juvenile offenders put on trial each year, the fact that there were only 123 juveniles serving life imprisonment without parole for non-homicide offenses in 2010 demonstrates that the practice is dying out.[154] The decreasing number of juveniles serving life without parole sentences indicates a national consensus against such a harsh punishment for juvenile offenders.[155] Because de facto

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145 *Id.* at 62.

146 Stanford v. Kentucky, 492 U.S. 361, 369 (1989); Thompson v. Oklahoma, 487 U.S. 815, 821-22 (1988).

147 *Graham*, 560 U.S. at 74-75.

148 *See id.* at 62-64.

149 Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013).

150 *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL (2008) *available at* http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf. This publication updates the executive summary published in 2005, referenced at *supra* note 92.

151 *Graham*, 560 U.S. at 62 (2010).

152 *Id.* at 64.

153 *Id.*

154 *See id.* at 62.

155 *Id.*

life and life without parole sentences are "materially indistinguishable," it is reasonable to conclude that the national consensus extends to de facto life sentences.[156]

Further, in recent years, legislation, or lack thereof, has indicated the movement toward the idea that de facto life sentences should not be implemented.[157] On September 16, 2013, California Governor Jerry Brown signed Senate Bill No. 260, Youth Offender Parole Hearings, into law.[158] This bill provided juvenile offenders with the opportunity to request a resentencing hearing after serving at least fifteen years in prison.[159] The amount of years in prison before the opportunity for a resentencing hearing is based on the original sentence.[160] A juvenile offender who was sentenced between twenty-five years and life imprisonment would be required to serve twenty-five years before requesting a resentencing hearing.[161] The California law allows most juvenile offenders serving life without parole to request a resentencing hearing.[162] This law indicates that California, although not outright prohibiting de facto life sentences, acknowledges the constitutional issue surrounding those sentences.[163] California also provides opportunities for release to juvenile offenders serving de facto sentences, in turn removing the de facto part of the sentence.[164] Although the legislature did not outright ban the sentences, the fact that they were able to generate the political will to give juveniles a way out of their sentences shows a discomfort with the imposition of those punishments.

The California law also required the resentencing committee to take into account certain factors.[165] These factors were the same factors the Court examined in *Graham* and *Roper*, when those Courts determined that there were specific important differences between adults and juveniles, and these differences should lead to different

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156 Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013).

157 *See* S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted); S.B. 1350, 2013 Leg., Reg. Sess. (Fla. 2013) (died on calendar).

158 S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted).

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *See id.*

164 *See* S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted).

165 *Id.*

sentencing standards.[166] In the California law, the resentencing committee must take into account, among other things, diminished capability and the growth of maturity of the juvenile offender since the commission of the crime.[167] Similarly, *Graham* and *Roper* both acknowledged the diminished capacity of juvenile offenders compared to adult offenders, and the immaturity of juvenile offenders.[168]

Florida also drafted a bill, which required sentencing hearing committees to consider a juvenile offender's age, maturity, background, peer pressure, criminal history, and intellectual capacity, among other factors.[169] These factors were akin to the factors considered under *Graham*, *Roper*, and the California law.[170] The proposed bill provided the opportunity for juvenile sentencing committees to sentence a juvenile to life without parole for a murder conviction, so long as the committee considered the prior mentioned factors.[171] Yet the committee also proposed that juvenile offenders who committed non-homicide felonies should serve no more than fifty years in prison.[172] Although this bill died in the Florida senate, the creation of a bill, which would effectively abolish de facto life sentences, indicates a growing movement toward permanently ending de facto life sentences.[173]

Although not conclusive, state legislation indicates a growing consensus against issuing de facto life sentences to juvenile offenders.[174] This attitude suggests that although states have not expressly declared de facto life sentences unconstitutional, the current standards of decency do not implicitly consent to sentencing juvenile offenders to de facto life sentences.

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166 Graham v. Florida, 560 U.S. 48, 68-69 (2010); Roper v. Simmons, 543 U.S. 551, 569-71 (2005).

167 S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted).

168 *Graham,* 560 U.S. at 68, 89; *Roper*, 543 U.S. at 553, 569.

169 S.B. 1350, 2013 Leg., Reg. Sess. (Fla. 2013) (died on calendar).

170 *Graham,* 560 U.S. at 68, 89; *Roper*, 543 U.S. at 553, 569; S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted).

171 S.B. 1350, 2013 Leg., Reg. Sess. (Fla. 2013) (died on calendar).

172 *Id.*

173 *Id.*

174 *See* S.B. 260, 2013 Leg., Reg. Sess. (Ca. 2013) (enacted); S.B. 1350, 2013 Leg., Reg. Sess. (Fla. 2013) (died on calendar).

B. *Punishment Disproportional to Penological Goals is Excessive and Extreme, and Therefore Unconstitutional Under the Eighth Amendment*

The second step of the *Graham* analysis involves determining whether the punishment satisfied one of the rationales of penological theory.[175] A criminal sentence should be based on one of the four penological theory rationales: retribution, deterrence, incapacitation, and rehabilitation.[176] A punishment that does not satisfy a penological rationale would likely be disproportionate to the crime committed, lack the justification for its implementation, and violate the Eighth Amendment's prohibition against cruel and unusual punishment.[177] De facto life sentences violate the Eighth Amendment because none of the rationales behind penological theory are served when a juvenile offender is sentenced to de facto life imprisonment for a non-homicide offense, and is guaranteed to die in prison.[178]

1. Retribution Does Not Justify A Juvenile De Facto Life Sentence

A retribution penological theory does not justify a de facto life sentence for a juvenile offender, and is therefore disproportionate and unconstitutional. When determining a criminal sentence, retribution often is taken into account because "society is entitled to impose severe sanctions on a juvenile non-homicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense."[179] However, retribution can only serve as a penological goal when the punishment corresponds to the culpability of the offender.[180] As the Court in *Graham* noted, "retribution does not justify imposing [life without parole] on the less culpable juvenile non-homicide offender" because the "case for retribution is not as strong with a minor as with an adult."[181]

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175 Graham v. Florida, 560 U.S. 48, 67 (2010).

176 *See id.* at 71 (stating that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

177 *See id.*

178 *See id.* at 74.

179 *Id.* at 71.

180 *See id*. at 71-72.

181 Graham v. Florida, 560 U.S. 48, 71-72 (2010).

Retribution is disproportionate for a juvenile offender serving a de facto life sentence because the imposition of life imprisonment is diminished by the juvenile status of the offender.[182] Medical advances now show that the frontal lobe, which controls the decision-making process, is not fully formed until late adolescence.[183] The frontal lobe regulates the amygdala, which controls impulse and aggression. In juveniles where the frontal lobe is not fully formed, the amygdala is not regulated.[184] Relying on the amygdala "makes adolescents 'more prone to react with gut instincts.'"[185] The result is that juveniles lack the ability to make sound, rational, and mature choices, resulting in diminished culpability.[186]

The *Graham* Court stated that a punishment based on the theory of retribution is only justified if the punishment is proportional to the offender's culpability.[187] Unlike the decisions in *Graham* and *Moore*, the Sixth Circuit in *Bunch* does not even consider whether the eighty-nine year punishment is proportional to the crimes committed by Bunch.[188] Unlike the *Graham* Court, the Sixth Circuit does not consider whether the sentence is proportional to society's moral outrage regarding Bunch's conduct.[189] At the very least, if the Sixth Circuit were to base their opinion on this rational for penological theory, they should have considered whether there was an imbalance between the crimes committed by Bunch, and the sentence he received.[190]

Retribution could not be a constitutional justification for a de facto life sentence for a juvenile offender, because the de facto sentence would be deemed excessive under the Eighth Amendment.[191] In both the Ninth and Sixth Circuit cases, the offenders were juveniles.[192] But the Ninth Circuit's ruling is constitutional where the Sixth Circuit's is not because the Ninth Circuit determined, in light of the

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182 Roper v. Simmons, 543 U.S. 551, 571 (2005).

183 *Graham*, 560 U.S. at 68.

184 HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, *supra* note 92, at 49.

185 *Id*. (quoting National Juvenile Defender Center, *Adolescent Brain Development and Legal Culpability*, April 2003 (quoting Dr. Deborah Yurgelun-Todd of Harvard Medical School)).

186 *Id.*

187 *See* Graham v. Florida, 560 U.S. 48, 71 (2010).

188 Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012).

189 *See Graham*, 560 U.S. at 71.

190 *See id.* at 71-72.

191 Roper v. Simmons, 543 U.S. 551, 571 (2005).

192 *See* Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013); *Bunch*, 685 F.3d at 547.

Eighth Amendment, that retribution does not justify de facto sentences because juvenile offenders lack the full mental capabilities to control their actions.[193] In compliance with the Eighth Amendment, the Ninth Circuit deemed the de facto life sentence unconstitutional in light of the juvenile's diminished capacity because the lack of capacity in the juvenile offender made the sentence disproportionate to the offender's actions.[194]

2. Deterrence Rationale Behind Penological Theory is Not Satisfied in a De Facto Life Sentence

The penological goal of deterrence also does not justify a de facto life sentence for a juvenile offender, which results in deeming de facto life sentences based on this goal extreme and therefore unconstitutional. Deterrence works to prevent offenders from committing a crime from fear of the punishment, which would be inflicted as a result of conviction.[195] Yet for deterrence to work, the offender must be aware and conscious of the consequences before the commission of the crime.[196] The Court acknowledged in *Roper* that juveniles lack maturity and responsibility, which "often result in impetuous and ill-considered actions and decisions."[197] The juvenile cognitive process is different from adults, because juveniles rarely reflect on the consequences or long-term outlook of their actions.[198] Any consequences that are considered by the juvenile usually center on short-term consequences.[199]

The Sixth Circuit acknowledged that the *Graham* Court noted that juvenile offenders often did not consider the consequence of their actions because they "exhibit a lack of maturity and an underdeveloped sense of responsibility."[200] Yet the Sixth Circuit refused to consider these characteristics when sentencing Bunch.[201] In both the

193 *See* Graham v. Florida, 560 U.S. 48, 71 (2010); *Moore*, 725 F.3d at 1190.

194 *See Graham*, 560 U.S. at 71-72.

195 *See id.* at 72.

196 *See id.*

197 Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

198 *Graham*, 560 U.S. at 72; *see also* HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, *supra* note 92, at 46.

199 HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, *supra* note 92, at 46.

200 Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012) (internal citations omitted).

201 *Id*. at 551.

Graham and the *Bunch* case, the juvenile offenders were sixteen at the time of the crimes.[202] However, because the *Graham* Court considered the deterrence effect, or lack thereof, the *Graham* Court determined that deterrence did not justify sentencing Graham to die in prison.[203] Instead, the *Bunch* court ignored the implications the lack of deterrence had on the juvenile offender and sentenced him to a term of years likely exceeding his life expectancy.[204]

Both of the juvenile offenders in the cases discussed in Part II were under the age of eighteen, and because of their age, presumably lacked a fully formed frontal lobe, which regulates the decision-making process.[205] Still, the Sixth and Ninth Circuits differed in their treatment of the defendants.[206] The Ninth Circuit correctly determined that deterrence could not justify a de facto life sentence because the Eighth Amendment required the punishment be proportional to the crime, and punishment based on deterrence would not be proportional for a juvenile offender who does not have the full mental ability to appreciate the long-term consequences of his actions.[207]

Although there is an argument to be made that a sixteen-year-old juvenile offender, such as the defendant in the Sixth Circuit case, has some cognitive ability to understand the deterrence affect, this reasoning does not provide sufficient justification for an offender to be constitutionally sentence to de facto life imprisonment.[208] The sentence remains unconstitutional because the punishment remains largely disproportionate to the crime attributable to the generally diminished capacity of juvenile offenders compared to adult offenders.[209]

3. Incapacitation Does Not Provide Justification for a Juvenile De Facto Life Sentence

Penological theory based on incapacitation does not justify a de facto life sentence for a juvenile offender, and is therefore disproportionate and unconstitutional. This theory bases the length of punishment on the amount of danger the offender represents to society at

202 Graham v. Florida, 560 U.S. 48, 53 (2010); *Bunch*, 685 F.3d at 547.
203 *Graham*, 560 U.S. at 72.
204 *Bunch*, 685 F.3d at 550.
205 *See* Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013); *id.*
206 *See Moore*, 725 F.3d 1184, 1191; Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012).
207 *See Graham*, 560 U.S. at 72; *Moore*, 725 F.3d at 1190.
208 *See Graham*, 560 U.S. at 72.
209 *See id.*

the time of the crime, and the risk of the offender recidivating.[210] The *Graham* Court acknowledged that approximately two-thirds of released prisoners commit a crime within three years of their release.[211]

Still, the *Graham* Court stated that incapacitation was not a sufficient justification to sentence a juvenile offender to life without parole.[212] The Court based their determination in light of that juveniles' psyches are not fully formed until adulthood, meaning the character and personality of a juvenile offender likely change as they age.[213] For example, a juvenile sentenced at fifteen will likely not suffer from the same immaturity or irresponsibleness ten years later, at the age of twenty-five.[214] By the age of twenty five, the offender will likely have a fully formed frontal lobe controlling their behavior, and time will have provided the juvenile with the opportunity to mature and reform their behavior.[215] This is not to say that juvenile offenders should not be incapacitated at all: it simply means that making a determination during an offender's youth about the future risk he poses could lead to a disproportionate and unconstitutional punishment, because the juvenile offender's psyche will likely change significantly as he ages into adulthood, unlike adult offenders.[216]

In the *Bunch* case, the trial court did just that: the judge made a determination on the risk Bunch posed to society in the future.[217] Specifically, the trial court stated, "I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there, because it would be a mistake to have you back in society."[218] This statement directly conflicts with the *Graham* analysis on juvenile offenders. The *Graham* Court stated that "it does not follow that [Graham] would be a risk to society for the rest of his life. Even if the state's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because the judgment was made at the out-

210 *See id.*
211 *Id.*
212 *Id.*
213 Roper v. Simmons, 543 U.S. 551, 569 (2005).
214 *Graham*, 560 U.S. at 72-73.
215 *Id.* at 68; *Roper*, 543 U.S. at 570.
216 *See* Graham v. Florida, 560 U.S. 48, 73 (2010).
217 Bunch v. Smith, 685 F.3d 546, 548 (6th Cir. 2012).
218 *Id.*

set."[219] The *Bunch* court was wrong to follow the trial judge's determination, because *Graham* required the Sixth Circuit to allow the Bunch the opportunity in the future to prove that he no longer poses a risk to society.[220]

The offenders in *Bunch* and *Moore* were sixteen-years-old at the time of the commission of their crimes.[221] After serving ten years of their sentence, the offenders would have grown into adulthood and had the opportunity to grow out of the mental and psychological characteristics that make juvenile offenders different from adult offenders.[222] The Ninth Circuit's decision allowed for the juvenile offender to demonstrate that he had matured, and no longer needed a de facto life sentence because of this growth.[223] Conversely, by not allowing a lower court to reconsider whether the de facto life sentence was still needed in light of the mental growth of the offender once an adult, the Sixth Circuit created a disproportionate and unconstitutional sentence.[224]

4. Rehabilitation is Not Satisfied by Sentencing a Juvenile to a De Facto Life Sentence

Lastly, the penological theory of rehabilitation does not justify sentencing a juvenile offender to a de facto life sentence, and therefore is excessive and unconstitutional. Rehabilitation requires the opportunity for an offender to reform so the offender can be trusted to return to society without the risk of recidivism.[225] Yet an offender, who remains in prison for the rest of his life, with no opportunity for parole, has little incentive to act in a manner indicative of reform, whether the offender was sentenced to life without parole or a de facto life sentence.[226]

The *Graham* Court demanded that states provide juvenile offenders "like Graham some meaningful opportunity to obtain release."[227] The *Bunch* court concentrated on one specific part of that

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219 *Graham*, 560 U.S. at 73.
220 *See id.* at 72-73.
221 *See* Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013); *Bunch*, 685 F.3d at 547.
222 *See* Roper v. Simmons, 543 U.S. 551, 569 (2005).
223 *See* Graham v. Florida, 560 U.S. 48, 73 (2010); *Moore*, 725 F.3d at 1190.
224 *See Graham*, 560 U.S. at 73; Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012).
225 BLACK'S LAW DICTIONARY, *supra* note 86, at 1398-99.
226 *See Graham*, 560 U.S. at 74.
227 *Id.* at 75.

requirement, and concluded that only juvenile offenders who were sentenced to life without parole had to be afforded some opportunity for release.[228] But the Bunch court failed to take into account the rationale behind the *Graham* Court's decision. The *Graham* Court explained that rehabilitation does not justify life without parole "in light of a juvenile non-homicide offender's capacity for change and limited moral culpability."[229] Because a juvenile who was sentenced to life without parole likely has the same capacity for change and limited moral culpability as a juvenile who was sentenced to a de facto life sentence, rehabilitation should also not be used as a justification for de facto life sentences.[230] A juvenile offender sentenced to life without parole is essentially the same thing as a juvenile offender sentenced to a de facto life sentence, and therefore the rationale used by the *Graham* Court should apply to the Sixth Circuit's case.[231]

The Ninth Circuit's holding offered the juvenile offender the possibility of reentering society after serving part of his sentence, which conformed to the Eighth Amendment's requirement that a juvenile offender be allowed the chance to obtain parole.[232] In contrast, the Sixth Circuit's decision reasoned that the juvenile's de facto life sentence was justified by rehabilitation because Bunch might be eligible for parole after his ninety-fifth birthday.[233] The Eighth Amendment does not support the Sixth Circuit's reasoning, because the Eighth Amendment requires that Bunch have a "meaningful opportunity to obtain release."[234]

No goal of the penological theory provides sufficient justification for a juvenile offender to be sentenced to a de facto life sentence because the Eighth Amendment "forbid[s] States from making the judgment at the outset that [the] offenders never will be fit to reenter society."[235] Like the Court's conclusion in *Graham*, de facto sentences for juvenile offenders violate the Eighth Amendment

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228 *Bunch*, 685 F.3d at 551.

229 Graham v. Florida, 560 U.S. 48, 74 (2010).

230 *Id.* at 73-74.

231 *See id.*

232 *Id.* at 75; Moore v. Biter, 725 F.3d 1184, 1190 (9th Cir. 2013).

233 Bunch v. Smith, 685 F.3d 546, 551 (6th Cir. 2012).

234 *Graham*, 560 U.S. at 75.

235 *Moore*, 725 F.3d at 1190.

because the juvenile's diminished culpability makes the punishment disproportionate.[236]

CONCLUSION

The Eighth Amendment requires that punishments be "graduated and proportioned to [the] offense."[237] In *Graham v. Florida*, the Supreme Court established a two-step test for determining whether a punishment was constitutional under the Eighth Amendment.[238] The first step, although not wholly determinative of a punishment's constitutionality, examined the current standards of decency based on a survey of legislation in the fifty states.[239] The second step evaluated the rationales behind penological theory (retribution, deterrence, incapacitation, and rehabilitation), and in conjunction with the determination of the first step, guides courts to whether a punishment is constitutional.[240]

Moore and *Bunch* are just two of the recent cases, which raise the issue of the constitutionality de facto life sentences.[241] Although the *Graham* decision did not strictly state that all life without parole sentences are unconstitutional, including de facto life sentences, analysis of the rationales behind penological theory lends to the conclusion that de facto life sentences are cruel and unusual.[242] Furthermore, the established precedent demonstrates that the proposed bright line rule is the natural progression of juvenile law, because precedent has established that sentencing standards should conform to the "evolving standards of decency" recognized by soci-

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236 Graham v. Florida, 560 U.S. 48, 74-75 (2010). This rule does not mean that no juvenile may serve a de facto life sentence. It merely means that juvenile offenders who commit non-homicide crimes must be given the opportunity to be release during their lifetime.

237 *Id.* at 48 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

238 *Id*. at 48.

239 *Id.* at 48-49.

240 *Id.* at 49.

241 *See generally* Goins v. Smith, 556 Fed. App'x. 434 (6th Cir. 2014); Martinez v. Duffy, 2014 WL 547594 (N.D. Cal. Feb. 7, 2014); Voight v. Gipson, 2014 WL 1779816 (C.D. Cal. Apr. 30, 2014); Bryant v. Foulk, 2014 WL 5454224 (E.D. Cal. Oct. 28, 2014); Louisiana v. Brown, 118 So. 3d. 332 (La. 2013); Colorado v. Rainer, 2013 WL 1490107 (Colo. App. Apr. 11, 2013).

242 *See generally* Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013); Bunch v. Smith, 685 F.3d 546, 547 (6th Cir. 2012).

ety.[243] Current "evolving standards of decency" dictate that it is cruel and unusual punishment under the Eighth Amendment to sentence a juvenile to imprisonment with no opportunity for release in their lifetime, and to guarantee a juvenile offender to die in prison.[244]

Adopting the Ninth Circuit's holding as a bright line rule conforms to a strict interpretation of the majority's argument in *Graham v. Florida*. Not only is this rule superior to the Sixth Circuit rule in light of past Eighth Amendment juvenile decisions, but it will also provide clarity in the future, as the field of juvenile law expands.

243 *See* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); Thompson v. Oklahoma 487 U.S. 815,821 (1988) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

244 Graham v. Florida, 560 U.S. 48, 71 (2010).