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AN EIGHTH AMENDMENT ANALYSIS OF JUVENILE LIFE WITHOUT PAROLE: EXTENDING *GRAHAM* TO ALL JUVENILE OFFENDERS

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In 2005, the Supreme Court in *Roper v. Simmons*¹ held that the death penalty is a cruel and unusual punishment when applied to juveniles.² *Graham v. Florida*³ followed, proscribing sentences of life without parole for juveniles convicted of non-homicide crimes.⁴ Analyzing Supreme Court precedent in light of evidence on the deleterious effects of prison life, both psychologically and in terms of assaults on human dignity, we argue that the abolition of juvenile life without parole sentences in all cases, not simply non-homicide cases, is a logical extension of the analytical framework articulated in *Roper* and *Graham*.

In Part I of this article, we review the Supreme Court's jurisprudence on juvenile culpability in relation to the death penalty and life imprisonment without the possibility of parole.⁵ We argue that the reasons on which the Supreme Court relied when invalidating the death penalty for juveniles in *Roper* are equally applicable to life without parole. In both the death penalty and life without parole, in which prisoners are sentenced to die in prison,⁶ death is the end result. That death, moreover, is in both instances hastened by the actions of the state.

In Part II we argue that, since there is no meaningful distinction between the death penalty and life without parole, the oft-cited notion

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

2. *Id.* at 578–79.

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

4. *Id.* at 2034.

5. We recognize that very long sentences—some sentences are effectively beyond the human lifespan—are the functional equivalent of life without parole sentences. The term “life imprisonment without parole” is meant to capture all sentences that effectively preclude release from prison, including lengthy sentences that exceed the human lifespan.

6. Robert Johnson & Sonia Tabriz, *Death by Incarceration as a Cruel and Unusual Punishment When Applied To Juveniles: Extending Roper to Life Without Parole, Our Other Death Penalty*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 241–42 (2009).

that “death is different” from all other punishments, articulated in Supreme Court jurisprudence,⁷ is an untenable justification for the disparate treatment of juveniles sentenced to life without parole.

In Part III we examine juvenile life without parole in an Eighth Amendment context by reviewing the Supreme Court’s criteria for determining the constitutionality of a given punishment and applying these criteria to life without parole. We present a definition of what it means to be a human being, and use that definition to examine the Court’s pronouncements about punishment and human dignity.

In Part IV we examine life without parole in light of the four legally recognized justifications for punishment: deterrence, retribution, incapacitation, and rehabilitation.⁸ Subjecting juveniles to life imprisonment without the possibility of parole clearly and unambiguously fails to serve any penological justification other than retribution, and ultimately serves the ends of retribution in ways that are not suitable in the case of juveniles. The limited retributive benefits of juvenile life without parole sentences must be weighed against the loss of potential rehabilitative benefits when juveniles are exposed to a life-long punishment in a setting that violates notions of decency and human dignity in ways that are particularly pernicious for them. We conclude in Part V that life without parole is an unduly harsh and hence cruel and unusual sanction when applied to juveniles.

I. JURISPRUDENTIAL OVERVIEW OF JUVENILE LIFE WITHOUT PAROLE

A. Past Jurisprudence Regarding Juvenile Culpability

In the 1982 case *Eddings v. Oklahoma*,⁹ the Court observed that “[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹⁰ The Court expanded on this theme in *Roper v. Simmons*,¹¹ declaring that juveniles manifest “a lack of maturity and an underdeveloped sense of responsibility.”¹² The Court

7. As Chief Justice Roberts notes in *Graham*, there is a “longstanding view” in Supreme Court jurisprudence “that ‘the death penalty is different from other punishments in kind rather than degree.’” *Graham*, 130 S. Ct. at 2038–39 (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)). See also *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

8. See *Graham*, 130 S. Ct. at 2028.

9. 455 U.S. 104 (1982).

10. *Id.* at 115.

11. 543 U.S. 551 (2005).

12. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

acknowledged that juveniles are more vulnerable, and hence susceptible to negative outside influences.¹³ Most importantly, the Court found that the actions of juveniles are not the result of depravity.¹⁴ Writing for the majority in *Roper*, Justice Kennedy stated that

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.¹⁵

This body of jurisprudence supports the conclusion that juveniles “cannot with reliability be classified among the worst offenders,”¹⁶ and formed the basis for a decision exempting juveniles from the death penalty in *Roper*.¹⁷ Such arguments apply with equal force to the sentence of life imprisonment without the possibility of parole. This is particularly true since the Court has made findings in *Roper* and *Graham* about life without parole as applied to juveniles that indicate the comparability of these sanctions.¹⁸

B. Graham v. Florida

In *Graham v. Florida*, the controlling Supreme Court case on juvenile life without parole, the Court held that a juvenile cannot be sentenced to life imprisonment for a non-homicide crime.¹⁹ The case involved a juvenile who was sentenced to life imprisonment without the possibility of parole after being convicted for armed robbery.²⁰ The Court found that juveniles were inherently immature and therefore less

13. *Id.* at 569.

14. *See, e.g., id.* at 570, 573.

15. *Id.* at 570.

16. *Id.* at 569.

17. *See id.* at 572 (“To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person”). *See also* *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

18. *See supra* note 17 and accompanying text.

19. *Graham*, 130 S. Ct. at 2034 (“The constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

20. *Id.* at 2017–18.

culpable for their criminal behavior. Furthermore, the Court, drawing on *Roper*, recognized that juveniles are malleable beings, whose characters have not been fully formed.²¹ The Court, again drawing on *Roper*, explicitly stated that as compared to adult offenders, a “greater possibility exists that a minor’s character deficiencies will be reformed.”²² As a result of these findings, the Court held that a juvenile cannot be sentenced to life without parole for a non–homicide crime.²³

This holding, however, does not ban life imprisonment without the possibility of parole for juveniles who commit homicide crimes. Yet, the severity of the crime committed does not change the nature of the finding: juveniles who commit homicides are still juveniles. Since, as *Graham* held, juveniles are immature, less culpable, malleable, and more likely to be reformed, the Court should expand its holding to ban life without parole for juveniles committing homicide crimes. A court cannot reasonably conclude that a given population, in this case juveniles, is capable of reform and then allow some of them to receive a punishment—life without parole—that destroys hope and, as a consequence, virtually precludes any possibility of reform.²⁴ This is especially true because, as *Graham* noted, prisons often deny offenders sentenced to life without parole the opportunity to participate in any sort of rehabilitation programs.²⁵ By allowing a juvenile to be sentenced to life imprisonment without the possibility of parole, even for a narrow variety of crimes, we are essentially saying that society’s interest in punishing a certain group of immature and marginally culpable people outweighs any efforts at rehabilitation, even when the possibility of rehabilitation, or at least abstention from crime, is quite real.²⁶

21. *Id.* at 2026–27.

22. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

23. *Id.* at 2034.

24. *See, e.g.*, Johnson, *supra* note 6, at 251, 254 (“A sentence of death by incarceration extinguishes the juvenile’s life in a free society, condemning him to a mere existence in the often brutal netherworld of prison . . . Meaningful, positive change is only possible if juvenile offenders have some hope that they may one day return to society”).

25. *See, e.g.*, *Graham*, 130 S. Ct. at 2029–30.

26. *See generally* EDWARD P. MULVEY, HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS, OFF. JUV. JUST. & DELINQUENCY PREVENTION (MAR. 2011), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf>. Research has established firmly that “most youth who commit felonies greatly reduce their offending over time,” and that the most effective interventions that reduce juvenile offending occur in community–based programs, often featuring substance abuse treatment. *Id.* at 1.

C. Similarities Between Death and Life Imprisonment

In *Graham*, the Court observed that “the sentence [of life without parole] alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration.”²⁷ Among those basic liberties is the hope of release to the free society while the offender is alive. The reality is that the offender will, in the words of one judge, “get to come out of prison in a pine box.”²⁸ An irrevocable life sentence is aptly described as “death by incarceration.”²⁹ In both death by incarceration and death by execution,

[d]eath is the intended and expected outcome of the sentence. With both sanctions, death is untimely because it is hastened by the actions of the state. These deaths are also undignified, occurring with the stigma of dying in the intrinsically degrading conditions of America’s maximum security prisons.³⁰

The emphasis on irrevocability mimics the “death is different” rationale that is offered in support of limitations on the death penalty. Sentences of life without the possibility of parole for juveniles are akin to a death sentence because these sentences halt the juveniles’ development before they have a chance to mature to a point at which they can meaningfully take responsibility for their crimes.

The key role of character formation and culpability was highlighted in *Roper*, where the death penalty was precluded because execution prevents the juvenile from achieving “a mature understanding of his own humanity” before he is put to death.³¹ Similarly, given the destructive and often adolescent quality of prison life, an irrevocable life sentence essentially precludes any chance of molding offenders into productive human beings who have a mature understanding of their own humanity.

27. *Graham*, 130 S. Ct. at 2027.

28. Lisa Rogers, *Judge to Holladay: ‘You get to come out of prison in a pine box’* GADSDEN TIMES (Jun. 26, 2009, 6:06 PM), <http://www.gadsdentimes.com/article/20090626/NEWS/906269983/-1/NEWS04?Title=Judge-to-Holladay-You-get-to-come-out-of-prison-in-a-pine-box->

29. See Johnson, *supra* note 6, at 242.

30. *Id.* at 248.

31. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

Prisons are not settings of forgiveness. Nor are they settings in which young persons can mature into responsible, moral adults. Prisons are monuments to punishment and exclusion, and the code of life in prison embodies the exact sort of immaturity, impulsivity, and aggression that the Court in *Roper* claims that juveniles may overcome if given suitable punishments.³²

Graham argued that juvenile offenders must be given some meaningful chance to demonstrate reform.³³ Life sentences without the possibility of parole deny them that chance.

Moreover, the Supreme Court recognized the added severity of life without parole when applied to juveniles. In *Graham*, the Court observed that

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.³⁴

With the abolition of parole in the federal system and most state systems,³⁵ a life sentence truly does mandate a life of punitive and oppressive incarceration.³⁶ Furthermore, unlike adults, juveniles have not had the benefit of extensive maturing life experiences in the free world. They often have far more years ahead of them than an adult prisoner convicted of a comparable crime. While it is theoretically possible to alter the terms of a sentence of life without the possibility of parole, those facing such a punishment lack the avenues of mandatory appellate review currently available only to death penalty recipients.³⁷ This remains true even though death by incarceration is

32. See Johnson, *supra* note 6, at 251.

33. See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

34. *Id.* at 2028.

35. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65, 68 (2003) (discussing the abolition of parole on the state and federal levels).

36. See *id.* at 221.

37. See, e.g., Johnson, *supra* note 6, at 245, 246 (Death sentences “are frequently the subject of successful litigation,” whereas sentences of life without parole “are rarely voided or changed for any reason,” giving rise to the paradoxical conclusion that, in practice, life without parole sentences “may well be more final and irrevocable than sentences of death”).

currently the most severe punishment available for juvenile offenders. In point of fact, studies demonstrate that when sentences of life without parole are reviewed on appeal, they are modified far less frequently than are death sentences.³⁸ Thus, it is correct to describe life without parole as “a civil death,”³⁹ by which juvenile “prisoners are slated to spend the remainder of their natural lives behind bars, gaining release only upon their deaths.”⁴⁰

II. “DEATH IS DIFFERENT” IS A MISNOMER: LIFE IMPRISONMENT WITHOUT PAROLE AND THE DEATH PENALTY ARE COMPARABLY SEVERE

While the Supreme Court has consistently differentiated between the protections accorded to those sentenced to death and those sentenced to life imprisonment without parole by claiming that “death is different,” death is actually not different at all. Both a death sentence and a sentence of life without the possibility of parole have the same result: death. Furthermore, in both instances, death is caused by the percipient actions of the State. “Offenders sentenced to death by incarceration, like prisoners condemned to death by execution, experience a final and irrevocable sentence that culminates in deaths that are untimely and undignified.”⁴¹

The more accurate statement, therefore, is that “execution is different.” When given a sentence of life without parole, death will inevitably result. However, only with death sentences does the State affirmatively undertake to execute a person. Therefore, the relevant question is whether the distinction between dying in prison, versus being executed in prison, constitutes a difference sufficient to justify the imposition of a life without parole sentence upon juveniles.

The affirmative view in this matter was expressed as recently as 2010 in *Graham* by Chief Justice Roberts. Roberts castigated his colleagues for abandoning the position taken in *Roper*, which banned the death penalty for juveniles partially because less severe punishments, such as life imprisonment without parole, would remain available.⁴² Though writing in concurrence with the judgment, Roberts

38. JAMES S. LIEBMAN, JEFFREY FAGAN, & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, ii–iii (Jun. 12, 2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

39. See, e.g., Johnson, *supra* note 6, at 245.

40. *Id.*

41. *Id.* at 246.

42. *Graham*, 130 S. Ct. at 2038–39 (Roberts, C.J., concurring).

opposed the imposition of a categorical rule against life without parole in non-homicide cases.

[T]reating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that “the death penalty is different from other punishments in kind rather than degree.” It is also at odds with *Roper* itself, which drew the line at capital punishment by blessing juvenile sentences that are “less severe than death” despite involving “forfeiture of some of the most basic liberties.” Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders⁴³

Despite Chief Justice Roberts’ belief that the death penalty is “different,” research demonstrates that suffering experienced by those sentenced to life without parole is comparable to, and in some cases arguably worse than, that experienced by those sentenced to death, some of whom expressly drop their appeals and opt for execution rather than a life in prison.⁴⁴

By its very terms, a sentence of life without parole requires a permanent loss of liberty. Yet, life without parole entails pain on a much deeper level than a loss of freedom. Prison deprives its occupants of the autonomy to make even the simplest choices that might influence the course of their lives. Freedom from prison is the central goal and aspiration of life-sentence prisoners, yet nothing they do in prison can help them achieve that goal.⁴⁵ The essentials of daily life are regimented in prison, captured in a routine that never changes, preventing prisoners from doing anything of consequence with their profoundly circumscribed lives.⁴⁶ Research suggests that lifers live in an existential vacuum, isolated from the social relations that animate normal lives and relegated to “a lifetime of boredom, doubt, and anxiety punctuated by piercing moments of insight into one’s failings

43. *Id.*

44. Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America’s Other Death Penalty: Notes on Life Under Sentences of Death by Incarceration*, 88 PRISON J. 328, 335 (Jun. 2008). According to some statistics, roughly ten percent of condemned prisoners drop their appeals and submit to execution, choosing death in the execution chamber over life on death row or, in the best case scenario, life in prison after a successful capital appeal. *Id.* at 333.

45. *See id.* at 336–39, 342–44, 332.

46. *See id.* at 338–39.

as a human being.”⁴⁷ This existence keeps them permanently separated from friends and loved ones. Without the hope of joining the larger society—implicitly understood by life sentence prisoners to be the real world, the world that matters⁴⁸—their lives are denied larger meaning or purpose.⁴⁹

The deprivations of prison life, moreover, fall most heavily on juveniles, who typically lack the emotional maturity or capabilities necessary to cope with such profound adversity.⁵⁰ The harmful effects of imprisonment are particularly troubling in the case of juveniles because of the sheer fact that the prisoner’s young age, over which he or she has no control, renders it impossible for the prisoner to fully develop in the first place. Juveniles have much less experience of life in the outside world with which to compare their incarceration than do adults. Juveniles sentenced to life imprisonment without the possibility of parole are virtually guaranteed to spend more time in prison than they did in the outside world. Since some juveniles are as young as thirteen when they are incarcerated, the passage of years may mean that prison is all they can clearly remember. For a juvenile who serves long years of confinement as a lifer, prison becomes life as they know it, making it almost certain that they will fail to develop into adults “with a mature understanding of their own humanity.”

III. JUVENILE LIFE WITHOUT PAROLE IN AN EIGHTH AMENDMENT CONTEXT

From the very first modern death penalty case, *Furman v. Georgia*,⁵¹ the Court has stated that the meaning of the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵² Furthermore, the Court has steadfastly endorsed Chief Justice Warren’s conclusion in *Trop v. Dulles* that the Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵³ In *Atkins v. Virginia*,⁵⁴ the Court

47. *Id.* at 344.

48. See, e.g., ERIN GEORGE, *A WOMAN DOING LIFE 230* (Oxford University Press 2010); VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING AND DYING IN PRISON TODAY 75* (Oxford University Press 2011).

49. See Johnson, *supra* note 44, at 336–39.

50. See, e.g., Johnson, *supra* note 6, at 244–50.

51. 408 U.S. 238 (1972).

52. *Id.* at 242 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

53. 356 U.S. 86, 101 (1958).

54. 536 U.S. 304 (2002).

stated that these conceptions of decency are to be judged not by historical standards, but rather by “those that currently prevail.”⁵⁵

When assessing standards of decency, it is helpful to refer to conclusions drawn by the Court in past cases. In his opinion in *Furman*,⁵⁶ Justice Brennan cites *Trop*⁵⁷ in holding that the Eighth Amendment constitutes a broad prohibition against “inhumane treatment”⁵⁸ as manifested in “inhuman and uncivilized punishments.”⁵⁹ These prohibitions are animated by “nothing less than the dignity of man.”⁶⁰ This inherent dignity undergirds the conviction that “the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”⁶¹ This intrinsic worth protects humans from punishments that are “degrading”⁶² to their dignity. The considerations relevant to assessing whether a punishment is inhumane or uncivilized are revisited in *Roper* and *Graham*. The majority in *Roper* stated that “[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the

55. *Id.* at 311.

56. *Furman v. Georgia* was the first case to find the death penalty unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). There was no majority opinion. *See id.* at 240. Instead, each Justice wrote a separate opinion. *Id.* Several of these opinions articulated broad themes regarding the legitimacy of the death penalty, the legitimate goals of punishment, and the proper method of analyzing punishments under the Eighth Amendment. *See, e.g., id.* at 240–43 (Douglas, J., concurring); *id.* at 306–08 (Stewart, J., concurring); *id.* at 256–66 (Brennan, J., concurring). While these opinions did not have controlling weight in this particular case, many of the themes articulated therein would reemerge in later Eighth Amendment jurisprudence. *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (holding that where the rape of a child does not result, and was not intended to result, in the victim’s death, the Eighth Amendment prevents Louisiana from imposing the death penalty); *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (holding that an Arizona statute allowing trial judges to determine the presence or absence of aggravating factors necessary for the imposition of the death penalty after a jury adjudication of guilt for first-degree murder violates the Sixth Amendment right to jury trial).

57. 356 U.S. 86 (1958). In *Trop*, the Supreme Court ruled that loss of citizenship was an unconstitutionally cruel and unusual punishment for desertion of the Armed Forces during wartime. *Id.* at 87, 91–93. The Court ruled that a punishment may be cruel and unusual simply by being disproportionate to the crime for which it is given. *Id.* at 101. This case also definitively established that the concept of “cruel and unusual punishments” is not static. *Id.* at 103. “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.” *Id.* Rather, the applicability of the phrase to a given punishment must be judged according to “evolving standards of decency.” *Id.* at 101. This criteria is still used today.

58. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

59. *Id.* at 282.

60. *Id.* at 270.

61. *Id.*

62. *Id.* at 271.

government to respect the dignity of all persons.”⁶³ As recently as last year, in *Graham*, the Court observed that the State had a duty to “respect the human attributes”⁶⁴ in everyone. Thus, even those who commit the worst crimes imaginable must be respected for their inherent worth and dignity as human beings.⁶⁵

Analyzing whether a punishment runs afoul of these prohibitions, Justice Brennan enumerated two guidelines that are especially useful in the context of evaluating a sentence of life imprisonment without the possibility of parole. Brennan stated that “a punishment may be degrading simply by reason of its enormity.”⁶⁶ Tied to this is his conclusion that “if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary, and therefore excessive.”⁶⁷ This latter finding is certainly applicable when the State chooses to inflict a final, and as a practical matter, irrevocable punishment on a marginally culpable convict, rather than providing a punishment that serves the legitimate purpose of evincing moral disapproval of criminal conduct without barring all opportunities for rehabilitation and eventual return to society. When the Court judges punishments, it makes Eighth Amendment determinations based primarily on the themes of “decency” and “dignity of man,” but has neither defined these terms nor cited a definition that it considers authoritative. Therefore, it is difficult to apply the terms as definable legal concepts. Some guidance may be found in the book *Death Work*, an earlier work by one of the authors of this article, where a definition of humanity is articulated. *Death Work* divides humanity into several components:

The essence of personhood or humanity is a sense of self that conveys the capacity and moral right to make choices and hence be self-determining. Self-determination, in turn, both finds expression in and presupposes . . . some degree of (1) autonomy, defined as the capacity to influence one’s environment and hence shape one’s fate; (2) security, defined as the capacity to find or create stability in one’s world and hence shelter oneself from harm; and (3) relatedness to

63. *Roper*, 543 U.S. at 560.

64. *Graham*, 130 S. Ct. at 2021.

65. *Roper*, 543 U.S. at 560.

66. *Furman*, 408 U.S. at 273 (Brennan, J., concurring).

67. *Id.* at 279.

others, defined as the capacity to feel for oneself and others and hence to have caring and constructive relationships.⁶⁸

These dimensions of personhood or humanity are culled from seminal works in the humanities and social sciences. Such distinguished philosophers as Ernst Cassirer and Herbert Morris “have identified the capacity to reason and hence to be responsible for ourselves as the *sina qua non* of personhood.”⁶⁹ Abraham Maslow and other existential psychologists “have seen security as the essential psychological precondition to the unfolding of human nature, observing that without stability and safety in one’s world, self-determination would give way to determination by external forces.”⁷⁰ A host of scholars, including such luminaries as philosopher John Dewey and anthropologist Lewis Mumford, “have seen relatedness to others—to things outside ourselves and, more specifically, to other people—as basic to our nature as social animals that exercise self-determination through self-defining transactions with the world.”⁷¹ Autonomy, security, and relatedness to others develop “in interaction with one another as individuals become persons.”⁷² Ultimately, “[e]ach individual makes over the life-course of the [human] species and achieves a character and becomes a person. The more fully he organizes his environment [autonomy], the more skillfully he associates in groups [security], the more constantly he draws on his social heritage [relatedness], the more does the person emerge from society as its fulfillment and perfection.”⁷³

A person or human being has inherent self-worth that is the source of human dignity. Dignity, in turn, is “the sober, unshakable knowledge of self-worth and the equally unshakable recognition of it in others.”⁷⁴ Our understanding of what it means to be a human being—to appreciate our own humanity and that of others—creates a bright line distinction: while punishments can legitimately deprive persons of their liberty, they cannot degrade them by ignoring or violating their essential human dignity. Society, in the administration

68. ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 204 (2d ed. 1998).

69. *Id.*

70. *Id.*

71. *Id.* at 204.

72. *Id.* at 205.

73. *Id.*

74. SUSIE LINFIELD, *THE CRUEL RADIANCE: PHOTOGRAPHY AND POLITICAL VIOLENCE* 111 (2010).

of criminal punishments, must treat prisoners with a degree of empathy and accord them a degree of autonomy. Empathy requires us to see others, even the worst criminals, as human beings like ourselves, to recognize “that others feel and think as we do, that our inner feelings are alike in some fundamental fashion” that marks us as fellow human beings.⁷⁵ Like us, other human beings, even criminals, must be seen as autonomous entities, “separate and protected in [their] separation” from others, as we know ourselves to be separate and protected in our separation from others.⁷⁶ At the most basic level, separation from others means that “your body is yours and my body is mine, and we should respect the boundaries between each other’s bodies.”⁷⁷ The body of the criminal is his (or hers), just as the body of any human being is his (or hers) and must be accorded a degree of separation and respect from others. As physically separate, morally and emotionally autonomous creatures, other human beings, including criminals, must be accorded basic human rights in recognition of their inherent human dignity. Thus, it can be said that “[h]uman rights depend both on self-possession and on the recognition that all others are equally self-possessed.”⁷⁸

Clearly, to create conditions antithetical to basic human rights cannot be considered “decent” or demonstrative of respect for the “dignity of man,” because to create such conditions is essentially to deny and suppress a person’s humanity and hence to violate their inherent human dignity. It is critical to note that, as a general matter, and in sharp contrast to practices in Western Europe, “American criminal justice displays a resistance to considering the very personhood of offenders.”⁷⁹ Nowhere is the routine violation of the

75. LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 29 (2007).

76. *Id.*

77. *Id.*

78. *Id.* Why should we care about the rights of prisoners, including those who have committed terrible crimes? Prisoners might be thought of as a special class of refugees sent into exile from American society as punishment for their crimes. They have lost home, family, job, and whatever material possessions they might have acquired before their confinement. They are no longer citizens in any meaningful sense of the term; few prisoners can vote while confined in prison, and no prisoners are in any meaningful sense citizens of the prisons in which they are held captive. Prisoners appeal to human rights, or we appeal to human rights for them, because they have no recourse to assert their humanity in any other way. The sheer vulnerability of prisoners should call forth an explicit effort to treat them as the human beings they are, however compromised their current state and however culpable they may be for the crimes that put them behind bars. For a thoughtful discussion on refugees and human rights, see LINFIELD, *supra* note 74, at 37.

79. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 9 (2003). Note that in this body of work, the terms “personhood” and “human being” are used interchangeably.

offenders' personhood or humanity more evident than in our prisons, and especially our high security prisons, to which long-term inmates are routinely relegated. It is no exaggeration to say that "conditions are frightening in all high-security American correctional institutions, all of which suffer from drastic overcrowding, inmate-on-inmate violence, and guard-on-inmate violence as well."⁸⁰ To this litany of abuses must be added the virtual absence of privacy, leading to practices, like routine and often arbitrary cell- and strip-searches, including cavity searches, that "go mostly unquestioned, and even unnoticed, in the United States, but that have been wholly or largely eliminated across the Atlantic," explicitly rejected, for the most part, "as incompatible with inmate 'dignity.'"⁸¹ There is, in European penal law and policy, "a fundamental commitment . . . towards recognizing that prisoners should not be degraded" and in fact should be affirmatively "treated with dignity and mercy."⁸² In America's prisons, by contrast to their Western European counterparts, we seem almost to revel in the suffering that is inflicted upon offenders, perhaps confirming that "the core problem of degradation . . . is the intoxication that comes with treating people as inferiors."⁸³ The intoxicating quality of treating others as inferiors, in turn, would seem to be a logical corollary of the operation of our adversarial system. Adversaries are, in essence, enemies. We wage war against our legal adversaries. The convicted defendant, vanquished in court, is now a defeated prisoner, a person marked by infamy and disgrace.

Harsh and often invasive conditions found regularly in American prisons undermine efforts of prisoners to survive with dignity. This proposition was demonstrated empirically by the social scientist Hans Toch. Toch studied the experiences of hundreds of inmates who endured psychological breakdowns in various types of prison settings. He found that the absence of the aforementioned dimensions of humanity, "that is, impotence instead of autonomy, fear instead of security, and isolation instead of relatedness—interacted

80. *Id.* at 61. Lifers are usually kept in maximum-security or super maximum-security prisons that are virtually devoid of vocational, educational, or rehabilitative opportunities. Loss and degradation are central features of life in these institutions. "The extreme deprivation, the isolating architecture, the technology of control, and the rituals of degradation and subjugation that exist in supermax prisons are inimical to the mental health of prisoners." Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 961 (2008).

81. WHITMAN, *supra* note 79, at 65.

82. DIRK VAN ZYL SMIT & SONJA SNACKEN, PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY: PENOLOGY AND HUMAN RIGHTS 383 (2009).

83. WHITMAN, *supra* note 79, at 23.

with one another so as to provoke ‘existential questions’ about the individual’s sense of self and self-worth that influenced ‘crises of every kind in every setting’ and ultimately represented ‘universal motives’ associated with human despair.”⁸⁴ This demonstrates that the manner in which we treat prisoners in high security settings, such as those faced by lifers, creates circumstances that are neither decent nor dignified.⁸⁵ Toch’s work and others⁸⁶ lead to the conclusion that contemporary prisons, particularly as they are experienced by long-term prisoners, are “dehumanizing” and “hellish,”⁸⁷ and ultimately “un-survivable,”⁸⁸ due to profound violations of the prisoner’s human dignity.

IV. JUVENILE LIFE WITHOUT PAROLE IS NOT JUSTIFIED BY LEGITIMATE PENOLOGICAL GOALS

With the Court’s words as a guide, and our understanding of human nature and prison punishment as backdrop, we will argue that sentencing juveniles to life imprisonment without the possibility of parole can never accord with our prevailing sense of decency. All of the cases relating to criminal sanctions make clear that sanctions must serve one or more of the four legitimate ends of punishment in order to abide by the Eighth Amendment.⁸⁹ These ends are retribution, incapacitation, deterrence, and rehabilitation. Life without parole for juveniles clearly fails on three of these fronts—incapacitation, deterrence, and rehabilitation—and ultimately fails on the fourth and final rationale, retribution, as well.

One need not expend any effort to realize that, as a general matter, the punishment of life imprisonment without the possibility of parole serves the end of retribution: it is a punishment, pure and simple, that produces suffering for its own sake. On its face, the punishment also serves the goal of incapacitation: while confined, offenders are incapable of committing crimes in society. Yet, previous punishments defended on the grounds of incapacitation have been struck down on the basis of findings that a lesser punishment would

84. JOHNSON, *supra* note 68, at 205.

85. ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 6 (3d ed. 2002).

86. Alison Leibling, *Moral Performance, Inhuman and Degrading Treatment and Prison Pain*, 13 PUNISHMENT & SOC’Y 530 (2011).

87. *Id.* at 543.

88. *Id.* at 533.

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

serve the goal of incapacitation equally well.⁹⁰ In order to justify incapacitation as the reason for an irrevocable life sentence in the case of a juvenile, one must accept the premise that he or she is so depraved as to be beyond the curative efforts of rehabilitation.⁹¹ In *Roper* and *Graham*, the Court has explicitly acknowledged that the immaturity and vulnerability of juveniles impede the full formation of their characters and render it impossible to determine whether their crimes are the product of true depravity that places them beyond the reach of rehabilitation. As has been noted by scholars, “juveniles are immature through no fault of their own; their personalities are works in progress.”⁹² All of this has led to judicial recognition that juveniles are categorically less culpable than adults who commit similar crimes. Most importantly, juveniles have been proven to be more receptive to rehabilitation than their older counterparts.⁹³ Given these findings, it is impossible to conclude that juveniles are so irredeemable that draconian measures are justified in order to ensure their permanent confinement.

The interest of deterrence is only relevant if the sanction deters, which is to say, discourages an offender from committing future crimes and, more importantly, inspires others to abstain from the commission of crimes.⁹⁴ Yet, the Court has accepted the assertion that juveniles suffer from greater impulsivity than their adult counterparts and often demonstrate a profound inability to exercise reasoned judgment and anticipate the consequences of their actions, hence making them poor candidates for deterrence. In fact, when analyzing the legitimacy of the State’s deterrence interest in *Roper*, the Court endorsed the proposition that “[t]he likelihood that the teenage offender has made the kind of cost–benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”⁹⁵ With this finding, the Court acknowledges that juveniles typically will not experience the benefits of any deterrent effect that a punishment such as the death penalty might have. This observation also applies to the punishment of life without parole. When compared to the death penalty, life without parole “involves a

90. *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

91. *Graham*, 130 S. Ct. at 2029.

92. Johnson, *supra* note 6, at 244.

93. *Graham*, 130 S. Ct. at 2030.

94. *Deterrence Definition*, MERRIAM–WEBSTER.COM, <http://www.merriam-webster.com/dictionary/deterrence> (last visited Mar. 9, 2012). Deterrence is defined as “the inhibition of criminal behavior by fear especially of punishment.” *Id.*

95. *Roper*, 543 U.S. at 572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

death in prison that will be, in many cases, even more distant in time, and hence more abstract and psychologically remote to juveniles than death by execution.”⁹⁶ Therefore, this exceedingly severe punishment will lack any deterrent effect upon either the juveniles who suffer said punishment, or future potential juvenile criminals who may hear of it. Thus, deterrence cannot be offered as a defense for life without parole in the case of juveniles.

This leaves retribution as the sole interest that may arguably be served by a sentence of life imprisonment without parole for juveniles. The best defense of retribution was offered in the case of *Gregg v. Georgia*,⁹⁷ which affirmed the constitutionality of the death penalty. In that case, a majority of the Court concluded that retribution was a legitimate means of expressing moral condemnation of criminal conduct and channeling the natural human instinct toward revenge in a manner that prevents vigilantism.⁹⁸ Thus, retribution, envisioned as a species of revenge, is not so much a bid for justice as it is a palliative to the irrational excesses of emotion. Retributive sentencing will do nothing for the convict, unless it can be coupled with a strong deterrent effect. Yet, the Court has found that juveniles are not susceptible to the positive effects of deterrence.⁹⁹ More importantly, the Court has emphatically stated that retribution is insufficient as a justification for punishment of those whose culpability and moral blameworthiness are significantly lessened.¹⁰⁰ Juveniles have already been spared the death penalty based upon an explicit finding of reduced culpability and blameworthiness. In short, when applied to juveniles, society is far less justified in the sense of rage and moral indignity that it feels upon the commission of a crime. Therefore, the question becomes whether the mere act of placating a disgruntled citizenry is sufficient to deprive a juvenile of any chance to develop into a full human being, benefit from rehabilitation, and atone for his crime through future contributions to his fellow man.¹⁰¹

96. Johnson, *supra* note 6, at 249.

97. 428 U.S. 153, 207 (1976).

98. *Id.* at 183.

99. *Roper*, 543 U.S. at 571.

100. *Id.* at 571.

101. It should be noted that in a purely philosophical sense, retribution is equivalent to just deserts—the offender gets the punishment he or she deserves. To deserve punishment, the offender must be culpable; to be culpable, the offender must have freely chosen to act, which is only possible if the offender is an autonomous human being. The deserved punishment thus hinges on the personhood of the offender. For punishment to be just retribution, that punishment must in turn respect the personhood of the individual being punished. On these grounds, life without parole fails a retribution punishment for juveniles, because it is embedded in a system that violates the personhood of offenders, most notably in prison but in

To answer this question, one must understand what is lost by denying juveniles any chance of rehabilitation. When they commit crimes, juveniles do not have the benefit of a fully formed character. In this condition, the crime cannot be said to be the product of an incurably depraved person since these offenders are not yet fully formed as persons. Rather, juveniles, because they are still developing, are inherently malleable, a central consideration in *Roper*. As made clear in *Roper* and the authoritative research upon which the case relied, malleability is what makes juveniles more amenable to rehabilitation than adults. As a result, rehabilitative efforts still retain the potential to mold a juvenile's character in a positive manner. Many juveniles end up in prison precisely because they have never been exposed to positive role models or influences.¹⁰² Few positive role models are to be found in our harsh prisons. As has been noted, "[p]risons are monuments to punishment and exclusion and the code of life in prison embodies the exact sort of immaturity, impulsivity, and aggression that the Court in *Roper* claims that juveniles may overcome if given suitable punishments."¹⁰³

The conditions of life in American prisons would be traumatic for anyone. Yet, they are much worse for juveniles sentenced to life without parole. Juveniles serving life without parole have no hope of ever experiencing any positive consequences of maturation, including the flowering of key attributes of what it means to be a human being—a sense of self marked by autonomy, security, and relatedness to others. These basic deficiencies, in turn, stunt empathy and the capacity to feel remorse. In the terms used in this Article, the perpetual adolescence these prisoners show as a result of life in prison means that their personhood or status as developed human beings is profoundly impaired, possibly damaged permanently by the repressive prison environment. Arguably, their fate is sealed before they have even fully grown up.

Not only does the culture of prison life reinforce the impulsive immaturity of adolescence, but also, as noted by the Court in *Graham*, the existence of a life sentence is the dispositive factor in

many aspects of the justice process as well, and because, in the case of juveniles, their personhood is as yet unfinished, making punishment per se a questionable practice from a philosophical point of view. Juveniles are not fully developed as persons, and exposure to prison as punishment will almost certainly retard if not prevent the development of their personhood. On purely philosophical grounds, then, life without parole for juveniles fails all of the theoretical rationales for punishment.

102. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 53 (2008).

103. See Johnson, *supra* note 6, at 249.

determinations of whether a prisoner is eligible for rehabilitative services that might offer a path to some version of mature adulthood.¹⁰⁴ By establishing this unilateral distinction, society ensures that even a hardened adult recidivist serving a lengthy sentence short of life will have a better chance of positive growth by virtue of their access to rehabilitative services than will a juvenile serving a life term without the possibility of parole.¹⁰⁵ Juveniles serving life without parole will rarely receive such access, no matter how much they may deserve it, by virtue of age or capacity to mature.

The very circumstances of life imprisonment without the possibility of parole, then, essentially preclude the possibility of personal development for juveniles, much less their rehabilitation. Without rehabilitative efforts, it is impossible for juveniles to mature and grow. Their development as human beings essentially ceases upon their entrance into prison. Research provides a vivid description of the emotional impact on juvenile offenders of a life without parole sentence:

As they age, juveniles serving life without parole can become more emotionally stable within the highly structured routine of prison life, but they typically do not become more emotionally mature and autonomous; if anything, lifers become less emotionally mature and autonomous and more dependent on prison routine to manage their daily existence. They live on the surface of things, by routine and rote; their lives are superficial, which is why lifers seem not to mature emotionally as the years pass. They typically get through each day on “automatic pilot,” with little thought or reflection. Prisons can be compared to a deep freeze in the sense that personal autonomy—the capacity for mature self-management—stops at the point of entry into prison.¹⁰⁶

In *Roper* and *Graham*, the Supreme Court has recognized that juveniles are capable of reform and rehabilitation as they move into adulthood. Life without parole denies them this opportunity.

This most severe punishment literally gives up on a human being who faces diminished culpability and has yet to fully mature.

104. *Graham*, 130 S. Ct. at 2033.

105. John Irwin examines the reformatory power of hope among lifers who are eligible for parole. See JOHN IRWIN, *LIFERS: SEEKING REDEMPTION IN PRISON* (2009).

106. See Johnson, *supra* note 6, at 251–252.

More than simply abandoning juveniles on the basis of retribution, the government does not even take precautions to shield them from the population of hardened adult criminals. Like all of those sentenced to life imprisonment without the possibility of parole, most juveniles facing this penalty are placed directly into adult prisons,¹⁰⁷ relegating them to an environment in which they will be surrounded by negative influences. This will virtually ensure that they will become the very sort of incurable, depraved criminals who allegedly deserve retributive sentences in the first place.

All of these facts must be balanced against the benefits of using retributive sentences as a balm to calm the citizenry. In his dissent in *Gregg v. Georgia*, Justice Marshall stated that “the mere fact that the community demands the murderer’s life in return for the evil he has done cannot sustain the death penalty.”¹⁰⁸ The same can be said for life without parole. While this view was expressed in dissent, it reflects the discomfort felt by a majority of the Justices for punishments based solely upon retribution. However, in this context, retribution is the only ground offered in support of life imprisonment. Moreover, retribution must contend with numerous counter factors that argue for an increased emphasis on rehabilitation. Outside of the criminal context, the State recognizes the immaturity and vulnerability of juveniles by the assertion of broad powers in support of a duty to ensure their welfare. A strictly retributive approach is not consonant with this duty. A societal need to express moral disapproval is insufficient to justify abandoning a child and denying them means for reform before they have ever had the chance to gain life experience and maturity. This purely punitive approach fails to acknowledge the dignity of these uniquely malleable human beings and subjects them to

107. Adult lifers are placed directly into maximum–security prisons as a matter of course. There is no research published to date on the security level of the adult prisons to which juvenile serving life without parole are placed. Ongoing research indicates that juveniles go directly to maximum– or medium–security institutions, with early trends suggesting that medium–security facilities are the more likely original destination for these offenders. Personal communication with Ashley Nellis, Research Analyst, The Sentencing Project (8/26/10) (on file with author). Ironically, juveniles may be safer in maximum–security prisons since those settings, though oppressive, tend to be highly controlled. Medium–security prisons, by contrast, often feature dormitory housing (maximum–security prisons feature cells) and fairly fluid movements of prisoners within their secure perimeters (movement is sharply restricted in maximum–security prisons). Dorm living and prisoner movement can make medium–security prisons hard to control and may subject juveniles to more predation than they would experience in the higher security institutions. For a wide–ranging discussion of differing prison environments and their effects on adjustment, see ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 163 (3d ed. 2002).

108. *Gregg*, 428 U.S. at 240 (Marshall, J., dissenting).

the kind of “pointless infliction of suffering”¹⁰⁹ that is proscribed by the Eighth Amendment. The Court has explicitly found that juveniles are less culpable and more capable of change. The State cannot give force to this truth by subjecting its most vulnerable citizens to a punishment that presupposes mature culpability and an inability to change.

V. CONCLUSION: JUVENILE LIFE WITHOUT PAROLE SHOULD BE PROSCRIBED IN ALL CASES

Life without parole for juveniles is incompatible with the Supreme Court’s own findings about life imprisonment as described herein, and is also in conflict with the Court’s stated respect for human dignity. These findings have been deemed sufficient to proscribe both the death penalty for juveniles and life without parole for juveniles convicted of non–homicide crimes. No empirical evidence is available to demonstrate why these findings should not underpin a rationale for the elimination of life without parole for juveniles in all cases. The nature of the crime does not change the fact that a juvenile’s character is not fully formed, that they suffer from unique impairments that reduce their culpability, and that they remain able to change with rehabilitation. When addressing life without parole for non–homicide crimes, the Court endorsed the need for rehabilitation by stating that

the juvenile should not be deprived of the opportunity to achieve maturity of judgment and self–recognition of human worth and potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.¹¹⁰

The severity of a juvenile’s crime does not vitiate the truth of this statement. The Court in *Graham* seems to imply that life without parole sentences might be appropriate for those who are convicted of the crime of murder, a uniquely serious crime that the Court appeared

109. *Furman v. Georgia*, 408 U.S. 238, 312 (1972).

110. *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

to view as a marker of depravity.¹¹¹ The crime of homicide is a uniquely serious crime, to be sure, but there is no empirical evidence supporting the claim that the crime of murder, in and of itself, is an indicator of depravity for juveniles.¹¹² Juveniles convicted of murder, as noted above, remain juveniles.

The Court has previously manifested distrust for the corruptive power of retributive influences, creating a categorical rule against application of the death penalty to juveniles rather than allowing juries to weigh mitigating evidence on a case-by-case basis. The Court should follow the same course of action with regard to life imprisonment without the possibility of parole. This represents a logical application of the findings that it has already made.

No life can be fully judged on the basis of less than 18 years. No child deserves to be abandoned. Every juvenile offender must be given the opportunity to demonstrate positive change. To “deny [juvenile offenders] even the opportunity to be heard by a parole board is to ignore the most basic premise upon which the Court in *Roper* ruled.”¹¹³ That premise—simple, clear, and compelling—is this: “[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”¹¹⁴ Life imprisonment without the possibility of parole abruptly closes the book before the final chapter has been written.

111. Robert Johnson & Sonia Tabriz, *Sentencing Children to Death by Incarceration: A Deadly Denial of Social Responsibility*, 91 PRISON J. 198, 200 (2011).

112. *Id.*

113. Johnson, *supra* note 6, at 251.

114. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 573–74 (2005)).