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**“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**

LESLIE PATRICE WALLACE**

ABSTRACT

Terrance Graham pled guilty to armed burglary with assault or battery and attempted armed robbery when he was sixteen years old. He was sentenced to prison for the rest of his life. Like Roe v. Wade made history by forcing this country to consider the morality of abortion, so too will the United States Supreme Court’s decision in Graham v. Florida make history by challenging the morality of sentencing juveniles for the rest of their lives. After firmly abolishing the death penalty for all juvenile offenders under the age of eighteen, as a violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause, the Court has once again curbed the punishments permissible for the juvenile offender. Reaffirming that juveniles are less culpable than adults, the Court holds that life without parole is disproportionately harsh for juvenile non-homicide offenders, and is therefore cruel and unusual under the Eighth Amendment.

* *Graham v. State*, 982 So.2d 43, 45 (Fla. Dist. Ct. App. 2008) (emphasis added); *Graham v. Florida*, 130 S. Ct. 2011, 2019 (2010) (emphasis added).

** Professor of Legal Writing, California Western School of Law, and member of the National Association for the Counsel of Children. I would like to thank my wonderful colleagues and new friends in the Legal Writing Institute (LWI) Writers’ Workshop, especially Professors Steve Johansen (Lewis and Clark Law School), Cathren Koehlert (Golden Gate University), and Kim Flanery Coats (University of Arkansas, Fayetteville, Leflar Law Center) for their invaluable feedback on this article in its early stages; Mark E. Wojcik (The John Marshall Law School—Chicago), Legal Writing Institute Board member, Chair-Elect of the Association of American Law Schools Section on Legal Writing, Reasoning, and Research, and friend, for encouraging my participation in the Writers’ Workshop in the first place and for valuable article feedback; my colleagues at California Western, especially Associate Dean William Aceves and Professors Kenneth Klein, Roberta Thyfault, and Ryan Williams for their support of this article; my friend and colleague Darrin E. Johnson, Assistant Public Defender, Pinellas County Florida, for early discussion of this article proposal, and updates on *Graham’s* impact for Florida Juvenile Defenders; and, last but certainly not least, my fabulous Research Assistants, Bella Titiyevskaya and Matthew T. Williams, for their excellent support. I am blessed by this group.

Standing in agreement with Graham, this Article analyzes two issues left in its wake: (1) the inconsistency in the Court’s reasoning when viewed against lengthy term of year sentences, and (2) the implicit requirement to reinstate effective parole boards in light of Graham’s new constitutional mandate to give juveniles a meaningful opportunity to reenter society. This Article does not suggest that juvenile offenders escape punishment for committed offenses, but rather concludes that our country acknowledges the historic impact and repercussions of Graham’s central premise—juveniles are different from adults. Because of this decision, states must deal with those differences in tangible ways to give juvenile offenders hope to reenter society.

I. INTRODUCTION 36

II. THE RISE OF LIFE WITHOUT PAROLE FOR JUVENILES: A HISTORICAL LOOK AT A SENTENCE IGNITED BY FEAR 39

III. FROM 1988 TO 2010: A REVIEW OF SUPREME COURT JURISPRUDENCE IN JUVENILE SENTENCING..... 47

IV. GRAHAM V. FLORIDA: ABOLISHING LIFE WITHOUT PAROLE FOR THE JUVENILE NON-HOMICIDE OFFENDER 49

 A. *Lengthy Term of Years is Presumptively the Same as Life Without Parole, and Therefore Should Be Abolished* 53

 1. Using a Categorical Rule, the Court Reaffirms Juveniles Are Different, Thus Not Deserving of Life Without Parole 53

 2. The Court’s Holding Shuts One Door, But Leaves Open Another Detrimental Option—Lengthy Term of Years 58

 B. *Graham’s Constitutional Mandate Will Require All States to Have Active Parole Boards* 64

 1. The Court Hands Down a New Constitutional Mandate—States Are Now Required to Give “Some Meaningful Opportunity” for Juvenile Offenders to Obtain Release 65

 2. Going Forward, the Court’s Constitutional Mandate Implicitly Requires All States to Have Parole Boards and Likely Rehabilitation Measures in Place..... 67

V. CONCLUSION 76

I. INTRODUCTION

Well, if we — if we have already said that you can’t impose death on an adult who hasn’t committed a homicide, an intentional death, and so for an adult the most serious sentence that we can give them is life without parole, why should that same sentence be given to a juvenile who we have recognized as being less capable than an adult? And why should we per-

mit it for a crime that's not comparable to a homicide and/or something akin in seriousness to that?¹

....

[H]ow do you answer the argument that unlike an adult, because of the immaturity, you can't really judge a person — judge a teenager at the point of sentencing? That it's only after a period of time has gone by, and you see: [h]as this person overcome those youthful disabilities? That's why a proportionality review on the spot doesn't accommodate the — what is the driving force of the — your — the Petitioner's argument is you can't make a judgment until years later to see how that person has — has done.²

In a collision between the sentencing practices for juvenile offenders and the Eighth Amendment's Cruel and Unusual Punishment Clause, the juvenile offender once again prevails. The United States Supreme Court's decision in *Graham v. Florida* and its precedent centered on a seeming friction between the constitutional origin of "cruel and unusual punishment" for juveniles in light of the Eighth Amendment and the evolving standards of decency in our society.³ This friction has divided the United States from other countries in its treatment of juvenile offenders, in that all countries—except the United States and Somalia—explicitly forbid life imprisonment without the possibility of release for juvenile offenders.⁴ The Eighth Amendment provides that

¹ Transcript of Oral Argument at 38, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412) [hereinafter *Graham Transcript*] (Sotomayor, J.).

² *Id.* at 41 (Ginsburg, J.).

³ *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

⁴ "Virtually all countries in the world reject the punishment of life without parole for child offenders." HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 5 (2005) [hereinafter *HUMAN RIGHTS WATCH*], available at <http://www.amnestyusa.org/countries/usa/clwop/report.pdf>. Prior to *Graham*, Somalia and the United States were the two remaining countries that allowed juvenile life without parole. *Id.* "[A]ll countries except the United States and Somalia have ratified the Convention on the Rights of the Child, which explicitly forbids 'life imprisonment without possibility of release' for 'offenses committed by persons below eighteen years of age.'" *Id.* Regarding the global trend for sentencing juveniles, some authors note:

[T]he sentence is indeed cruel. These issues have become so well-understood at the international level that a state's execution of this sentence raises the possibility that it not only violates juvenile justice standards, but also contravenes international norms established by the United Nations Convention Against Torture. Globally, the consensus against imposing LWOP sentences on children is virtually universal. Based on the authors' research, there is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.

Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008) (engaging in comparative analysis of juvenile justice and rehabilitation models in other countries and the United States to identify alternatives to harsh and inappropriate sentences for children).

“[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,”⁵ and is made applicable to the states through the Fourteenth Amendment.⁶ “[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”⁷ Further, in determining which punishments are so disproportionate as to be cruel and unusual, it is necessary to refer to “the evolving standards of decency that mark the progress of a maturing society.”⁸ “This is because ‘[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’”⁹

The *Graham* Court stated that life without parole, the second most severe criminal punishment—second only to the death penalty¹⁰—violates two features of the Eighth Amendment: first, the concept of “proportionality” (balancing the punishment with the culpability, or guilt, of the offender), and second, the “essential principle” of the Eighth Amendment, which is the state’s duty to “respect the human attributes even of those who have committed serious crimes.”¹¹ Based on these principles, the *Graham* Court produced a landmark categorical rule rejecting a case-by-case analysis and holding that life without parole for juvenile non-homicide offenders (juveniles who do not murder) violates the Eighth Amendment’s Cruel and Unusual Punishment Clause.¹² A life without parole sentence for juvenile offenders means there is no possibility of release from incarceration during the offender’s lifetime.¹³

The scope of this Article is limited by Terrance Graham’s “adult” designation.¹⁴ Briefly, Terrance Graham was tried as an adult for his crimes, and if a

⁵ U.S. CONST. amend. VIII.

⁶ See *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citing *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (*per curiam*)).

⁷ *Id.* at 560 (quoting *Weems v. United States*, 249 U.S. 349, 367 (1910)).

⁸ *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

⁹ *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008)).

¹⁰ *Id.* at 2027.

¹¹ *Id.* at 2021.

¹² *Id.* at 2030. But see Justice Thomas’s dissenting opinion, contending that the Court’s opinion extended the Cruel and Unusual Punishment Clause to not only prohibit methods of punishment deemed cruel and unusual, but also “any punishment that the Court deems ‘grossly disproportionate’ to the crime committed. This latter interpretation is entirely the Court’s creation.” *Id.* at 2044 (Thomas, J., dissenting).

¹³ HUMAN RIGHTS WATCH, *supra* note 4, at 6.

¹⁴ See *Graham*, 130 S. Ct. at 2020 (noting that Graham’s violent offenses were “not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen.”).

juvenile offender is charged as an adult, they are transferred to adult court and thereafter susceptible to life without parole.¹⁵ As such, this Article will not discuss *Graham's* implication, if any, on juvenile transfers. Rather, this Article analyzes the current state and future fate of sentencing practices for juvenile offenders in light of the *Graham* decision. Part I will provide a historical overview of life sentences for juveniles, both with and without parole. Part II will review the United States Supreme Court's jurisprudence surrounding juvenile sentencing and permissible punishments from 1988 to 2010. Finally, Part III will critically evaluate two issues stemming from *Graham*: (1) the inconsistency in the Court's reasoning when viewed against allowing lengthy term of year sentences, and (2) the implicit requirement to reinstate effective parole boards in light of *Graham's* new constitutional mandate to give juveniles a meaningful opportunity to reenter society. In its conclusion, this Article does not suggest that juvenile offenders escape punishment for committed offenses, but rather, that our country acknowledge the historic impact and repercussions of *Graham's* central holding—juveniles are different from adults.¹⁶ Because of this decision, states must deal with the inherent differences between adults and juveniles in tangible ways in order to give juvenile offenders hope to reenter society.

II. THE RISE OF LIFE WITHOUT PAROLE FOR JUVENILES: A HISTORICAL LOOK AT A SENTENCE IGNITED BY FEAR

Gary C. "falsely confessed to a murder that occurred when he was fourteen years old."¹⁷ Having waived his constitutional rights, he was interrogated by police; first in the company of his mother and then without her being present, during which time he told police what they "wanted to hear."¹⁸ "No one double checked his statements."¹⁹ Presumably, Gary did not know someone should: "[H]e did not know what would happen once he confessed, but he had no idea he could be sentenced to life without parole."²⁰

Sentencing practices for juvenile offenders have changed considerably throughout history. In the eighteenth century, juvenile offenders were charged

¹⁵ "Once in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence." *Id.* at 2025.

¹⁶ See *id.* at 2026-27 (noting that *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) established salient characteristics that differentiate juveniles from adults).

¹⁷ HUMAN RIGHTS WATCH, *supra* note 4, at 17 (citing interview by the American Civil Liberties Union-Michigan Life without Parole Project with Gary C., in Tamms, Ill. (Sept. 21, 2004) (on file with Human Rights Watch)).

¹⁸ *Id.* For example, "[w]hen he left out details or failed to make statements that fit with the version of the crime already developed by the police, he said that they helped him along, saying things such as: '[Y]ou used the ladder to get in, right?'" *Id.*

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

and tried in adult criminal court.²¹ By the nineteenth century, many child welfare advocates reformed the country's view of children, and states found it counter-productive to convict children along with adults.²² In response to this view, individual states—beginning with Illinois in 1899—established a separate justice system for children, each with its myriad of laws, policies, and practices.²³

Over the last three decades, the United States has been inundated with “tough on crime” policies, which along with a decrease in rehabilitation, has made the United States the country with the highest incarceration rates for adults and juveniles.²⁴ These tough policies were due in part to the fear of the juvenile offender, which rose significantly in the mid-1980s.²⁵ Arguably the United States was feeling the stress of the twelve, thirteen, and fourteen-year-olds who were trading in make-up kits, football jerseys, and video games, in exchange for knives, guns, and other weapons of choice. No longer were the boy and girl next door the neighborhood “role models,” but rather they became the kids neither you nor your children made eye contact with.

One of the most infamous theories which seemed to single-handedly ignite the growing nationwide panic was John Dilulio's 1995 “warning that ‘ . . . on the horizon . . . are tens of thousands of severely morally impoverished juvenile superpredators.’ ”²⁶ Because of the already existing increase in juvenile

²¹ *Id.* at 13.

²² *Id.*; see also Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 12 (2007) (noting that “[p]rogressive reformers combined a more modern construction of childhood with a more scientific conception of social control to create a judicial-welfare alternative and to remove children from the adult criminal process.”).

²³ HUMAN RIGHTS WATCH, *supra* note 4, at 13; see *State Juvenile Justice Profiles, Using State Profiles*, NAT'L CTR. FOR JUVENILE JUSTICE, <http://70.89.227.250:8080/stateprofiles/asp/using.asp> [hereinafter NCJJ] (last visited July 6, 2010) (proposing that the United States does not have a unified juvenile justice system); see also Feld, *supra* note 22, at 13 (noting that “[f]or more than a century after the founding of the United States, no separate court or justice system existed for young offenders”).

²⁴ ASHLEY NELLIS AND RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 1 (2009) [hereinafter NELLIS & KING] (The Sentencing Project is a national non-profit organization based in Washington D.C. and engaged in the research and advocacy of criminal justice policy issues), available at http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf; see also Feld, *supra* note 22, at 12 (“During the 1980s and 1990s, a sharp increase in homicides committed by young black men provided political incentives to ‘get tough’ on youth crime and produced an unprecedented paroxysm of punitiveness”).

²⁵ See NELLIS & KING, *supra* note 24, at 30-31.

²⁶ NELLIS & KING, *supra* note 24, at 30 (quoting John Dilulio, *The Coming of the Superpredators*, THE WEEKLY STANDARD, NOV. 27, 1995); see also HUMAN RIGHTS WATCH, *supra* note 4, at 13 (quoting JOHN DIULIO, HOW TO STOP THE COMING CRIME WAVE 1 (1996)). At the time of the statement, John Dilulio was a Princeton University Professor, but

violent crime, this super-predator myth spread like wildfire.²⁷ Describing the juvenile super-predator, DiIulio writes:

First, they are radically present-oriented. Not only do they perceive no relationship between doing right (or wrong) now and being rewarded (or punished) for it later. They live entirely in and for the present moment; they quite literally have no concept of the future Second, the super-predators are radically self-regarding. They regret getting caught And they place zero value on the lives of their victims, whom they reflexively dehumanize as just so much worthless “white trash” if white, or by the Fo [sic] usual racial or ethnic epithets if black or Latino.²⁸

Remarkably, this super-predator myth arrived on the scene during a decrease in juvenile crime.²⁹ Nonetheless, this myth along with other catchy phrases like “adult time for adult crime,”³⁰ caused the United States to abandon “its commitment to a juvenile justice system and the youth rehabilitation principles embedded in it.”³¹

is currently the Frederic Fox Leadership Professor of Politics, Religion, and Civil Society and Professor of Political Science at the University of Pennsylvania.

²⁷ But see Shay Bilchik, U.S. Dep’t. of Justice, Office of Juvenile Justice and Delinquency Prevention, 1999 National Report Series: Challenging the Myth 1 (Feb. 2000) (arguing an analysis of juvenile homicide arrests leads to the conclusion that the juvenile super-predator is more myth than reality, based on statistics showing declining number of juveniles committing murders and facing arrest), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf>. Others have also criticized DiIulio’s theory as a myth:

Recent data on juvenile crime gives policy makers good reason to reconsider whether increased draconian measures are necessary or sound public policy. First, it is now clear that John DiIulio’s prediction that “by the year 2010, there will be approximately 270,000 more juvenile superpredators on the streets than there were in 1990” is alarmist and without foundation. Based on earlier studies that show 6% of the *adolescent* population is responsible for the majority of juvenile crime, he erroneously assumed 6% of the entire additional juvenile population (everyone from birth to 18 years) would be committing serious crimes in 2010.

THE SENTENCING PROJECT, CRITICAL CHOICES: NEW OPTIONS IN JUVENILE CRIME POLICY 1-2 (1999) [hereinafter SENTENCING PROJECT], available at http://www.sentencingproject.org/doc/publications/sl_criticalchoices.pdf (last visited July 21, 2010).

²⁸ John J. DiIulio, *The Coming Of The Super-Predators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 4, available at <http://cooley.libarts.wsu.edu/schwartz/criminology/dilulio.pdf>.

²⁹ See generally BILCHIK, *supra* note 27, at 2 (offering statistics showing a decline in murders committed by and arrests of juveniles), and JEFFREY A. BUTTS & HOWARD A. SNYDER, CHAPIN HALL CENTER FOR CHILDREN, ISSUE BRIEF, TOO SOON TO TELL: DECIPHERING RECENT TRENDS IN YOUTH VIOLENCE 1 (Nov. 2006) (“During the late 1980s and early 1990s, violent crime in the United States soared to levels higher than at any time since the beginning of modern-day crime statistics. Then, suddenly and dramatically, rates of violent crime began to descend, falling continuously through 2004.”).

³⁰ HUMAN RIGHTS WATCH, *supra* note 4, at 6.

³¹ *Id.*

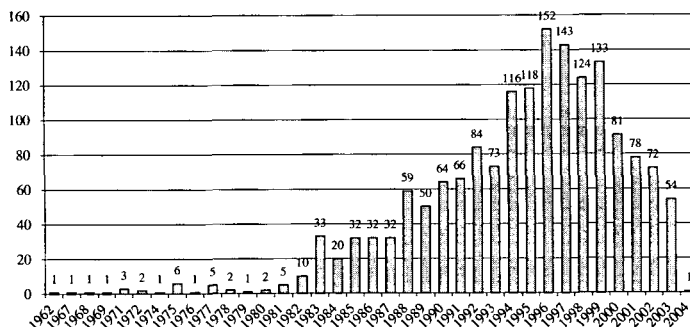
With the increase of "tough on crime" policies, life sentences (with and without parole) also increased.³² Despite various alternatives to incarceration, state policies expanded the types of offenses that resulted in life sentences and the restriction of parole, ultimately increasing the length of prison terms.³³ Furthermore, other legislative and public perceptions contributed to the rise in life sentences:

In particular, support for the expansion of [life without parole] sentences grew out of the same mistrust of the judicial process that birthed sentencing guidelines, mandatory minimums, and 'truth-in-sentencing' laws to restrict parole eligibility. These policies have often been politically inspired and fueled by accounts of people sentenced to life, often for violent crimes, being released on parole within a decade. Public dissatisfaction was part of a larger movement toward more legislative control of the criminal justice process at the expense of the discretion of judges and parole boards. The expansion of [life without parole] sentencing was intended to ensure that 'life means life.'³⁴

Currently, every State permits some type of life sentence, either with or without parole, for juveniles.³⁵ Yet before 1980, juveniles rarely received a life without parole sentence.³⁶

For example, this chart³⁷ illustrates that between 1962 until 1981, an average of two youth offenders each year entered prison with life without parole sentences in the United States.³⁸

NUMBER OF YOUTH OFFENDERS ADMITTED TO PRISON WITH
LIFE WITHOUT PAROLE OVER TIME



³² *Id.*

³³ NELLIS & KING, *supra* note 24, at 1-2.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ HUMAN RIGHTS WATCH, *supra* note 4, at 5.

³⁷ *Id.* at 24, fig. 3 (providing data from thirty-eight state correctional departments and additional sources for Alabama and Virginia).

³⁸ *Id.* at 23.

The number rose beginning in 1982, peaking at 152 juveniles in 1996.³⁹ While the numbers have declined since 1996, they have not returned to the much lower figures from the 1960s to mid-1980s.⁴⁰ Reportedly, juveniles are now sentenced to life without parole three times as frequently as they were in 1990.⁴¹ Between 1985 and 2001, juveniles convicted of murder received life without parole more than adults with the same convictions.⁴² The real effect of a life without parole sentence is that it “condemns a child to die in prison.”⁴³

As of 2009, forty-six states have juveniles serving some type of life sentence; among these juveniles, 6,807 are serving life sentences eligible for parole, while 1,755 (28.5%) are serving life without parole sentences.⁴⁴ Before the Court’s 2010 *Graham* opinion, life without parole was prohibited in Alaska, Colorado, Kansas, New Mexico and Oregon.⁴⁵ Nationally, four states account for half of the life without parole sentence population for juveniles: Pennsylvania (345), California (239), Michigan (152), and Louisiana (133).⁴⁶ “In many of these cases, judges were not permitted to consider sentences other than [life without parole] because of legislatively mandated restrictions concerning certain crimes. Therefore, mitigating circumstances—which almost universally accompany these cases . . . —are not allowed to be considered.”⁴⁷

Juveniles are not inherently among the worst offenders to warrant life without parole sentences. In 2005, the first national study of juvenile life without parole sentences, prepared by Human Rights Watch,⁴⁸ challenged the general presumption that life without parole was reserved for the most violent youth, the “worst of the worst,” and the assumption that only chronic repeat offenders

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 6.

⁴² HUMAN RIGHTS WATCH, *supra* note 4, at 25; NELLIS & KING, *supra* note 24, at 32; *see generally* Feld, *supra* note 22, at 70-71 (noting that youth crime policies have “oscillated between periods of more lenient treatment and harsher punishment,” and ultimately proposing that states give a “‘youth discount’ to formally recognize youthfulness as a mitigating factor.”).

⁴³ De la Vega & Leighton, *supra* note 4, at 983.

⁴⁴ NELLIS & KING, *supra* note 24, at 3, 17. Although their state law permits it, Indiana, Maine, Vermont, and West Virginia, as of 2009, do not have juveniles serving life sentences. *Id.* at 17, n.10. Interestingly, fifty percent of the juvenile life sentence population is located in five States: California (2,623), Texas (422), Pennsylvania (345), Florida (338) and Nevada (322). *Id.* at 17.

⁴⁵ *Id.* at 33. Juvenile life without parole was eliminated in Colorado in 2005, but does not apply retroactively, so juveniles who received the sentence prior to 2005 are still serving them. *Id.* at 33 n.25.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.*

⁴⁸ HUMAN RIGHTS WATCH, *supra* note 4, at 5.

served life without parole sentences.⁴⁹ This study found that first-time offender youths served fifty-nine percent of the sentences nationwide.⁵⁰ Sixteen percent of the offenders were between the ages of thirteen and fifteen at the time they committed their crimes.⁵¹ “In addition, in 26% of cases, the juvenile serving an LWOP sentence was not the primary assailant and, in many cases, was present but only minimally involved in the crime. However, because of state law, they were automatically given a sentence of life without the possibility of parole.”⁵²

For example, where the juvenile was merely present during the commission of a homicide, the “felony murder” rule sealed his or her fate.⁵³ This rule is invoked if someone is killed during the commission of a felony, resulting in excessive punishment for the juvenile who is present.⁵⁴ Described as “the pinnacle of inconsistency between an actor’s culpability and his subsequent punishment,” the felony murder rule subjects a juvenile to a life sentence without having committed the requisite homicide.⁵⁵

Whether juveniles receive life or life without parole sentences is affected by at least four factors reflective of both practice and policy: prosecutorial discretion, judicial waivers, media representations, and the politicized nature of parole decisions.⁵⁶ In addition to all of these factors, a murder conviction is usually the strongest basis for receiving a life sentence with or without parole.⁵⁷

First, prosecutorial discretion influences the selection of the charged offense and whether the defendant is charged as a juvenile or an adult.⁵⁸ “Once transferred to the adult court, young people face the same sentencing options as adults, including the possibility of sentences to life or life without parole.”⁵⁹

Second, closely tied to prosecutorial discretion are judicial waivers—either discretionary or mandatory—where the court makes a determination to transfer a juvenile to adult court.⁶⁰ Judicial waivers, the most common transfer method, drastically increased between the mid-1980s and mid-1990s.⁶¹ This was due, in

⁴⁹ NELLIS & KING, *supra* note 24, at 32 (referencing HUMAN RIGHTS WATCH, *supra* note 4).

⁵⁰ HUMAN RIGHTS WATCH, *supra* note 4, at 5, 28; *see also* NELLIS & KING, *supra* note 24, at 32 (referencing HUMAN RIGHTS WATCH, *supra* note 4).

⁵¹ HUMAN RIGHTS WATCH, *supra* note 4, at 5.

⁵² NELLIS & KING, *supra* note 24, at 32.

⁵³ *See id.* at 33.

⁵⁴ *Id.*

⁵⁵ *Id.* at 34 (quoting Erin H. Flynn, *Dismantling the Felony Murder Rule: Juvenile Deterrence and Retribution Post Roper v. Simmons*, 156 U. PA. L. REV. 1062, 1062 (2008)).

⁵⁶ *See id.* at 26-30.

⁵⁷ NELLIS & KING, *supra* note 24, at 31.

⁵⁸ HUMAN RIGHTS WATCH, *supra* note 4, at 14, 16.

⁵⁹ NELLIS & KING, *supra* note 24, at 31.

⁶⁰ *See id.* at 30. As previously noted, the discussion of juvenile transfers to adult court is beyond the scope of this Article. *See supra* note 14 and accompanying text.

⁶¹ *See* Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids*

part, to some state legislatures drafting statutes to exclude persons of a certain age who were charged with certain crimes from being defined as a “juvenile.”⁶² In such a scenario, at least theoretically, the district attorney is left with no option but to file charges in adult criminal court.⁶³ Similarly, in some cases, depending upon the statutory sentencing requirements for the crime, the court is left with no discretion as to sentencing options.⁶⁴ By the mid-1990s, most states adopted punitive laws to transfer more children to adult court, in order to punish them more severely.⁶⁵ However, trying children as adults in adult court so they receive “adult” punishments,

[S]quarely contradicts that most basic premise behind the establishment of juvenile justice systems: ensuring the well-being of youth offenders. The harsh sentences dispensed in adult courts do not take into account the lessened culpability of juvenile offenders, their ineptness at navigating the criminal justice system, or their potential for rehabilitation and reintegration into society.⁶⁶

The 2005 Human Rights Watch study also reports findings concerning the procedures involved in trying children as adults:

When children are tried in criminal courts, little or no accommodation is made to take into account their youth. Whether eleven or seventeen, the

Out of Adult Criminal Court, 42 SAN DIEGO L. REV. 1151, 1172 (2005) (“More than forty jurisdictions have enacted judicial waiver laws.”); *see also* NELLIS & KING, *supra* note 24, at 30 and BENJAMIN ADAMS & SEAN ADDIE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2007 (June 2010) (stating that the number of juvenile delinquency cases judicially waived peaked in 1994 at 13,100, an 81% increase from 7,200 in 1985). The most common age for transfer is fourteen, although at least three states (Texas, Indiana, and Vermont) permit juveniles as young as ten to be transferred to adult court under limited circumstances. Marrus & Rosenberg, *supra* note 61, at 1174-75.

⁶² Marrus & Rosenberg, *supra* note 61, at 1172.

⁶³ *Id.*

⁶⁴ *See* NELLIS & KING, *supra* note 24, at 31 (“Twenty-nine states require mandatory [juvenile life without parole] sentences for at least one crime, usually homicide.”) (citing HUMAN RIGHTS WATCH, *supra* note 4); *see also* Marrus & Rosenberg, *supra* note 61, at 1171 (noting that statutes empowering prosecutors to make transfer decisions were “upheld on the theory that the prosecutor’s determination was akin to charging decisions over which district attorneys have almost complete discretion.”).

⁶⁵ *See* Feld, *supra* note 22, at 34; *see also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 688 (1998) (“In a three-year period, between 1992 and 1995, forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court.”). For additional information regarding juvenile and adult courts, *see generally* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 718-22 (1991) (discussing procedural and substantive convergence between juvenile and criminal courts).

⁶⁶ De la Vega & Leighton, *supra* note 4, at 1008.

child offender must participate in all the same pre-trial and trial procedures and confront all the same decisions that adult defendants do. Contrary to popular belief, it is the child and not his or her parent or guardian who must decide what to tell the police and defense attorneys, whether or not to follow attorney instructions, whether to testify, whether to give information to the prosecution, and whether to go to trial or accept a plea bargain.⁶⁷

....

The trial of children as adults often fails to provide children with the special safeguards and care to which they are entitled under international law. Juvenile justice advocates in the United States widely recognize that decisions to send youth to adult court are often arbitrary and unfair and pay scant attention to the goal of rehabilitation. Once in the adult system, adolescents are deprived of the wide variety of rehabilitative sentencing options that they might be eligible to receive in the juvenile court system—sentencing options that are designed to give them the tools they need to turn their lives around and become law-abiding members of society.⁶⁸

Third, in addition to prosecutorial and judicial discretion, media reports, slogans such as “adult crime, adult time,” and ill-informed warnings by policy-makers also encouraged the fear that violent juvenile crime was on the rise.⁶⁹ States implemented policies to crack down on crime, and as a result sent thousands of youths into the juvenile justice system.⁷⁰

Lastly, releasing offenders eligible for parole has become a highly politicized issue, especially where current and prospective office holders demonstrate their tough stance on crime by limiting the number of offenders released on parole.⁷¹ For example, California Governor Arnold Schwarzenegger sought to change the parole policies of his predecessor Gray Davis (who released only eight people on parole between 1999 and 2003), and in 2004 permitted seventy-two releases.⁷² After receiving harsh criticism, Governor Schwarzenegger approved only thirty-five parole recommendations in 2005 and just twenty-three in 2006.⁷³

Unfortunately, borne out of fear and political agendas, life sentences (with and without parole) rose in America, to the detriment of many juvenile offenders. Yet, in *Graham v. Florida*, the United States Supreme Court drew another line in juvenile offender sentencing to bring national uniformity to a discretionary juvenile justice system. But, this may be a hollow victory; while this super-

⁶⁷ HUMAN RIGHTS WATCH, *supra* note 4, at 17.

⁶⁸ *Id.* at 22-23.

⁶⁹ NELLIS & KING, *supra* note 24, at 30-31.

⁷⁰ *See id.*

⁷¹ *See id.* at 26-27.

⁷² *Id.* at 27.

⁷³ *Id.*

ficial line closes the door on one sentence, life without parole, it implicitly encourages the use of another harsh sentence—lengthy term of years. Further, while the holding in *Graham* underscores that juveniles need an opportunity to reenter society, it does so without explicitly requiring that all states reinstate parole.

III. FROM 1988 TO 2010: A REVIEW OF SUPREME COURT JURISPRUDENCE IN JUVENILE SENTENCING

Graham v. Florida marks a pivotal step in what appears to be a moral retreat from harsh penalties for juvenile offenders. Beginning with *Thompson v. Oklahoma* in 1988, the Court held that the death penalty was unconstitutional for offenders who were younger than sixteen at the time of their offense.⁷⁴ There, fifteen-year old William Wayne Thompson, along with three older persons, participated in the brutal murder of Thompson's former brother-in-law.⁷⁵ Although Thompson was a "child" under Oklahoma law, the trial court concluded that "there [were] virtually no *reasonable* prospects for rehabilitation of Thompson within the juvenile system and that Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult."⁷⁶ During the penalty phase of his trial, the jury found the murder especially heinous and sentenced Thompson to death.⁷⁷ The Supreme Court granted certiorari to consider whether a death sentence for a crime committed by a fifteen-year-old child was cruel and unusual punishment.⁷⁸

On review, the *Thompson* Court drew a distinguishing line between childhood and adulthood. Consistent with "the experience of mankind, as well as the long history of our law," the *Thompson* Court found "that the normal 15-year-old is not prepared to assume the full responsibilities of an adult."⁷⁹ Confining its attention to the eighteen states which had a minimum age for the death penalty, the Court found that those states required defendants to be at least sixteen years old at the time of their offense before they could be subject to capital punishment.⁸⁰ The petitioner asked the Court to draw a categorical line prohibiting the execution of any person under the age of eighteen.⁸¹ However, because Thompson was only fifteen at the time of his offense, the Court

⁷⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 837-38 (1988); *see also* Marrus & Rosenberg, *supra* note 61, at 1152 (discussing Supreme Court jurisprudence for the constitutionality of capital punishment for juveniles, beginning with *Thompson v. Oklahoma* and continuing through *Roper v. Simmons*).

⁷⁵ *Thompson*, 487 U.S. at 819.

⁷⁶ *Id.* at 819-20.

⁷⁷ *Id.* at 820.

⁷⁸ *Id.*

⁷⁹ *Id.* at 825.

⁸⁰ *Id.* at 829.

⁸¹ *Id.* at 838.

ultimately abolished the death penalty for juveniles, who at the time of their offense were younger than sixteen.⁸²

A year after *Thompson*, the Court concluded in *Stanford v. Kentucky*,⁸³ that the Eighth and Fourteenth Amendments did not forbid the execution of sixteen and seventeen-year-old juvenile offenders.⁸⁴ There, Kevin Stanford, who was seventeen at the time of the offense, brutally murdered a twenty-year-old woman after repeatedly raping and sodomizing her.⁸⁵ The Kentucky Supreme Court affirmed Stanford's convictions for murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and upheld the sentence of death and forty-five years in prison.⁸⁶ Looking only at objective indicia, the United States Supreme Court found no national consensus forbidding capital punishment for "any person who murders at 16 or 17 years of age," and therefore capital punishment in these cases did not offend the Eighth Amendment's prohibition against cruel and unusual punishment.⁸⁷

However, almost twenty years later in the 2005 case of *Roper v. Simmons*, the Court revisited and overruled its decision in *Stanford*.⁸⁸ By then, the proposal in *Thompson* to draw the line at eighteen was ripe before the Court. Affirmatively relying on the exercise of its independent judgment as to whether the death penalty was a disproportionate punishment for juveniles, the Court extended the abolishment of the death penalty to juveniles who were younger than eighteen when they committed offenses.⁸⁹ There, Christopher Simmons was seventeen years old when he coerced two other youths to commit burglary and murder, a plan he conjured up bragging to his friends that they could get away with the murder because they were minors.⁹⁰ Tried as an adult in Missouri for burglary, kidnapping, stealing, and murder in the first degree, the trial court agreed with the jury's recommendation for the death penalty.⁹¹ However, on appeal, the Missouri Supreme Court agreed with the petitioner as to the infrequency of the death penalty for juveniles under eighteen, set aside the trial court's decision, and instead imposed life without the possibility of parole,

⁸² *Id.*

⁸³ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁸⁴ *Id.* at 380; see also Marrus & Rosenberg, *supra* note 61, at 1152 (discussing Supreme Court jurisprudence for the constitutionality of capital punishment for juveniles, beginning with *Thompson v. Oklahoma* and continuing through *Roper v. Simmons*).

⁸⁵ *Stanford*, 492 U.S. at 365.

⁸⁶ *Id.* at 366.

⁸⁷ *Id.* at 380.

⁸⁸ See *Roper v. Simmons*, 543 U.S. 551, 560 (2005); see also Marrus & Rosenberg, *supra* note 61, at 1152 (discussing Supreme Court jurisprudence for the constitutionality of capital punishment for juveniles, beginning with *Thompson v. Oklahoma* through *Roper v. Simmons*).

⁸⁹ *Roper*, 543 U.S. at 568.

⁹⁰ *Id.* at 556.

⁹¹ *Id.* at 558.

which the United States Supreme Court affirmed.⁹²

In *Thompson and Roper*, the Court firmly abolished the death penalty for all juvenile offenders under the age of eighteen as a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.⁹³ Five years later, in *Graham v. Florida*, the Court once again curbed the punishments permissible for juvenile offenders.⁹⁴ Acquiescing to its prior decisions which determined that juveniles were different than adults, the *Graham* Court focused on the "human attributes" of juveniles, finding juveniles "more vulnerable or susceptible to negative influences and outside pressures" with characters that are "not as well formed."⁹⁵ Even if the State of Florida was correct that Petitioner Graham might exhibit prison misbehavior or fail to mature, the Court stated that the sentence was still deemed disproportionate because the judgment was made at the outset.⁹⁶ The Court believed that the severity of "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity."⁹⁷ Finding this particular sentence cruel and unusual against the juvenile offender who did not commit homicide, it reversed the judgment of the Florida District Court.⁹⁸

IV. GRAHAM V. FLORIDA: ABOLISHING LIFE WITHOUT PAROLE FOR THE JUVENILE NON-HOMICIDE OFFENDER

In July of 2003, then sixteen-year-old Terrance Graham and three other accomplices attempted to rob a restaurant in Jacksonville, Florida.⁹⁹ Wearing masks, Graham and one of the accomplices entered through a door unlocked by a second accomplice, after which the first accomplice struck the restaurant manager twice in the back of the head with a metal bar.¹⁰⁰ When the manager began yelling, Graham and the two accomplices ran out of the restaurant and

⁹² *Id.* at 559-60.

⁹³ See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) and *Roper*, 543 U.S. at 560.

⁹⁴ The Supreme Court called Florida an "outlier in its willingness to impose sentences of life without parole on juveniles convicted of nonhomicide crimes." *Graham v. Florida*, 130 S. Ct. 2011, 2041 (2010) (Roberts, J., concurring). In 2000, Florida had more children in adult state prisons than any other state, and Florida's violent juvenile crime rate was fifty-four percent higher than the national average. HUMAN RIGHTS WATCH, *supra* note 4, at 18.

⁹⁵ *Graham*, 130 S. Ct. at 2021, 2026.

⁹⁶ *Id.* at 2029.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2034. *But cf. id.* at 2044 (Thomas, J., dissenting) (believing that the Court's opinion not only extended the Cruel and Unusual Punishment Clause to prohibit methods of punishment deemed cruel and unusual, "but also any punishment that the Court deems 'grossly disproportionate' to the crime committed. This latter interpretation is entirely the Court's creation.") (internal quotation marks omitted).

⁹⁹ *Id.* at 2018 (majority opinion); see also *Graham v. State*, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. 2008).

¹⁰⁰ *Graham*, 130 S. Ct. at 2018.

into a car driven by the third accomplice.¹⁰¹ Graham was arrested for attempted robbery and charged as an adult (in adult court) under Florida law for: armed burglary with assault or battery, a first-degree felony carrying a maximum sentence of life without the possibility of parole; and, attempted armed robbery, a second-degree felony carrying a maximum penalty of fifteen years imprisonment.¹⁰² Graham pled guilty to both charges under a plea agreement, made a statement to the trial court of his intent to change his ways, and served twelve months in a pre-trial detention facility.¹⁰³

Six months after being released, at the age of seventeen, Graham was arrested again, along with two other accomplices, for forcibly entering into a home and holding the homeowner at gunpoint while the youths ransacked the home.¹⁰⁴ Later that same evening, the three accomplices attempted a second robbery during which one of the accomplices was shot.¹⁰⁵ Graham drove his two accomplices to a hospital, and after a lengthy car chase with police, he eventually crashed his car.¹⁰⁶ The police officers apprehended Graham when he attempted to flee on foot.¹⁰⁷ Following the probation hearing, where he admitted violating his probation, the trial court¹⁰⁸ held a sentence hearing where it ultimately imposed life without the possibility of parole, a sentence far exceeding the request of Graham's attorney or the State's recommendation.¹⁰⁹

¹⁰¹ *Id.*

¹⁰² *Id.* (citing Fla. Stat. § 985.227(1)(b) (2003) (subsequently renumbered at § 985.557(1)(b) (2007))).

¹⁰³ *Id.* ("Graham was required to spend the first twelve months of his probation in county jail, but he received credit for the time he served awaiting trial, and was released on June 25, 2004."); see also *Graham*, 982 So. 2d at 45 ("Appellant pled guilty to the offenses in return for the court withholding adjudication and three years' probation with the condition that he serve twelve months in a pre-trial detention facility.").

¹⁰⁴ *Graham*, 130 S. Ct. at 2018. Graham was sixteen when he was first charged with armed burglary and attempted armed robbery burglary. *Id.* He served twelve months and was released on June 25, 2004, and in December 2004 a probation violation was filed against him. *Id.*

¹⁰⁵ *Graham*, 130 S. Ct. at 2019. Graham also admitted he was involved in "two or three before tonight." *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ "The judge who presided was not the same judge who had accepted Graham's guilty plea to the earlier offenses." *Id.*

¹⁰⁹ *Id.* "Under Florida law the minimum sentence Graham could receive absent a downward departure by the judge was 5 years' imprisonment. The maximum was life imprisonment. Graham's attorney requested the minimum nondeparture sentence of 5 years. A presentence report prepared by the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most 4 years' imprisonment. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count." *Id.*

Graham “was nineteen years old at the time of his sentencing.”¹¹⁰

In explaining its sentence, the trial court in *Graham v. Florida* stated:

Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. *And I don't know why it is that you threw your life away. I don't know why.*

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with The attempted robbery with a weapon was a very serious charge.

. . . .

[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of 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, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try

¹¹⁰ *Graham*, 982 So. 2d at 45.

and protect the community from your actions.”¹¹¹

Regarding this sentence, Justice Ginsburg stated during the November 9, 2009 oral arguments that “[t]he individual sentencing judge might think that Graham is a very bad individual, but the prosecutor had a different judgment of it. And Florida doesn’t have any kind of proportionality review, doesn’t have any review—appellate review of the sentences.”¹¹² Justice Ginsburg may or may not be implying an abuse of power when she went on to state, “[t]his judge, I think, surprised everyone in the courtroom with the—with the sentence. Certainly it was far beyond what the prosecutor recommended.”¹¹³ At a minimum, one could read her comment to infer she believed the sentencing judge acted with surprising harshness.

Graham filed a motion challenging the sentence under the Eighth Amendment, which was denied.¹¹⁴ Florida’s First District Court of Appeal affirmed the ruling, finding that “Graham’s sentence was not grossly disproportionate” to the crime and that Graham was ultimately “incapable of rehabilitation.”¹¹⁵ The Florida Supreme Court denied reviewing the case,¹¹⁶ and the United States Supreme Court granted certiorari¹¹⁷ ultimately reversing the judgment of the First District Court of Appeal of Florida.¹¹⁸

The Court’s 2010 holding in *Graham* breathes modern life into the long-established Eighth Amendment Cruel and Unusual Punishment Clause in favor of the juvenile offender.¹¹⁹ Categorically abolishing life without parole sentences for juvenile non-homicide offenders, the *Graham* Court based its decision largely on the lack of maturity, responsibility, and wisdom that is characteristic of youth.¹²⁰ However, despite its lofty intentions, the Court’s holding

¹¹¹ *Graham*, 130 S. Ct. at 2019-20 (alteration in original) (emphasis added).

¹¹² *Graham* Transcript, *supra* note 1, at 32-33. The prosecutor recommended thirty years for the armed burglary charge. *Graham*, 130 S. Ct. at 2019.

¹¹³ *Graham* Transcript, *supra* note 1, at 33.

¹¹⁴ Since the trial court failed to rule on the motion within 60 days, it was deemed denied. *Graham*, 130 S. Ct. at 2020.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2034.

¹¹⁹ The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

¹²⁰ See *Graham*, 130 S. Ct. at 2026-27.

As compared to adults, juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.” These salient characteristics mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”

left significant concerns in its wake, including: (1) a line-drawing problem¹²¹ as to when a lengthy term of years rises to the level of presumptive life without parole, and (2) an implicit expectation that all states have active parole boards and rehabilitation measures in a country that has historically seen a decrease in both.

A. *Lengthy Term of Years is Presumptively the Same as Life Without Parole, and Therefore Should Be Abolished*

The heart of the Court's holding turned on two points: the recognition of a juvenile's youthful immaturity as compared to adults, and the Court's desire to allow juvenile offenders to reenter society.¹²² For purposes of this Article, it will be assumed that both reasons to abolish life without parole are sound; however, the essence of those reasons extends beyond abolishing life without parole to abolishing lengthy term of year sentences, as well. By drawing the categorical line at banning life without parole sentences, and not extending *Graham's* reach to include *any* sentence that would deny a juvenile offender a meaningful opportunity to reenter society, such as fifty years, the Court's holding inherently conflicts with its underlying reasoning in such a way as to limit *Graham's* potential effectiveness.

1. Using a Categorical Rule, the Court Reaffirms Juveniles Are Different, Thus Not Deserving of Life Without Parole

The *Graham* Court confined its decision to juveniles below the age of eighteen at the time of the offense, because the age of "18 is the point where society draws the line for many purposes between childhood and adulthood[.]"¹²³ The Court framed the issue in *Graham* in two ways: first, "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime"¹²⁴ and second, as "an issue the Court has not considered previously: a categorical challenge to a term of years sentence."¹²⁵ That the Court stated the issue in two distinct ways becomes important when viewed in light of its holding, which will be discussed below.¹²⁶ Turning to its analy-

Id. at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70, 573 (2005)).

¹²¹ Justice Thomas's dissenting opinion in *Graham* acknowledged the line-drawing problems that the Court's opinion left. *Id.* (Thomas, J., dissenting).

¹²² See *id.* at 2026-27.

¹²³ *Id.* at 2016 (quoting *Roper v. Simmons*, 543 U.S. at 574). Because the *Graham* court drew the line at juveniles under the age of eighteen at the time of their offense, this Article does not propose whether a juvenile who is seventeen and within months or days of his eighteenth birthday should be treated as an adult falling outside the purview of *Graham* and the propositions set forth in this Article.

¹²⁴ *Id.* at 2017-18.

¹²⁵ *Id.* at 2022.

¹²⁶ See *infra* note 160 and accompanying text.

sis, at the outset, the Court had to determine the type of review this sentencing challenge required: proportional or categorical?¹²⁷

In analyzing the constitutionality of sentences, the Court's cases have fallen "within two general classifications."¹²⁸ The first classification involves challenges to a lengthy term of years sentence in a particular defendant's case.¹²⁹ These types of cases utilize a proportionality review where the Court determines whether that defendant's "sentence is unconstitutionally excessive."¹³⁰ The second classification involves cases in which the Court "use[s] categorical rules to define Eighth Amendment standards," which previously have related to restrictions on the use of the death penalty.¹³¹ This category has included cases regarding the nature of the offense and cases regarding the characteristics of the offender.¹³² For example, the Court has categorically held the death penalty impermissible for any non-homicide offenses¹³³ and has established categorical

¹²⁷ See *Graham*, 130 S. Ct. at 2021-23.

¹²⁸ *Id.* at 2021.

¹²⁹ *Id.*

¹³⁰ *Id.* For example, in *Harmelin v. Michigan*, the defendant was sentenced "to life without parole for possessing a large quantity of cocaine." *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991)). A closely divided Court upheld the sentence concluding that the "Eighth Amendment contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence,' but rather 'forbids only extreme sentences that are 'grossly disproportionate' to the crime.'" *Id.* (quoting *Harmelin*, 501 U.S. at 997, 1000-01 (Kennedy, J., concurring in part and concurring in judgment)). The *Harmelin* Court set out the proportional review analysis for determining whether a defendant's sentence for a term of years is grossly disproportionate to his crime under the Eighth Amendment. See *Harmelin*, 501 U.S. at 1005; *Graham*, 130 S. Ct. at 2021. For this review, the Court compared the gravity of the offense to the severity of the sentence. *Harmelin*, 501 U.S. at 1005; *Graham*, 130 S. Ct. at 2021. "If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005). And where this comparison leads to an inference of disproportionality, a Court should then compare the defendant's sentence with sentences received by other offenders for the same crime, in other jurisdictions. *Harmelin*, 501 U.S. at 1005. Justice Roberts, concurring in *Graham*, referred to this review as *intra* jurisdictional (where the Court compares the defendant's sentence to sentences given for similar offenses under that state's law) and *inter* jurisdictional (where the Court compares the defendant's sentence to sentences given for similar offenses in another state). *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring).

¹³¹ *Graham*, 130 S. Ct. at 2022.

¹³² *Id.*

¹³³ *Id.* (citing *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2642 (2008) (holding that the Eighth Amendment prohibited the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment prohibited imposition of the death penalty on a defendant who aided and abetted a felony in the course of which a murder was committed by others, but who the defendant did not himself kill, attempt to kill, or intend that a killing would take place or that lethal force would be employed); *Coker v.*

rules prohibiting the death penalty for defendants: (1) who committed their crimes before the age of 18,¹³⁴ or (2) whose intellectual functioning is in a low range.¹³⁵ Further, in cases utilizing categorical rules, the Court looks first at the “objective indicia of society’s standards” as expressed in a state’s legislative enactments and actual practice “to determine whether there is a national consensus against the sentencing practice at issue.”¹³⁶ Second, the Court is guided by its own independent judgment—in other words, an “understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” as elaborated by its controlling precedent.¹³⁷

Ultimately, the Court analyzed *Graham* under its long-standing categorical review, previously reserved for death penalty cases.¹³⁸ Because *Graham* concerned more than just Terrance Graham’s particular sentence, the Court rejected the proportionality review, and instead chose the categorical approach to analyze the constitutionality of a sentencing practice applied to an *entire* class of offenders who committed a range of crimes.¹³⁹ Using this catch-all categorical rule, the Court abolished life without parole based first upon its review of objective indicia and second upon the Court’s own independent judgment.

Reviewing first the objective indicia¹⁴⁰—or the national consensus (statistics, research and other trends)—the Court found that the majority of the country did not favor the use of life without parole for juvenile offenders despite having statutes in place permitting its use.¹⁴¹ The Court’s research revealed that six jurisdictions did not permit life without parole sentences for *any* juvenile offenders; seven permitted the sentence *only* for homicide crimes, and thirty-seven—including the District of Columbia—permitted the sentence for a juvenile non-homicide offender in *some* circumstances.¹⁴² On this evidence, the State of Florida argued that there was no national consensus *against* life without parole for non-homicide offenses committed by juveniles. However, the Court found the argument “unavailing,” stating that an examination of “actual sentencing practices in [the states] where the sentence . . . is permitted . . . disclose[d] a consensus against its use.”¹⁴³ To support its point, the Court re-

Georgia, 433 U. S. 584, 585 (1977) (holding that the death penalty was an excessive penalty for a rapist, who while deserving serious punishment, did not unjustifiably take human life)).

¹³⁴ See *Roper v. Simmons*, 543 U.S. 551, 608-09 (2005).

¹³⁵ See *Atkins v. Virginia*, 536 U.S. 304, *passim* (2002).

¹³⁶ *Graham*, 130 S. Ct. at 2022 (quoting *Roper*, 543 U.S. at 572).

¹³⁷ *Id.* (quoting *Kennedy*, 128 S. Ct. at 2650).

¹³⁸ *Id.* (“The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty.”).

¹³⁹ *Id.* at 2022-23 (emphasis added).

¹⁴⁰ *Id.* at 2023.

¹⁴¹ *Id.* at 2026.

¹⁴² *Id.* at 2035.

¹⁴³ *Id.* at 2023.

lied on a recent study¹⁴⁴ and its own independent research to find that only 129 juveniles nationwide were serving life without parole sentences for non-homicide offenses, with 77 of the 129 in Florida and the remaining 52 only in 10 other states.¹⁴⁵ Admitting that the statistics may not be precise, the Court nonetheless believed the available data was “sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.”¹⁴⁶

Yet, it was the Court’s independent judgment, free from any objective data, that fueled its rationale to abolish life without parole for juveniles.¹⁴⁷ On its own accord, the Court examined the differences between juveniles and adults, and the severity of life without parole.¹⁴⁸ Guided by *Roper*,¹⁴⁹ the 2005 leading case affirmatively abolishing the death penalty for juveniles under eighteen years old, the Court acknowledged that juveniles have lessened culpability than adults and are “less deserving of the most severe punishments.”¹⁵⁰ Specifically, it noted that juveniles are more vulnerable or susceptible to negative influences and outside pressures, and based on “these salient characteristics . . . [i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”¹⁵¹ Moreover,

¹⁴⁴ *Id.* (citing PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (2009)).

¹⁴⁵ *Id.* at 2024. The numbers reflected current juvenile convicts at the time of the opinion, to the best of the Court’s available data. *Id.* Per the study used by the Court, the ten other states are “California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia—and in the federal system.” *Id.*

¹⁴⁶ *Id.* at 2024.

¹⁴⁷ *See id.* at 2026.

¹⁴⁸ *Id.* at 2027.

¹⁴⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵⁰ *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569). The line has been drawn between homicide and serious non-homicide offenses, wherein the former category encompasses a moral depravity that outweighs non-homicide offenses in terms of severity and irrevocability. *See id.* at 2031 “Serious nonhomicide crimes ‘may be devastating in their harm . . . but ‘in terms of moral depravity and of the injury to the person and to the public,’ . . . they cannot be compared to murder in their ‘severity and irrevocability.’” *Id.* at 2027 (quoting *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008)). Moreover, the life of a victim of a serious non-homicide offense is not over, as it is for the victim of a murder. *Id.* Therefore, “when compared to an adult murderer, [the] juvenile offender who [has] not kill[ed] or intend[ed] to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.” *Id.* at 2026.

¹⁵¹ *Id.* (quoting *Roper*, 543 U.S. at 573); *see also* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185, 198 (1999) (“[A]dolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in the sense of conforming to what peers are doing.”).

“[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”¹⁵² Further,

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults. It remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’¹⁵³

Finally, “juveniles ‘lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions’”¹⁵⁴ The Court also expressed a concern that sentencing judges are making permanent future decisions on a juvenile’s life foregoing any possibility that the juvenile may ever change; a determination that not even expert psychologists can make.¹⁵⁵ “Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’”¹⁵⁶

Turning toward the sentence itself, the Court stated that life without parole for a juvenile, the second most severe punishment next to the death penalty, is “especially harsh” a sentence for a juvenile.¹⁵⁷ Altering the offender’s life, this sentence “deprives the [offender] of the most basic liberties without giving hope of restoration[.]”¹⁵⁸ and for the juvenile offender this sentence “means

¹⁵² *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70).

¹⁵³ *Id.* at 2026-27 (quoting *Roper*, 543 U.S. at 570).

¹⁵⁴ *Id.* at 2026 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

¹⁵⁵ *Id.*; see also Marrus & Rosenberg, *supra* note 61, at 1180 (“If the child’s brain is still growing until either twenty or twenty-five . . . subjecting a child to adult punishment, especially life without possibility of parole, is irrational. We do not know who that child will be in five years or ten years. Just as teenagers’ bodies change as they mature, so do their brains.”).

¹⁵⁶ *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569) (internal citations omitted); see HUMAN RIGHTS WATCH, *supra* note 4, at 36 (discussing cognitive or psychosocial differences between juveniles and adults, and suggesting that “children simply think differently than adults” and that “children lack social and emotional capabilities that are better developed in adults.”).

¹⁵⁷ *Graham*, 130 S. Ct. at 2028. The Court commented that a juvenile offender under this sentence would serve more time than an adult under the same sentence—for example, a sixteen-year-old and a seventy-five-year-old each sentenced to life without parole “receive the same punishment in name only.” *Id.*; see also De la Vega & Leighton, *supra* note 4, at 983 (“LWOP is the harshest of sentences that may be imposed on an adult. Imposing such a punishment on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child’s rehabilitation and redemption.”).

¹⁵⁸ *Graham*, 130 S. Ct. at 2027.

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.”¹⁵⁹

2. The Court’s Holding Shuts One Door, But Leaves Open Another
Detrimental Option—Lengthy Term of Years

There is an inherent conflict when comparing the Court’s stated holding with the holding’s underlying rationale, the latter of which suggests that lengthy term of years sentences should also be abolished. As previously mentioned, the fact that the Court stated the issue in two distinct ways is important in light of *Graham*’s holding. Abolishing life without parole makes sense in response to how the Court initially framed the issue; but, given how the Court framed the issue a second time, it arguably leaves the door open to reasoning that the Court could have, or later will, abolish lengthy term of years sentences.¹⁶⁰

The Court’s holding centered on its independent judgment which utilized the pulse of society’s morals for support. The results of the Court’s analysis concluded that juveniles are different from adults, and as such, juvenile offenders should have some hope to reenter society. And while the majority of the Justices in *Graham* recognized the juvenile’s diminished culpability in order to abolish life without parole, the Court did not draw a categorical line in such a way as to prohibit *any* sentence denying a juvenile offender a meaningful opportunity to reenter society. Whether the sentence is life without parole or a term of years, the common thread is that a juvenile will be denied a “conceivable hope” of release, an idea central to the Court’s holding.¹⁶¹ This inherent conflict begs the question of what the Court actually found unconstitutional: a sentencing practice in name only, or any sentence which defeats the underlying goal of the Court’s holding? If the effect of this categorical rule is to not “deprive[] [juveniles] of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential,” then it follows that a lengthy term of years sentence is also unconstitutional.¹⁶²

As an example of the conflict between the holding and its reasoning, consider two sixteen-year-olds, Andy Assault and Michael Murder. Andy Assault commits an aggravated assault and Michael Murder commits an assault resulting in a homicide. If *Graham*’s reasoning means that life without parole is unconstitutional because juveniles are different, then neither Andy nor Michael should receive life without parole. But under *Graham*’s holding, Michael Murder, whose acts resulted in a homicide, will be transferred to adult court and receive either life without parole or a lengthy term of years sentence, such as

¹⁵⁹ *Id.* at 227 (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

¹⁶⁰ *See id.* at 222.

¹⁶¹ *Graham* Transcript, *supra* note 1, at 11 (Counselor Gowdy for Petitioner).

¹⁶² *Graham*, 130 S. Ct. at 2032.

sixty years.¹⁶³ Michael's fate defeats the underlying goal of *Graham*—to give juvenile offenders some semblance of hope to reenter society. And even with a sixty-year sentence, permanent decisions are still being made about a juvenile's life at the point of sentencing. The Court raised this concern during oral arguments, when it commented that because of a juvenile's immaturity, juveniles cannot really be judged as adults, and thus, an "on the spot" judgment was essentially inappropriate.¹⁶⁴

While beyond the scope of this Article, the very essence of *Graham's* reasoning should also preclude life without parole even for juvenile murderers. Critics may argue that life without parole should remain on the table for juvenile homicide offenders because of the gravity of the offense, but this is the inherent conflict *Graham* now presents. The *Graham* Court holds that life without parole is disproportionate for the juvenile *non-homicide* offender, but it supports this reasoning by stating that juveniles are less culpable than adults. The Court's reasoning does not distinguish between the *non-homicide* and *homicide* juvenile offender; thus, the abolishment of life without parole should apply to both groups. Any concern by the states or crime victims that a juvenile offender will not "pay" for their crime is lessened by the fact that the *Graham* Court has emphasized that a state does not have to ever release a juvenile offender during their natural life:

It bears emphasis, however, that while the Eighth Amendment forbids 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*. 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.¹⁶⁵

Abolishing life without parole for juvenile offenders will allow courts to balance appropriate punishment for a juvenile offender with the realization that juveniles are not adults.

Following *Graham's* holding, lengthy term of year sentences should also be abolished. The Court reasoned that a sentence of life without parole "alters the

¹⁶³ HUMAN RIGHTS WATCH, *supra* note 4, at 20 ("Life without parole is imposed for a variety of crimes However, it is most often imposed on child offenders who have been convicted of crimes of homicide").

¹⁶⁴ *Graham* Transcript, *supra* note 1, at 41 (Ginsburg, J.). Justice Ginsburg asked Petitioner *Graham*:

[H]ow do you answer the argument that unlike an adult, because of the immaturity, you can't really judge a person — judge a teenager at the point of sentencing? That it's only after a period of time has gone by, and you see: Has this person overcome those youthful disabilities? That's why a proportionality review on the spot doesn't accommodate the — what is the driving force of the — your — the Petitioner's argument is you can't make a judgment until years later to see how that person has -has done.

Id.

¹⁶⁵ *Graham*, 130 S. Ct. at 2030 (emphasis added).

offender's life It deprives the convict of the most basic liberties without giving hope of restoration,"¹⁶⁶ and for the juvenile "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.'" ¹⁶⁷ By only abolishing life without parole for certain offenders and remaining silent on the effect of the ruling on other long-term sentences, *Graham* left open the detrimental option of a lengthy term of years sentence.¹⁶⁸ The rationale for the Court's categorical abolishment of life without parole, however, also supports abolishing lengthy term of year sentences, both with and without parole eligibility. Regarding a life without parole sentence, the Court acknowledged that "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."¹⁶⁹ Nevertheless, a sentence of forty, fifty, or sixty years received at age sixteen will still yield the same problem—a disproportionate amount of time served.

Interestingly, Justice Alito's dissent pointed out that "petitioner [Graham] conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional."¹⁷⁰ Justice Alito added, "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."¹⁷¹ Petitioner Graham's concession at oral argument was incorrect; forty years in prison for a juvenile is tantamount to life without parole. As mentioned, a lengthy term of years sentence raises the same concerns which led the Court to abolish life without parole for juvenile non-homicide offenders. It would be inherently inconsistent to strike down life without parole in the name of juvenile growth and maturation, yet sustain a forty-year sentence, which implicitly suggests that a juvenile serving forty years is barred from growth and maturation. On this point, it has been

¹⁶⁶ *Id.* at 2027.

¹⁶⁷ *Id.* (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

¹⁶⁸ While the Court is bound to decide the case before it and not issue advisory opinions, the *Graham* analysis uses a framework that has meaning beyond life without parole sentences, leaving room for its applicability to term of years sentences. Compare *Graham*, 130 S. Ct. at 2017-18 (limiting the analysis to life without parole: "[t]he issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime."), with *id.* at 2022 (acknowledging that "[t]he present case involves an issue the Court has not considered previously: a categorical challenge to a term-of years sentence.").

¹⁶⁹ *Id.* at 2028; see also De la Vega & Leighton, *supra* note 4, at 1008 ("Indeed, the LWOP sentence penalizes child offenders more than adults, because the child, by virtue of his or her young age, will likely serve a longer sentence than an adult given LWOP for the same crime.").

¹⁷⁰ *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting).

¹⁷¹ *Id.*

noted that “[i]mposing such a punishment on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood”¹⁷² Further,

If the child’s brain is still growing until either twenty or twenty-five . . . subjecting a child to adult punishment, especially life without possibility of parole, is irrational. We do not know who that child will be in five years or ten years. Just as teenagers’ bodies change as they mature, so do their brains.¹⁷³

While any sentence imposed on a juvenile should certainly reflect the seriousness of the crime, the sentence cannot ignore the diminished culpability of a juvenile as compared to an adult.¹⁷⁴ The Court asserted that not only are juveniles and adults different, but that fundamental scientific distinctions make juveniles less culpable than adults.¹⁷⁵ Even Chief Justice Roberts in his concurrence stated there was no reason that Terrance Graham should not be afforded the general presumption of diminished culpability given to juveniles as established in *Roper*.¹⁷⁶ Further, Chief Justice Roberts emphasized that Graham was a juvenile whose culpability or blameworthiness was diminished by youth and immaturity.¹⁷⁷ Specifically, “Graham’s youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure.”¹⁷⁸ That Graham committed the crimes, as Chief Justice Roberts acknowledged, proves he was dangerous and deserved punishment, but it did not establish that Graham was “*particularly* dangerous,” at least in comparison to “the murderers and rapists for whom

¹⁷² De La Vega & Leighton, *supra* note 4, at 983.

This growth potential counters the instinct to sentence youthful offenders to long terms of incarceration in order to ensure public safety. Whatever the appropriateness of parole eligibility for [forty]-year-old career criminals serving several life sentences, quite different issues are raised for [fourteen]-year-olds, certainly as compared to [forty]-year-olds, [who] are almost certain to undergo dramatic personality changes as they mature from adolescence to middle age.

Experts have documented that children cannot be expected to have achieved the same level of psychological and neurological development as an adult, even when they become teenagers. They lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, and to understand the long-term consequences of rash actions.

Id. at 983-84 (internal citations omitted).

¹⁷³ Marrus & Rosenberg, *supra* note 61, at 1180.

¹⁷⁴ See HUMAN RIGHTS WATCH, *supra* note 4, at 3-4; see also Feld, *supra* note 22, at 13 (arguing for “a ‘youth discount’” in sentencing “to formally recognize youthfulness as a mitigating factor.”).

¹⁷⁵ See *Graham*, 130 S. Ct. at 2026.

¹⁷⁶ *Id.* at 2040 (Roberts, C.J., concurring) (citing *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

the sentence of life without parole is typically reserved.”¹⁷⁹ “On the contrary, [Graham’s] lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing noted by the majority . . . all suggest that he was markedly less culpable than a typical adult who commits the same offenses.”¹⁸⁰

On this point, the dissent sharply criticized the majority’s use of its independent judgment. Specifically, the dissent described the majority’s approach as unfettered power to approve or reject democratic choices in penal policy based not only on how society’s standards have evolved, but also “on the basis of the Court’s ‘independent’ perception of how those standards *should* evolve.”¹⁸¹ Disagreeing with the majority’s “‘moral’ conclusion that youth defeats culpability in *every* case,” the dissent did not believe “the Constitution prohibit[s] judges and juries from *ever* concluding that an offender under the age of 18 has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.”¹⁸² The dissent asserted that the justice system, “stand[ing] between the defendant and an outraged public,” is better fit to recognize a rare juvenile offender and the necessary punishment.¹⁸³

Despite the dissent’s sharp criticism, the majority’s categorical rule marginally protects the future of juvenile offenders with the intent to give “all juvenile nonhomicide offenders a chance to demonstrate maturity and reform.”¹⁸⁴ Unfortunately, the majority’s holding simply does not go far enough to reach the holes it left open, thereby enabling a state to circumvent the Court’s holding by sentencing a juvenile non-homicide offender to a lengthy term of years, which will create “virtual lifers.”¹⁸⁵ Both life without parole and a lengthy term of years result in the same concern—an offender who has spent decades in prison is likely to emerge a different person than when he was first sentenced as a juvenile.¹⁸⁶

Now, even in light of *Graham*, what will stop a prosecutor from seeking a fifty-year prison term for a fifteen-year-old juvenile non-homicide offender? True, it is not “life without parole” by name, but it is not functionally any different. A juvenile sentenced to fifty years at age fifteen will be in prison

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (internal citation omitted).

¹⁸¹ *Id.* at 2046 (Thomas, J., dissenting) (internal citations omitted).

¹⁸² *Id.* at 2054.

¹⁸³ *Id.* at 2055.

¹⁸⁴ *Id.* at 2032.

¹⁸⁵ Feld, *supra* note 22, at 67 (noting that “[e]ven states that do not formally impose LWOP sentences on juveniles allow judges to accomplish the functional equivalent and create ‘virtual lifers.’”). For example, a California appellate court overturned a fifteen-year-olds invalid LWOP sentence and resentenced him to two consecutive life sentences. *Id.*

¹⁸⁶ See NELLIS & KING, *supra* note 24, at 36; see generally *infra* notes 194-97, 226-39 and accompanying text (discussing the sentences of Sandra Davis Lawrence and Sarah Kruzan).

until he is sixty-five years old. That juvenile's life is altered and he is deprived of the most basic liberties without hope of restoration. In this generation, a fifteen-year-old believes age thirty is old. Therefore, is it reasonable that this same fifteen-year-old would actually be motivated by the hope of eventual release, taking steps to mature, because there exists a *possibility* he may see freedom again at age sixty-five? "For many of the children who are sentenced to [life without parole], it is effectively a death sentence carried out by the state over a long period of time."¹⁸⁷ This problem completely circumvents the Court's holding and its entire rationale. This is more than a loophole; it is an open door. Although a forty-year sentence may serve the penological goal of keeping a juvenile offender off the streets, at some point a lengthy sentence will be challenged as denying juveniles the chance to demonstrate maturity and effectively be rehabilitated. Do forty years forego effective rehabilitation? Fifty or sixty years most assuredly do. Juveniles who will spend the rest of their childhood, and most of their adult life in prison will unlikely maintain the hope that fuels the desire to change, the primary objective of rehabilitation.¹⁸⁸

In a Human Rights Watch Report, Ethan W., who began serving his prison term at age nineteen, "described hope as the only thing preventing him from committing suicide."¹⁸⁹ He explained that:

The only reason I don't kill myself is 'cause there's still hope. I mean at least if you got a dog that you know is never going to get adopted, that's never going to live free again, I mean they kill it. They put it to sleep. That's more humane than keeping him in this cage the next twenty years, making him live with his own shit and his own piss. I came in here at seventeen years old and what are they going to do, keep me for sixty or seventy years? I mean c'mon now . . . that's a long time!¹⁹⁰

If the country sees a rise in lengthy term of years sentences for juvenile offenders, the sentencing judge has an added burden in light of *Graham*. A judge must not only determine what term of years will effectively punish the juvenile (to appease the state and its citizens), but must also determine what term of years does not deprive a juvenile of a "meaningful opportunity" to obtain release and reenter society (as the *Graham* holding now requires).¹⁹¹ However, as Justice Thomas asks in his dissent, what does a "meaningful op-

¹⁸⁷ De la Vega & Leighton, *supra* note 4, at 984.

¹⁸⁸ See *Graham*, 130 S. Ct. at 2030 (explaining that the penalty of life without parole "forfeits altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.").

¹⁸⁹ HUMAN RIGHTS WATCH, *supra* note 4, at 44, 47.

¹⁹⁰ *Id.* at 47.

¹⁹¹ See *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting).

portunity” mean?¹⁹² What term of years will tread the line of that meaningful opportunity? What term of years will cross over it? “The Court provides no answers to these questions, which will no doubt embroil the courts for years.”¹⁹³ These inquiries mandate an understandable line, or at least a less than blurry one, in order to ensure uniformity and consistency in juvenile sentencing practices consistent with *Graham*. Unfortunately, as a result of *Graham*, no such line exists.

B. *Graham’s Constitutional Mandate Will Require All States to Have Active Parole Boards*

Sarah Kruzan was sixteen years old when she shot and killed her thirty-one-year-old pimp, and was thereafter sentenced to life without parole, plus four years.¹⁹⁴ In 2009, Sarah reflected upon the gravity of her sentence, commenting that if she were ever given a chance to speak to a parole board, she would say:

[F]irst of all, I’ve learned what moral scruples are; second, that every day is a challenge . . . that I’ve found the ability to believe in myself, and that I have a lot of good to offer, now— the person who I am today, at 29:¹⁹⁵ I believe that I could set a positive example. I’m very determined to show that no matter what you’ve done, or where you’ve come from, or what you’ve experienced in life, it’s up to you to change.¹⁹⁶

A year later Sarah filed an Application for Clemency with the Governor of California, wherein she stated:

If I am given the opportunity to rejoin society I know I will make the most of it. Just like I have made the most and continued to make the most of my life here. I am requesting a commutation of my sentence based on my history of abuse, *my youthful age and vulnerability at the time of the crime*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Tolo Olorunda, *Sarah Kruzan: 16-Year-Old Sentenced to Life for Killing Pimp*, THE DAILY VOICE (Oct. 26, 2009), <http://thedailyvoice.com/voice/2009/10/sarah-kruzan-16year-old-sentenc-002362.php> [hereinafter *Sarah Kruzan*]. On September 24, 2010, Sarah Kruzan filed an Application for Clemency with the Office of the Governor in California. See Application for Clemency of Sarah Kruzan, (Sept. 24, 2010) [hereinafter *Kruzan Clemency Application*] (on file with author), available at <http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Kruzan/sara-kruzan-clemency-applic-9-24-2010.pdf>; see also Sara Kruzan, *Serving Life Without Parole, Petitions CA Governor for Release*, NEWS BLAZE (Sept. 29, 2010), <http://newsblaze.com/story/20100929185820zzzz.nb/topstory.html>.

¹⁹⁵ There is a discrepancy in Sarah Kruzan’s age in the cited documents. Compare *Sarah Kruzan*, *supra* note 194, which provides a quote that Ms. Kruzan is 29, with *Kruzan Clemency Application*, *supra* note 194, which lists her birthday as January 1, 1978, and that she was 32 at the time of filing her clemency application on September 24, 2010.

¹⁹⁶ *Id.*

and because of the person I am today.¹⁹⁷

There are likely many Sarah Kruzan's behind bars possibly for the rest of their lives. The inherent differences between juveniles and adults, coupled with decreased recidivism rates, support the need for active state parole systems. During oral arguments in *Graham v. Florida*, Chief Justice Roberts asked what evidence, if any, existed that a seventeen-year-old released on parole would once again commit crimes. Petitioner Graham replied, ". . . I think that the evidence shows that, as people get older, they are less likely to recommit crimes."¹⁹⁸ Although knowledge of this decreased recidivism statistic may have contributed to the Court's ultimate holding, it was the Court's recognition that juveniles are different from adults that controlled its mandate that states must give juveniles a chance to reenter society.

1. The Court Hands Down a New Constitutional Mandate—States Are Now Required to Give "Some Meaningful Opportunity" for Juvenile Offenders to Obtain Release

The familiar premise that juveniles are different than adults triggered *Graham's* charge to the states—give deserving juveniles a chance to reenter society. During the *Graham* oral arguments, counsel for the State of Florida argued that a categorical rule "goes against the national consensus and the national trend," one such trend being the elimination of parole.¹⁹⁹ He added, "[p]arole has been eliminated in many States. 15 States have totally eliminated it in the last 10, 15 years."²⁰⁰ Yet, despite the State's argument against a categorical rule, the Court drew a "clear line" to protect juvenile non-homicide offenders who lack the culpability to merit life without parole.²⁰¹ Of fundamental importance, the Court indicated that, while a state was not required to guarantee eventual freedom, it must give offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."²⁰²

The phrase "meaningful opportunity" originated during the *Graham* oral arguments when Justice Alito asked counsel for Petitioner Graham at what point parole must be given.²⁰³ Perhaps recognizing intuitively that to remove life without parole as a constitutional option would force states to invoke parole boards, Justice Alito questioned whether a Colorado statute permitting parole

¹⁹⁷ *Kruzan Clemency Application*, *supra* note 194, at 2, 5 (emphasis added).

¹⁹⁸ *Graham Transcript*, *supra* note 1, at 54 (Roberts, C.J.). Mr. Gowdy was counsel for Petitioner Graham. *Id.* at 1.

¹⁹⁹ *Id.* at 26 (Counselor Makar for the State of Florida).

²⁰⁰ *Id.*

²⁰¹ *Graham*, 130 S. Ct. 2011, 2030 (2010) ("This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.").

²⁰² *Id.*

²⁰³ *Graham Transcript*, *supra* note 1, at 6 (Alito, J.).

eligibility after forty years would be constitutional.²⁰⁴ In response, Petitioner stated that the individual state has discretion in determining when parole should be permitted, but “even that long amount of time would give at least some hope to the adolescent offender.”²⁰⁵ When Chief Justice Roberts questioned the effectiveness of a state’s parole system that granted parole to, for example, “1 out of 20 applicants,” Petitioner argued:

*All that would have to be required is a meaningful opportunity to the adolescent offender to demonstrate that he has in fact changed, reformed, and is now fit to live in society. It’s—that’s all. That’s all we are asking for. We are not asking that it be automatic right to get back out.*²⁰⁶

Unfortunately the Court did not define what a meaningful opportunity entailed, but simply instructed the states to “explore the means and mechanisms for compliance.”²⁰⁷ Still, while the Eighth Amendment prohibits a state from imposing a life without parole sentence on a juvenile non-homicide offender, a state does not have to release an offender during his natural life. In other words, an offender who commits a truly heinous crime “will remain behind bars for life.”²⁰⁸ The effect of the Court’s holding on the sentencing problem is that it “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society.”²⁰⁹

At the heart of its opinion, the Court held that a categorical rule would give juvenile non-homicide offenders the opportunity to demonstrate maturity and reform, as opposed to being “deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²¹⁰ Again relying on the *Roper* decision, the *Graham* Court reiterated that the death penalty deprives juveniles of the opportunity to mature and find human worth, and applied those same concerns towards imprisonment for life without parole.²¹¹ The Court stated,

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual. In some prisons, moreover,

²⁰⁴ *Id.* (referencing a Colorado statute that permits parole consideration after forty years).

²⁰⁵ *Id.* at 6-7 (Counselor Gowdy for Petitioner).

²⁰⁶ *Id.* at 7 (emphasis added).

²⁰⁷ *Graham*, 130 S. Ct. 2011, 2030 (2010); *see also id.* at 2057 (Thomas, J., dissenting) (noting that the majority provided no guidance as to what meaningful opportunity entails or when it must occur).

²⁰⁸ *Id.* at 2030.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2032.

²¹¹ *Id.*

the system itself becomes complicit in the lack of development [I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.²¹²

The Court found Terrence Graham's fate to be inconsistent with the Eighth Amendment.²¹³ Specifically, his sentence "guarantee[d] he [would] die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character" ²¹⁴ Spending the "next half century attempting to atone for his crimes and learn from his mistakes," the State of Florida's sentence on Graham "has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a non-homicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit."²¹⁵

2. Going Forward, the Court's Constitutional Mandate Implicitly Requires All States to Have Parole Boards and Likely Rehabilitation Measures in Place

The Court in *Graham* makes it clear that the Eighth Amendment forbids states from imposing a life without parole sentence on a juvenile non-homicide offender, but also that states do not have to actually release juvenile offenders during their natural life.²¹⁶ However, states must give juvenile non-homicide offenders a meaningful opportunity to obtain release and reenter society based on demonstrated maturity and rehabilitation before the juvenile spends the rest of his or her life in prison.²¹⁷ As previously noted, Justice Thomas's dissent criticized the value of the newly founded "meaningful opportunity" requirement for juvenile offenders, arguing that the Court's self-proclaimed narrow decision actually invites a "host of linedrawing problems . . . beyond the strictures of the Constitution."²¹⁸ Justice Thomas asked when the meaningful opportunity for release must occur, and "what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel?"²¹⁹ The line²²⁰ the Court drew to abolish life without parole is important, but *Graham* still leaves lofty conditions in its wake, with little practical gui-

²¹² *Id.* at 2032-33.

²¹³ *See id.* at 2033.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 2031, 2034.

²¹⁷ *Id.* at 2034.

²¹⁸ *Id.*; *see supra* notes 190 and accompanying text.

²¹⁹ *Graham*, 130 S. Ct. at 2034.

²²⁰ "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Id.* at 2030.

dance as to how to execute them other than for the states to “explore the means and mechanisms for compliance.”²²¹ What does seem relatively clear is that in order to carry out this new constitutional mandate, all states will need an active parole board and rehabilitative measures in place.²²²

As it stands, states have no duty to establish parole systems, and the federal government cannot require them to establish systems.²²³ At least fifteen states have abolished parole for all offenders, and at least four have abolished parole for certain violent offenders.²²⁴ Without mandatory parole systems, these states will likely be unable to provide any “meaningful opportunity” for juvenile non-homicide offenders to obtain release and reenter society.

The reason for parole is sound in theory and worthwhile in practice. In theory, parole brings integrity to the justice system by forcing the system to balance the repercussions of offenders’ actions against the four penological justifications for incarceration: retribution, deterrence, incapacitation, and rehabilita-

²²¹ *Id.* “Some juvenile justice advocates and scholars argued that by ordering states merely to provide an ‘opportunity’ for release, the opinion did not go far enough in protecting young offenders from disproportionately punitive sentences.” Tamar R. Birkhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 *Duke J. of Const. L. & Pub. Pol’y Special Issue* 66, 75 n.64 (draft) (forthcoming 2010) (citing Jeffrey Fagan, *Juvenile Justice Delayed? Rather than Set a Uniform Standard to Reduce Harsh Sentences for Minors, the Court in Graham Left Compliance Mechanisms up to the States*, 32 *NAT’L L.J.* 38 (June 14, 2010) (“Rather than establishing a firm principle of discounted culpability that would cabin harsh sentencing for all minors, Graham instead offers eligible juveniles a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’ The ‘means and mechanisms for compliance’ are left up to the states.”) (quoting Graham, 130 S. Ct. at 2016)), available at <http://www.law.duke.edu/journals/djclpp/?action=downloadarticle&id=182>.

²²² See *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting) (commenting that the majority’s holding will necessarily require Eighth Amendment principles to govern review by parole boards that the “Court now demands that States empanel”).

²²³ See 59 *AM. JUR. 2D Pardon and Parole* § 85 (West 2010) (citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 19 (1979) (Powell, J., concurring) (“Nothing in the Constitution requires a State to provide for probation or parole.”)).

²²⁴ Since 2000, various sources put the number of total states having abolished parole at either fifteen or sixteen, with either four or five having abolished parole for certain violent offenders. See Press Release, Office of Justice Programs, *Forty-two Percent of State Parole Discharges Were Successful* (Oct. 3, 2001), <http://www.ojp.gov/archives/pressreleases/2001/bjs01181.html> (“By the end of last year 15 states had abolished parole board authority for releasing all offenders, and an additional 5 states had abolished parole board authority for releasing certain violent offenders.”). Parole was abolished for federal convicts in 1987. See *Local Role of the U.S. Parole Commission: Hearing Before the H. Subcomm. on Fed. Workforce, Postal Serv., and the D.C. Comm. on Oversight and Gov’t Reform.*, 111th Cong. 3 (2009) (statement of Isaac Fulwood, Chairman, United States Parole Comm’n, <http://www.justice.gov/ola/testimony/111-1/2009-09-22-uspc-fulwood-local-role.pdf>).

tion.²²⁵ Further, parole is certainly worthwhile in practice because it stops any one state from playing God over an offender's life. Whether one personally adheres to a religious or moral acumen, the reasonable person would agree that while an educated guess about an offender's likelihood of recidivism can be grounded in theory, psychology, and science, it is impossible to predict the prior offender's future with absolute certainty. Parole, or at least eligibility for parole, is the manifestation of that latter truth. Parole acknowledges time served (which is in the interest of society), but it also forces integrity in the justice system to ensure that the appropriate length of incarceration is not grossly exceeded to the point of detriment and harm—a systemic accountability.

The need for systemic accountability in parole is demonstrated in the cases of Sandra Davis Lawrence (an adult) and Sarah Kruzan (a juvenile). Sandra Davis Lawrence was sentenced to life imprisonment in California for the 1971 murder of her lover's wife.²²⁶ Having fled California, she returned to face trial in 1982 and was sentenced in 1983.²²⁷ Ms. Lawrence made substantial progress in maturation while incarcerated.²²⁸ In 1993, Ms. Lawrence became eligible for parole, but despite numerous recommendations from the Parole Board of Hearings, California Governors Wilson, Davis, and Schwarzenegger repeatedly denied her parole.²²⁹ Ms. Lawrence's case raised the question: at what point does a life sentence meet the four goals for incarceration—retribution, deterrence, incapacitation, and rehabilitation?²³⁰ Ms. Lawrence was finally released on parole in 2005; and, in 2008 the California Supreme Court, in a 4-3 ruling, upheld the trial court's decision that "the Governor must consider more than the crime itself when making a parole suitability decision."²³¹ After nearly twenty-four years in prison, the California Supreme Court affirmed the "over-

²²⁵ See *Graham*, 130 S. Ct. at 2028-29.

²²⁶ NELLIS & KING, *supra* note 24, at 35.

²²⁷ *Id.*

²²⁸ See *id.*

²²⁹ *Id.* at 35-36.

²³⁰ See *id.* at 35; *Graham*, 130 S. Ct. at 2028. Detailed discussion of these incarceration justifications is beyond the scope of this Article. In short, 1) *retribution* supports society's right to express its condemnation of the crime, and its desire to restore a moral imbalance for the harm committed to the victim caused by offense; 2) *deterrence* suggests that a potential offender take the possible punishment into consideration when making decisions; 3) *incapacitation*, while an important goal for purposes of decreasing recidivism, requires the sentencer to make a judgment that the offender is incorrigible; and, finally 4) *rehabilitation* is the right to reenter the community. *Id.* at 2028-29. The *Graham* Court discussed these penological goals in depth, but ultimately rejected the goals as viable justifications for supporting life without parole for the juvenile nonhomicide offender. See *id.* at 2030. "In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and, the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual." *Id.*

²³¹ The California Coalition for Women Prisoners, *Sandra Lawrence Ruling Important*

whelming” evidence of her rehabilitation and her suitability for parole, noting that once a prisoner has completed their base sentence, “the circumstances of the crime alone ‘rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.’”²³² Ms. Lawrence will remain free and on parole as a result of the 2008 decision.²³³

Sadly, unlike Ms. Lawrence, Sarah Kruzan, sentenced at sixteen-years-old, may never be free.²³⁴ Described as an overachiever and Honor Roll student, young Sarah had a relatively normal and healthy life until she met “G.G.,” a thirty-one-year-old “father figure,” who showered Sarah with lavish gifts and attention.²³⁵ When Sarah turned thirteen, G.G. raped her, and eventually put her out on the streets working as a prostitute for twelve-hour shifts.²³⁶ “Three years later, fed up and frustrated, Sarah snapped and killed G.G., and was subsequently sentenced to life in prison without the possibility of parole. Plus four years.”²³⁷ At age twenty-nine, reflecting upon the gravity of her sentence, Sarah cried, “[t]hat means I’m gonna die here . . . I definitely know I deserve punishment: I mean, you don’t just take somebody’s life and think that it’s okay; so yes, definitely, I deserve punishment.”²³⁸ However, on further reflection Sarah asks and answers the question her sentencing judge should have pondered more carefully: “How much? I don’t know.”²³⁹

In analyzing the balance between punishment and proportionality, a 2009 Sentencing Project report asked:

For what purpose are so many people incarcerated for life at an exponentially increasing cost? The rationale for opposing the use of parole for persons serving a life sentence generally pivots around issues of punishment, retribution, and incapacitation in the interest of public safety. This goal conjures up the question of the appropriate duration of time in prison. How are these various goals met by a life sentence, as opposed to a term of 15 or 25 years, for example?²⁴⁰

This same report further suggests that parole hearings for juveniles offered at regularly scheduled intervals could provide the appropriate venue to determine which individuals should remain incarcerated and which demonstrate the ma-

Victory / Shaputis Ruling a Setback, THE FIRE INSIDE, 38 Summer/Fall 2008, at 12, <http://www.womenprisoners.org/fire/FI38.pdf> [hereinafter *Sandra Lawrence*].

²³² *Id.*

²³³ *See id.*

²³⁴ *See supra* notes 194-97 and accompanying text.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ NELLIS & KING, *supra* note 24, at 35.

turity for release.²⁴¹ The report also explains that:

Such a change would not necessarily mean that all parole eligible persons would be released at some point during their term. In the interest of public safety, many individuals sentenced to life will serve the remainder of their natural lives in prison. However, this reform would provide that a decision on release be made by a professional parole board at the time of eligibility, taking into account a person's prospects for a successful transition to the community.²⁴²

Thus, to answer the Court's concern for juvenile reform, and building on the previous suggestion, states should build in sentencing reviews. These reviews would provide a meaningful opportunity for release in a time frame that does not deprive the juvenile of hope, a significant factor in the *Graham* Court's opinion.²⁴³ Such reviews could be in ten, fifteen, or twenty-year increments, depending upon the nature of the crime and limited to those crimes with lengthy sentences. For example, in Louisiana, the felony of producing or manufacturing cocaine or a cocaine base carries an imprisonment of ten to thirty years of hard labor without parole or suspension, and up to a \$500,000 fine.²⁴⁴ However, if a juvenile is charged as an adult and sentenced to a term of thirty years for a felony under a sentencing review system, the court could require the Louisiana Parole Board to first review his eligibility for parole after ten years of imprisonment, and to offer rehabilitation programs while he is incarcerated.

In April of 2010, Louisiana considered several pieces of legislation that could change the State's current parole system.²⁴⁵ House Bill 195 would allow

²⁴¹ *Id.* at 31 ("Some children serving life sentences have committed heinous and gruesome acts; it is a murder conviction that typically prompts the sentence of life or life without parole for juveniles. For especially violent acts, long-term incarceration can be the most appropriate option for them as well as for public safety goals. However, a parole hearing, offered at regularly scheduled intervals, would provide the appropriate venue at which to determine which individuals should remain incarcerated and which have been sufficiently reformed and demonstrate the maturity to warrant release.") (emphasis added).

²⁴² *Id.* at 41.

²⁴³ See *supra* notes 158-59 and accompanying text.

²⁴⁴ LA. REV. STAT. ANN. § 40:967B(4)(a) (West 2008). Prior to a 2001 amendment, the penalty for this provision was "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence and may be fined not more than five hundred thousand dollars." *Id.* (quoting language of LA. REV. STAT. ANN. § 40:967B(4)(a) prior to 2001 amendment, by Acts 2001, No. 403, § 4).

²⁴⁵ See Jan Moller, *Parole would be made easier to obtain under bills headed to House floor*, THE TIMES-PICAYUNE, http://www.nola.com/politics/index.ssf/2010/04/parole_would_be_made_easier_to.html [hereinafter *Louisiana Parole Bills*]. As of June 2010, HB 195, which would change the number of votes required to grant parole to certain offenders under specified conditions was signed by the Governor. See *The Web Portal to the Louisiana State Legislature* [hereinafter *Louisiana State Legislature*], at <http://www.legis.state.la.us/> (accessible under heading "Final Disposition of All Bills," then click "House Bills," then click on

inmates serving time for nonviolent crimes, such as drug possession, to be released with a two-thirds majority vote of the parole panel if certain criteria are met, such as earning a GED and completing at least one hundred hours of a pre-release program.²⁴⁶ House Bill 194 would permit first-time offenders of violent crimes to accrue “good time” credits for good behavior.²⁴⁷ If approved, an offender could serve a minimum of 75% of their sentence, as opposed to the previous 85%, before they may be eligible for parole.²⁴⁸ Finally, House Bill 35 would grant automatic parole hearings to inmates convicted of nonviolent crimes that are older than age sixty and have served at least ten years of their sentence.²⁴⁹ While the language of some of the bills applies only to adult offenders,²⁵⁰ the existence of the reform bills underscores the point that states need functioning parole systems and that those systems should not be untenable. If such measures are in place for the *adult* offender, then the juvenile offender should receive parole consideration even earlier in their lengthy sentence in order to encourage good behavior and character improvement which leads to a meaningful opportunity to reenter society. *Graham* now requires this earlier standard.²⁵¹

Critics may argue that a requisite review ten or twenty years into a thirty-year sentence undercuts the role of the prosecutor in seeking a particular sentence, and subverts justice by altering the sentence imposed by the court.²⁵²

“195”), or at <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=10rs&billtype=HB&billno=195>. House Bill 194, which would have “[a]mend[ed] the earning rate for diminution of sentence and length of sentence which must be served before being eligible for parole” was not approved by the Senate. See *Louisiana State Legislature*, *supra* note 245, at <http://www.legis.state.la.us/> (accessible under heading “Final Disposition of All Bills,” then click “House Bills,” then click on “194”), or at <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=10rs&billtype=HB&billno=194>. Finally, HB 35, which would provide parole consideration for “certain elderly inmates” is subject to call in the Louisiana Senate, meaning it may receive further action or consideration at a later date. See *Louisiana State Legislature*, *supra* note 245, at <http://www.legis.state.la.us/> (accessible under heading “Final Disposition of All Bills,” then click “House Bills,” then click on “35”), or at <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=10rs&billtype=HB&billno=35>; and see <http://www.legis.state.la.us/glossary.htm> (defining “subject to call” for purposes of Louisiana State Legislature).

²⁴⁶ *Louisiana Parole Bills*, *supra* note 245, at 1 (H. B. 195). For an update on the status of HB 195, see *supra* note 245.

²⁴⁷ See *id.* (H. B. 194). For an update on the status of HB 194, see *supra* note 245.

²⁴⁸ See *id.* (H. B. 194). For an update on the status of HB 194, see *supra* note 245.

²⁴⁹ See *id.* (H. B. 35). For an update on the status of HB 35, see *supra* note 245.

²⁵⁰ See *id.* (“[A]pproved legislation . . . would grant parole hearings to felons who are at least 60 years old . . .”)

²⁵¹ See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010) (“What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”).

²⁵² For example, Justice Thomas, in his dissent, criticized the majority’s categorical approach, inferring it was unnecessary given the constitutional and governmental safeguards in

This concern can be addressed in two ways. First, given the holding in *Graham*, a thirty-year sentence is now arguably tantamount to life without parole and thus, too long a sentence to offer juveniles any hope of restoration.²⁵³ Second, even if *Graham* does not restrict the imposition of lengthy sentences, a review of the case after ten or twenty years does not mean that offender will be paroled; a juvenile will continue to serve the entire thirty-year sentence if certain conditions are not satisfied to warrant parole release.²⁵⁴ Additionally, a

place to ensure that any defendant receives a fair process and appropriate punishment. Specifically, he stated:

In adopting these categorical proportionality rules, the Court intrudes upon areas that the Constitution reserves to other (state and federal) organs of government. The Eighth Amendment prohibits the government from inflicting a cruel and unusual method of punishment upon a defendant. Other constitutional provisions ensure the defendant's right to fair process before any punishment is imposed. But, as members of today's majority note, '[s]ociety changes,' and the Eighth Amendment leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate.

Graham, 130 S. Ct. at 2045 (Thomas, J., dissenting). Justice Thomas also noted that the citizens of any state are in a better position to determine what punishment they find tolerable. *See id.* at 2051 (inferring that the existence of a legislatively authorized penalty means "at a minimum, that the citizens of that jurisdiction find tolerable the possibility that a jury of their peers could impose a life-without-parole sentence on a juvenile whose nonhomicide crime is sufficiently depraved."), and *id.* at 2055 ("The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented."). *See also* Birkhead, *supra* note 221, at 76-78 (discussing that Justice Thomas' dissent in *Graham*, along with Justice Scalia's dissent in *Roper v. Simmons*, 543 U.S. 551 (2005), oppose the view that *Graham* did not go far enough to protect young offenders from disproportionately punitive sentences, premised on a "traditional reading of American history" and the contention that the *Graham* and *Roper* majorities "flagrantly imposed their 'own sense of morality and retributive justice' on state lawmakers and voters.").

²⁵³ *See supra* notes 171-72 and accompanying text.

²⁵⁴ The United States Supreme Court has held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (deciding to grant parole release requires "the [parole] Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice."). *Id.* at 8. *See also* US Department of Justice, US Parole Commission, *Answering Your Questions*, <http://www.justice.gov/uspc/questions.htm> ("The law says that the U.S. Parole Commission may grant parole if (a) the inmate has substantially observed the rules of the institution; (b) release would not depreciate the seriousness of the offense or promote disrespect for the law; and (c) release would not jeopardize the public welfare."). States have no duty to establish parole systems. *See supra* note 223. But, as an example of a state parole process for adults, in California, only inmates who are sentenced to life in prison with the possibility

safeguard now exists for a juvenile offender when the court subjectively (as in *Graham*) or by statute imposes a lengthy imprisonment. *Graham's* mandate that juvenile non-homicide offenders be given some meaningful opportunity for release implicitly requires active parole boards to exist, and infers that the burden for providing such meaningful opportunity falls on parole boards.²⁵⁵

The *Graham* Court does not foreclose the possibility that a juvenile may spend his entire life or a significant part of it in prison.²⁵⁶ However, an incremental sentencing review by the parole board ensures that states adhere to *Graham's* mandate for a meaningful opportunity for release. If the juvenile offender has not demonstrated change during imprisonment, then the offender should

of parole are subject to "suitability hearings" by the parole board, and become automatically eligible, one year prior to their minimum eligible parole date. California Dep't of Corrections and Rehabilitation, *Division of Adult Parole Operations, Lifer Parole Process*, http://www.cdcr.ca.gov/Parole/Life_Parole_Process/Index.html. Of significance,

Being scheduled for a parole hearing is no indication of the inmate's suitability for release from prison. Whether inmates are found suitable for parole is a judgment of the BPH [Board of Parole Hearings] hearing panel. These inmates are sentenced to the possibility of parole, not the assurance of it, recognizing that their maximum potential sentence is life. It is not uncommon for inmates to receive many parole hearings before they are found suitable for release.

Id. A California parole board considers the following factors to determine whether an inmate is suitable for release: "counseling reports and psychological evaluations, behavior in prison (i.e., disciplinary notices or laudatory accomplishments), vocational and educational accomplishments in prison, involvement in self-help therapy programs that can range from anti-addiction programs for drugs and alcohol to anger management, [and] parole plans, including where an inmate would live and support himself if he was released." *Id.* Further, relying on the California Supreme Court's decision in *In re Dannenberg*, 34 Cal. 4th 1061(2005), overruled in part on other grounds by, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), parole boards are entitled to consider public safety, and such a concern "trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders." *Dannenberg*, 34 Cal. 4th at 1084. For additional factors affecting the grant or denial of parole, see 59 AM. JUR. 2d *Pardon and Parole* §§ 86-91 (discussing factors such as prison conduct, likelihood of rehabilitation, merit to society, deterrence, seriousness of offense effect of restitution, and prior criminal record).

²⁵⁵ The only reference in *Graham* to parole boards comes from Justice Thomas's dissent, where he questions the majority's requisite for states to provide some meaningful opportunity for release. See *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting). Justice Thomas states, "But what, exactly, does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years." *Id.* (emphasis added).

²⁵⁶ See *id.* at 2030 ("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.").

not be released on parole; but, such change cannot be assessed without a review. The *Graham* Court was clear that “[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.”²⁵⁷

Once released there are measures that states can and should take to aid juvenile offenders’ successful reentry into society. These rehabilitation measures should align with the Court’s concern of giving the juvenile offender hope, and encourage behavior and character improvement.²⁵⁸ Currently, many states have some form of an “aftercare” program where juvenile parole officers supervise recently released juveniles.²⁵⁹ At a minimum, aftercare programs generally require: communication between the probation officer, the youth, and his or her parents/guardians; an assessment tool to measure progress; and, any other available community resources deemed necessary.²⁶⁰ In addition, many states participate in the Office of Justice Program’s Serious and Violent Offender Reentry Initiative, which was launched in October 2009 “to advance the safe and successful reentry of individuals from prisons and jails into their communities.”²⁶¹

²⁵⁷ *Id.* at 2030.

²⁵⁸ *See id.* at 2026. For international examples of rehabilitation for juveniles, see De la Vega & Leighton, *supra* note 4, at 983 (engaging in comparative analysis of juvenile justice and rehabilitation models in other countries and the United States for purposes of identifying alternative to harsh and inappropriate sentences for children).

²⁵⁹ *See* NCJJ, *supra* note 23 (select a state in the “State Profiles” drop down menu, then at “Select a Topic” choose “Aftercare/Re-entry.”) (last visited July 20, 2010).

²⁶⁰ *See generally id.*

²⁶¹ U.S. Department of Justice, Office of Justice Programs, *National Reentry Resource Launched*, RENTRY.GOV, <http://www.reentry.gov/>. According to the National Center for Juvenile Justice, as of 2006, participating jurisdictions include: Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, Wyoming. For example, in Colorado all juveniles released from incarceration must have a period of mandatory service and supervision by the juvenile parole officers to aid in their transition back into the community. NCJJ, *supra* note 23, at Aftercare/Re-entry. In Connecticut, the Department of Children and Families places a strong emphasis on community reintegration and requires the juvenile to participate in pre-release transition activities to allow for a structured return to the community upon their release. *Id.* at Connecticut, Aftercare/Re-entry. In Alaska, the Division of Juvenile Justice uses the Youth Level of Service/Case Management Inventory as a measure of assessment during aftercare. *Id.* at Alaska, Aftercare/Re-entry. And in 2006 Georgia created JUSTGeorgia—a partnership with the State’s justice and social service systems, designed to pass a new juvenile code reflecting best practices for child development and preventing detention by fostering healthy behaviors outside the juvenile justice system. *Id.* at Georgia, Entire Profile.

These proposed rehabilitation measures could satisfy Justice Thomas's inquiry as to which "Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel?"²⁶² According to the majority, life without parole violated the Eighth Amendment's essential principle—that states "respect the human attributes even of those who have committed serious crimes."²⁶³ Further, the majority noted that the standard for what is cruel under the Eighth Amendment embodies a moral judgment;²⁶⁴ which when applied to juveniles, requires states to take into account their youth, immaturity, and lack of culpability.²⁶⁵ By offering parole hearings at regularly scheduled intervals or sentencing reviews based on the length of sentence, parole boards can put review mechanisms in place that reflect these Eighth Amendment principles. These protections may prevent juveniles from being denied "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law."²⁶⁶ "This the Eighth Amendment does not permit."²⁶⁷

V. CONCLUSION

Following the Court's recent opinion in *Graham v. Florida*, this Article concludes two points. First, the Court's holding abolishing life without parole leaves a detrimental door open for juvenile offenders to receive lengthy term of year sentences.²⁶⁸ This is a concern because a lengthy term of years sentence still carries the same problems raised by the *Graham* Court in abolishing life without parole: a failure to recognize that juveniles are different than adults, and the need for juveniles to not be deprived of all hope to ever reenter society. Second, in light of *Graham's* new constitutional mandate to give juvenile offenders a "meaningful opportunity" to obtain release, all states will need to establish active parole boards for juvenile offenders. Notably, "children and adolescents are growing and maturing and the chances for them to 'make it' are

²⁶² *Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting).

²⁶³ *Id.* at 2021.

²⁶⁴ *See id.* (reiterating that the Eighth Amendment standard of extreme cruelty "is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.") (quoting *Kennedy v. Louisiana*, 12 S. Ct. 2641, 2649 (2008)).

²⁶⁵ *See id.* at 2031-32.

²⁶⁶ *Id.* at 2033.

²⁶⁷ *Id.*

²⁶⁸ *See Ashby Jones, Is Florida Ignoring a High Court Ruling on Juvenile Sentences?*, THE WALL STREET JOURNAL, LAW BLOG, at 1 (Nov. 23, 2010), <http://blogs.wsj.com/law/2010/11/23/is-florida-ignoring-a-high-court-ruling-on-juvenile-sentences/> (commenting that in Florida, "more than six months after the U.S. Supreme Court [ruling] . . . not a single former juvenile sentenced in such cases has found much relief[,] [i]nstead, . . . Florida courts, in several high-profile cases are re-sentencing the juveniles to new terms that still amount to life sentences.").

much higher than for adults.”²⁶⁹

This Article does not suggest that juvenile offenders escape punishment for committed offenses, but rather, that our country acknowledge the historic impact and repercussions of *Graham*’s central premise—juveniles are different from adults. While children may generally know right from wrong, by virtue of their immaturity, they have less than developed capacities to control their impulses, to use reason to guide their behavior, and to think about the consequences of their conduct.²⁷⁰ “They are, in short, still ‘growing up,’ [and] [a] sentence of life without parole negates that reality, treating child offenders as though their characters are already irrevocably set.”²⁷¹ *Graham* now requires states to account for the very real and tangible difference between juveniles and adults. Thus, states can no longer impose life without parole on juvenile offenders to live out the rest of their days in adult prison for crimes that may reflect unfortunate yet transient immaturity.²⁷²

Knowing all too well the consequences of youthful immaturity, fourteen-year-old Stacy Torrance was sentenced to life without parole in 1988 for felony murder, where during the course of a robbery, his accomplices murdered the victim without Stacy’s knowledge or assistance.²⁷³ In a letter to Human Rights Watch, Stacy wrote:

Convinced that I could make some money, I agreed with my cousin to rob this guy of his keys so that [my cousin] and his friend could rob the guy’s and his father’s apartment. . . . but I had no idea that this guy would end up dead. . . . Yes, I made a mistake. I associated with the wrong crowd. I engaged in committing a crime with them. However, is it fair that I spend the rest of my life in prison for a crime which was committed by someone else without my knowledge or without me being present? I feel sorry for the life which was lost in my case. I feel a deep sense of empathy for his family and what they must continue to endure in terms of pain. But this tragedy was never supposed to happen. I don’t absolve myself of all guilt. I, *out of naiveness, out of influence, out of the ignorance of knowing the consequences*, agreed to do a crime: a robbery.²⁷⁴

²⁶⁹ Marrus & Rosenberg, *supra* note 61, at 1183.

²⁷⁰ See HUMAN RIGHTS WATCH, *supra* note 4, at 36.

²⁷¹ *Id.*

²⁷² *Graham*, 130 S. Ct. at 2026 (internal citations omitted). For further information on the culpability of juveniles as compared to adults, see HUMAN RIGHTS WATCH, *supra* note 4, at 36 (discussing cognitive or psychosocial differences between juvenile and adults, and suggesting that “children simply think differently than adults” and that “children lack social and emotional capabilities that are better developed in adults.”).

²⁷³ HUMAN RIGHTS WATCH, *supra* note 4, at 22-23. For more information on the case of Stacey Torrance, see Matt Stroud, *Little Kid, Life Sentence*, PHILADELPHIA CITY PAPER, July 29, 2009, <http://citypaper.net/articles/2009/07/30/little-kid-life-sentence>.

²⁷⁴ HUMAN RIGHTS WATCH, *supra* note 4, at 23 (emphasis added) (quoting Letter from

Another juvenile offender wrote, "my life in prison has been like living in hell. It's like living and dying at the same time, and with my sentence the misery never ends. Life in prison is no life at all. It is a mere existence."²⁷⁵ The Supreme Court's decision in *Graham v. Florida* now takes its place in history. Reminding this country that juveniles are not the same as adults, *Graham* in no way excuses the offenses committed by juveniles, but rather requires states to at least give them hope and a meaningful opportunity for a second chance at life.

Stacey Torrance to Human Rights Watch (May 20, 2004) (on file with Human Rights Watch)).

²⁷⁵ *Id.* at 41.