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Daniel Jones

TECHNICAL DIFFICULTIES: WHY A BROADER READING OF *GRAHAM* AND *MILLER* SHOULD PROHIBIT DE FACTO LIFE WITHOUT PAROLE SENTENCES FOR JUVENILE OFFENDERS

DANIEL JONES[†]

INTRODUCTION

Jeffrey Ragland was seventeen years old when he made a terrible mistake that would leave him facing a lifetime of imprisonment.[1] One night in 1986, he and a group of friends were in a grocery store parking lot in Council Bluffs, Iowa.[2] He and two friends attacked another group of boys, and by all accounts, Ragland was the instigator.[3] During the incident, one of Ragland's friends, Matt Gill, proceeded to swing a tire iron striking Timothy Sieff in the head and instantly killing him.[4] Ragland was tried as an adult and was mandatorily sentenced to life without parole, while Matt Gill served just three years in prison.[5] When Ragland was forty-four years old, the Governor of Iowa commuted his sentence to sixty years with no possibility of parole or credit for time served,[6] based on a recent United States Supreme Court decision.[7] Thus, although not directly responsible for the tragic death of Timothy Sieff, Ragland would

[†] Senior Articles Editor, *St. John's Law Review*; J.D., *cum laude*, 2016, St. John's University School of Law.

[1] State v. Ragland, 836 N.W.2d 107, 110 (Iowa 2013).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 111–12.

[6] *Id.* at 110–12.

[7] *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (holding that defendants who committed homicide crimes as juveniles could not be sentenced to life without parole before considering certain mitigating factors).

not be eligible for parole until he was seventy-eight years old, while Matt Gill, who actually swung the tire iron, had been free for nearly twenty-four years.[8]

In the last decade, the Supreme Court has decided three cases that have drastically altered the way juveniles are sentenced in this country. In 2005, the Court issued the landmark decision of *Roper v. Simmons*,[9] which held that the death penalty for juvenile offenders is per se unconstitutional as a violation of the Eighth Amendment.[10] Five years later, the Court again spoke on juvenile sentencing in *Graham v. Florida*.[11] The Court adopted a categorical rule for nonhomicide juvenile offenders, holding that a sentence of life without parole is unconstitutional.[12] Finally, in 2012, the Court concluded its "trilogy"[13] on juvenile sentencing with *Miller v. Alabama*.[14] In *Miller*, the Court held that juveniles who committed homicide offenses could not be mandatorily sentenced to life without parole without individualized assessments as to the juvenile's character and background.[15]

Recently, a split has emerged amongst state and federal courts[16] regarding a significant issue that was not expressly addressed in any of the Court's holdings in the trilogy of juvenile sentencing cases mentioned above. Say, for example, a juvenile is sentenced for a nonhomicide offense to ninety years in jail without the possibility of parole until seventy years are served. This would not be a death penalty case so *Roper* is not triggered, nor does the sentence of life without parole render *Graham* inapplicable. Finally, the offense is nonhomicide, thus rendering it outside of *Miller*'s application. But effectively, such a sentence amounts to the equivalent of life without parole.

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[8] *Ragland*, 836 N.W.2d at 112.

[9] 543 U.S. 551 (2005).

[10] *Id.* at 568.

[11] 560 U.S. 48 (2010).

[12] *Id.* at 82.

[13] *See, e.g.*, State v. Null, 836 N.W.2d 41, 50 (Iowa 2013) (referring to *Roper*, *Graham*, and *Miller* as the "trilogy"); Barry C. Feld, *The Youth Discount: Old Enough To Do the Crime, Too Young To Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 107 (2013) (referring to *Roper*, *Graham*, and *Miller* as the "trilogy").

[14] 132 S. Ct. 2455 (2012).

[15] *Id.* at 2469.

[16] *See infra* notes 130–158 and accompanying text.

Commentators and courts refer to the sentencing described above as "de facto" life sentences because they are the functional equivalent of life without parole.[17] Federal and state courts have dealt with the issue of de facto life sentences in different and conflicting ways.[18] Some courts have used the "spirit" approach, which acknowledges that while the Court has not dealt directly with the de facto life sentence issue, the spirit of the trilogy cases bars courts from sentencing juveniles to lengthy term-of-years sentences.[19] The opposite approach is the "letter of the law" approach, which applies the trilogy very technically and allows lengthy term-of-years sentences for juvenile offenders.[20] For the time being, it appears that the Supreme Court will continue to allow state courts to apply their decisions in *Roper*, *Graham*, and *Miller* in vastly different ways.[21]

This Note argues that the spirit of the trilogy prohibits courts from sentencing juvenile offenders, regardless of their crime(s), to de facto life sentences. This Note maintains that the Eighth Amendment of the United States Constitution and the relevant case law render de facto life sentences unconstitutional. Part I examines the history of juvenile sentencing laws and concludes that many of the laws currently in place are based on a misguided fear that juveniles are more culpable than adult offenders. Part I also examines the relevant Supreme Court Eighth Amendment jurisprudence as well as the competing

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[17] *See, e.g.*, Adams v. State, No. 1D11–3225, 2012 WL 3193932, at *2 (Fla. Dist. Ct. App. Aug. 8, 2012) ("[A] de facto life sentence is one that exceeds the defendant's life expectancy."); Cara H. Drinan, Commentary, *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 785, 791 (2014) ("By far, the greatest judicial debate in the state courts has been around the issue of 'de facto life sentences.' ").

[18] *See infra* Part II.

[19] This approach is best described by the Supreme Court of Iowa in *State v. Ragland*: "The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible" and that "*Miller* applies to sentences that are the functional equivalent of life without parole." 836 N.W.2d 107, 121–22 (Iowa 2013).

[20] This approach seems to get its inspiration from Justice Alito's dissenting opinion in *Graham v. Florida*, where he stated, "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." 560 U.S. 48, 124 (2010) (Alito, J., dissenting). The basic rationale of this approach is that because the Supreme Court did not specifically address lengthy term-of-years sentences, states are permitted to sentence juveniles to de facto life sentences. *See infra* Part II.A.

[21] *See* Drinan, *supra* note 17, at 791–92; *see generally* Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (holding that the *Miller* rule should be applied retroactively to juvenile offenders but leaving alone the de facto life sentencing issue).

theoretical arguments used by courts. Part II presents the split in federal and state courts interpretations of *Roper*, *Graham*, and *Miller,* and examines the conflicting approaches used by courts in deciding whether de facto life sentences of juvenile offenders are permissible. Part III asserts that de facto life sentences are unconstitutional under the Eighth Amendment and the Supreme Court trilogy. Part III also concludes that in the absence of legislative compliance, state courts have a duty to apply the trilogy to de facto life sentences. Finally, Part IV sums up why courts and legislatures should ignore the letter of the law argument on de facto life sentences.

I. BACKGROUND

This Part first explores the history of juvenile sentencing laws in the United States. Next, this Part discusses the Supreme Court trilogy and analyzes what the purpose of those decisions really were. Finally, this Part discusses differing judicial theoretical frameworks, specifically formalism and realism, and minimalism and maximalism, with the goal of showing how these theories have led to differing approaches amongst the federal and state courts dealing with de facto life sentences for juvenile offenders.

A. History of Juvenile Sentencing Laws

In 1899, the world's first juvenile court opened in Cook County, Illinois,[22] and by 1917, nearly every state adopted some form of a separate juvenile court system.[23] Juvenile courts used "informal methods" and rejected criminal procedures afforded to adults.[24] The policy behind these early juvenile courts was that "[j]udges acted in offenders' 'best interests' and imposed indeterminate and non-proportional dispositions to enhance [the juveniles'] future well-being rather than punish them for past offenses."[25]

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[22] Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 16 & n.25 (2007).

[23] Michelle Marquis, Note, Graham v. Florida: *A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 261 (2011).

[24] *See* Feld, *supra* note 22, at 17.

[25] *Id.*

This system remained largely intact until the 1960s when "it became apparent that the purpose of juvenile court proceedings was no longer primarily to protect the best interest of the child and was instead becoming more punitive in nature."[26] The United States Supreme Court decided two cases in the 1960s that required courts sentencing juveniles to use many of the same procedural safeguards afforded to adults.[27] Although meant to protect juveniles, these decisions "may have stimulated a mindset of increased exposure of youth to adult criminal sentences."[28]

In the 1980s and the early 1990s, with the crime rate rising across America, there was a growing fear of juvenile "super-predators."[29] The theory of super-predators was based on a perceived increase of juvenile violent crime in the 1980s and 1990s.[30] A typical characterization of the super-predator fear can be found in Princeton University Professor John Dilulio Jr's 1995 article titled "The Coming of the Super-Predator":

> On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their

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[26] State v. Null, 836 N.W.2d 41, 52 (Iowa 2013).

[27] *See In re* Gault, 387 U.S. 1, 10–11 (1967) (holding that many procedural protections given to adults must be given to juveniles as well); Kent v. United States, 383 U.S. 541, 563–64 (1966) (holding that procedural safeguards are required in juvenile waiver proceedings).

[28] *Null*, 836 N.W.2d at 52–53; *see also* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 101 (2010) (arguing that *Kent* and *In re Gault* "actually helped create the political environment responsible for the punitive criminal justice policies of the 1970s and beyond").

[29] *See* Feld, *supra* note 22, at 28–32 (discussing the crack epidemic and the rise of violent juvenile arrests); *see also* Marquis, *supra* note 23, at 262–64. The term super-predator came from an influential book published by political scientists William J. Bennett, John J. DiIulio Jr., and John P. Waters titled "Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs." *See* Feld, *supra* note 22, 31 n.108.

[30] *See* Marquis, *supra* note 23, at 262–63 (arguing that in the 1980s and 1990s "there was a *perceived* increase in violent juvenile crime"); *see also Juvenile Arrest Rates by Offense, Sex, and Race (1980-2014)*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, http://www.ojjdp.gov/ojstatbb/dat.html (last visited Apr. 5, 2016).

> violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.[31]

Largely in response to this fear, state legislatures across the country passed "adult crime, adult time" statutes that included provisions making it easier to transfer juveniles to adult courts.[32] As a result of these "adult time, adult crime" laws, nearly 200,000 youths are prosecuted as adults every year.[33] This represents an eighty percent increase from the previous generation.[34]

The fear of juvenile super-predators espoused by Professor Dilulio and others appears to be misguided.[35] In fact, according to a 2013 study, youth violent crime is at a thirty-two-year low.[36] Although some states have modified their "adult crime, adult time" statutes,[37] the rationale and fear of super-predators still seeps forward when juveniles are sentenced to de facto life sentences.[38] However, the Supreme Court trilogy cases decided

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[31] John J. Dilulio Jr., *The Coming of the Super-Predators*, THE WEEKLY STANDARD (Nov. 27, 1995), http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160.

[32] *See, e.g.*, Feld, *supra* note 22, at 31 ("In the mid-1990s, virtually all states changed their laws to make it easier to transfer more and younger youths to criminal court for prosecution as adults."); David L. Hudson Jr., *Adult Time for Adult Crimes: Is Life Without Parole Unconstitutional for Juveniles?*, ABA J., Nov. 2009, at 16 ("On the heels of fear about rising juvenile crime and reports of juvenile 'super predators,' legislatures across the country enacted 'adult crime, adult time' statutes, including automatic waiver laws that provide for the transfer of more youths from juvenile court into adult criminal court.").

[33] *See* Arya, *supra* note 28, at 108.

[34] Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L L. REV. 43, 53 (2006).

[35] *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html.

[36] Jeffrey A. Butts, *Violent Youth Crime in U.S. Falls to New 32-Year Low*, JOHN JAY C. CRIM. JUST. RES. & EVALUATION CTR. (Oct. 4, 2013), http://johnjayresearch.org/rec/files/2013/10/databit201304.pdf.

[37] Stephanie Chen, *States Rethink 'Adult Time for Adult Crime*,' CNN (Jan. 15, 2010, 7:37 AM), http://www.cnn.com/2010/CRIME/01/15/connecticut.juvenile.ages.

[38] For example, the trial court in *Graham* indicated some acceptance of the super-predator fear when sentencing the juvenile defendant to life without parole. Graham v. Florida, 560 U.S. 48, 57 (2010) ("[T]his is an escalating pattern of

in the last decade have reignited the discussion on juvenile sentencing laws throughout the country. In these cases, the Court attempted to peel back some of the harshness associated with juvenile sentencing that arose from the super-predator fear.

B. The Supreme Court Trilogy: Roper*,* Graham*, and* Miller

From 2005 to 2012, the Supreme Court issued three opinions on juvenile sentencing that drastically changed how juveniles are sentenced in this country. Specifically, the Court seemed to indicate that, in terms of sentencing, "kids are different" and could not be constitutionally sentenced to the harshest penalties.[39] This section will explore each of the three cases and show how the trilogy collectively stands for the broader proposition that there are "inherent differences between adults and juveniles" and, as such, state courts must "give juvenile offenders hope to reenter society" regardless of whether the sentence is life or a de facto life sentence.[40]

In 2005, the Supreme Court decided the landmark case of *Roper v. Simmons* and held that the death penalty was per se unconstitutional for juvenile offenders.[41] *Roper* involved a heinous murder committed by Christopher Simmons when he was seventeen years old.[42] The State of Missouri charged Simmons with burglary, kidnapping, stealing, and murder in the first degree.[43] Based on Missouri law, Simmons was tried as an adult.[44] The jury quickly convicted Simmons of murder and

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criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life.").

[39] *See* Stephen St. Vincent, Commentary, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9, 9, 12 (2010).

[40] Leslie Patrice Wallace, *"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States To Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 39 (2010).

[41] 543 U.S. 551, 578 (2005).

[42] *Id.* at 556. Simmons and an accomplice broke into the victim's house at 2:00 a.m., used duct tape to cover her eyes and mouth, and drove her to a railroad over the Meramec River. *Id.* at 556–57. Once at the railroad, they tied her hands and feet with electrical wire, covered her face in duct tape, and threw her from the bridge, causing her to drown. *Id.* After the murder, Simmons showed little remorse and bragged about the murder to friends. *Id.* at 557.

[43] *Id.*

[44] *Id.* Missouri law placed seventeen-year-olds outside of the juvenile court system. *Id.*

recommended the death penalty; Simmons appealed the trial court's decision and the case was eventually granted certiorari by the Supreme Court.[45]

The Court began by addressing the diminished culpability of juvenile offenders.[46] It explained that there are three important differences between juveniles and adults that ultimately caution against ever imposing the death penalty on a juvenile offender.[47] First, juveniles exhibit "[a] lack of maturity and an underdeveloped sense of responsibility . . . . These qualities often result in impetuous and ill-considered actions and decisions."[48] Second, compared to adults, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[49] Finally, the Court noted that "the character of a juvenile is not as well formed as that of an adult."[50] According to the Court, these differences "render suspect any conclusion that a juvenile falls among the worst offenders"[51] and were thus less deserving of the death penalty than their adult counterparts.[52] The Court then held that juveniles below the age of 18 are per se barred from being eligible for the death penalty, regardless of the crime committed.[53]

The main question left unanswered by *Roper* was whether the case was "simply a death penalty case, which rested on the slogan 'death is different,' or did *Roper* have wider implications for cruel and unusual punishment cases involving juveniles?"[54] Five years later, the Court in *Graham* held that it was unconstitutional to sentence a juvenile nonhomicide offender to life without parole without giving the offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[55]

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[45] *Id.* at 557–60.

[46] *Id.* at 568.

[47] *Id.* at 569–70.

[48] *Id.* at 569 (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[49] *Id.*

[50] *Id.* at 570.

[51] *Id.*

[52] *Id.* at 571.

[53] *Id.* at 575.

[54] State v. Null, 836 N.W.2d 41, 62 (Iowa 2013).

[55] Graham v. Florida, 560 U.S. 48, 75 (2010).

Graham involved several crimes committed by defendant Terrance Graham.[56] In 2003, when Graham was sixteen years old, he and three accomplices attempted to rob a restaurant in Florida.[57] Graham was prosecuted as an adult, pled guilty, and received three years of probation.[58] Six months after his release, Graham was again arrested for armed burglary and attempted armed robbery.[59] Under Florida law, Graham was subject to a minimum sentence of five years and a maximum sentence of life without parole.[60] The trial court sentenced Graham to the maximum sentence on each charge, the result of which was a life without parole sentence.[61] The trial court reasoned that Graham was given a second chance on his previous sentence and that Graham decided to "[throw his] life away."[62]

In deciding *Graham,* the Court began by noting that there are generally two classifications with respect to the proportionality of a sentence.[63] One classification involves a case-specific inquiry to determine if the sentence in question is "excessive"[64] while the other classification involves categorical rules for death penalty sentences.[65] The Court decided that the second category was the relevant classification here, as it involved a "categorical challenge to a term-of-years sentence."[66] This was a pivotal move by the Court, indicating that it would issue a *Roper*-type categorical rule regarding life without parole sentences.[67]

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[56] *Id.* at 53–55.

[57] *Id.* at 53.

[58] *Id.* at 53–54.

[59] *Id.* at 54–55, 57. Graham and two accomplices forcibly entered the home of Carlos Rodriguez and held him at gunpoint. *Id.* at 54. The same evening, the three attempted a second robbery during which one of the accomplices was shot. *Id.*

[60] *Id.* at 55–56.

[61] *Id.* at 57. Graham was also sentenced to fifteen years for the attempted armed robbery charge. *Id.*

[62] *Id.* at 56.

[63] *Id.* at 59.

[64] *Id.* In this category, the Court is looking at the specific case and is not looking at a broad category, such as juveniles and the death penalty. *Id.*

[65] *Id.* at 60–61. In this category, the Court is issuing broad categorical rules that apply to an entire class of offenders. *Id.* at 60. An example of this approach is *Roper*, where the Court decided that for all juveniles the death penalty was unconstitutional. *Id.* at 61.

[66] *Id.* at 61.

[67] *See id.* at 102 (Thomas, J., dissenting) ("Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special

The Court then turned to the question of culpability and noted that "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments."[68] It then stated that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishments than are murderers."[69]

The Court next addressed the life without parole sentence itself, and concluded that it was "the second most severe penalty permitted by law."[70] In another key move, the Court noted the similarities between a life without parole sentence and the death penalty.[71] The Court stated that like the death penalty, a life without parole sentence is "irrevocable," and that it "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[72] The Court then noted how life without parole was unusually harsh for a juvenile offender because a juvenile will serve more years and a longer proportion of their lives in jail than their adult counterparts.[73]

Finally, the Court held:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.

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protection to capital defendants because the death penalty is a uniquely severe punishment . . . .").

[68] *Id.* at 68 (majority opinion).

[69] *Id.* at 69.

[70] *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

[71] *Id.* at 69–70.

[72] *Id.* (alteration in original) (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)).

[73] *Id.* at 70. The Court gave an example of a sixteen-year-old and a seventy-five-year-old being sentenced to life without parole sentences, and noted that they were the "same punishment in name only." *Id.*

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.[74]

What was abundantly clear after *Graham* was that a State cannot make a "once-and-for-all determination of [a juvenile] offender's capacity to change" at the outset by sentencing them to life without the possibility of parole.[75] The Court made it clear that juveniles sentenced to life without parole for nonhomicide offenses are not guaranteed release but instead must be given "at least a shot at redemption."[76] The Court was very careful to limit its holding to life without parole sentences for nonhomicide offenses only and was careful to point out that the States themselves would have to determine the "means and mechanisms for compliance."[77]

Justice Alito wrote a short but influential two paragraph dissenting opinion.[78] He noted that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."[79] This one-sentence statement would come to have a vast impact on the de facto life sentence issue.

Many things were unclear after *Graham*. Some commentators argued that *Graham* indicated a shift from the proposition that "death is different" to "kids are different."[80] If "kids are different," the issue left unaddressed in *Graham* deals with what other crimes or sentencing schemes the reasoning may be applied to.[81] The other issue left unaddressed deals with what

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[74] *Id.* at 75.

[75] Robert Smith & G. Ben Cohen, Commentary, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 94 (2010).

[76] *Id.* at 93.

[77] Graham, 560 U.S. at 75.

[78] *Id.* at 124 (Alito, J., dissenting). Justice Alito's reasoning was picked up by many states that narrowly apply the trilogy and allow de facto life sentences. *See infra* notes 138 and 149 and accompanying text.

[79] *Graham*, 560 U.S. at 124 (Alito, J., dissenting).

[80] *See* St. Vincent, *supra* note 39, at 9.

[81] State v. Null, 836 N.W.2d 41, 67 (Iowa 2013) (stating that "the notion that *Graham*'s reasoning was limited to nonhomicide cases was proven wrong in *Miller*").

the States must do to comply with the Court's requirement of giving a juvenile nonhomicide offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[82] Some unresolved questions were answered just two years after *Graham*, when the Court concluded its trilogy in *Miller v. Alabama* and held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," regardless of the crime committed.[83]

Miller involved two separate cases that were consolidated into one appeal to the Supreme Court.[84] In 1999, when Kuntrell Jackson was fourteen years old, he and two other boys were involved in a video store robbery.[85] During the robbery Jackson stayed outside of the store but later entered.[86] When the store owner threatened to call the police, she was shot and killed by one of the accomplices.[87] A jury convicted Jackson of capital felony murder and aggravated robbery, and under Arkansas law, the judge was required to sentence Jackson to life without parole.[88]

The other case involved Evan Miller, who, like Jackson, was fourteen years old at the time he committed his crime.[89] In 2003, Miller and a neighbor went to Cole Cannon's trailer where the three smoked marijuana and drank alcohol.[90] When Cannon passed out, Miller and his friend stole his wallet, took $300, and attempted to put the wallet back in Cannon's pocket.[91] Cannon awoke and grabbed Miller by the throat; subsequently, Miller's friend grabbed a baseball bat, gave it to Miller, and then Miller repeatedly struck Cannon.[92] The two boys later decided to cover

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[82] *Id.* at 67–68 (quoting *Graham*, 560 U.S. at 75).

[83] 132 S. Ct. 2455, 2469 (2012). As will be explained below, *Miller* held that even for homicide offenses, a court could not impose a mandatory life without parole sentence without considering certain mitigating factors. *Id.*

[84] *Id.* at 2460.

[85] *Id.* at 2461.

[86] *Id.*

[87] *Id.*

[88] *Id.* The trial judge was statutorily required to sentence Jackson to life without the possibility of parole. *Id.*

[89] *Id.* at 2462.

[90] *Id.*

[91] *Id.*

[92] *Id.*

up their crime and lit two fires to burn down the trailer.[93] Cannon died from the injuries he sustained from the baseball bat and from smoke inhalation.[94] Miller was ultimately convicted of murder in the course of arson and was sentenced to a statutorily imposed mandatory minimum sentence of life without parole.[95]

The Court, in discussing the issue of youth and culpability, stated broadly that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."[96] The Court then repeated the three differences between juvenile and adult offenders pointed out in *Roper* and concluded that these differences "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[97] The Court then took *Graham* one step further when it noted:

> To be sure, *Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.[98]

Put another way, "the Court considered whether the rationale of *Roper* and *Graham* was limited by their factual settings and concluded it was not."[99]

However, the Court did not categorically ban life without parole sentences for all juvenile offenders, but rather categorically prohibited a mandatory imposition of life without parole if a court did not "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[100] Finally, the Court predicted, that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and

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[93] *Id.*

[94] *Id.*

[95] *Id.* at 2462–63.

[96] *Id.* at 2464. This statement seems to answer one question left open by *Graham* that, to a majority, "kids are different" *See* St. Vincent, *supra* note 39, at 9.

[97] *Miller*, 132 S. Ct. at 2464–65. The three differences being that (1) juveniles lack maturity, (2) they succumb easily to peer pressure, and (3) they lack a well formed character. *Id.* at 2464.

[98] *Id.* at 2465 (citation omitted).

[99] State v. Null, 836 N.W.2d 41, 65 (Iowa 2013).

[100] *Miller*, 132 S. Ct. at 2469 (noting that the Court is not considering the categorical bar argument).

heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possibly penalty will be uncommon."[101]

What is unclear after the trilogy, specifically after *Miller*, is what was meant by the Court's prediction that a sentence of life without parole will be "uncommon."[102] The Supreme Court did not categorically ban the sentence, but it certainly appears that was the direction in which it was heading.[103] It is also unclear what is meant by *Graham*'s requirement that the state must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[104] Finally, what was left unresolved and what this Note focuses on is the application of the trilogy to de facto life sentences.[105]

C. Differing Judicial Philosophies

Before addressing the split amongst the state and federal courts on the de facto life sentencing issue, it is necessary to briefly explore the theoretical underpinnings implicit in each side's argument. This section first explores judicial formalism and realism—or instrumentalism. Next, this section explores judicial minimalism and maximalism. Ultimately, this Note posits that the spirit approach rightly recognizes that the Supreme Court, in its trilogy on juvenile sentencing, clearly wanted an instrumentalist and maximalist interpretation applied to the issue of de facto life sentences.

1. Formalism and Instrumentalism

Formalism is the idea that law and precedent can be applied to new cases and facts like a "mathematical formula[]."[106] In other words, "judges [do] not make law (even when declaring new rules) but merely discove[r] and appl[y] preexisting law."[107] Professor Lawrence B. Solum, a prominent legal formalist, has

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[101] *Id.*

[102] *Null*, 836 N.W.2d at 66.

[103] *Id.*

[104] *Id.* at 67–68 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

[105] *Id.* at 67.

[106] Jeffrey M. Shaman, *Essay: Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135, 135–36 (1994) (quoting Gompers v. United States, 233 U.S. 604, 610 (1914)).

[107] BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 13 (2010) (emphasis omitted).

described two ideas that formalists believe: First, that judges should follow the law and not make it; and second, that judges should decide cases in ways that are consistent with controlling precedent.[108] For a formalist judge, stability and predictability in the law are important goals; therefore, judges should apply the existing precedent narrowly, rather than expansively.[109]

An instrumentalist or realist generally believes that "legal rules should be interpreted in light of their purposes."[110] An instrumentalist, rather than applying a rule mechanically, will instead "[dig] beneath the semantic surface of the applicable rule for the practical considerations that motivated its adoption."[111] When applying a precedent, the instrumentalist will ask whether the application furthers the precedent's purpose.[112] If not, then a judge should not apply the precedent; however, "if the spirit of the law would be served by its application, then [a] judge[] should give the rule an expansive interpretation."[113] Thus, an instrumentalist judge may be more willing than a classic formalist judge to expand a precedent or overturn a precedent if the court determines it was a wrong application of its purpose.

A common critique of instrumentalism, which will be explained below, is that legal rules and precedent provide more predictability than do judges' subjective beliefs on what a rule's purpose is.[114] In other words, legal rules provide certainty, whereas "[p]urposes provide less guidance, and different judges are likely to have different opinions about what the true purposes of the rule may be."[115] For a formalist, it is the rule itself that is important, not necessarily the broader purpose behind it.

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[108] Lawrence Solum, *Legal Theory Lexicon 043: Formalism and Instrumentalism*, LEGAL THEORY LEXICON (May 22, 2005), http://legaltheorylexicon.blogspot.com/2005/05/legal-theory-lexicon-043-formalism-and.html.

[109] *Id.*; *see also* RICHARD A. POSNER, REFLECTIONS ON JUDGING 5 (2013) (arguing that formalists believe that "change in law" falls to legislative and executive branches, not the judicial branch).

[110] *Id.*

[111] *See* Posner, *supra* note 109, at 121.

[112] *See* Solum, *supra* note 108.

[113] *Id.*

[114] *See* Solum, *supra* note 108.

[115] *Id.*

Instrumentalism and realism are often defined by their opposition to formalism, indeed the whole theory generally arose as a critique of formalism.[116] One of the main critiques of formalism is that a rigid application of "the rule"—or precedent—can lead to absurd results.[117] A classic example of the absurd result criticism is a medieval law—for the sake of this Note, let us say a precedent—that forbade drawing blood on the streets, but was applied to a doctor aiding a dying patient.[118] Obviously the purpose of the law was to stop crime, not to stop a doctor from helping a dying patient. Another common criticism is that formalist judges ultimately decide cases based upon their own policy preferences and "dress up the results in language of legal formalism."[119]

The contrasts between formalism and instrumentalism, as this Note explores in Parts II and III, are especially prevalent in the de facto life sentencing issue. The letter of the law approach tends to overly formalize the Supreme Court trilogy, while the spirit approach rightly recognizes the trilogy's overarching purpose.

2. Minimalism and Maximalism

Minimalism is the idea that a judge, in deciding a case, should say "no more than necessary to justify an outcome, and leav[e] as much as possible undecided."[120] The basic idea is that courts should refrain from deciding issues that are not necessary to the resolution of the case at hand.[121] One appeal of minimalism is that it avoids "foundational issues," which people tend to have deep disagreements about.[122] Another appeal is that

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[116] *See* Posner, *supra* note 109.

[117] Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 69 (2003).

[118] Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring).

[119] Solum, *supra* note 108.

[120] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999).

[121] *Id.* at 4, 10. However, Professor Sunstein added the caveat that courts can decide other cases when "one decision necessarily bears on other cases." *Id.* at 10. It is this Note's position that it is an error for courts to interpret the trilogy as not applying to lengthy term-of-years that are the functional equivalent of a "life sentence" such as the 76.5 year sentence given to the sixteen-year-old defendant in *State v. Henry*. *See infra* note 134 and accompanying text.

[122] *See* Sunstein, *supra* note 120, at 14.

this approach is based upon democratic ideals—the idea that each branch of government has its own role to play, and judges, as a general rule, should avoid broad decisions that might trump on other, more democratic, branches' roles.[123] Finally, another benefit of minimalism is that judges who employ this approach avoid opening up more questions than necessary to decide the assigned case.[124]

The maximalist judge, by contrast, is one who "seek[s] to decide cases in a way that sets broad rules for the future and that also gives ambitious theoretical justifications for outcomes."[125] No judge could be absolutely maximalist because no judge "seeks to decide, in every case, everything that might be decided" in the future; however, maximalism is often employed when courts seek to decide broader, more ambitious issues often regarding constitutional notions of "liberty" and "equality."[126]

While no judge could be strictly a minimalist or a maximalist, some cases arguably do stand for a broader proposition. This Note's conclusion is that the Supreme Court trilogy is an example of a broader concern for juveniles and that the spirit approach on the de facto life sentence issue rightly recognizes what the Court was trying to accomplish.

In Part II, this Note analyzes the current split on the de facto life sentence issue, and ultimately shows that the spirit approach rightly extends the trilogy to this issue.

II. THE SPLIT: THE "SPIRIT" APPROACH VERSUS THE "LETTER OF THE LAW" APPROACH

As mentioned above, a split has developed in state and federal courts regarding the United States Supreme Court's reasoning in the juvenile sentencing trilogy and its application to de facto life sentences for juvenile offenders.[127] This section explores the split and examines the competing reasoning used by each side.

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[123] *Id.* at 24–25.
[124] *Id.* at 10.
[125] *Id.* at 9–10.
[126] *Id.* at 3, 9–11.
[127] *See supra* note 16 and accompanying text.

A. The "Letter of the Law" Approach

What this Note terms the "letter of the law" approach[128] is when courts employ a formalistic and minimalistic construction of the Supreme Court trilogy. The main argument of the letter of the law approach is that because none of the Supreme Court cases dealt specifically with de facto life sentences or lengthy term-of-year sentences, the reasoning of *Roper*, *Graham*, and *Miller* do not apply.[129] Below are examples of two decisions that employed the letter of the law approach.

1. *Henry v. State*[130]

In 2012, the District Court of Appeal for Florida's Fifth Appellate District considered *Graham*'s application to a ninety year prison sentence for a juvenile nonhomicide offender and ultimately concluded that it did not apply.[131]

Seventeen year-old Leighdon Henry was charged and convicted of three counts of sexual battery, one count of kidnapping with intent to commit a felony, two counts of robbery, one count of carjacking, and one count of possession of marijuana.[132] For all of these crimes, Henry was sentenced to ninety years in prison.[133] Under Florida law, Henry will be required to serve at least eighty-five percent of his sentence, thus, he will serve at least 76.5 years before he is eligible for release.[134] In other words, Henry will be 93.5 years old when he becomes eligible for parole. Henry appealed his sentence arguing it constituted a de facto life sentence in violation of *Graham*.[135]

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[128] *See supra* note 20 and accompanying text.

[129] Bunch v. Smith, 685 F.3d 546, 552–53 (6th Cir. 2012).

[130] 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012), *decision quashed*, 175 So. 3d 675 (Fla. 2015). It should be noted that the Supreme Court of Florida recently held that de facto life sentences for juvenile offenders are unconstitutional under the Eighth Amendment, thus quashing *Henry v. State*. *See* Gridine v. State, 175 So. 3d 672 (Fla. 2015). However, the reasoning in *Henry* is still used by a number of "letter of the law" courts. *See, e.g.*, *Smith*, 685 F.3d at 552; State v. Brown, 2012-0872, p. 10 (La. 5/7/13); 118 So. 3d 332, 338–39; Vasquez v. Commonwealth, 781 S.E.2d 920, 925 (Va. 2016).

[131] *Henry*, 82 So. 3d at 1089.

[132] *Id.* at 1085. One night, Henry broke into the victim's apartment, threatened her with a gun, and brutally raped her. *Id.* He then stole from the victim and forced her to drive him to an ATM and made her withdraw money. *Id.* The victim luckily was able to escape after they left the ATM. *Id.*

[133] *Id.* at 1086.

[134] *Id.*

[135] *Id.*

The *Henry* court ultimately concluded that *Graham* was inapplicable to the defendant's sentence because *Graham* only dealt with "life without parole" and not lengthy term-of-years sentences.[136] The court began by discussing *Graham* and favorably cited Justice Alito's dissenting opinion, specifically: "[N]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."[137] The *Henry* court then distinguished *Graham* by noting that "[t]he facts here are different from those in *Graham*. Here, unlike the defendant in *Graham*, Henry did not (in the end) receive a life sentence without parole for a nonhomicide offense; he received a lengthy aggregate term-of-years sentence without the possibility of parole for multiple nonhomicide offenses."[138] This was the pivotal move of the court and is evidence of a very formalistic and minimalistic view of *Graham*. Put another way, by noting the technical differences from *Graham*,[139] the *Henry* court was able to conclude its reasoning did not apply.

The *Henry* court then went on to discuss the vast difficulties of applying *Graham* to de facto life sentences:

> At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? . . . Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.[140]

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[136] *Id.* at 1089.

[137] *Id.* at 1087 (quoting Graham v. Florida, 560 U.S. 48, 124 (2010) (Alito, J., dissenting)).

[138] *Id.* at 1087.

[139] Although the *Henry* court was correct in noting the differences, it is the conclusion of this Note that there were far more similarities. The crimes in *Henry* were much more gruesome, but they were, like *Graham*, nonhomicide offenses thus triggering *Graham*'s application. Also, it is this Notes opinion that not affording a juvenile offender an opportunity for release until they are 93.5 years old triggers the very concerns the Supreme Court raised when discussing the sentencing practices in *Miller* and *Graham*.

[140] *Henry*, 82 So. 3d at 1089.

Thus, although conceding there was language in *Graham* that hints at its applicability to de facto life sentences,[141] the *Henry* court reached its ultimate conclusion by exploiting the technical differences between the facts before it and *Graham*.

2. *Bunch v. Smith*

Six months after *Henry*, the United States Court of Appeals for the Sixth Circuit held that an eighty-nine year sentence given to a sixteen-year-old, nonhomicide offender did "not violate clearly established federal law."[142]

When Chaz Bunch was sixteen years old, he was charged and convicted of robbing, kidnapping, and raping a young woman.[143] Due to his numerous convictions, Bunch was consecutively sentenced to a total of eighty-nine years, ensuring he would not be released until he was 105 years old.[144] Bunch appealed, arguing that *Graham* should be extended to de facto life sentences.[145]

The Sixth Circuit held that neither *Graham* nor *Miller* applied to this case because neither of the two cases "establish[ed] that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole."[146]

The Sixth Circuit discussed the Court's holding in *Graham*, and distinguished the facts of the two cases using formalist and minimalist reasoning.[147] The Sixth Circuit noted that *Graham* "did not address juvenile offenders, like Bunch, who received consecutive, fixed-term sentences for committing multiple

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[141] *Id.*

[142] Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012).

[143] *Id.* at 547. In 2001, Bunch and two accomplices stopped the victim at her place of work. *Id.* at 547–48. After forcing her to get in their car at gunpoint, Bunch and an accomplice took turns raping the victim as the third accomplice robbed the victim's car. *Id.* at 548. Eventually the third accomplice stopped the rape, and all three were later apprehended. *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 547.

[147] *Id.* at 550–51. The Sixth Circuit, like the *Henry* court, pointed out the technical differences of *Graham*, when discussing its ruling, for example, by noting multiple times that *Graham* only applied to life without parole for nonhomicide sentences. *Id.* at 551.

nonhomicide offenses."[148] The court conceded that Bunch's sentence may very well equate to the "functional equivalent" of life without parole but "since no federal court has ever extended *Graham*'s holding beyond its plain language," they could not hold that his sentence was unconstitutional.[149] Like the *Henry* court, this rationale made it abundantly clear that the Sixth Circuit was reading the trilogy in a very formalistic and minimalistic way.

The Sixth Circuit then argued that the split amongst the states regarding de facto life sentences demonstrated that the broader reading of *Graham* was not "clearly established."[150] The court explicitly adopted the *Henry* court's minimalist reasoning and concluded that "[i]f the Supreme Court has more in mind, it will have to say what that is."[151]

Finally, the Sixth Circuit also concluded that the Court's decision in *Miller* did not apply to the facts before it.[152] The Sixth Circuit rejected *Miller*'s application because *Miller* "did not address juvenile offenders, like Bunch, who received consecutive, fixed-term sentences for committing nonhomicide offenses."[153] Bunch appealed this decision to the Supreme Court, but in 2013, the Court denied his petition for certiorari.[154]

As was the case in *Henry*, the Sixth Circuit in *Bunch* capitalized on the technical factual differences between *Graham* and its case. However, the Sixth Circuit took *Henry* one step further by extending the letter of the law approach to *Miller*.

3. Conclusion on the "Letter of the Law" Approach

These cases establish the blueprint for a court to hold that *Miller* and *Graham* are inapplicable to de facto life sentences. The first step is to point out how narrow those two holdings are,[155] while ignoring the broader propositions they arguably

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[148] *Id.*

[149] *Id.*

[150] *Id.* at 552.

[151] *Id.* at 553 (alteration in original) (quoting Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012)).

[152] *Id.*

[153] *Id.*

[154] Bunch v. Bobby, 133 S. Ct. 1996 (2013).

[155] *See, e.g.*, *Bunch*, 685 F.3d at 547 (arguing that *Graham* did "not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole"); Henry v. State, 82 So. 3d 1084, 1087

stand for. The courts employ a formalistic and minimalistic view of the trilogy by pointing out that nothing in *Miller* or *Graham* applies to lengthy term-of-years sentences. The second step is to cite favorably Justice Alito's dissent in *Graham*.[156] Finally, the courts point out that if *Miller* or *Graham* were to be extended to de facto life sentences, there would be tremendous difficulty in establishing a bright line.[157]

B. The "Spirit" Approach

Courts that employ this approach recognize that "[t]he spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure parole is possible."[158] This approach dismisses the technical distinctions between life without parole and a de facto life sentence by endorsing the broader reasoning underlying the Supreme Court trilogy. Courts that endorse the spirit approach employ an instrumentalist and maximalist reading of the juvenile sentencing trilogy.

1. *State v. Ragland*

As discussed previously, *Ragland* dealt with a unique set of facts and procedural posture.[159] In 1986, when Jeffrey Ragland was seventeen years old, he and two friends attacked another group of boys in a grocery store parking lot.[160] Moments before the fight, Ragland yelled either "[l]et's do it" or "[w]e're gonna fight."[161] Moments after Ragland yelled, one of his accomplices struck the victim in the head with a tire iron, killing him.[162] Ragland was charged and convicted of first-degree murder based on the theory he was the instigator of the crime, despite the fact

(Fla. Dist. Ct. App. 2012) (arguing that unlike *Graham*, which dealt with a life sentence without parole, the defendant in this case was sentenced to a lengthy term-of-years sentence without the possibility of parole), *decision quashed*, 175 So. 3d 675 (Fla. 2015).

[156] *See supra* notes 138 and 149 and accompanying text.

[157] *Bunch*, 685 F.3d at 552 (arguing that extending *Graham*'s meaning to de facto life sentences "would lead to a lot of questions"); *see also Henry*, 82 So. 3d at 1089.

[158] State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013).

[159] *See supra* notes 1–8 and accompanying text.

[160] *Ragland*, 836 N.W.2d at 110.

[161] *Id.*

[162] *Id.*

that he did not actually swing the tire iron.[163] Ragland was sentenced to the mandatory sentence of life without parole.[164] Matt Gill, who actually swung the tire iron, was charged with second-degree murder and served three years in prison.[165]

In 2012, after *Graham*, but before *Miller*, the Governor of Iowa commuted Ragland and thirty-seven other *Graham* challengers' sentences to life with no possibility of parole for sixty years imprisonment with no credit given for earned time.[166] Ragland challenged this sentence as being a violation of the Court's recent decision in *Miller*.[167]

The Supreme Court of Iowa ultimately concluded that *Miller* and *Graham* applied to de facto life sentences and as such, Ragland's sentence was unconstitutional.[168] Specifically, the *Ragland* court held that "[f]or all practical purposes, the same motivation behind the mandates of *Miller* applies to the commuted sentence in this case or any sentence that is the practical equivalent to life without parole."[169]

The *Ragland* court, in a rebuttal to the letter of the law argument, then stated that "[o]ftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time."[170] This is an implicit adoption of an instrumentalist or maximalist reading of the trilogy, illustrated by its broad declaration:

> In the end, a government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no

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[163] *Id.*

[164] *Id.*

[165] *Id.* at 112. Gill wrote a letter in support of Ragland's release where he claimed sole responsibility for the death and disputed the State's argument that Ragland was the "Ring Leader." *Id.*

[166] *Id.* at 111. The effect of this commutation would mean that Ragland would not be eligible for parole until he was seventy-eight years old. *Id.* at 119.

[167] *Id.* at 112.

[168] *Id.* at 121.

[169] *Id.* The *Ragland* court noted that *Miller* and *Graham* held that to sentence a juvenile to life without parole foreswears any possibility of rehabilitation and rejects the fact that juveniles have a lesser culpability and greater ability to change. *Id.*

[170] *Id.*

> parole until age seventy-eight. Accordingly, we hold *Miller* applies to sentences that are the functional equivalent of life without parole.[171]

The *Ragland* court affirmed the sentence imposed by the district court, thus making the defendant immediately eligible for parole.[172] However, the Supreme Court of Iowa was not done on the de facto life sentence issue. On the very same day, it decided *State v. Null*, another decision that accepted that the Supreme Court's spirit approach extended to de facto life sentences.

2. *State v. Null*

In *State v. Null*, the Supreme Court of Iowa held that the trial court's sentence of a minimum of 52.5 years for a sixteen-year-old juvenile offender was unconstitutional, in violation of *Roper*, *Graham*, and *Miller*.[173]

The case involved Denem Anthony Null who was charged and convicted of second-degree murder and first-degree robbery.[174] Null challenged the conviction on numerous grounds, the main one being that his sentence was in violation of the Supreme Court's holdings in *Roper*, *Graham*, and *Miller*.[175]

The Supreme Court of Iowa began by pointing out that the Supreme Court trilogy actually stood for the proposition that juveniles are generally less culpable and less deserving of the harshest sentences than are their adult counterparts.[176] First, the court noted that *Miller* emphasized that nothing said in the Supreme Court trilogy is "crime-specific."[177] Thus, central to the Court's holding in the three cases is the notion that "children are different" and are categorically less culpable then adults.[178]

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[171] *Id.* at 121–22.

[172] *Id.* at 122.

[173] 836 N.W.2d 41, 45 (Iowa 2013).

[174] *Id.* In 2006, Null and two accomplices went to the victim's home to steal a pound of marijuana and in the course of the robbery Null shot and killed the victim. *Id.* at 45–46.

[175] *Id.* at 50. Null argued that his sentence was a de facto life sentence while the State urged for strict construction of the Supreme Court trilogy, noting that *Graham* and *Miller* only dealt with life without parole sentences. *Id.* at 50–51.

[176] *Id.* at 71.

[177] *Id.* at 67 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012)).

[178] *Id.* at 71.

Second, the court conceded that the 52.5 year sentence here was "not technically life-without-parole," however, it was still "sufficient to trigger *Miller*-type protections."[179] The court dismissed the letter of the law approach as "seek[ing] to avoid the basic thrust of *Roper*, *Graham*, and *Miller* by refusing to recognize the underlying rational of the Supreme Court is not crime specific."[180] The Supreme Court of Iowa concluded:

> *Miller*'s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.[181]

3. Conclusion on the "Spirit" Approach

For a court to extend the Supreme Court's spirit approach to de facto life sentences for juvenile offenders, a common path has emerged. First, the term-of-years sentence must clearly outlast the offender's life span or come very close to it.[182] Second, this approach recognizes that the broader and maximalist tenets of the Supreme Court trilogy was that "children are different" and therefore, less culpable, and while the state does not have to one-day release juvenile offenders, they are entitled to a meaningful opportunity for release.[183] Under this prong, the spirit courts rightly employ the maximalist and instrumentalist approach to juvenile sentencing that the Supreme Court clearly intended. Finally, this approach flatly rejects the formalist and minimalist strategy regarding the sentence's label, and is willing to apply the tenets of the trilogy to almost all categories of juvenile offenders.[184]

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[179] *Id.* The *Null* court stated these "protections" were some sort of opportunity to obtain release by showing "maturity and rehabilitation." *Id.*

[180] *Id.* at 72–73.

[181] *Id.* at 72.

[182] For example, in *State v. Null*, the juvenile offender would not be eligible for parole until he was sixty-nine years old. *Id.* at 45.

[183] *Id.* at 71 (noting that "the notion[] in *Roper*, *Graham*, and *Miller* [is] that 'children are different' and that they are categorically less culpable than adult offenders").

[184] *Id.* at 72, 75. For example, the *Null* court argued that, in effect, the letter of the law approach is basically stating that a juvenile sentenced to a lengthy term-of-years sentence should be worse off than a juvenile sentenced to life without parole. *Id.* at 72.

III. COURTS AND LEGISLATURES MUST APPLY THE SUPREME COURT "SPIRIT" APPROACH TO DE FACTO LIFE SENTENCES

After the United States Supreme Court trilogy, state and federal courts have struggled to apply the resulting mandates to de facto life sentences. The approaches employed by the Supreme Court of Iowa and other courts is the better reading of the trilogy because these courts recognize the broader and maximalist tenets that those decisions stood for. This Part argues that as long as the Supreme Court stays out of the de facto life sentence issue, state courts must extend the reasoning of the trilogy to de facto sentences.

A. The "Spirit" Approach Is the Better Analysis for De Facto Life Sentences

Say, for example, in 2005, two juvenile offenders—X and Y, both sixteen years old—commit armed burglary. The lowest sentence they may receive is five years in prison and the maximum is life without parole. X is sentenced to life without parole and Y is sentenced to seventy years. In other words, Y will not be eligible for parole until he is eighty-six years old. Today, both are seeking resentencing based on the Supreme Court trilogy. Every court, even the ones that apply the trilogy narrowly, would agree that X would have to be given some meaningful opportunity for release because of the label of his sentence: "life without parole."[185] However, depending on the state Y is in, he may not be given a meaningful opportunity for release, unless he is lucky enough to live to be eighty-six years old. Despite the fact that X and Y committed the same crimes, and despite the fact that X was sentenced to the "second most severe penalty permitted by law,"[186] X will likely receive a chance at redemption while Y will most likely die in jail.

This, of course, is the hypocrisy of the current split on the de facto life sentences issue. Because of the label "life without parole," X will receive at least the possibility of parole, while Y, serving the functional equivalent of life without parole, will not.

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[185] *See* State v. Brown, 2012-0872, p. 14 (La. 5/7/13); 118 So. 3d 332, 341 (recognizing that the defendant's life sentence would qualify for *Graham* protections, but the problem was that the defendant committed four other nonhomicide crimes).

[186] Graham v. Florida, 560 U.S. 48, 69 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

1. The Broader Concern for Juvenile Offenders

The Supreme Court trilogy represents a broader concern for the culpability of juveniles and accepts "the notion that juveniles are constitutionally different from adults for purposes of the imposition of harsh punishments."[187] Indeed, if the trilogy stands for anything it is that juveniles, as compared to adults, "are developmentally immature, are less culpable . . . and more likely to reform—and that these differences are important to the legal response to juvenile crime."[188] Also, as the Court discussed in *Graham* and *Miller*, the traditional justifications for the harshest penalties do not apply to juvenile offenders in the same way they would an adult offender.[189] As *Graham* made clear, juveniles sentenced to life without parole are deprived of hope, are given little incentive to rehabilitate, and are categorically barred from any chance to prove to society that they have learned from their mistakes.[190] Therefore, the trilogy are maximalist decisions meant to apply to juvenile sentencing generally[191] and are not to be ignored merely because of the label of the sentence.

None of these broad concerns are alleviated simply because the juvenile is sentenced to a de facto life sentence. A juvenile sentenced to seventy years without the possibility of parole is no less deserving of a chance to show redemption then a juvenile sentenced to life without parole.

A broader and maximalist reading of the Supreme Court trilogy recognizes what the Court was trying to accomplish.[192] Common sense dictates that concerns about juveniles sentenced to harsh penalties do not disappear simply because it is a lengthy term-of-years sentence, rather than life without parole. The concerns that the Court noted in the trilogy apply equally to juveniles sentenced to lengthy-term-of years. It would be absurd to say that juveniles sentenced to de facto life sentences are more

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[187] *Null*, 836 N.W.2d at 66.

[188] Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 535 (2013).

[189] Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

[190] *Graham*, 560 U.S. at 69–70.

[191] *See supra* note 126 and accompanying text.

[192] *See, e.g.*, *Null*, 836 N.W.2d at 74 ("[T]he direction from the Supreme Court that trial courts consider everything said about youth in *Roper*, *Graham*, and *Miller* means more than a generalized notion of taking age into consideration as a factor in sentencing.").

mature, more culpable, and less likely to reform because of the label of their sentence.[193] The spirit approach thus rightly comports with the trilogy's concern regarding juvenile offenders.

2. The Incorrect "Super-Predator" Fear

When discussing the de facto life sentencing issue, it is impossible not to recognize that the rapid rise in harsh sentences for juveniles is a modern phenomenon. The changes in state juvenile sentencing practices were shaped by the mythical fear that juvenile "super-predators" were on the rise and had to be severely punished.[194]

However, as several commentators have noted, this fear was a fiction and juvenile crime has sharply decreased in recent years.[195] Before the super-predator fear swept America, juveniles rarely received life without parole.[196] However, after the introduction of this fear, juveniles were sentenced to life without parole "three times as frequently as they were in 1990."[197]

The Court attempted to peel back this recent phenomenon. In applying the trilogy to de facto life sentencing cases, courts that use the spirit approach are correctly employing instrumentalism in that they are "digging beneath" the Court's reasoning and recognizing the "practical considerations that motivated" its rulings.[198] Thus, courts that follow the spirit approach recognize that the Court was particularly troubled by the history of juvenile sentencing in this country, and correctly expand the trilogy's application to sentences that are the functional equivalent of life without parole.

B. The "Letter of the Law" Courts Ignore Broader Concerns Based on Technical Differences

Courts that employ a "letter of the law" approach wrongly ignore what the Supreme Court was trying to accomplish in the trilogy on juvenile sentencing. By employing an extremely

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[193] *Id.* at 72 (arguing that a juvenile sentenced to a de facto life sentence should not be worse off than a juvenile sentenced to a life sentence.).

[194] *See supra* notes 32–36 and accompanying text.

[195] *See supra* notes 32, 36 and accompanying text; *see also* Wallace, *supra* note 40, at 41 (noting that "[r]emarkably, this super-predator myth arrived on the scene during a decrease in juvenile crime").

[196] *See* Wallace, *supra* note 40, at 42–43.

[197] *Id.* at 43.

[198] *See supra* note 111 and accompanying text.

formalistic and minimalist reading of the trilogy, courts seem to intentionally throw away what the trilogy actually stood for. Despite the benefits of formalism and minimalism in other contexts, it is abundantly clear that the trilogy stood for a broader concern of juvenile sentencing. Thus, the courts that use this approach wrongfully ignore common sense and exploit the labels of sentences to get around the broader maximalist and instrumentalist holdings of the trilogy.

1. Ignoring Common Sense

A common theme among the courts that apply the trilogy narrowly is that because the Supreme Court only dealt with "life without parole" sentences, lengthy term-of-years sentences are outside the scope of its holdings. While no one can dispute the scope, the Court did not decide the constitutionality of de facto life sentences.[199] To throw away the Court's broader concerns for juveniles based on labels ignores what the three decisions were trying to accomplish.

All of the "letter of the law" cases analyzed by this Note emphasize that *Graham* and *Miller* only dealt with life without parole sentences.[200] For these courts, the lengthy term-of-years sentences made *Graham* and *Miller* inapplicable.[201] However, it does not take a sociologist to recognize that if a juvenile does not have a chance for parole until they are 93.5 years old or 78 years old, the juvenile will most likely die before getting that opportunity.[202] In fact, without taking race, gender, economic status or the earlier mortality rate of those incarcerated into effect,[203] the average age of death in this country is 78.8 years.[204] While not life without parole, it is certainly the functional equivalent of it. If the sentence is the functional equivalent of life without parole, then all of the broader concerns about juvenile sentencing espoused in the trilogy should apply.

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[199] State v. Null, 836 N.W.2d 41, 67 (Iowa 2013) ("Neither *Roper*, *Graham*, nor *Miller* involved a sentence for a lengthy term of years that was not life without parole.").

[200] *See supra* Part II.A.

[201] *See supra* Part II.A.

[202] *See supra* notes 134 and 144 and accompanying text.

[203] Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012), *decision quashed*, 175 So. 3d 675 (Fla. 2015).

[204] *Deaths and Mortality*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/fastats/deaths.htm (last updated Feb. 25, 2016).

2. Errant Application of Formalism and Minimalism to the Trilogy

The basic problem with the letter of the law view is that it wrongfully applies minimalism and formalism to the Supreme Court's trilogy cases. The letter of the law courts use exaggerated technical differences to ignore the basic principles the Supreme Court has deemed relevant for juvenile sentencing.

First, the Court made clear that states are forbidden "from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society."[205] Second, the Court held that, while eventual release is not guaranteed, the States are required to give juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[206] Third, *Miller* stated that none of the concerns expressed about sentencing juveniles is "crime-specific" and that "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."[207] Finally, while *Miller* does allow life without parole to be imposed—after individualized characteristics of youth are considered—the Court predicted that the "harshest possible penalty will be uncommon."[208]

If the Court made clear that States must give juveniles some chance at redemption, then concerns about juveniles' diminished culpability are not "crime-specific," and that life without parole will become "uncommon" for all classes of juvenile offenders, such tenets should not be any less applicable to the functional equivalent of life without parole. Is it really, as the Sixth Circuit argued, because the sentence of "life" was not involved?[209] This is an extremely formalistic reading of the Supreme Court trilogy, and one that the Court certainly did not intend. The Court's broader intention in the trilogy was to make clear that juveniles were constitutionally different for sentencing purposes.[210] The Court intentionally used broad language to note the differences between juveniles and adults as well as hint that, as a general

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[205] Graham v. Florida, 560 U.S. 48, 75 (2010).

[206] *Id.*

[207] Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

[208] *Id.* at 2469.

[209] Bunch v. Smith, 685 F.3d 546, 550 (6th Cir. 2012).

[210] State v. Null, 836 N.W.2d 41, 65 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012)).

matter, juveniles should not be handed the harshest penalties afforded by law.[211] It appears as though the Court used instrumentalist and maximalist reasoning to, in part, deal with the relatively recent rise of harsh sentences for juvenile offenders.[212]

Letter of the law courts clearly disagree and use minimalism and formalism to "dress up" their disagreements.[213] However, after three broad opinions, lower courts should not misconstrue what the trilogy stood for simply because of the label of the sentence or their personal disagreement with a higher court.

As the *Null* court argued, a juvenile sentenced to a lengthy term-of-years should not be worse off than a juvenile sentenced to life.[214] It would be inconsistent to require a meaningful opportunity for a release in a life sentence, but subsequently deny that chance in a ninety year sentence. This approach incorrectly ignores the broader principles of the trilogy.

C. State Courts Must Apply the "Spirit" Approach When Legislatures Fail To Act

The Supreme Court has, to date, denied certiorari in de facto life sentence cases.[215] If the Court continues to deny certiorari for cases involving de facto life sentences, state courts must apply the spirit approach to juveniles sentenced to de facto life sentences, especially where there has been insufficient or no legislative response to the Court's recent decisions. As long as state legislatures continue to stall, state courts are in a unique position to deal with the de facto life sentence issue with common-sense procedures and rules.

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[211] *See supra* notes 97–100, 102 and accompanying text.
[212] *See supra* notes 35–36 and accompanying text.
[213] *See supra* note 119 and accompanying text.
[214] *Null*, 836 N.W.2d at 72.
[215] Bunch v. Bobby, 133 S. Ct. 1996 (2013); *see also supra* note 21 and accompanying text.

1. State Legislative Response Has Not Been Adequate

Many commentators have argued that it is the legislature, and not the judiciary, that must enact laws that comport with the Supreme Court trilogy.[216] Thus, some have argued that the state legislatures, and not the courts, should deal with the de facto life sentence issue.[217] There are two problems with this argument.

First, many states have not passed legislation comporting with the Court's ruling in *Miller*.[218] In fact, as of 2013, only 11 states have passed laws in compliance with *Miller*.[219] In addition, two of the five states that have held the majority of juvenile offenders sentenced to life without parole have not passed legislation in compliance with *Graham*, let alone *Miller*.[220] If state legislatures are resisting the Court's rulings on this issue, it is unlikely for them to take the lead with de facto life sentences.

Second, even in states that have passed legislation, some state courts are constructing the statutes narrowly.[221] For example, Louisiana passed a law in response to *Graham* that required, upon certain conditions, juvenile nonhomicide offenders previously sentenced to life without parole be eligible for a parole hearing after serving thirty years.[222] However, the Supreme Court of Louisiana noted that the statute only applies to "life sentences" and therefore did not address lengthy term-of-years sentences.[223]

If legislatures are resisting *Graham* and *Miller* legislation, such precedent cannot be relied upon to address de facto life sentences in the way the Court required.

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[216] *See, e.g.*, Drinan, *supra* note 17, at 786; Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3479 (2014).

[217] *See* Scavone, *supra* note 216, at 3444.

[218] *See* Drinan, *supra* note 17, at 786–87.

[219] *Id.* at 787.

[220] *Id.*

[221] *See, e.g.*, State v. Brown, 2012-0872 pp. 14–15 (La. 5/7/13); 118 So. 3d 332, 341; *see also supra* note 130 and accompanying text.

[222] *See* Scavone, *supra* note 216, at 3471.

[223] *Brown*, 118 So. 3d. at 341.

2. Judicial Response Required

If legislatures continue to stall, the highest state courts and federal appellate courts should continue to extend *Graham* and *Miller* to de facto life sentences. In the absence of legislation, state courts should use *State v. Null* as a model when juveniles are sentenced to de facto life sentences.[224]

The Supreme Court of Iowa emphasized a formula for trial courts to use when addressing de facto sentences, an approach that adequately deals with all of the concerns noted in the letter of the law approach.[225] First, as a general rule, trial courts must recognize that "children are constitutionally different from adults."[226] Therefore, trial courts must recognize that the characteristics of youth are mitigating factors, not aggravating ones.[227] If the trial court feels differently—for example, if the crimes are especially heinous—it must explain why the case warrants an exception from the general rule.[228] In doing so, the court cannot just recite the facts of the crime, but instead must specifically explain why the mitigating factors do not apply.[229] Nothing in *Roper*, *Graham* or *Miller* ensures a juvenile offender will be released; however, what is required is that all juveniles, despite their crimes, be given some opportunity to show "rehabilitation and fitness to return to society."[230]

Second, trial courts should recognize that one of the central tenets of the Supreme Court trilogy is that "[j]uveniles are more capable of change than are adults," and that courts should embrace the concept that most juveniles who commit criminal acts will not become lifelong criminals.[231]

Third, trial courts should recognize that a lengthy term-of-years sentence is only appropriate in "rare" cases.[232] It may be that a "rare" case will be a particularly heinous crime like the ones in *Henry* and *Bunch*. However, the sentencing court cannot make a definitive determination that the juvenile will never be able to rehabilitate.

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[224] 836 N.W.2d 41, 74–77 (Iowa 2013).
[225] *Id.*
[226] *Id.* at 74 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012)).
[227] *Id.* at 75.
[228] *Id.* at 74.
[229] *Id.* at 74–75.
[230] *Id.* at 75.
[231] *Id.* (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).
[232] *Id.*

Finally, although the Supreme Court of Iowa did not determine whether the 52.5 year sentence in *Null* constituted a de facto life sentence,[233] this Note concludes that absent legislative determination, courts should use a common sense approach in determining what number or length of years constitutes a de facto life sentence.

The letter of the law proponents would likely attack this formula as creating more confusion than existed before. They will ask how many years will a juvenile have to serve before being given a "meaningful opportunity for release"?[234] Would a forty year sentence trigger this sort of protection? Does it make a difference whether the juvenile committed homicide or nonhomicide offenses?[235] What if the juvenile committed multiple crimes?[236]

The Supreme Court expressly and implicitly answered the latter two questions.[237] Certainly, the first two questions are not easy to answer. In judicially created law, it is difficult to make bright line determinations because it is impossible to foresee every future case.[238] However, a few points might ease the concern of the letter of the law courts.

First, nothing in the Supreme Court trilogy required that a juvenile offender be released.[239] All that is required is that States do not categorically refuse juveniles a chance to show society that they have changed.[240] Therefore, in a particularly gruesome case like *Bunch v. Smith*, where the defendant repeatedly raped, robbed, and abused a young woman,[241] it might well be that the defendant will spend the rest of his or her life in

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[233] *Id.* at 71.

[234] *See supra* note 141 and accompanying text.

[235] *See supra* note 141 and accompanying text.

[236] *See supra* note 141 and accompanying text.

[237] *See Null*, 836 N.W.2d at 71, 73 (recognizing that one of the central tenets of the trilogy is that the decisions were not "crime specific" and that one of the cases in *Miller* involved multiple crimes).

[238] *See* Sunstein, *supra* note 120, at 9.

[239] *Null*, 836 N.W.2d at 75 ("[N]othing in *Roper*, *Graham*, or *Miller* guarantees that youthful offenders will obtain eventual release.").

[240] *Id.* ("All that is required is a 'meaningful opportunity' to demonstrate rehabilitation and fitness to return to society." (quoting Graham v. Florida, 560 U.S. 48, 75 (2010))).

[241] 685 F.3d 546, 547–48 (6th Cir. 2012).

jail. Nothing in the Court's holdings would prevent that result.[242] All that is required is that the defendant is afforded a chance to prove he or she is reformed.

Second, in the absence of state legislature action, courts should instead take a case-by-case approach to determine the amount of time required to be served before the "meaningful opportunity" be afforded.[243] For example, it is clear that an eighty-nine year sentence[244] would trigger *Graham* and *Miller* protections, while a 52.5 year sentence is a closer call.[245]

In the absence of legislation, courts have a duty to extend the central tenets of *Roper*, *Graham*, and *Miller*'s reasoning to de facto life sentences for juvenile offenders.

D. Proposed Model for State Action

There are many issues with what state legislatures are enacting in response to *Graham* and *Miller*.[246] Although this Note argues that state courts have a duty to extend the Supreme Court trilogy to de facto sentences, the far better response would be for States to enact legislation that clearly defines the limit for de facto sentences, clearly defines when *Graham* and *Miller* protections kick-in, and allows for judicial determination on what individualized mitigating factors are to be considered. This would better deal with the issue of de facto life sentences and embrace the broader spirit of the Court's decisions.

1. Legislative Action

States should enact legislation that deals with all of the outstanding issues of the post-*Graham* and *Miller* landscape. First, states should clearly define what length of sentence qualifies a juvenile offender for *Graham* and *Miller* protections. A number conceded by Graham's counsel was forty years.[247] Although some states may want to go lower, it seems that a forty year sentence or more is of such length that it would adequately

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[242] *See supra* notes 100–101 and accompanying text.

[243] The ideal solution would be for the state legislatures to define the amount of time required to be served before the "meaningful opportunity" be afforded, or better yet, to create a bright-line rule dealing with the terms-of-years sentences.

[244] *Bunch*, 685 F.3d at 547.

[245] *Null*, 836 N.W.2d at 45.

[246] *See supra* notes 220–225.

[247] Graham v. Florida, 560 U.S. 48, 124 (2010) (Alito, J., dissenting).

trigger *Graham* and *Miller*'s protections. Second, states should create a schedule listing specific offenses—homicide, nonhomicide, and so forth—and mandate how long the offenders would have to serve before being given an opportunity to prove their redemption. For example, if a juvenile in State X is convicted of homicide and is sentenced to a sixty year sentence, the schedule would require that after the juvenile serves thirty years, a parole board or court would be required to take a "second look" to determine if he has proven that he is rehabilitated and mature enough to be released. The schedule can take into account aggregating offenses or particularly heinous nonhomicide offenses. However, no matter how long the sentence is, after forty years, or whatever number the State chooses, a court or parole board is required to take a "second look." Third, legislatures should require that the juvenile offender affirmatively prove his or her rehabilitation and maturity by balancing certain factors. Some factors proposed by commentators are education, the capacity to contribute to society, and counseling.[248] Also, if the juvenile offender has disciplinary citations while incarcerated, he or she may sacrifice their opportunity for a "second look" depending on the nature of such offenses. Finally, States should require judges to consider certain factors before sentencing, such as the ones presented by the Supreme Court of Iowa in *State v. Null*.[249]

2. Judicial Action

Under the model act, the state legislature should create a presumption against sentencing a juvenile to an extremely lengthy term in order to comply with *Miller*'s statement that the harshest sentences, while allowable, should be "uncommon."[250] The act should require that mitigating factors of youth be considered at sentencing. And, unlike Louisiana's post-*Miller* law, the opportunity to affirmatively prove eligibility for release should be required after sentencing.[251] This would mitigate the fact that "sentencing courts are likely not well equipped to make decisions about a juvenile's potential for reform at this early

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[248] *See* Drinan, *supra* note 17, at 793.
[249] *See supra* notes 227–235 and accompanying text.
[250] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).
[251] *See* Scavone, *supra* note 216, at 3471.

stage."[252] Finally, state courts should be allowed to review any parole board's action to ensure compliance with the spirit of *Graham* and *Miller*. This would ensure that parole boards are not simply rubber-stamping denials.

CONCLUSION

Roper, *Graham*, and *Miller* have opened up as many questions as they answered. However, the broader implications of the Supreme Court trilogy on juvenile sentencing are clear. Some "meaningful opportunity for release"[253] must be given to *all* juvenile offenders, regardless if they were sentenced to a lengthy-term-of-years or life without parole. Therefore, the split should be resolved in favor of the broader reading of the trilogy. The broader reading acknowledges what common sense dictates: There is no functional difference between an eighty-nine year sentence and a sentence of life without parole. Courts should ignore letter of the law arguments and recognize the Supreme Court trilogy for what it actually stands for.

[252] *Id.*

[253] Graham v. Florida, 560 U.S. 48, 75 (2010).