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6-1-2010

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Recommended Citation

Natalie Pifer, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia on Life without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 Loy. L.A. L. Rev. 1495 (2010).
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IS LIFE THE SAME AS DEATH?: IMPLICATIONS OF *GRAHAM V. FLORIDA*, *ROPER V. SIMMONS*, AND *ATKINS V. VIRGINIA* ON LIFE WITHOUT PAROLE SENTENCES FOR JUVENILE AND MENTALLY RETARDED OFFENDERS

*Natalie Pifer**

In the wake of the U.S. Supreme Court's prohibition on executing mentally retarded and juvenile offenders, life without parole has become the maximum available sentence for these offenders. However, an analysis of the Court's death penalty jurisprudence indicates that life without parole sentences for these groups present many of the same concerns that led the Court to prohibit executions. While juvenile life without parole sentences have received much attention from advocacy groups, legislators, and even the U.S. Supreme Court—which recently found unconstitutional juvenile life without parole sentences for non-homicide crimes—there is a notable absence of any similar movement on behalf of mentally retarded offenders. This silence is especially striking in light of the two groups' intertwined death penalty jurisprudence. This Note explores the constitutional difficulties implicated in sentencing these two groups to life without parole in four parts: (1) comparing the death penalty jurisprudence surrounding mentally retarded and juvenile offenders; (2) analyzing the recent Graham v. Florida *decision and evaluating whether it can be extended to support a categorical ban of juvenile life without parole sentences for homicide-related offenses; (3) exploring the viability of a challenge to life without parole sentences by mentally retarded offenders; and (4) seeking to explain the absence of any movement challenging life without parole sentences by mental retardation advocates.*

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I. INTRODUCTION

In 1989, the U.S. Supreme Court held that the Eighth Amendment did not preclude execution of mentally retarded[1] offenders by virtue of their mental retardation alone.[2] Thirteen years later, the Supreme Court reconsidered the issue in *Atkins v. Virginia*.[3] After applying society's evolved standards of decency, the Court reversed its earlier holding, finding in *Atkins* that executing mentally retarded offenders violated the Eighth Amendment's prohibition of cruel and unusual punishment.[4] *Atkins* represented a particular triumph for advocates of mentally retarded individuals' rights and a landmark victory for death penalty opponents in general, who hoped the decision would inspire continued death penalty reform.[5]

Three years after *Atkins*, the Court again grappled with the constitutionality of capital punishment in *Roper v. Simmons*.[6] In

1. While terminology used to describe those individuals with sub-average intellectual functioning has evolved from "mentally retarded" to a more progressive categorization of either "mentally disabled" or "intellectually disabled," this Note will use the term "mentally retarded." This decision is engendered simply by a desire to preserve consistency, given the language used by the U.S. Supreme Court and legal scholars.

2. Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

3. 536 U.S. 304 (2002). In criminal punishment discussions, it is tempting to focus only on the offender. To avoid losing perspective and sight of the victims, a brief summary of the case is as follows. Daryl Atkins was convicted of abduction, armed robbery, and murder. *Id.* at 307. Atkins and a partner, William Jones, abducted Eric Nesbitt, an airman stationed at Langley Air Force Base, from a convenience store. *Id.* at 307, 338. They ordered him to withdraw $200 from a nearby automated teller machine and drove him to a deserted area. *Id.* at 338. According to Jones, who pled guilty to first-degree murder in exchange for his testimony against Atkins, Atkins ordered Nesbitt out of the car and shot Nesbitt eight times in the thorax, chest, abdomen, arms, and legs. *Id.* After Atkins was convicted of capital murder in Virginia, a jury sentenced him to death, even after hearing evidence that Atkins was mildly mentally retarded with an IQ of fifty-nine. Atkins v. Commonwealth, 510 S.E.2d 445, 451–53 (Va. 1999). The Supreme Court of Virginia upheld Atkins's death sentence, but the U.S. Supreme Court reversed on appeal. *Atkins*, 536 U.S. at 321.

4. *Atkins*, 536 U.S. at 321 (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

5. Press Release, Am. Civil Liberties Union, High Court Rules That Executing the Mentally Retarded Is "Cruel and Unusual" Punishment (June 20, 2002), *available at* http://www.aclu.org/capital/mentalretardation/10334prs20020620.html.

6. 543 U.S. 551 (2005). While the Court found capital punishment to be inappropriate, Christopher Simmons was not innocent. *Id.* at 578. Seventeen-year-old Simmons, along with a fifteen-year-old accomplice, broke into Shirley Crook's home, entered her bedroom, covered her eyes and mouth with duct tape, and drove her to a state park where they threw her from a bridge. *Id.* at 556. She drowned in the river below. *Id.* at 557. After police received information of his involvement, Simmons was arrested and charged as an adult for burglary, kidnapping, stealing, and murder in the first degree. *Id.* After convicting him of murder, the jury sentenced Simmons to death. *Id.* at 558. After the Supreme Court's ruling in *Atkins*, Simmons filed a new petition for post-conviction relief, asserting that *Atkins* established the unconstitutionality of executing a juvenile offender. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399, 413 (Mo. 2003). The

Roper, the petitioner contended that the reasoning of *Atkins* established that the Constitution also prohibits the execution of juveniles who were under the age of eighteen when the crime was committed.[7] The Court agreed.[8] After carefully reviewing similarities to *Atkins*,[9] the Court held that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders.[10] Again, death penalty opponents rejoiced.[11] *Atkins* had not only inspired further reform, but it had also provided the necessary impetus for a successful, categorical Eighth Amendment challenge to capital punishment sentences for juvenile offenders.[12]

In the wake of *Atkins* and *Roper*, life without parole sentences have replaced executions for juvenile and mentally retarded offenders, but this substitution is not without constitutional difficulties and challenges.[13] Whereas mentally retarded offenders mounted the first successful categorical challenge to capital punishment, today's Eighth Amendment challenges have centered on life without parole challenges involving juvenile offenders. Indeed, in May 2010, the Court ruled that the Eighth Amendment prohibits juvenile life without parole for non-homicide crimes.[14] The *Graham v. Florida*[15] decision is the first time the Court has ruled an entire

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Missouri Supreme Court agreed, resentencing him to life without parole. *Id.* The U.S. Supreme Court upheld the lower court's decision, thereby categorically banning the execution of juvenile offenders. *Roper*, 543 U.S. at 578.

7. *Id.* at 559.

8. *Id.* at 568; *see infra* Part II (explaining the analytical similarities between *Atkins* and *Roper* the Court relied on in banning executions of juvenile offenders).

9. *Roper*, 543 U.S. at 564–75.

10. *Id.* at 578. Unless otherwise noted, the term "juvenile offender" refers to an offender who was under the age of eighteen at the time the offense was committed.

11. Press Release, Am. Civil Liberties Union, ACLU Welcomes Landmark Supreme Court Ruling Striking Down Death Penalty for Juveniles (Mar. 1, 2005), *available at* http://www.aclu.org/scotus/2004/13928prs20050301.html.

12. Previous challenges had only produced a partial ban. Stanford v. Kentucky, 492 U.S. 361 (1989) (finding the Constitution does not proscribe the execution of juvenile offenders over the age of fifteen but under the age of eighteen); Thompson v. Oklahoma, 487 U.S. 815 (1988) (finding unconstitutional the execution of any offender under the age of sixteen at the time of the crime).

13. Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 10 (2008).

14. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010). The Court declined to decide a companion case, dismissing it as improvidently granted. Sullivan v. Florida, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157, *cert. dismissed*, 130 S. Ct. 2059 (2010).

15. 130 S. Ct. 2011 (2010).

category of punishment—outside of the death penalty—unconstitutional. While juvenile advocates are already pushing to extend the Court's reasoning in *Graham* to offenders serving life without parole for their roles in killings committed at seventeen or younger,[16] any parallel challenges on behalf of the mentally retarded seem to be absent from the Eighth Amendment landscape. This silence is especially striking when compared to the dynamic and intertwined evolution of capital punishment jurisprudence involving these two groups.[17]

In today's criminal justice culture, capital punishment has been replaced by life without parole sentences for juvenile and mentally retarded offenders. Like execution, a life without parole sentence imposes a "terminal, unchangeable, once-and-for-all judgment upon the whole life of a human being and declares that human being forever unfit to be a part of civil society."[18] Accordingly, as *Graham* demonstrates, the Court must begin to reevaluate the constitutionality of sentencing the most vulnerable criminal offenders to life without parole. This Note explores the constitutional difficulties in sentencing these two groups of offenders to life without parole sentences and the viability of any such challenge. Part II describes the legal similarities between juvenile and mentally retarded offenders as established in *Roper* and *Atkins*, respectively, and surveys the current life without parole landscape. Part III analyzes the recent *Graham* decision and evaluates whether it can be broadened to support a categorical challenge to life without parole sentences for juveniles convicted of homicide-related offenses. Part IV contends that much of *Graham*'s logic can be extended to life without parole sentences involving mentally retarded offenders. Finally, Part V evaluates the viability of a categorical challenge by mentally retarded offenders sentenced to life without parole for non-homicide offenses and suggests a possible policy explanation for the silence of mental retardation advocates on life without parole.

16. *See* Adam Liptack, *Justices Limit Life Sentences for Juveniles*, N.Y. TIMES, May 17, 2010, at 1.

17. *Stanford*, 492 U.S. at 380; *Thompson*, 487 U.S. at 838.

18. Brief for Petitioner at 5, Sullivan v. Florida, No. 08-7621 (U.S. July 16, 2009).

II. THE PAST AND PRESENT LANDSCAPE OF MAXIMUM PUNISHMENTS FOR JUVENILE AND MENTALLY RETARDED OFFENDERS

This part has three purposes: (1) it analyzes the Supreme Court's Eighth Amendment death penalty precedent; (2) it surveys the current life without parole statutory landscape and evaluates the prevalence of life without parole sentences within the criminal justice system; and (3) it establishes the similar treatment of juvenile and mentally retarded offenders under the Eighth Amendment. The first section's importance lies in understanding the Court's Eighth Amendment precedent that has guided the *Graham* Court and would likely control a similar challenge brought by a mentally retarded offender.[19] The latter sections are critical to properly evaluating a national-consensus claim regarding life without parole sentences, and factors relied on by the Court in all of its most recent Eighth Amendment jurisprudence.[20] The intersection of these factors will likely be necessary to a successful categorical Eighth Amendment challenge to life without parole sentences.[21] Furthermore, this part will illustrate that, more often than not, juvenile and mentally retarded offenders have received similar treatment by the sentencing side of the criminal justice system.

A. Eighth Amendment Jurisprudence

Eighth Amendment jurisprudence prohibiting certain punishments for certain classes of offenses has remained largely untouched since *Atkins* and *Roper*.[22] These cases remain among the Court's most recent and sweeping Eighth Amendment mandates and were guideposts for the Court's analysis in *Graham*.[23] In order to

19. *See generally* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (discussing the use of precedent in Supreme Court decisions).

20. *Graham*, 130 S. Ct. at 2023–26; Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); Roper v. Simmons, 543 U.S. 551, 566 (2005); Atkins v. Virginia, 536 U.S. 304, 316 (2002).

21. *See infra* notes 114–28 and accompanying text.

22. The 2008 *Kennedy* decision illustrates the Court's continued commitment to: (1) finding the existence of a national consensus against a particular type of punishment, and (2) the importance of satisfying the capital punishment justifications of retribution and deterrence. *See Kennedy*, 128 S. Ct. at 2645–61 (holding that the statute authorizing the death penalty for the rape of a child was unconstitutional under the Eighth Amendment).

23. While the Court's capital-sentencing jurisprudence has traditionally departed from its noncapital-sentencing case law in fundamental ways, it was unclear how the Court would

invalidate life without parole sentences as cruel and unusual punishment, the criteria set forth in these capital punishment cases will need to be satisfied.[24] Thus, a careful understanding of the Court's analysis in *Atkins* and *Roper* will provide the appropriate standard against which to evaluate the validity of a mentally retarded or juvenile offender's challenge to a life without parole sentence. Furthermore, reviewing these cases will also establish that juvenile and mentally retarded offenders are undeniably similar in aspects crucial to an Eighth Amendment challenge.

1. The Ineffectiveness of Retribution and Deterrence

Atkins and *Roper* both place significant emphasis on the difficulty of applying retribution and deterrence rationales to mentally retarded and juvenile offenders.[25] Retribution, the punishment imposed as repayment or revenge for the offense committed,[26] and deterrence, the prevention of criminal behavior by fear of punishment,[27] have long been among society's goals in punishing its offenders.[28] The Court continues to embrace these philosophical ends, citing the effectiveness of both retribution and deterrence as the primary legitimate social justification of the death penalty.[29] Thus, if neither retribution nor deterrence is served by execution, the imposition of the death penalty is unconstitutional.[30]

a. Retribution

Retribution demands that the severity of punishment be dependent on the offender's culpability.[31] In *Atkins*, the Court found that mental retardation directly affects a criminal offender's

approach a categorical challenge to life without parole sentences. In *Graham*, the Court specifically adopted the analysis used in *Roper* and *Atkins*. *Graham*, 130 S. Ct. at 2023.

24. *See infra* note 111 and accompanying text.

25. *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319–20.

26. BLACK'S LAW DICTIONARY 1431 (9th ed. 2009).

27. *Id.* at 514.

28. *See generally* THOMAS HOBBES, LEVIATHAN 214–20 (Richard Tuck ed., Cambridge Univ. Press 2006) (1651) (asserting that the justification of punishment must be utilitarian and that punishment is by nature retributive).

29. Gregg v. Georgia, 428 U.S. 153, 183 (1976).

30. Enmund v. Florida, 458 U.S. 782, 798 (1982).

31. Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).

culpability.[32] The clinical definition of mental retardation describes sub-average intellectual functioning as well as significant limitations in adaptive skills—such as communication, self-care, and self-direction—that manifest before the age of eighteen.[33] In turn, these impairments affect a mentally retarded offender's ability to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.[34] The *Atkins* Court found these characteristics created a lesser culpability, inadequate to justify the most severe punishment available to the State.[35]

The argument in *Roper* was the same as that in *Atkins*: diminished culpability renders the case for retribution not "strong" enough to justify the "law's most severe penalty."[36] In order to establish the juvenile offender's diminished culpability, the Court described three conditions intrinsic to youth, two of which distinctly echoed those described in *Atkins*.[37] First, a juvenile's lack of maturity and undeveloped sense of responsibility often result in "impetuous and ill-considered actions."[38] Second, a juvenile is "more vulnerable . . . to negative influences and outside pressures, including peer pressure."[39] Third, a juvenile's personality traits are "more transitory, less fixed" than those of an adult.[40] Taken in totality, the *Roper* Court concluded that those characteristics combined to "render suspect any conclusion that a juvenile falls among the worst

32. *Id.*; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429–32 (1985).

33. John McGee & Frank Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 55, 58–60 (Ronald W. Conley, Ruth Luckasson, & George N. Bouthilet eds., 1992).

34. Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice-Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY & L. 483, 487–89 (1994).

35. *Atkins*, 536 U.S. at 319.

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

37. *Compare Atkins*, 536 U.S. at 318 (describing mentally retarded offenders' proclivity to act according to impulse rather than a premeditated plan and follow rather than lead in group settings), *with Roper*, 543 U.S. at 569 (describing juvenile offenders' vulnerability to impulsive decisions, negative influence, and outside pressure).

38. *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

39. *Id.* at 569 (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

40. *Id.* at 570. *See generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (W.W. Norton 1968).

offenders" since the irresponsible conduct of a juvenile is not as morally reprehensible as that of an adult.[41] Ultimately, the Court found the case for retribution not as strong with a juvenile as with an adult offender.[42]

b. Deterrence

Capital punishment works as an effective deterrent "only when murder is the result of premeditation and deliberation"[43] because it is based upon the assumption that the increased severity of punishment will prevent people from murdering.[44] However, as with retribution, the mentally retarded offender has certain cognitive and behavioral incapacities, such as diminished capabilities to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses that render the calculus of deterrence ineffective and execution unjustifiable.[45]

The *Atkins* Court reasoned that these characteristics particular to mentally retarded offenders decrease the likelihood that mentally retarded individuals can adequately reason that their actions may lead to their execution and therefore control their conduct based on that information.[46] Since only mentally retarded offenders are precluded from receiving capital punishment, offenders who can engage in such analytical reasoning still face the threat of execution, thereby preserving the greater societal deterrent value of capital punishment.[47]

In *Roper*, the Court concluded that the very same youthful characteristics that diminished a juvenile offender's culpability such that retribution was unjustifiable also rendered the deterrence rationale less effective.[48] Similar to how it treated the mentally retarded offender, the Court treated the possibility that a youthful offender would engage in any cost-benefit analysis that would attach

41. *Roper*, 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

42. *Id.* at 571.

43. Enmund v. Florida, 458 U.S. 782, 799 (1982) (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

44. Atkins v. Virginia, 536 U.S. 304, 320 (2002).

45. *Id.*

46. *Id.*

47. *Id.*

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

weight to the possibility of execution as virtually nonexistent.[49] Thus, as with mentally retarded offenders, executing juveniles furthered no societal interest in deterrence.

2. A Reduced Capacity to Effectively Demonstrate Mitigation

Mandatory imposition of capital punishment regardless of a crime's severity is unconstitutional.[50] Rather, in capital cases, justice requires that the sentencer consider not only the acts by which the crime was committed, but also the circumstances of the offense and the character of the offender.[51] While imposition of a lesser sentence may not warrant such detailed reflection, the severity of a death sentence requires a heightened standard of consideration in order to satisfy the Eighth Amendment's fundamental respect for humanity.[52] Without a mandated exploration into possible mitigation during sentencing, a death sentence may be imposed although other factors call for a lesser penalty.[53]

The reduced capacity of mentally retarded offenders enhances the risk that capital punishment, rather than a lesser penalty, will be inflicted.[54] Mentally retarded defendants are more likely to make false confessions[55] and less likely to make a persuasive showing of mitigation during sentencing, a combination that the *Atkins* Court concluded placed the mentally retarded at a special risk of wrongful execution.[56] The risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty is enhanced not only by the possibility of false confessions but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.[57] Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression

49. *Id.* at 572 (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

50. Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

51. Pa. *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

52. *Woodson*, 428 U.S. at 304.

53. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

54. Atkins v. Virginia, 536 U.S. 304, 320 (2002).

55. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 503–04 (2002).

56. *Atkins*, 536 U.S. at 320–21.

57. *Id.*

of lack of remorse for their crimes.[58] Additionally, mental retardation may actually work as an aggravating sentencing factor rather than a mitigating factor, since juries may find mental retardation to be an indication of future dangerousness.[59] In light of these considerations, the *Atkins* Court elected to adopt a categorical ban on the execution of mentally retarded offenders, finding the risk of wrongful execution outweighs any societal benefit, especially in light of the ineffectiveness of retribution and deterrence when it comes to mentally retarded offenders.[60]

Significantly, in *Roper*, the Court's reliance on reduced capacity to effectively demonstrate mitigation is less prominent than in *Atkins*.[61] While the Court did not include a separate "reduced capacity" section in its analysis, as it did in *Atkins*, it briefly noted concerns about sentencing mitigation in its analysis in *Roper*.[62] The *Roper* Court emphasized the importance of an individualized evaluation of every crime's circumstances and every offender's characteristics when assessing the appropriateness of execution.[63] While the Eighth Amendment requires the consideration of both the circumstances of a particular offense and the offender's character as mitigating factors when deciding whether to impose the death penalty,[64] the *Roper* Court feared that even the adoption of a mandatory rule designed to ensure that youth would not be overlooked as a mitigating factor during sentencing could not address the Court's concerns about executions of juvenile offenders.[65] Further, even if youth's mitigating value was a required consideration and objectively called for a sentence less than death, the Court feared it would still be improperly overpowered by other factors.[66] Just as the very condition of mental retardation may be held

58. *Id.*

59. *Id.* at 321 (citing Penry v. Lynaugh, 492 U.S. 302, 323–25 (1989)).

60. *Id.* at 318–21.

61. *See* Roper v. Simmons, 543 U.S. 551, 572 (2005).

62. *Id.* at 572; *Atkins*, 536 U.S. at 320–21.

63. *Roper*, 543 U.S. at 572.

64. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

65. *Roper*, 543 U.S. at 573.

66. *Id.* at 572–73.

against the mentally retarded offender,[67] the *Roper* Court feared that a juvenile defendant's youth could be "counted against him."[68]

3. A National Consensus

The Eighth Amendment, though unwavering in its elemental conception as protecting man's dignity, is truly dynamic. What constitutes excessive punishment today cannot be judged by the founding fathers' standards. Rather the Eighth Amendment draws meaning from society's evolving standards of decency.[69] The Court cannot simply divine these societal standards of decency.[70] Instead, it must rely on objective evidence of contemporary values as demonstrated by state and federal legislation.[71]

In *Atkins*, the Court cited nineteen states that had enacted legislation that specifically prohibits the execution of mentally retarded offenders, and at least two additional states that had passed similar bills in at least one house since the Court first considered the constitutionality of executing the mentally retarded in *Penry v. Lynaugh*.[72] While not an overwhelming percentage,[73] the *Atkins* Court decided it was a trend sufficient to demonstrate an evolved standard of decency.[74] Indeed, rather than sheer numerical force, the Court placed significance on the consistency of change in the thirteen years since the Court first considered the issue.[75] The Court also expanded the objective criteria for evaluating whether a national consensus exists to include demonstrated practice, noting that even in states that had no prohibition on executing the mentally retarded the practice had become exceedingly uncommon.[76]

In *Roper*, the Court found evidence of a national consensus against the death penalty for juveniles that was similar to the

67. *Atkins*, 536 U.S. at 321 (citing Penry v. Lynaugh, 492 U.S. 302, 323–25 (1989)).

68. *Roper*, 543 U.S. at 573.

69. *Atkins*, 536 U.S. at 311–12 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

70. *See Penry*, 492 U.S. at 331.

71. *Id.* at 331.

72. *Atkins*, 536 U.S. at 313–15.

73. This, however, represented a marked increase from the two states and Congress that had bans against executing mentally retarded offenders when *Penry* was decided. *See Penry*, 492 U.S. at 334.

74. *Atkins*, 536 U.S. at 313–16.

75. *Id.* at 315.

76. *Id.* at 316.

evidence the Court found to be demonstrative of a national consensus in *Atkins*.[77] The *Roper* Court cited eighteen states that had categorically banned juvenile executions, either by express legislative provision or by judicial interpretation.[78] As in *Atkins*, the Court documented the infrequency of actual juvenile execution as additional evidence of the national consensus.[79] While the rate of abolition of the death penalty for juveniles was slower than the rate for the mentally retarded, the *Roper* Court attributed the pace not to any consensus in favor of juvenile execution but to an earlier recognition of its impropriety.[80] Indeed, when the Court first considered the constitutionality of juvenile executions in *Stanford v. Kentucky*,[81] twelve states already prohibited executing any juvenile under age eighteen, and fifteen states prohibited the execution of any juvenile under age seventeen.[82] Thus, the Court placed the same weight on the consistency of change demonstrated in *Roper*, although slow-moving, as it had placed on the rapid pace of statutory change demonstrated in *Atkins*.

4. International Community

While often controversial,[83] reliance on foreign and international law in Supreme Court jurisprudence has been commonplace since the eighteenth century.[84] Scholars and jurists can debate the propriety of such reliance, but no one can deny that foreign materials frequently appear in judicial opinions. Indeed, some of the Supreme Court's most famous and controversial cases have relied on and included citations to international materials.[85] In particular, a range of

77. Roper v. Simmons, 543 U.S. 551, 564 (2005).

78. *Id.*

79. *Id.* at 564–65.

80. *Id.* at 566–67.

81. 492 U.S. 361 (1989).

82. *Roper*, 543 U.S. at 566.

83. *See* Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

84. *See generally* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (discussing the early Supreme Court's use of international laws and views).

85. *See* Lawrence v. Texas, 539 U.S. 558, 573, 576 (2003); Washington v. Glucksberg, 521 U.S. 702, 718 n.16 (1997); Roe v. Wade, 410 U.S. 113, 130, 149 n.44 (1973); Miranda v.

Eighth Amendment cases—including *Atkins* and *Roper*—include analyses of foreign sources.[86]

In *Atkins*, the majority attached a footnote at the end of its national-consensus analysis incorporating an international perspective on executing mentally retarded offenders.[87] While the international perspective was not dispositive, the Court used the fact that international materials were consistent with domestic legislative evidence to bolster its finding that a consensus against executing mentally retarded offenders exists.[88] Additionally, *Roper* provided a more extensive and explicit reliance on foreign materials, ultimately concluding that the almost-unanimous international condemnation of the juvenile death penalty provided "respected and significant confirmation" of the Court's finding.[89] In both *Atkins* and *Roper*, the Court relied on foreign materials to buttress its holdings.

B. Life Without Parole

1. Juvenile Life Without Parole Statistics

Forty-two states appear to allow juvenile life without parole sentences for a wide variety of crimes.[90] Thirty-seven states, the District of Columbia, and the federal government allow life without parole sentences for certain non-homicide crimes to be imposed on juveniles.[91] In twenty-seven of those states, a life without parole sentence "is mandatory for anyone, child or adult, found guilty of certain enumerated crimes."[92] A 2005 study found that there were 2,225 juvenile offenders serving life without parole sentences, accounting for roughly .02 percent of the total population of

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Arizona, 384 U.S. 436, 458 n.27, 478 n.46, 488–89 (1966); Poe v. Ullman, 367 U.S. 497, 555 n.16 (1961) (Harlan, J., dissenting); Dred Scott v. Sanford, 60 U.S. 393, 407 (1856).

86. *See Roper*, 543 U.S. at 604 (citing Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102–03 (1958)).

87. *Atkins*, 536 U.S. at 316 n.21.

88. *Id.*

89. *Roper*, 543 U.S. at 578.

90. HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 25 (2005).

91. Graham v. Florida, 130 S. Ct. 2011, 2023 (2010).

92. HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 90, at 25.

offenders serving life without parole sentences.[93] According to a 2008 study, this number increased to 2,484 prisoners serving life without parole sentences for offenses committed under the age of eighteen.[94] This increase is due not to a significant increase in juvenile life without parole sentences rates, but to improvements in state data reporting.[95] Of these approximately 2,484 offenders, the Court's decision in *Graham* will directly apply to only 129 offenders.[96]

While the United States was once alone in recognizing the special vulnerabilities of children in the legal system, it stands today in stark contrast to the international community's prohibition against life without parole sentences for juveniles.[97] Throughout the rest of the world, there are no juvenile offenders serving life without parole sentences.[98] Additionally, the United States' use of juvenile life without parole sentences is a violation of, or at least raises concern under, various international agreements to which the United States is a party.[99] For example, the United Nations Human Rights Committee, which oversees and enforces the International Covenant on Civil and Political Rights, issued the United States a 2006 directive to stop sentencing juvenile offenders to life without parole and review those juveniles already serving such sentences.[100] This was necessary because juvenile life without parole sentences violate

93. *Id.* at 124.

94. HUMAN RIGHTS WATCH, EXECUTIVE SUMMARY: THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES IN 2008, at 2 (2008).

95. *Id.*; *see* HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 90, at 124.

96. Alan Greenblatt, *States Soften 'Adult Time for Adult Crimes' Stance*, NAT'L PUB. RADIO, May 12, 2010, http://www.npr.org/templates/story/story.php?storyId=126928416.

97. In 1899, the state of Illinois was the first government in the world to decide that children accused of crimes should be tried in a juvenile court that was structured differently from the regular criminal courts. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 43 (Margaret K. Rosenheim et al. eds., 2001); *see also* Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. GAOR, 14th Sess. (Nov. 20, 1959) (adopted unanimously by the 78 members of the U.N. General Assembly and recognizing that children need appropriate legal protection by reason of their physical and mental immaturity); *infra* notes 206–10 and accompanying text.

98. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008).

99. HUMAN RIGHTS WATCH, *supra* note 94, at 8–9 (explaining the United States' various treaty obligations regarding the provision of juvenile legal protections).

100. U.N. Human Rights Committee, *Consideration of Reports Submitted by States' Parties Under Article 40 of the Covenant*, art. 34, U.N. Doc CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

article 24(1) of the Covenant,[101] to which the United States has been a party since 1992.[102]

Further, in 2008, the Committee on the Elimination of Racial Discrimination—the oversight and enforcement body for the International Convention on the Elimination of All Forms of Racial Discrimination—found that the United States' use of juvenile life without parole sentences, in light of racial disparities, violated the Convention.[103] The Committee recommended that the United States no longer sentence juveniles to life without parole and review any such sentences already imposed.[104] The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1994.[105]

2. Mentally Retarded Life Without Parole Statistics

To date, the Supreme Court has ignored the lesser culpability of mentally retarded offenders in hearing noncapital cases.[106] Rather than requiring that mental retardation be considered as either a complete bar to all extreme punishments, as with *Atkins*'s ban on capital punishment, or as a mitigating factor, as the Court did in *Penry*, the Court has so far left the treatment of mental retardation at sentencing to the discretion of individual jurisdictions.[107] In turn, many states have passed sentencing legislation that recognizes mental retardation as a mitigating factor or that exempts mentally retarded defendants from otherwise applicable mandatory minimum sentences.[108] While not direct or categorical prohibitions on life

101. *Id.*

102. 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights), *available at* http://www1.umn.edu/humanrts/usdocs/civilres.html. While the Senate ratified the Covenant with five reservations, the reservations do not affect Article 24.

103. U.N. Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

104. *Id.*

105. International Convention on the Elimination of All Forms of Racial Discrimination, 1966 U.S.T. 521, 660 U.N.T.S. 195.

106. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1161 (2009).

107. *Id.*

108. Timothy Cone, *Developing the Eighth Amendment for Those "Least Deserving" of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be "Cruel and Unusual" When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35, 44 (2004).

without parole sentences for mentally retarded offenders, these statutes can be viewed as an implicit recognition by some states that life without parole is not always an appropriate or fair punishment for the mentally retarded.[109] While concrete data on the number of mentally retarded offenders serving life without parole does not exist, it is likely that there are at least 370.[110]

III. THE PROBLEM WITH LIFE: CONSTITUTIONAL CONCERNS WITH JUVENILE LIFE WITHOUT PAROLE SENTENCING POLICY

This part is twofold. First, it explores the analytical highlights of the recent *Graham* decision. Second, it considers whether *Graham*'s reasoning could be extended to support a categorical challenge to juvenile life without parole sentences for homicide-related offenses. Before moving to the specifics of *Graham*, however, it is worth noting the analytical methodology adopted by the Court.

In deciding Eighth Amendment proportionality challenges, the Court has developed two distinct approaches, either of which could have been applied to *Graham*'s categorical challenge to juvenile life without parole. In the first, used for challenges to the length of a term-of-years sentence, the Court considers the circumstances of the individual case to determine if the sentence is unconstitutionally excessive.[111] The second approach, traditionally used only in categorical challenges to the death penalty, considers the nature of the offense and the characteristics of the offenders.[112] While it was originally unclear which analytical approach the Court would take to

109. *See id.*

110. This number was calculated based on the number of offenders serving life without parole sentences and the percentage of the population estimated to be mentally retarded. *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005 (finding that 28 percent of 132,000 of the nation's inmates serving life are serving life without parole sentences); Kerry Hall, *Life-or-Death Decision Hinges on Nebulous IQ Scores: Claims of Mental Retardation by Death-Row Inmates May Bring Life Sentences Under N.C. Legislation; Advocates Say Jurors Should Decide Claims*, CHARLOTTE OBSERVER, Aug. 23, 2003, at 4. ("Nationally, the mentally retarded make up 1 percent to 3 percent of the general population . . . ."). While this is a rough approximation, it should serve to provide at least some quantitative anchor to the number of mentally retarded offenders serving life without parole.

111. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010). Notable examples of this approach are found in *Solem v. Helm*, 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Ewing v. California*, 583 U.S. 11 (2003).

112. *Graham*, 130 S. Ct. at 2022. Notable cases using this approach include *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

resolve a categorical challenge to a life without parole sentence, *Graham* made clear that *Atkins* and *Roper* controlled.[113] While the Court provides only cursory justification for its choice of analytical methodology, the choice comes as little surprise.

Since *Atkins* and *Roper* eliminate death penalty sentences for certain classes of offenders, life without parole sentences effectively function as the "most severe punishment" available—a phrase used by the Court in *Roper* to describe punishments that should be dispensed with caution.[114] Indeed, the Court in *Roper* identified life without parole sentencing as an operable substitute for any residual deterrent effect capital punishment might have held for juvenile offenders.[115] Following this logic, the Eighth Amendment should apply to categorical challenges to life without parole with the "special force" demonstrated in *Atkins* and *Roper*.[116] Accordingly, in order to find juvenile life without parole sentences unconstitutional, the same analytical factors used in *Roper* and *Atkins* must be addressed.[117]

A. Punishment Theory Concerns

Just as in *Roper*, the *Graham* Court considered the culpability of juvenile offenders as part of its inquiry into whether the challenged sentencing practice served any legitimate penological goals.[118] Thus, the juvenile offender's diminished personal culpability is as important in evaluating life without parole sentences for non-homicide offenses as it was in *Roper*'s inquiry into the death penalty.[119] To this end, the *Graham* Court simply noted that there was no reason to reconsider *Roper*'s conclusions about the nature of

113. *Graham*, 130 S. Ct. at 2023. Even before the Court's adoption of the analytical methodology used in *Atkins* and *Roper*, there existed strong arguments for reconciling the Court's divergent approaches, especially for challenges involving juvenile and mentally retarded offenders. *See* Barkow, *supra* note 106, at 1179–82.

114. *Roper*, 543 U.S. at 568.

115. *Id.* at 572.

116. *Id.* at 568 (citing Thompson v. Oklahoma, 487 U.S. 815, 856 (1988)); *see also* Jason Cato & Chris Togneri, *U.S. Supreme Court May Alter Juveniles' Life Sentences*, PITTSBURGH TRIB. REV., May 13, 2009 (quoting Michael Sturley, professor and director of the Supreme Court Clinic at the University of Texas Law School).

117. *See supra* Part II.A.

118. *Graham*, 130 S. Ct. at 2026.

119. *See supra* notes 36–42, 48–49 and accompanying text.

juveniles.[120] Rather, the *Graham* Court, using references to recent psychological and neurological studies,[121] only confirmed *Roper*'s findings that juveniles, by virtue of their youth, are less able to control their impulses, to use reason to guide their behavior, and to think about the consequences of their conduct than adults.[122]

These characteristics served to validate that there are fundamental differences between juvenile and adult offenders.[123] For example, neurological evidence indicates the brain's frontal lobe, undeveloped in children, is linked to an individual's capacity to engage in decision making and to rationally weigh the consequences of conduct.[124] Furthermore, because their frontal lobes function poorly, juveniles tend to rely on a part of the brain called the amygdala during decision making.[125] The amygdala is impulsive and creates immediate emotional responses to situations.[126] Accordingly, juveniles are more likely than adults to react with gut instincts.[127]

In addition to scientific evidence describing the differences between juveniles and adults, the legal treatment of juveniles differs in areas outside of criminal sentencing jurisprudence. Laws at both state and federal levels recognize juveniles' special vulnerabilities and their ramifications on the amount of responsibility and protection juveniles should be given.[128] Laws limiting juvenile freedom reflect a societal understanding that juveniles are not mature enough for a diverse array of responsibilities.[129] These range from the obvious, such as restrictions upon driver's licenses,[130] to the mundane, such as

120. *Graham*, 130 S. Ct. at 2026.

121. *Id.*

122. *See supra* notes 38–40, 48–49 and accompanying text.

123. *Id.*

124. Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, SCI. NEWS, May 8, 2004, at 299.

125. HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 90, at 49.

126. John Matthew Fabian, *Forensic Neuropsychological Assessment and Death Penalty Litigation*, CHAMPION, Apr. 2009, at 29.

127. A.B.A. JUVENILE JUSTICE CENTER, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 2 (2004) (quoting Dr. Deborah Yurgelun-Todd, Harv. Med. Sch.), *available at* www.abanet.org/crimjust/juvjus/Adolescence.pdf.

128. Brief for Petitioner, *supra* note 18, at 30.

129. *Id.*

130. *See, e.g.*, CAL. VEH. CODE § 12509 (West 2010) (stating that no minor under age fifteen years and six months may hold a learner's permit).

restrictions upon tattoos.[131] Other laws, such as those that impose enhanced criminal liability on offenders who victimize minors,[132] reflect society's judgment that juveniles are especially vulnerable and in need of legal protections.[133] In particular, criminal statutes that specifically prohibit the luring or enticing of juveniles for the purpose of proposing illicit conduct reflect the legal recognition that juveniles are susceptible to outside negative influences and are vulnerable.[134]

As established in *Roper*, these legal protections, together with the psychological and biological evidence described above, have direct impact on the Eighth Amendment calculation of personal culpability.[135] As in *Roper*, this calculation in turn influenced the *Graham* Court's inquiry into penological justification for the challenged sentencing practice.[136] While the Constitution does not mandate the adoption of any particular penological theory,[137] the Court in both *Atkins* and *Roper* assessed retribution and deterrence as the chief concerns of punishment theory when dealing with the law's most severe penalty.[138] The *Graham* Court similarly explored retribution and deterrence, as well as incapacitation and rehabilitation, as possible penological justifications for sentencing juvenile offenders to life without parole for non-homicide offenses.[139] While the Court's discussion of incapacitation and rehabilitation is interesting, this analysis will focus solely on retribution and deterrence.[140]

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131. *See, e.g.*, WIS. STAT. § 948.70 (2009) (a minor age sixteen or younger may not be tattooed except for medical reasons).

132. *See, e.g.*, ALA. CODE § 13A-5-40(a)(15) (2009) (making murder a capital offense where the victim is under fourteen years of age).

133. Brief for Petitioner, *supra* note 18, at 32.

134. *See, e.g.*, ALA. CODE § 13A-6-67 (2009) (making it a crime to entice or lure a child under the age of sixteen).

135. Brief for Petitioner, *supra* note 18, at 28.

136. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 571 (2005).

137. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment).

138. *See supra* Part II.A.1.

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

140. This Note proposes that when a life without parole sentence is the maximum sentence available for a particular group of offenders, incapacitation or rehabilitation alone would be insufficient to justify the law's most severe sentence. While life without parole sentences undoubtedly work as effectively as death sentences to segregate juvenile offenders from society,

Retribution justifies punishing offenders because the sentence expresses society's condemnation of the crime and seeks to restore the moral imbalance created by the offense.[141] However, these goals must be tempered by and proportional to the personal culpability of the offender.[142] Here, the lowered personal culpability of the juvenile offender becomes critical. As the *Graham* Court noted, if retribution does not justify imposing the death penalty on juvenile offenders given their lesser culpability, it is an even weaker justification for juvenile non-homicide offenders.[143] Simply put, juveniles, by virtue of their diminished culpability, do not warrant life without parole sentences when compared to their adult counterparts convicted of the same crimes.[144]

Similarly, the deterrence justifications underlying juvenile life without parole are undercut by a youth's "lack of maturity and underdeveloped sense of maturity" and inability to imagine future consequences for today's actions.[145] This echoes the Court's determination in *Roper* that the death penalty was not an effective deterrent to juvenile offenders since juveniles are unlikely to engage in any cost-benefit analysis that weighs the cost of their life against the perceived benefit of any criminal conduct.[146] To contextualize, a juvenile's perception of the "rest of their lives" is so impaired, many juvenile offenders sentenced to life without parole do not come to grips with the reality of their sentences until years of incarceration

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juveniles' identities are not fixed and young offenders will often mature such that segregation will no longer be necessary. *Roper*, 543 U.S. at 570. Just as with execution, the inflexibility of juvenile life without parole sentences overlooks juveniles' capacity to grow. Furthermore, as a lower court grappling with a life without parole challenge stated, the need to segregate criminals "does not justify locking up this boy [a thirteen-year-old boy who pled guilty to murder] for his whole life." Naovarath v. State, 779 P.2d 944, 948 (Nev. 1989). As for rehabilitation, the very nature of life without parole sentences dismisses the goal altogether. *Graham*, 130 S. Ct. at 2029–30. Thus, to withstand categorical challenges by juvenile offenders, either deterrence or retribution *must* serve as justification for life without parole sentences. Since at least one of these penological goals is necessary to justify juvenile life without parole for non-homicide crimes, they alone will be explored.

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

142. *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

143. *Id.*

144. Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1108 (2006).

145. *Graham*, 130 S. Ct. at 2028–29 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

146. Roper v. Simmons, 543 U.S. 551, 572 (2005) (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

have already passed.[147] Such a delayed realization is particularly effective to illustrate the virtually nonexistent likelihood that a juvenile has incorporated the possibility of receiving life without parole into his decision-making process.[148] If a juvenile offender cannot even comprehend life with parole after years of incarceration, to expect him to rationalize that possibility prior to offending is to expect the near impossible.[149] This improbability makes any deterrent effect virtually nonexistent, echoing the Court's conclusions in *Roper* about juveniles and the deterrent value of long-term, future punishments.[150] Even if the extremity of life without parole served to deter a few juvenile offenders, the *Graham* Court noted that this limited deterrent effect was insufficient justification, given the juvenile non-homicide offender's "diminished moral responsibility."[151]

After finding incapacitation and rehabilitation similarly insufficient to justify juvenile life without parole sentences for non-homicide crimes,[152] the Court concluded that without adequate penological justification, the practice was cruel and unusual.[153] Since the Court's findings regarding retribution and deterrence seem based upon *Roper*'s conclusions about the juvenile offender's lowered personal culpability, extending *Graham* to cover life without parole sentences for homicide-related crimes may seem a natural progression. However, *Graham* adds an additional inquiry absent from *Roper*'s analysis: the severity of the offense.[154] While all

147. *See* HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 90, at 54 (citing Interview by Human Rights Watch with Matthew C. (pseudonym) at Colo. State Penitentiary, Cañon City, Colo., (July 27, 2004) ("I don't think it really sunk in until I'd been in prison for a while and had some time to look over my case and then I realized, 'man they're trying to keep me here.' You know what I mean? It kinda sunk in."); Letter from Jacob O. (pseudonym), Wash. State Penitentiary, Walla Walla, Wash., to Human Rights Watch (Mar. 26, 2004) (on file with Human Rights Watch) ("In all reality it was not until about the age of twenty-two that I truly understood [the sentence]. I did not know that this would mean that my whole life was going to be gone. If I would have known at the time what it all meant I would have tried to take the plea.")).

148. *Roper*, 543 U.S. at 572 (quoting *Thompson*, 487 U.S. at 837).

149. *See* Meghan M. Deerin, *The Teen Brain Theory*, CHI. TRIB., Aug. 12, 2001, at C1 (stating that at least one researcher has found that teenagers typically have a very short time-horizon, looking only a few days into the future when making decisions).

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

151. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010).

152. *Id.* at 2029–30

153. *Id.* at 2030.

154. *Id.* at 2026.

juvenile offenders—regardless of their crimes—may share a similarly diminished personal culpability, their "moral culpability" depends not on age, but on offense.[155] While personal culpability is determined by way of an offender's age and brain development,[156] moral culpability is determined by his crime.[157]

Where *Roper* predicated its analysis of both retribution and deterrence on a juvenile offender's lowered personal culpability,[158] *Graham* balanced only retribution against personal culpability.[159] In contrast, deterrence was juxtaposed with the juvenile offender's moral responsibility.[160] Thus, because personal culpability is determined by age, not by crime, the Court's analysis of retribution as justification for juvenile life without parole sentences would likely be unaltered by the offense's increased severity. However, because the Court has drawn a line between those offenses resulting in death and those that do not,[161] the Court's deterrence analysis, weighed against an offender's "moral responsibility,"[162] would almost certainly be altered by the increased severity of homicide-related offenses. Thus, it is likely that in a categorical challenge to juvenile life without parole sentences for homicide-related crimes, the Court would find that while retribution does not justify such sentences, deterrence does. The question remains whether deterrence alone would be enough to justify life without parole.[163]

B. Evidence of Reduced Capacity

When an offender is subject to the most extreme sentence available, justice demands that the court consider more than just his

155. *Id.* at 2027.

156. *Id.* at 2026.

157. *Id.* at 2027.

158. *See supra* notes 36–42, 48–49 and accompanying text.

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

160. *Id.* at 2028–29.

161. *Id.* at 2027; Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008).

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

163. In this scenario, the *Graham* Court's analysis of incapacitation and rehabilitation may be telling. While the incapacitation analysis mentions neither personal culpability nor moral responsibility, the Court noted that foreclosing the possibility of rehabilitation by sentencing a juvenile non-homicide offender to life without parole was inappropriate in light of his "limited moral culpability." *Id.* at 2029–30. Thus, it is possible that in a challenge involving a homicide-related offense, the Court may find the absence of rehabilitation appropriate. Again, it remains to be seen if that, together with deterrence, can justify juvenile life without parole sentences.

crime during sentencing.[164] Without this more in-depth review, an extreme sentence may be imposed when there are factors that call for a less severe penalty.[165] The *Roper* Court grappled with these Eighth Amendment concerns in the context of the death penalty, focusing on the distinct possibility that the mitigating value of juvenile offenders' youth would be overshadowed by the brutality of their crimes.[166] Interestingly, the *Graham* Court does not include any analysis of a juvenile's reduced capacity to mitigate a severe sentence.[167] However, as in *Roper*, it is important to note that a juvenile's reduced capacity to effectively mitigate severe sentences creates special dangers when it comes to life without parole sentences. With this in mind, *Graham* silently helps to alleviate concerns developed in *Roper* about a juvenile's ability to effectively navigate the criminal justice system. The following may also be persuasive in considering a categorical challenge to juvenile life without parole sentences for homicide-related crimes.

Besides increasing the risk that juvenile offenders will face more severe sentences than perhaps appropriate, juvenile characteristics bear on the risk of wrongful conviction.[168] The psychological and neurological characteristics inherent in youth[169] raise concerns about the fairness and reliability of criminal proceedings involving juveniles to a degree intolerable in heightened Eighth Amendment review.[170] For example, the justice system has a serious systemic concern about the reliability of child witnesses[171] that is founded on evidence showing that children are extremely susceptible to suggestive questioning techniques like repetition, guided imagery,

164. Pa. *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937); *see also supra* notes 50–53 and accompanying text (describing the Eighth Amendment's heightened standard of review in cases where capital punishment is a possible sentence).

165. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

166. *See supra* notes 62–65 and accompanying text.

167. This absence is perhaps unsurprising given the Court's continued de-emphasis on mitigation. In *Atkins*, the Court found a mentally retarded offender's reduced capacity to mitigate his sentence as a separate justification to categorically ban the execution of such offenders. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002). In *Roper*, the difficulties juveniles face in effectively mitigating their sentences receive a much less distinct treatment. Roper v. Simmons, 543 U.S. 551, 573–74 (2005).

168. Brief for Petitioner, *supra* note 18, at 35, 38.

169. *See supra* notes 122–27 and accompanying text (describing the psychological and neurological characteristics inherent in youth).

170. *See* Brief for Petitioner, *supra* note 18, at 39.

171. Kennedy v. Louisiana, 128 S. Ct. 2641, 2663 (2008).

and selective reinforcement.[172] These susceptibilities impact not only the reliability of child witnesses, but also the reliability of the police interrogation process, creating a heightened risk that juveniles will falsely confess. Furthermore, given their tendency to value short-term benefits over future outcomes, juveniles are more likely to give inculpatory statements in order to be allowed to leave the police station.[173] Juveniles are usually quick to comply with and reluctant to question the wishes of authority figures, increasing juveniles' susceptibility to police suggestions and interrogation pressures.[174] Indeed, of the young adolescents aged twelve to fifteen who have been exonerated in the United States, 69 percent have confessed falsely, as compared with 25 percent of teens aged sixteen to seventeen and 8 percent of adults.[175]

Even after interrogations, juveniles continue to face unique challenges in the criminal justice system. For example, during an adult criminal proceeding, the defendant is responsible for making critical decisions, such as whether to testify, waive a jury trial, or accept a plea bargain.[176] However, there exist serious scientific and sociological doubts regarding the capacity of juveniles to make these critical legal decisions.[177] Furthermore, like mentally retarded adults, juveniles are "less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[178]

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172. *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 47–54 (2000).

173. *See* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 65–66 (2007).

174. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 150–52 (2003).

175. Samuel R. Gross, et al., *Exonerations in the United States: 1989–2003*, 95 CRIM. L. & CRIMINOLOGY 523, 545 tbl.4 (2005).

176. *See* MODEL RULES OF PROF'L CONDUCT § 1.2(a) (2007).

177. *See* Thomas Grisso et. al., *Juveniles' Competence to Stand Trial*, 27 LAW & HUM. BEHAV. 333, 356 (2003) (finding that one of every three eleven- to thirteen-year-olds and one of every five fourteen- to fifteen-year-olds showed impairments in competency that would result in a mentally ill adult being found incompetent to stand trial); *id.* at 357 (finding that young adolescents cannot recognize the risks or consider the long-term consequences of legal decisions); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y. & L. 3, 11 (1997) (noting that over half of adolescents studied thought judges would penalize defendants for exercising rights).

178. Brief for Petitioner, *supra* note 18, at 39 (quoting Atkins v. Virginia, 536 U.S. 304, 320–21 (2002)).

C. Evidence of a National Consensus

While particularly illustrative of the impropriety of juvenile life without parole sentences for non-homicide offenses, the above analysis was not the Court's first step in its Eighth Amendment examination. Rather, as in *Atkins* and *Roper*, the *Graham* Court first reviewed the objective indicia of national consensus as expressed by federal and state legislation addressing juvenile life without parole sentences.[179] These statutes work to inform the Court's inquiry into society's evolving standards of decency.[180] Here, the *Graham* Court cited that thirty-seven states, the District of Columbia, and the federal government allowed the possibility of life without parole for non-homicide crimes.[181] The Court quickly dismissed that the sheer number of jurisdictions authorizing juvenile life without parole for non-homicide crimes alone conclusively demonstrated a national consensus approving the practice.[182] According to the Court, the absence of any legislative trend working to ban juvenile life without parole sentences for non-homicide crimes is a result of transfer laws and not an indication of legislative approval of the sentencing practice.[183]

Since actual statutory authorization of juvenile life without parole sentences for non-homicide crimes was an unreliable indicator of the national consensus, the Court focused its analysis on the actual sentencing practices of the states.[184] Citing that only 109 juvenile offenders were serving life without parole sentences for non-homicide offenses, the Court concluded that while a significant number of jurisdictions allow for the sentence, the infrequency of its use disclosed a consensus against its use.[185] While the Court admitted that the number of juveniles sentenced to life without parole for non-

179. Graham v. Florida, 130 S. Ct. 2011, 2023–26 (2010).

180. *Id.* at 2022–23.

181. *Id.* at 2023.

182. *See id.* Indeed, had the Court relied on this evidence alone, the Court would almost have certainly found no national consensus against juvenile life without parole sentences for non-homicide offenses given the Court's analysis in *Atkins* and *Roper*. *See supra* Part II.A.3.

183. *Graham*, 130 S. Ct. at 2025–26.

184. *Id.* at 2023.

185. *Id.* The Court later noted that this number may not be entirely precise, which may account for media reports that *Graham* will directly affect 129 offenders. *Id.* at 2024; *see, e.g.*, Greenblatt, *supra* note 96.

homicide crimes may be higher than in past Eighth Amendment challenges, proportionally, the practice is rare.[186]

This is perhaps the most surprising aspect of the *Graham* Court's decision.[187] While both *Atkins* and *Roper* relied on demonstrated sentencing practices in evaluating the respective national consensuses, these findings were supported by a consistent legislative trend toward banning the sentencing practices at issue.[188] In *Graham*, the Court affirmatively moved away from relying on enacted legislation as the "clearest and most reliable objective evidence of contemporary values"[189] and toward actual sentencing practices.[190] This analytical shift could have important implications for a future challenge to juvenile life without parole sentences for homicide-related offenses.

Among the fifty states, the District of Columbia, and the federal system, there are 2,574 juvenile offenders serving life without parole sentences.[191] While it is unclear exactly how many of these offenders are serving life without parole for homicide-related offenses, the number is approximately 2,400.[192] Interestingly, between 2005—when the Court decided *Roper*—and 2008, nearly 2,900 juveniles were arrested in connection with murder and non-negligent manslaughter.[193] This means that approximately 82 percent of

186. *Graham*, 130 S. Ct. at 2024. In comparison to the five mentally retarded offenders executed in a five-year period cited by the *Atkins* Court, 109 juvenile offenders does appear high. Atkins v. Virginia, 536 U.S. 304, 316 (2002). However, when one considers—as the *Graham* Court did—that in 2007 alone, some 57,600 juveniles were arrested for aggravated assault; 3,580 for forcible rape; 34,500 for robbery; 81,900 for burglary; 195,700 for drug offenses; and 7,200 for arson, 109 total juveniles serving life without parole for comparable offenses seems very small. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, http://ojjdp.ncjrs.org/ojstatbb/ (last visited July 1, 2010).

187. Justice Thomas would agree. *Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting).

188. *See supra* Part II.A.3.

189. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

190. *Graham*, 130 S. Ct. at 2023.

191. PBS Frontline, *Juveniles Serving Life Without Parole in the U.S.* ¶ 3 (May 21, 2009), http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html#more.

192. This approximation is based on the *Graham* Court's statistic that 109 juveniles are serving life without parole for non-homicide-related offenses as compared to the PBS statistic that nationwide, some 2,574 juveniles are serving life without parole. While a rough estimate, it seems in line with other sources. *See, e.g.*, Mark Sherman, *Justices Bar Life Terms in Some Juvenile Cases*, COLUMBUS DISPATCH, May 17, 2010, at 1 (noting that more than 2,000 juveniles are serving life without parole for killing someone).

193. Between 2005 and 2008, according to the federal government's Uniform Crime Reports, 2,872 offenders under the age of eighteen were arrested for murder or non-negligent homicide.

juveniles arrested for homicide-related offenses received the maximum available sentence.[194] This percentage would be unlikely to convince the Court that a national consensus exists against juvenile life without parole sentences.

While the Court would likely not be persuaded by demonstrated sentencing practices, it is not the only piece that composes national-consensus evidence. The Court would likely give weight, as it did in *Atkins* and *Roper*, to the consistent movement of recent legislative proposals toward the abolition of juvenile life without parole sentences.[195] For example, if passed, the Juvenile Justice Accountability and Improvement Act of 2009 would deny funding to states that refuse to offer a parole option to juvenile offenders and authorize state grants to improve legal representation for youths facing life sentences.[196] Further, states have also proposed legislation that would reduce the impact of juvenile life without parole sentences.[197] However, these proposals would be unlikely to persuade the Court that a national consensus exists against sentencing juveniles to life without parole for homicide-related crimes.

As compared with the legislative trend that opposed executing juvenile offenders, there has not yet been a consistent direction of national change reflected by legislation dealing directly with juvenile

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See U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, tbl.32 (2008), http://www.fbi.gov/ucr/cius2008/data/table_32.html; *id.* (2007), http://www.fbi.gov/ucr/cius2007/data/table_32.html; *id.* (2006), http://www.fbi.gov/ucr/cius2006/data/table_32.html; *id.* (2005), http://www.fbi.gov/ucr/05cius/data/table_32.html.

194. This estimate assumes all arrested juveniles were convicted and all juveniles currently serving life without parole were sentenced after *Roper*. While extremely rough, this figure should still shed some light on the actual incidence of juvenile life without parole sentences for homicide-related offenses.

195. Roper v. Simmons, 543 U.S. 551, 567 (2005); Atkins v. Virginia, 536 U.S. 304, 315 (2002).

196. Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 111th Cong. §§ 3(d)(2), 6(a) (2009).

197. *See, e.g.*, H.B. 4518, Leg. 95th Sess. (Mich. 2009) (proposing a categorical ban on juvenile life without parole sentences); H.B. 757, Leg. 111th Sess. (Fla. 2009) (providing that a child fifteen years of age or younger who is sentenced to life or more than ten years in prison is eligible for parole if (1) the offender has been incarcerated for a minimum period and (2) has not previously been convicted of or pled *nolo contendere* to certain violent offenses); S.B 399, 2009-10 Leg., Reg. Sess. (Cal. 2009) (proposing a procedural mechanism to review the sentence of a person who was convicted and sentenced to life without parole for a crime committed when the person was under the age of eighteen, authorize courts to recall that sentence, and impose a new sentence).

life without parole sentences.[198] Juvenile advocates should press state legislatures to prohibit juvenile life without parole sentences. This effort is likely to eventually produce the necessary national consensus by way of legislative enactments. For example, it is conceivable that the Court would be persuaded of a national consensus if fourteen states and Congress were to ban juvenile life without parole sentences after the Court's ruling in *Graham*.[199] As there have already been bills in several states proposing categorical bans on juvenile life without parole sentences, it may only be a matter of time before a national consensus indicates the Eighth Amendment standard has once again evolved.[200]

D. International Community

As in *Atkins* and *Roper*,[201] the Court in *Graham* found support for its categorical ban after surveying the sentencing practices of the international community.[202] The Court noted that the United States is the last remaining nation to impose life without parole sentences on juveniles convicted of non-homicide offenses.[203] Interestingly, the United States appears to be alone in sentencing juveniles to life without parole sentences, regardless of the nature of the crime.[204] While evidence of the international community's attitude toward a particular sentencing practice is not controlling,[205] it is still a valuable consideration in future challenges by juveniles sentenced to life without parole for homicide-related crimes—especially if the Court is divided on the other factors.

In addition to being shunned by every other nation, juvenile life without parole sentences are banned by international conventions

198. Brianne Ogilvie, *Is Life Unfair?: What's Next for Juveniles After* Roper v. Simmons, 60 BAYLOR L. REV. 293, 306 (2008).

199. *See supra* notes 72–76 and accompanying text (describing the evidence of national consensus relied upon in *Atkins* as an increase from two states to sixteen states and Congress). Here, the baseline would be from forty-two states—the number that apparently allows for juvenile life without parole sentences. Legislative changes in fourteen states and Congress would represent the same percentage change as relied upon in *Atkins*.

200. *See supra* note 197 (noting proposed state legislation banning juvenile life without parole sentences).

201. *See supra* Part II.A.4.

202. Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

203. *Id.* at 2034.

204. *Supra* notes 97–98 and accompanying text.

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

that nearly every member of the world community has signed.[206] For example, the United Nations Convention on the Rights of the Child specifically prohibits life without parole sentences for offenses committed by persons below the age of eighteen.[207] Every member of the United Nations except the United States and Somalia has adopted the Convention.[208] Soon, the United States will likely be the lone holdout, as Somalia has indicated its intention to adopt the Convention.[209] Further, the United States is the only country that has opposed a United Nations General Assembly resolution that called on all countries to abolish juvenile life without parole sentences.[210]

IV. WHAT ABOUT MENTALLY RETARDED OFFENDERS?

This part proposes that much of the *Graham* Court's reasoning can be applied to banning life without parole sentences for mentally retarded offenders convicted of non-homicide-related offenses. Assuming the Court follows the *Graham* methodology in evaluating life without parole sentences for mentally retarded offenders, the Court would likely rely on evidence of (1) punishment-theory concerns, (2) reduced capacity,[211] and (3) a national consensus indicating evolved standards of decency.[212]

A. Punishment-Theory Concerns

Imposing the maximum available sentence on mentally retarded offenders raises serious punishment-theory concerns.[213] Since the Court's ruling in *Atkins*, life without parole sentences have replaced the death penalty as the maximum possible sentence available for mentally retarded offenders. If the Court follows the same analytical

206. Brief for Petitioner, *supra* note 18, at 55.

207. Convention on the Rights of the Child, G.A. Res. 44/25, Art. 37(a), U.N. Doc. A/RES/44/25 (Sept. 1, 1990).

208. *Somalia to Join Child Rights Pact: UN*, REUTERS, Nov. 20, 2009, http://af.reuters.com/article/topNews/idAFJOE5AJ0IT2009112.

209. *Id.*

210. G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006); Voting Record, Rights of the Child, *available at* http://www.un.org/ga/61/third/votingrecords/c3116rev1.pdf.

211. While this section was conspicuously absent in *Graham*, it may be of greater significance given its prominence in *Atkins*.

212. There does not appear to be any real evidence of the international community's treatment of sentencing mentally retarded offenders to life without parole. Since *Atkins* indicates such evidence merely lends support and is not dispositive, it will not be examined below.

213. Atkins v. Virginia, 536 U.S. 304, 318–22 (2002).

methodology adopted in *Graham*, is likely to find that in order to socially justify imposing these sentences, they must be in line with the policies underlying deterrence and retribution.[214] Therefore, in analyzing deterrence and retribution, evidence of the mentally retarded offender's reduced personal culpability will be important in evaluating the effectiveness of life without parole sentences.[215]

Both scientific and legal evidence exist that mentally retarded offenders have lowered personal culpability. As the Court established in *Atkins*, mental retardation impairs an offender's ability to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.[216] Together, these characteristics create a lesser culpability that the Court has deemed insufficient to "justify the most extreme sanction available to the State."[217] Furthermore, even outside of capital punishment jurisprudence, the law treats mentally retarded offenders differently based on their unique culpability. Wide varieties of federal and state laws establish special protections for the mentally retarded[218] and limit their freedoms.[219] Together, these laws reflect society's view that the mentally retarded are less responsible than other adults.[220] These psychological and legal differences work to diminish the mentally retarded offender's personal culpability.[221] This, as established in *Atkins*, directly impacts the fairness of retribution.[222]

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214. *See supra* notes 135–40 and accompanying text.

215. *Atkins*, 536 U.S. at 318–19.

216. *Id.* at 318; Appelbaum & Appelbaum, *supra* note 34, at 487–89.

217. *Atkins*, 536 U.S. at 319.

218. *See, e.g.*, Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (ensuring the mentally retarded receive the services and support they need in Employment, Education, Child Care, Health, Housing, Transportation, Recreation, and Quality Assurance); D.C. CODE § 46-404 (2009) (giving the mentally retarded special ability to annul a marriage).

219. *See, e.g.*, BAZELON CENTER FOR MENTAL HEALTH LAW & NATIONAL DISABILITY RIGHTS NETWORK, VOTE. IT'S YOUR RIGHT: A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 5–6 (2008) (describing the numerous state laws that affect the voting rights of the mentally disabled).

220. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (1981) (limiting the contractual liability of the mentally retarded).

221. *Atkins*, 536 U.S. at 318.

222. *Id.* at 319.

Furthermore, the deterrence justifications for sentencing a mentally retarded offender to life without parole are undercut by the same cognitive and behavioral impairments that undermine retributive justifications.[223] Because mentally retarded offenders are so unlikely to process the possibility of receiving the maximum punishment, they are unlikely to control their conduct based on that information.[224] Simply put, a mentally retarded offender is less likely to understand the permanence of a life without parole sentence, let alone weigh those costs against the perceived benefit of criminal conduct.[225] This unlikelihood is perhaps even more pronounced than it is with juveniles. While a juvenile offender may eventually mature enough to realize the permanence of life without parole years after receiving a sentence,[226] a mentally retarded offender's intellectual resources are subnormal through all or most of his development.[227] Thus, the mentally retarded offender may never understand the implications of life without parole, echoing the Court's conclusion in *Atkins* about the deterrent value of long-term future punishments.[228]

B. Reduced Capacity

When a defendant faces the most severe punishment available to the State, the court must consider more than the defendant's crime during sentencing.[229] In part, this heightened Eighth Amendment standard of review prompted the *Atkins* Court to categorically ban capital punishment for mentally retarded offenders, fearing that those defendants' inability to effectively show mitigation in the face of the most severe sentence would result in wrongful executions.[230] The

223. *Id.* at 320.

224. *Id.*

225. Take, for example, Ricky Ray Rector, who, on the night he was scheduled for execution, put aside his dessert, saying he wanted to save it for the next day. Steve Mills & Andrew Zajac, *Ruling Too Late for 40 Inmates: Some with Low IQ Executed Before High Court's Ban*, CHI. TRIB., June 23, 2002.

226. *See supra* notes 147–49 and accompanying text.

227. JAMES N. BUTCHER ET AL., ABNORMAL PSYCHOLOGY 540 (12th ed. 2003).

228. *Atkins*, 536 U.S. at 319–20.

229. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976); Pa. *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

230. *See Atkins*, 536 U.S. at 320–21 (citing Penry v. Lynaugh, 492 U.S. 302, 323–25 (1989)) (describing *Atkins*'s focus on the possibility that mentally retarded defendants would receive a more severe punishment because of their lesser ability to make a persuasive showing of mitigation); Cloud et al., *supra* note 55, at 503–04.

Atkins Court cited the increased likelihood that a mentally retarded defendant would make a false confession as well as such a defendant's decreased ability to give meaningful assistance to counsel, testify effectively, or show remorse.[231] These factors, as in *Atkins*, place mentally retarded defendants at a special risk for receiving life without parole when a lesser sentence—or perhaps no sentence at all—is more appropriate.[232]

Mentally retarded offenders, like juveniles, are at a high risk for wrongful conviction based on false confessions.[233] Mentally retarded defendants, however, may be more vulnerable than juveniles during criminal interrogations. For example, while both juvenile and mentally retarded defendants are likely to make a waiver of *Miranda* rights that is neither voluntary, knowing, nor intelligent, thereby rendering the confession inadmissible, judges are more willing to deny the validity of waivers by juveniles than by the mentally retarded.[234] Further, while some jurisdictions have adopted a special rule banning interrogations of juveniles,[235] a similar judicial protection for mentally retarded suspects is not feasible given the current criminal justice landscape. While police officers can easily separate juvenile from adult offenders given the bright-line rule of age, many police officers cannot recognize when an offender is mentally retarded.[236] This may also explain why most police departments do not have special protocols for dealing with mentally retarded suspects.[237] Recognition by law enforcement is unlikely to

231. *Atkins*, 536 U.S. at 320–21.

232. *See id.* at 321.

233. False confessions are at the root of approximately 25 percent of wrongful convictions. In approximately 35 percent of the cases where a false confession led to a wrongful conviction, the defendant was either eighteen years or younger, mentally retarded, or both. The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited July 30, 2010).

234. Brian Corcoran, *"This Has to Be Wrong": Mirandizing the Mentally Challenged*, 6 GEO. J.L. & PUB. POL'Y 629, 630 n.3 (2008).

235. *See, e.g.*, Thomas J. Von Wald, Note, *No Questions Asked!* State v. Horse*: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 164–70 (2003).

236. Maura Dolan & Evelyn Larrubia, *Telling Police What They Want to Hear, Even If It's False*, L.A. TIMES, Oct. 30, 2004, at 2 ("[P]olice officers sometimes do 'not really recognize' that suspects are mentally retarded.") (quoting Morgan Cloud, Professor, Emory University).

237. *Id.* at 1.

improve since few states have training programs on the special problems posed by mentally retarded defendants.[238]

C. Evidence of National Consensus

As demonstrated in *Atkins*, *Roper*, and *Graham*, the Court will only explore evidence of punishment-theory concerns and reduced capacity if it finds that there is consensus indicating that sentencing the mentally retarded to life without parole offends society's evolving standards of decency.[239] Here, there is considerably less evidence directly signifying society's condemnation of sentencing mentally retarded offenders to life without parole than there was in *Atkins*, *Roper*, and *Graham*.[240] Some statutes recognize mental retardation as a mitigating factor or exempt mentally retarded defendants from otherwise applicable mandatory minimum sentences.[241] Such statutes may indirectly reflect legislative recognition that life without parole may not be appropriate for mentally retarded offenders in all situations.[242]

Additionally, some legislative proposals aimed at juvenile life without parole sentences would require parole boards to consider the existence of developmental disabilities when evaluating whether juvenile offenders' prior life without parole sentences warrant granting the juveniles new sentencing hearings.[243] Such bills have won the support of some disability rights advocates.[244] However, it is unlikely the Court would find these examples illustrative of a national consensus against sentencing mentally retarded offenders to life without parole.[245]

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238. Ronald W. Conley, et al., *Introduction* to THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS xxi (Conley et al. eds., 1992).

239. Roper v. Simmons, 543 U.S. 551, 563–64 (2005).

240. *See supra* notes 196–97 and accompanying text (providing examples of recent legislative proposals that would abolish or limit juvenile life without parole sentences).

241. *See supra* note 108 and accompanying text.

242. *Id.*

243. *See, e.g.*, Letter from Margaret Johnson, Advocacy Director, Disability Rights California, to Jose Soloria, Chair, California Assembly Public Safety Committee (June 22, 2009), *available at* http://www.disabilityrightsca.org/legislature/legislation/2008-2009/SB_0399_Yee.htm.

244. *Id.*

245. *See* Penry v. Lynaugh, 492 U.S. 302, 334 (finding that prohibitions on executing mentally retarded defendants in two states and the federal system did not constitute a national consensus).

Furthermore, it is unlikely that the Court would find that sufficient evidence exists to demonstrate "consistency of the direction of change" or that sentencing mentally retarded defendants to life without parole is "truly unusual."[246] Since these statutes do not ban life without parole sentences for mentally retarded offenders, and the frequency of mentally retarded defendants receiving life without parole sentences is a rough estimate at best,[247] the Court is unlikely to find this evidence compelling enough to overcome the small number of state laws dealing with this issue.

V. AN EVALUATION: COULD—AND SHOULD—LIFE WITHOUT PAROLE SENTENCES FOR MENTALLY RETARDED OFFENDERS BE UNCONSTITUTIONAL?

A constitutional challenge to sentencing mentally retarded offenders to life without parole for non-homicide crimes presents the same strengths and weaknesses as a challenge to sentencing juveniles to life without parole for homicide-related offenses. While there is strong evidence that sentencing mentally retarded offenders to life without parole raises the same punishment-theory and reduced-capacity concerns relied upon in *Atkins*, evidence of a national consensus is notably lacking.[248] Sufficient time may not have passed to allow the legislature to enact statutes in response to juvenile life without parole sentences, and the lack of direct statutory response dealing categorically with the appropriateness of life without parole sentences for mentally retarded offenders may also reflect larger policy concerns surrounding mental retardation.[249]

Over the past several decades, society's understanding of mental retardation has undergone a dynamic evolution.[250] Thus, it is possible to understand *Atkins* as the product of a different era of societal understanding of mental retardation. While the Court's decision was handed down after the increase of community living centers and

246. Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (placing additional emphasis on these two factors over the number of states banning the execution of mentally retarded defendants).

247. *See supra* note 110 and accompanying text.

248. *See supra* Part IV.

249. Cone, *supra* note 108, at 44.

250. *See generally* PATRICIA AINSWORTH & PAMELA BAKER, UNDERSTANDING MENTAL RETARDATION 53–57 (2004) (describing the evolving treatment of mentally retarded individuals during the late nineteenth and twentieth centuries).

special education programs working toward the integration of the mentally retarded in the 1990s,[251] it is likely that the state legislators responsible for providing the national consensus relied on by the Court in *Atkins* were cultured, at least to some extent, in the lingering era of institutionalization symptomatic of 1950s American medical practice[252]—either during their own childhoods or by proxy through their parents' childhood experiences. *Atkins*'s categorical prohibition may be grounded on the assumption that mentally retarded persons are too incompetent to be held responsible for their own decisions, an image many of today's mental retardation advocates strive to disown.[253] Indeed, many disability rights advocates were dismayed by *Atkins*, not because they were in favor of capital punishment, but because they believed that finding mentally retarded offenders ineligible for capital punishment signified that the intellectually disabled are less human than those still eligible for execution.[254]

The legislative silence on categorically banning life without parole sentences for mentally retarded offenders may not be an indication of society's standards of decency for Eighth Amendment purposes, but instead an indication of society's evolved conception of mental retardation. Today, intellectual disability groups advocate for the rights and full participation of all children and adults with intellectual and developmental disabilities.[255] With this ideology in mind, advocates face difficulty in reconciling their desire to seek protection for mentally retarded persons involved in the criminal justice system with their desire to win equal treatment for the disabled.[256]

For some disability rights advocates, "it is equally important to promote the right of all persons to make their own choices and, as a

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251. *Id.*

252. *Id.*

253. *See* Donald N. Bersoff, *The Differing Conceptions of Culpability in Law and Psychology*, 11 WIDENER L. REV. 83, 88 (2004) (describing the amicus briefs submitted on the petitioner's behalf in *Atkins* as well-intentioned efforts that ultimately served to undermine the rights of people with mental retardation).

254. Christopher Slobogin, *Is* Atkins *the Antithesis or Apotheosis of Anti-Discrimination Principles?: Sorting Out the Groupwide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1101, 1101 (2004).

255. The Arc, Mission Statement, http://www.thearc.org/who-we-are/mission-and-values (last visited July 30, 2010).

256. *See* Slobogin, *supra* note 254, at 1101–04 (exploring the different views disability rights advocates have of *Atkins*).

corollary, to be held accountable for those choices"[257] as it is to protect mentally retarded persons in the criminal justice system. This ideological struggle has already been documented in the debate surrounding mentally retarded persons' ability to waive their *Miranda* rights.[258] Advocating for the categorical prohibition of life without parole sentences for mentally retarded defendants may run counter to this mission by creating a protection at the expense of other rights.[259]

VI. CONCLUSION

The Court's capital punishment jurisprudence regarding juvenile and mentally retarded offenders is remarkably intertwined. Each case—from *Thompson* to *Penry* to *Stanford* to *Atkins* to *Roper*—has been an important step in a dynamic evolution that has resulted in life without parole sentences operating as an effective alternative to the death penalty for juvenile and mentally retarded offenders. In doing so, the Court has used analysis that reinforces the frequent perception that juvenile and mentally retarded offenders share similar Eighth Amendment interests. This was further perpetuated by advocacy groups claiming that *Atkins*, by virtue of the two groups' similarities, demanded the result in *Roper*.

Today, life without parole sentences have replaced death as the maximum sentence available to juvenile and mentally retarded offenders. Both execution and life without parole sentences permanently remove an individual from society by placing that person in a prison to await his or her death, and they present similar Eighth Amendment concerns. However, as juvenile advocates celebrate their victory in *Graham* and plan their next challenge, the comparative silence on behalf of mentally retarded offenders is reflective of the differences between the two groups. Thus, while the Court's decision in *Graham* may serve as the necessary impetus for

257. Bersoff, *supra* note 253, at 90.

258. Caroline Everington & Solomon M. Fulero, *Assessing the Capacity of Persons with Mental Retardation to Waive* Miranda *Rights: A Jurisprudent Theory Perspective*, 28 LAW & PSYCHOL. REV. 53, 67 (2004).

259. *See* Bersoff, *supra* note 253, at 90 ("If we accept the concept of blanket incapacity, we relegate people with mental retardation to second class citizenship, potentially permitting the State to abrogate the exercise of such fundamental interests as the right to marry, to have and to rear one's children, or such everyday entitlements such as to enter into contracts or to make a will.").

juvenile advocates to more effectively mobilize state legislatures to ban juvenile life without parole sentences for all offenses, it will likely serve a different function for mentally retarded offenders. As life without parole sentences receive more attention because of juvenile challenges, advocates working for mental retardation interests will have to resolve their ideological struggle. Advocates will have to decide whether to challenge life without parole sentences—perhaps at the cost of rendering vulnerable other substantive rights—or remain silent on life without parole at the cost of judicial protection.