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Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates

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GRAHAM V. FLORIDA: A GAME-CHANGING VICTORY FOR BOTH JUVENILES AND JUVENILE-RIGHTS ADVOCATES

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In Graham v. Florida*, the U.S. Supreme Court ruled that the Constitution—specifically, the Cruel and Unusual Punishment Clause of the Eighth Amendment—prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit a homicide.* Graham *marks a significant departure from the Supreme Court's Eighth Amendment jurisprudence because it categorically bars life sentences for juveniles who are convicted of nonhomicide crimes based on juveniles' unique amenability to rehabilitation, rather than on the nature of the punishment itself. While* Graham*'s central holding is ostensibly straightforward, the decision has generated more questions than answers. Courts have split on whether* Graham *applies to term of years sentences that are materially indistinguishable from life without parole. They have also split on whether the decision's reasoning supports an invalidation of life without parole sentences for juveniles who are convicted under felony-murder and accomplice-liability theories of criminal liability. Furthermore, the legislative response to* Graham *has been protracted, and critics continue to question the effectiveness of using state parole boards as the primary mechanism for compliance with* Graham *given that parole systems are structured to make any opportunity for release virtually unattainable. Despite this uncertainty,* Graham *has transformative potential in the area of juvenile rights, and advocates should use it to push for additional reform that, until recently, had no solid foundation in Supreme Court precedent.*

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TABLE OF CONTENTS

I. INTRODUCTION 258
II. THE JUVENILE JUSTICE SYSTEM: THEN AND NOW 261
A. The Creation of Separate Juvenile Courts 261
B. Juvenile Adjudications Begin to Mirror Adult Criminal Proceedings 262
C. The Legislative Response to the Juvenile "Super-Predator" 262
D. "Adult Crime, Adult Time" Statutes and Legislative Proliferation of Transfer Laws 264
E. Transfer Laws and the Availability of Life Without Parole for Juveniles 265
III. *ROPER V. SIMMONS* 265
IV. *GRAHAM V. FLORIDA*: THE NATURAL EXTENSION OF *ROPER* 267
A. Terrance Graham 267
B. *Graham v. Florida*: Kids Are Different? 268
1. The Holding 268
2. The Analysis 269
V. WHAT IS CLEAR AFTER *GRAHAM* 271
A. Juveniles Sentenced to Life Without Parole for Nonhomicide Crimes Must Be Given a "Meaningful Opportunity for Release" 271
B. It Is Within the Province of the States to Interpret "Meaningful Opportunity for Release" 272
1. *Harmelin v. Michigan*: State Legislatures Have Broad, but Not Limitless, Sentencing Discretion 272
2. The Constitution Will Always Constrain Legislative Discretion 273
VI. WHAT IS NOT CLEAR AFTER *GRAHAM* 274
A. Kids Are Different? 274
B. Who Is Entitled to a "Meaningful Opportunity for Release"? 275
1. Does *Graham* Apply to Term of Years Sentences That Are Materially Indistinguishable from Life Without Parole? 275
a. *People v. Caballero* 276
b. *People v. Mendez* 277
c. *People v. Nunez* 278

2. Does *Graham* Apply to Juveniles "Who Did Not Kill or Intend to Kill" but Have Been Convicted of Homicide Under Felony-Murder Statutes or Accomplice Liability? 279
a. Felony murder and accomplice liability 279
b. The relevance and applicability of *Graham* 280
VII. THE PAROLE BOARD: THE STATES' MECHANISM FOR COMPLIANCE WITH *GRAHAM* 282
A. Compliance in States That Have Abolished Parole 282
B. Compliance in States with Indeterminate Sentencing and Parole Boards 284
1. Iowa 284
2. California 285
3. Pennsylvania 285
C. Practical Problems Remain: Ensuring "Meaningful" Parole Review 286
VIII. CONCLUSION 287

I. INTRODUCTION

The original goal of the juvenile justice system was to benefit and rehabilitate adolescent offenders.[1] The establishment of separate juvenile courts was premised on the general belief that "the normal adolescent experience is characterized by experimentation and risky behavior"[2] and the idea that adolescents are "more amenable to rehabilitation as compared to adults."[3] In other words, there was a clear understanding that "children are different from adults and therefore needed to be treated differently."[4] However, as Patricia L. West, head of the Virginia Department of Juvenile Justice, stated, "The thinking behind the juvenile court, that everything be done in the best interest of the child, is from a bygone era."[5]

The current systems that exist in California and across the nation have abandoned these rehabilitative objectives. American criminal law no longer reflects the view that children are less culpable and in greater need of protection than adults are.[6] As Peter Elikann, author of *Superpredators: The Demonization of Our Children by the Law*, has pointed out, severe punishments for juveniles are now "in vogue."[7] The elimination of juvenile courts and facilities has become increasingly common; as a result, juveniles are tried as adults and sentenced to lengthy incarceration in adult facilities.[8] For the most serious offenses, courts have not hesitated to impose the most serious penalties. Until the U.S. Supreme Court's landmark decision in *Roper v. Simmons*,[9] which categorically prohibited the execution of

1. Jennifer M. O'Connor & Lucinda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303 (1996).

2. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 106 (2010).

3. *Id.*

4. PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 123 (Insight Books, 1999).

5. *Id.*

6. Scott Hechinger, Note, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 462–63 (2011).

7. ELIKANN, *supra* note 4, at 6.

8. *Id.*

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

juveniles, the death penalty was the most severe sentence available for juveniles.

Following *Roper*, life without the possibility of parole replaced execution as the toughest sentence that states could constitutionally impose on juveniles.[10] Many thought that the Court's ruling in *Roper* was restricted to the death penalty because "death is different."[11] The other faction countered that the message of *Roper* was that "kids are different" and that this decision set the stage for a constitutional challenge to juvenile life without parole (JLWOP)—a sentence that, not unlike the death penalty, imposes a "terminal, unchangeable, once-and-for-all judgment upon the whole life of a human being and declares that human being forever unfit to be a part of civil society."[12]

In May 2010, five years after *Roper*, the Court in *Graham v. Florida*[13] barred the imposition of life without parole on juveniles who are convicted of nonhomicide offenses that they committed before they turned eighteen.[14] In rendering its decision, the Court emphasized the diminished culpability of juveniles, which reaffirmed the central foundation laid in *Roper*.[15]

Taken together, the Court's decisions in *Roper* and *Graham* have led many advocates to intimate that the Court is prepared to respond to the problem of serious and violent juvenile crime in a developmentally appropriate manner. In both decisions, the Court relied on a broad body of research that supported the proposition that children are "cognitively, behaviorally, and emotionally different from adults in ways that make a sentence of life without parole entirely inappropriate for [juveniles]."[16]

Graham's basic holding forbids states from sentencing juveniles to life without parole for nonhomicide offenses.[17] Instead, youths must be provided a "meaningful opportunity to obtain release based

10. *See* Hechinger, *supra* note 6, at 415–17.

11. *See, e.g.*, Brief for Petitioner at 5, Sullivan v. Florida, 130 S. Ct. 2059 (2010) (No. 08-7621).

12. *Id.*

13. 130 S. Ct. 2011 (2010).

14. *Id.*

15. *Id.* at 2026–28.

16. THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE 1 (2010), *available at* http://www.sentencingproject.org/doc/publications/publications/jj_jlwopfactsheetJuly2010.pdf.

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

on demonstrated maturity and rehabilitation."[18] Legislatures are prohibited from making a "once-and-for-all determination of [a juvenile] offender's capacity to change . . . at the onset of a sentence."[19]

Given our current knowledge of the psychological development of adolescents, we know that it is impossible to make such a determination with any accuracy at the time of sentencing.[20] When dealing with juveniles in particular, "there is always the possibility of growth and improvement with maturation, and dramatic response to intervention."[21] For this reason, *Graham* is arguably the most important Supreme Court decision to address the rights of juveniles. The reasoning of the decision supports the proposition that courts should *always* consider the diminished culpability of juveniles when deciding on appropriate punishments.

In order to fully appreciate the impact of this decision, one must delve into the history of the juvenile justice system and examine the reasons behind its recent shift away from rehabilitation toward punishment and incapacitation. To that end, Part II traces the history of the juvenile justice system, from the creation of the first juvenile courts through today. Then, Part III provides an overview of the Court's analysis in *Roper*, and Part IV analyzes the Court's extension of that reasoning beyond the context of the death penalty in *Graham*. The next two sections examine the implications of the decision: Part V sets forth what is clear after *Graham*, while Part VI underscores several areas of uncertainty that remain. Finally, Part VII examines the use of parole boards as a mechanism for state compliance with *Graham*.

18. *Id.* at 2034.

19. Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 94 (2010), http://www.michiganlawreview.org/assets/fi/108/smithcohen.pdf.

20. Brief for the American Psychological Ass'n, American Psychiatric Ass'n, National Ass'n of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621).

21. Gregory K. Fritz, *Juveniles with Life but Not Parole*, THE PROVIDENCE J.-BULL., Aug. 19, 2010, at 7.

II. THE JUVENILE JUSTICE SYSTEM: THEN AND NOW

A. The Creation of Separate Juvenile Courts

At its infancy, the United States did not have separate adjudicatory proceedings for children accused of criminal behavior.[22] As a result, children were tried as adults and sentenced to adult prisons upon conviction.[23] Social reformers were "dismayed by a system that permitted children to be confined alongside adult offenders . . . [and] objected to the punitive nature of the adult system and sentencing as it applied to juveniles."[24] These reformers advocated for a separate system that reflected "children's potential for rehabilitation in its response to their criminal behavior."[25]

The first juvenile court was established in 1899; by 1917, nearly every state had statutorily established separate courts for juvenile offenders.[26] Initially, juvenile delinquency proceedings were considered "civil," which distinguished them from adult criminal proceedings.[27] As such, juveniles were not afforded the same procedural protections as adults had.[28] In the early years, legal practitioners widely accepted that the procedural safeguards afforded

22. Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 U. COLO. L. REV. 1059, 1063 (2007); *see also* HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 14 (2005) [hereinafter HRW THE REST OF THEIR LIVES] (noting that child offenders aged fifteen and over were charged and tried in adult courts in early U.S. history).

23. Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders Are Treated as Adults, Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 127 (2004).

24. Goodman, *supra* note 22, at 1064 (discussing the objections of reformers).

25. HRW THE REST OF THEIR LIVES, *supra* note 22, at 14 (discussing the arguments made by children's welfare advocates).

26. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 9–10 (2d ed. 1977).

27. Goodman, *supra* note 22, at 1067; *see also* R. BARRI FLOWERS, KIDS WHO COMMIT ADULT CRIMES: SERIOUS CRIMINALITY BY JUVENILE OFFENDERS 152 (Nathanial J. Pallone ed., 2002) (discussing differences between proceedings and philosophy in juvenile court and those in adult court).

28. Goodman, *supra* note 22, at 1067. Specifically, juveniles were not entitled to the procedural due process rights guaranteed by the Fifth and Fourteenth Amendments. *Id.*

to adults in criminal proceedings were "neither necessary nor helpful" to the juvenile process.[29]

B. Juvenile Adjudications Begin to Mirror Adult Criminal Proceedings

During the late 1960s and early 1970s, however, the U.S. Supreme Court decided several important cases requiring that juveniles be provided with procedural protections comparable to those that were required in adult criminal proceedings.[30] As the procedures of the juvenile justice system started to mirror those of the adult criminal system, the proceedings became more adversarial in nature, which inevitably led to a shift in the focus of the system as a whole.[31]

Neelum Arya, Policy Director for the Campaign for Youth Justice, notes that many scholars suggest that the Supreme Court victories that resulted in new constitutional protections for juveniles "actually helped create the political environment responsible for the punitive criminal justice policies of the 1970s and beyond."[32] Adjudications were no longer focused on the goals of educating juvenile offenders, reducing recidivism, and promoting positive societal values; instead, the focus shifted toward incapacitation, deterrence, and retribution.[33]

C. The Legislative Response to the Juvenile "Super-Predator"

Another factor that played a significant role in this policy shift occurred during the mid-1980s, when there was a *perceived*[34]

29. *Id.* at 1067 n.51 (citing Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 11 (2005)).

30. Goodman, *supra* note 22, at 1067. *See generally In re* Winship, 397 U.S. 358, 368 (1970) (holding that juveniles are entitled to the procedural safeguard of proof beyond a reasonable doubt during the adjudicatory stage of a delinquency proceeding); *In re* Gault, 387 U.S. 1, 35–41 (1967) (holding that the Fourteenth Amendment entitles juveniles to the same procedural protections as adults).

31. Goodman, *supra* note 22, at 1070.

32. Arya, *supra* note 2, at 101.

33. *Id.* at 125–28; Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 685–86 (1998).

34. *See* Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders Is Not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 277 (1997) (discussing the

increase in violent juvenile crime.[35] According to the Office of Juvenile Justice and Delinquency Prevention, "[e]xtensive media coverage of violent crimes . . . fueled perceptions that violence committed by juveniles . . . reached epidemic proportions and that no community [was] immune to random violent acts committed by young people."[36] As a result, "the climate in the United States . . . became one of fear and retribution when it came to juvenile crime."[37] In 1996, political scientists William J. Bennett, John J. DiIulio, Jr., and John P. Walters published *Body Count Moral Poverty . . . And How to Win America's War Against Crime and Drugs*, a widely read and extremely influential book that was premised on the idea that America's youth had become devoid of morality.[38]

> America is now home to thickening ranks of juvenile "super-predators"—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.[39]

Driven by the public's fears about these juvenile "super-predators," politicians passed legislation that "significantly altered the legal response to violent and other serious crimes."[40] Through such legislation, "[s]tates embraced harsher criminal justice policies for children just as they did for adults, without stopping to ascertain whether or not they would prove effective."[41] Underlying many of

"misguided perception" that violent juvenile crime is increasing, despite statistical evidence to the contrary).

35. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980–2008) (2009), *available at* http://www.ojjdp.gov/ojstatbb/dat.html (downloadable spreadsheet).

36. PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 1 (1996).

37. Fritz, *supra* note 21.

38. Liliana Segura, *Ugly Truth: Most U.S. Kids Sentenced to Die in Prison Are Black*, CENTRE FOR RESEARCH ON GLOBALIZATION (Nov. 11, 2009), http://www.globalresearch.ca/index.php?context=va&aid=16034.

39. WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996).

40. *See* TORBET ET AL., *supra* note 36, at xi.

41. HRW THE REST OF THEIR LIVES, *supra* note 22, at 15; *see, e.g.*, TORBET ET AL., *supra* note 36, at xi. Examples of the legislative response include, but are not limited to, the removal of more serious and violent juvenile offenders from juvenile courts to adult courts, the revision of

these legislative changes was the innate belief that "serious and violent juvenile offenders must be held accountable for their actions."[42] Whereas the traditional approach of the juvenile justice system emphasized the importance of offender-based dispositions, focusing on the individual needs of the offender as well as on his or her future welfare, the new offense-based approach had two main goals: punishment and incapacitation.[43]

D. "Adult Crime, Adult Time" Statutes and Legislative Proliferation of Transfer Laws

In direct response to the public's fear of juvenile "super-predators," legislatures across the country enacted "adult crime, adult time" statutes, which included provisions that facilitated the *automatic* transfer of juveniles from juvenile court to adult court.[44] Such statutes also resulted in harsher sentences, including life without parole for certain violent offenses.[45]

By 1997, nearly every state had altered its laws to facilitate the transfer of juvenile offenders into adult court.[46] Three mechanisms used to facilitate the adult trial and sentencing of juvenile offenders are the withdrawal of juvenile jurisdiction, the use of prosecutorial discretion to direct file, and the lowering of the age for adult court jurisdiction.[47] Originally, transfers were infrequent and only occurred when the transfer would serve the "best interests" of the juvenile.[48] Today, "all states and the federal government have the capacity to try

confidentiality provisions in favor of more open proceedings and records, and the inclusion of victims of juvenile crime as active participants in the juvenile justice process. TORBET ET AL., *supra* note 36, at xi.

42. TORBET ET AL., *supra* note 36, at xi.

43. *Id.* at 11.

44. David L. Hudson Jr., *Adult Time for Adult Crimes: Is Life Without Parole Unconstitutional for Juveniles?*, A.B.A. J., Nov. 2009, at 16, 16.

45. *Id.*

46. HRW THE REST OF THEIR LIVES, *supra* note 22, at 16–17.

47. *Id.* at 17. "Withdrawal legislation" is legislation that precludes a juvenile court from exercising jurisdiction over certain cases (e.g., a homicide committed by a fifteen-year-old). *Id.* Direct file legislation permits the prosecutor to file charges against child offenders in adult court rather than in juvenile court for certain offenses. *Id.* Legislation lowering the age for adult-court jurisdiction lowers the age at which juvenile offenders are subject to adult-court jurisdiction. *Id.*

48. *See* Arya, *supra* note 2, at 106–07 (describing the purpose of the American juvenile justice system and its changing nature).

certain youths as adults in criminal court."[49] In fact, each year an estimated 200,000 juveniles are "prosecuted, sentenced, or incarcerated as adults . . . instead of being adjudicated in the juvenile justice system."[50] This number represents a more than 80 percent increase over that in the past generation and exemplifies the routine nature of this practice.[51]

E. Transfer Laws and the Availability of Life Without Parole for Juveniles

A JLWOP sentence "becomes available once juveniles are transferred to the adult system."[52] Depending on applicable state law, this transfer can occur either mandatorily or discretionarily.[53] After a juvenile's case has been transferred to adult court, life without parole may be imposed either as a mandatory sentence for certain crimes (e.g., homicide) or as a result of judicial discretion.[54] As applied to juveniles, the imposition of life without parole "effectively reject[s] the well-established principle of criminal justice that children are less culpable than adults for crimes they commit."[55]

III. *ROPER V. SIMMONS*

Five years before the Supreme Court granted certiorari in *Graham v. Florida*,[56] the Court in *Roper* addressed the constitutionality of capital punishment as applied to juvenile offenders.[57] There, the Court held that the Eighth Amendment forbids the imposition of the death penalty on offenders who were under the age of eighteen at the time that they committed the offense.[58] In

49. HRW THE REST OF THEIR LIVES, *supra* note 22, at 17.

50. Arya, *supra* note 2, at 108.

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

52. THE SENTENCING PROJECT, *supra* note 16, at 1.

53. *Id.*

54. *Id.*

55. HRW THE REST OF THEIR LIVES, *supra* note 22, at 3.

56. 130 S. Ct. 2011 (2010).

57. Roper v. Simmons, 543 U.S. 551, 555–56 (2002).

58. *Id.* at 578; *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded because their diminished culpability makes them less culpable than competent individuals are for morally reprehensible and criminal behavior). *See generally* Natalie Pifer, Note, *Is Life the Same as Death?: Implications of* Graham

coming to this conclusion, the Court focused on adolescent brain development, relying heavily on "medical, psychological, and sociological studies, as well as common experience, which all showed that children under 18 are less culpable and more amenable to rehabilitation than adults who commit similar crimes."[59] Specifically, the Court focused on three significant differences between adults and juveniles that indicated that juvenile offenders, unlike their adult counterparts, should not be included among the worst criminals who deserve the death penalty.[60]

First, the Court noted that the "lack of maturity and an underdeveloped sense of responsibility" often found in juveniles tend to result in "impetuous and ill-considered actions and decisions."[61] Second, the Court acknowledged that "juveniles are more vulnerable or susceptible to negative influences and outside pressures."[62] Third, the Court pointed out that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[63]

As a result, the Court reasoned that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[64] Thus, the imposition of a final and irrevocable penalty on juvenile offenders, even those convicted of the most heinous crimes, is inappropriate in light of juveniles' lessened culpability and capacity to change.[65]

Following the Court's decision in *Roper*, life without parole sentences replaced executions for juvenile offenders. Given that both the death penalty and life without parole impose a "terminal,

v. Florida*,* Roper v. Simmons*, and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1501 (2010) (providing a thorough analysis of the relationship between criminal behavior and culpability).

59. Marsha Levick, *Kids Really Are Different: Looking Past* Graham v. Florida, CRIM. L. REP., July 14, 2010, at 1, 2. *See generally* Pifer, *supra* note 58, at 1501 (providing a thorough analysis of the relationship between criminal behavior and culpability).

60. *Roper*, 543 U.S. at 569–70.

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

62. *Id.*

63. *Id.* at 570.

64. *Id.*

65. *See id.* at 571 (explaining that penological justifications for the death penalty apply to children with lesser force than they do to adults in light of diminished culpability).

unchangeable, once-and-for-all judgment upon the whole life of a human being,"[66] the question became: if juveniles are less culpable and thus less deserving of death, do the same principles mitigate against life without parole?[67]

IV. *GRAHAM V. FLORIDA*: THE NATURAL EXTENSION OF *ROPER*

A. Terrance Graham

When Terrance Graham was sixteen years old, he and three other juvenile accomplices were arrested for attempted robbery of a restaurant that left the owner of the establishment injured.[68] Graham was charged as an adult with one count of armed burglary with assault or battery (a first-degree felony with a maximum sentence of life in prison without the possibility of parole in Florida) and another count of attempted armed robbery (a second-degree felony with a maximum sentence of fifteen years in prison).[69]

Graham pleaded guilty to both charges and made a declaration before the court that he was committed to turning his life around.[70] Under his plea agreement, he received time served and three years of probation.[71]

Less than six months later, Graham was again arrested, this time for his alleged role in a home-invasion robbery.[72] He was never convicted of that offense, but the court found that he had violated his probation.[73] At the sentencing hearing, the probation department recommended "at most four years imprisonment,"[74] Graham's attorney argued for five years (the statutory minimum for his

66. Brief for Petitioner at 5, Sullivan v. Florida, 130 S. Ct. 2059 (2010) (No. 08-7621).

67. Graham v. Florida, 130 S. Ct. 2011, 2021–23 (2010) (explaining how the Court has handled Eighth Amendment challenges to the death penalty and noting that the Court has never considered such a categorical challenge to a term of years sentence under the Eighth Amendment).

68. *Id.* at 2018.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2019.

74. *Id.*

probation violations), and the state pressed for thirty years.[75] The trial judge sentenced Graham to life without parole, and made the following remarks:

> 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*.[76]

Graham immediately filed an appeal that challenged the constitutionality of his sentence under the Eighth Amendment.[77] The First District Court of Appeal of Florida affirmed his sentence, noting that he "rejected his second chance and chose to continue committing crimes at an escalating pace,"[78] and that he was "incapable of rehabilitation."[79]

B. Graham v. Florida*: Kids Are Different?*

1. The Holding

Although the Florida Supreme Court denied review,[80] the U.S. Supreme Court granted certiorari to address the issue of whether the Constitution, specifically the Eighth Amendment, permits a juvenile offender to be sentenced to life without parole for a nonhomicide crime.[81] On May 17, 2010, the Court ruled in a 5–4 decision that a sentence of life without parole for a juvenile who was convicted of a nonhomicide offense does, in fact, violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.[82] In the central holding of the decision, Justice Kennedy declared:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual

75. *Id.*
76. *Id.* at 2020 (emphasis added).
77. *Id.*
78. *Id.* (quoting Graham v. Florida, 982 So. 2d 43, 52 (Fla. Dist. Ct. App. 2008)).
79. *Id.*
80. *Id.*
81. *Id.* at 2020–21.
82. Levick, *supra* note 59, at 664.

> release, but if it imposes a sentence of life it must provide him or her with *some realistic opportunity* to obtain release before the end of that term.[83]

2. The Analysis

Prior to beginning its analysis, the Court considered which approach to Eighth Amendment proportionality was more appropriate—the categorical approach of *Atkins* and *Roper* or *Harmelin v. Michigan*'s[84] "grossly disproportionate" standard.[85] Because a sentencing practice, rather than a particular defendant's sentence, was at issue, the Court adopted the categorical approach.[86] The Court reasoned that *Harmelin*'s "threshold comparison between the severity of the penalty and the gravity of the crime"[87] would do nothing to advance the Court's analysis, and thus, was not appropriate.[88]

Once the Court determined that *Harmelin*'s "threshold comparison" was inappropriate, it began its Eighth Amendment analysis by considering whether the punishment of life without parole for juveniles who are convicted of nonhomicide offenses was congruent with "the evolving standards of decency that mark the progress of a maturing society,"[89] the appropriate test for categorical cases.[90] In doing so, the Court used a two-prong analysis, looking first at evidence of a strong national consensus against the sentencing practice, and then using its own independent judgment.[91]

Under the first prong, the Court analyzed the "objective indicia of national consensus" as reflected in relevant state legislation and in the states' actual sentencing practices.[92] Although twenty-six states (and the District of Columbia and the federal government) had statutory authorization to impose life without parole for nonhomicide

83. *Graham*, 130 S. Ct. at 2034 (emphasis added).

84. 501 U.S. 957 (1991).

85. Graham, 130 S. Ct. at 2021–23 (citing Harmelin, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment)).

86. *Id.* at 2022–23.

87. *Id.* at 2023.

88. *Id.*

89. *Id.* at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

90. *Id.* at 2023.

91. Arya, *supra* note 2, at 113.

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

offenses, only eleven jurisdictions actually did so.[93] The Court concluded that this was indicative of a national consensus against the practice, despite the existence of legislation allowing for these sentences.[94]

Under the second prong of the test, the Court departed somewhat from traditional Eighth Amendment analysis and considered (1) the "culpability of the offenders at issue in light of their crimes and characteristics"; (2) the "severity of the punishment"; and (3) "whether the challenged sentencing practice serves legitimate penological goals."[95]

Relying heavily on *Roper*'s findings regarding the lessened culpability of juveniles,[96] the Court took a categorical approach to its evaluation of the severity of life without parole.[97] Rather than focusing on the nature of the offense (as it had previously done in Eighth Amendment challenges where the death penalty was not at issue),[98] the Court's analysis centered on the characteristics of the offender (specifically age)—the same approach that it used in both *Roper* and *Atkins* to invalidate the death penalty for an entire class of offenders.[99]

In evaluating the severity of the sentence, the Court recognized that life without parole shares certain characteristics with the death penalty that no other sentences share.[100] Specifically, life without parole "alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration."[101] The Court also pointed out that this sentence is "especially harsh" for juveniles because, inevitably, a juvenile sentenced to life without parole will spend more time behind bars than his or her adult counterpart will spend.[102]

93. *Id.* at 2024.
94. *See id.* at 2025.
95. *Id.* at 2026.
96. *See supra* Part III.
97. *Graham*, 130 S. Ct. at 2022.
98. *Id.*
99. *Id.*
100. *Id.* at 2027.
101. *Id.*
102. *Id.* at 2028.

In examining the penological justifications for a sentence of life without parole, the Court concluded that the diminished culpability of juveniles undermines the legitimacy of deterrence, incapacitation, and rehabilitation as justifiable goals for these sentences.[103] Specifically, with regard to incapacitation, the Court reasoned that "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable."[104] As it addressed in *Roper*, the Court has forbidden courts from making this sort of determination at the outset of a juvenile's sentence.

V. WHAT IS CLEAR AFTER *GRAHAM*

A. Juveniles Sentenced to Life Without Parole for Nonhomicide Crimes Must Be Given a "Meaningful Opportunity for Release"

In *Graham*, the Court explicitly held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[105] While a state is not required to guarantee the eventual release of the offender, the imposition of a life sentence on a juvenile triggers a constitutional requirement that the state "provide him or her with some realistic opportunity to obtain release before the end of that term."[106] In other words, the juvenile offender must be given "at least a shot at redemption."[107] Implicit in the "recognition of redemption as an Eighth Amendment constitutional principle" is the Court's rejection of the view that "a legislative determination that entire classes of individuals [are] irredeemable."[108] In the relevant portion of the *Graham* decision, Justice Kennedy warned:

> Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of

103. *Id.* at 2028–30.

104. *Id.* at 2029.

105. *Id.* at 2034.

106. *Id.*

107. Smith & Cohen, *supra* note 19, at 93.

108. *Id.* at 92.

> incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It *does* forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.[109]

As a direct result of this ruling, the 123 individuals who were serving life without parole for nonhomicide crimes before the Court issued its opinion[110] must, at a bare minimum, have been afforded a new sentence that allowed for a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[111]

B. It Is Within the Province of the States to Interpret "Meaningful Opportunity for Release"

1. *Harmelin v. Michigan*: State Legislatures Have Broad, but Not Limitless, Sentencing Discretion

Although the Court held that states are constitutionally required to give juvenile defendants who are charged with nonhomicide offenses "some meaningful opportunity to obtain release," the Court also declared that "[i]t is for the State . . . to explore the means and mechanisms for compliance."[112] While a state-by-state approach is fraught with inherent difficulties,[113] it is not likely that the Court will "establish some sort of a numerical ceiling on the length of sentences that could be given to juveniles convicted of nonhomicide crimes . . . . [Because] [t]his kind of analysis is not one that the Court engages in either routinely or eagerly."[114]

The Court has repeatedly emphasized that sentencing is "a legislative function entitled to great deference."[115] It unequivocally stressed this point in *Harmelin v. Michigan*, where the Court upheld a life without parole sentence for an offender who was convicted of

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

110. *Id.* at 2024.

111. THE SENTENCING PROJECT, *supra* note 16.

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

113. *See infra* Part VI.

114. Stephen St. Vincent, Comment, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9, 13–14 (2010), http://www.michiganlawreview.org/assets/fi/109/stvincent.pdf.

115. Hudson, *supra* note 44, at 17.

possession of a large quantity of cocaine.[116] In his concurring opinion, Justice Kennedy made two illustrative statements regarding the Court's approach to sentencing. First, he noted that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of the legislatures, not courts.'"[117] As such, "Reviewing courts should . . . grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[118] Second, Justice Kennedy pointed out that the nature of this legislative determination may result in varying conclusions "regarding the appropriate length of prison terms for particular crimes."[119] As a natural corollary, he reasoned that, as a result, "the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment . . . [unconstitutional]."[120]

This sentiment has been echoed by commentators, such as Kent S. Scheidegger, the legal director of the Criminal Justice Legal Foundation, who argues that sentencing-policy decisions (such as those at issue here) are "to be made by the people of the several states through the democratic process. Whether one agrees or disagrees with the decision, it is the people's to make."[121] While this idea may be rooted in Supreme Court precedent, it is equally important to recognize that legislative deference is not without limitation.

2. The Constitution Will Always Constrain Legislative Discretion

In *Graham*, the Court declared that "penological theory is not adequate to justify life without parole for juvenile nonhomicide

116. Harmelin v. Michigan, 501 U.S. 957, 1009 (1991).

117. *Id.* at 998 (Kennedy, J., concurring) (quoting Rummel v. Estelle 445 U.S. 263, 275–76 (1980)).

118. *Id.* at 999 (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)).

119. *Id.* at 1000.

120. *Id.* (citing Rummel v. Estelle, 445 U.S. 263, 281 (1980)).

121. Hudson, *supra* note 44, at 17. To put Mr. Scheidegger's comment in perspective, it is important to note that the Criminal Justice Legal Foundation is a group that supports crime victims and maintains that *Roper* should have never been extended. *Id.* This argument is based on the organization's fundamental belief that the Constitution does not give the federal judiciary the right to tamper with state sentencing laws. *Id.*

offenders."[122] In this respect, the Court explicitly determined that the penological justifications that legislatures relied on in enacting these sentencing statutes were improper and thus undeserving of such deference. In other words, "the people" got it wrong. While the Court gives them a certain amount of deference, neither the state legislatures nor the state courts may contravene the Constitution as the Court has interpreted it. And in *Graham*, the Court made it quite clear that juvenile offenders who are charged with nonhomicide offenses must—at a minimum—be given a "realistic"[123] and "meaningful"[124] opportunity to obtain release, even if they have been sentenced to life without parole.

VI. WHAT IS NOT CLEAR AFTER *GRAHAM*

A. Kids Are Different?

Many scholars contend that *Graham* has "completely altered the landscape of the Court's Eighth Amendment jurisprudence."[125] Until this decision, the prevailing approach was "death is different."[126] Historically, the Court has applied the Eight Amendment to the death penalty with "special force" because it is the "most severe punishment."[127] In this way, the Court has effectively isolated death penalty jurisprudence from the rest of criminal procedure.[128] Until *Graham*, the Court had been "reluctant to apply rules specially created to regulate the death penalty to noncapital [cases]."[129] By taking a categorical rule that was developed in the context of the death penalty and applying it to a life without parole sentence for a nonhomicide case, the Court has radically departed from precedent.[130]

122. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

123. *Id.* at 2034.

124. *Id.* at 2030.

125. *E.g.*, St. Vincent, *supra* note 114, at 9.

126. Arya, *supra* note 2, at 99.

127. Roper v. Simmons, 543 U.S. 551, 568 (2005) (citing Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring)).

128. St. Vincent, *supra* note 114, at 10.

129. Arya, *supra* note 2, at 120.

130. *Id.* at 112.

In banning life without parole sentences for juveniles who are convicted of nonhomicide offenses, the Court relied on the same developmental and scientific research that it used to invalidate the death penalty for juveniles in *Roper*.[131] Throughout the decision, the Court repeatedly emphasized the reduced culpability of juvenile offenders when they are compared to adult offenders.[132] By adopting this "developmentally driven"[133] approach to Eighth Amendment analysis, the Court has arguably transitioned from a policy that "death is different" to a policy that "kids are different."[134]

If that is indeed the case and "kids are different," then there is a strong argument for extending *Graham* to at least two additional populations: juveniles who are sentenced to "functional" life without parole and juveniles who are sentenced to life without parole for homicide offenses under felony-murder statutes and accomplice liability.

B. Who Is Entitled to a "Meaningful Opportunity for Release"?

1. Does Graham Apply to Term of Years Sentences That Are Materially Indistinguishable from Life Without Parole?

In *Graham*, the Court framed the issue as "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime."[135] By expressly limiting the scope of the holding to life without parole, the Court created the opportunity for states to circumvent the decision by assigning a lengthy term of years sentence, which is the practical equivalent of life without parole.[136]

Justice Alito acknowledged this limitation in his dissent in *Graham*.[137] He pointed out that although the Eighth Amendment prevents a juvenile offender who is convicted of a nonhomicide

131. Levick, *supra* note 59, at 1–2.

132. *Roper*, 543 U.S. at 553, 567, 571.

133. *Id.* at 2.

134. St. Vincent, *supra* note 114, at 9–10.

135. Graham v. Florida, 130 S. Ct. 2011, 2017–18 (2010).

136. St. Vincent, *supra* note 114, at 13–14.

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

offense from facing a sentence of life without parole, "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."[138]

Thus, it may be possible for a state to conform to the letter of the law while it simultaneously violates the spirit of the decision. If, for instance, a state court imposed a hundred-year sentence on a juvenile for a particularly heinous nonhomicide offense, it seems evident that this sentence is, for all intents and purposes, the functional equivalent of life without parole. Nonetheless, Justice Kennedy's precise language, which expressly limits the holding to life without parole, has allowed for the argument that imposing a hundred-year sentence does not technically violate *Graham* because the Court's holding is only triggered by the imposition of life without parole.[139]

In the year following *Graham*, there was a significant split in the application of the Court's central holding. This tension was best illustrated by *People v. Caballero*,[140] *People v. Mendez*,[141] and *People v. Nunez*,[142] three California Court of Appeal cases that addressed whether *Graham* applies where a juvenile receives an extreme term of years sentence rather than life without parole.[143] Although the courts agreed that *Graham* was not controlling,[144] they ultimately arrived at different conclusions regarding the constitutionality of the extreme term of years sentences at issue.

a. People v. Caballero

On January 18, 2011, the Court of Appeal for the State of California, Second Appellate District, Division Four, affirmed a 110-year sentence for sixteen-year-old defendant Rodrigo Caballero.[145] Relying on *Graham*, Caballero argued that his sentence of three consecutive life terms was unconstitutional because it denied him

138. *Id.*

139. *Id.* at 2034 (majority opinion).

140. 119 Cal. Rptr. 3d 920 (Ct. App. 2010).

141. 114 Cal. Rptr. 3d 870 (Ct. App. 2010).

142. 125 Cal. Rptr. 3d. 616 (Ct. App. 2011).

143. *Mendez*, 114 Cal. Rptr. 3d at 881–86; *Caballero*, 119 Cal. Rptr. 3d at 924–26.

144. *Mendez*, 114 Cal. Rptr. 3d at 882; *Caballero*, 119 Cal. Rptr. 3d at 925–26.

145. *Caballero*, 119 Cal. Rptr. 3d at 920–21. Caballero was convicted of "three counts of willful, deliberate, and premeditated attempted murder, with findings that he personally and intentionally discharged a firearm, inflicted great bodily injury on one victim, and committed crimes for the benefit of a criminal street gang." *Id.* at 920.

any "meaningful" chance for release and foreclosed any opportunity for him to work toward good conduct and to obtain work credits to mitigate his sentence.[146]

The court rejected this argument, concluding that *Graham* was not controlling because the holding was expressly limited to "juvenile offenders sentenced to life without parole solely for nonhomicide offenses."[147] The court reasoned that the "defendant's sentence was a term of years (110) to life, not life without the possibility of parole, and no language in *Graham* suggests that the case applies to such a sentence."[148] Furthermore, the court determined that *if* the Supreme Court had intended to broaden the class of offenders within the scope of its decision, it would have stated that *Graham* also concerned juvenile offenders who receive the functional equivalent of a life sentence without parole for a nonhomicide offense.[149]

b. People v. Mendez

On the opposite end of the spectrum was the Court of Appeal for the State of California, Second Appellate District, Division Two. On September 1, 2010, the court held that the eighty-four-year sentence that sixteen-year-old defendant Victor Mendez received "constitute[d] cruel and unusual punishment"[150] because it "amount[ed] to a de facto sentence of life without parole."[151] As such, the sentence was unconstitutional under the federal and state constitutions, per *Graham*.[152]

Mendez argued that *Graham* applied because under his current sentence, he would not be eligible for parole until well past his life expectancy.[153] Thus, his sentence amounted to a virtual, or de facto,

146. *Id.* at 925.

147. *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2033 (2010)).

148. *Id.*

149. *Id.*

150. People v. Mendez, 114 Cal. Rptr. 3d 870, 873 (Ct. App. 2010). Sixteen-year-old Victor Mendez received an eighty-four-year sentence after being convicted of one count of carjacking, one count of assault with a firearm, and seven counts of second degree robbery, including enhancements on each count. *Id.*

151. *Id.* at 881.

152. *Id.* at 873.

153. *Id.* at 881.

life without parole sentence.[154] Although the court recognized that Mendez's sentence was "materially indistinguishable" from life without parole, it did not agree that his sentence should be reversed pursuant to *Graham*.[155] Citing the precise language that the *Caballero* court used to uphold the defendant's 110-year sentence, the *Mendez* court stressed that "*Graham* expressly limited its holding to . . . 'juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'"[156] Thus, because Mendez's sentence was not "technically" a life without parole sentence, the holding in *Graham* did not control.

Despite this technicality, the court determined that the principles that *Graham* set forth *should* be applied to Mendez.[157] The court pointed out that *Graham* required that a state give a juvenile "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[158] While the Supreme Court did not provide an explicit definition of "meaningful opportunity," the *Mendez* court reasoned that "common sense dictates that a juvenile who is sentenced at the age of 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court also put it, 'realistic,' opportunity of release."[159] For Mendez, the imposition of an eighty-four-year sentence would guarantee his eventual death in prison—an outcome that is prohibited under the spirit of *Graham*.

c. People v. Nunez

In *People v. Nunez,* the Court of Appeal for the State of California, Fourth Appellate District, Division Three, espoused a similar sentiment.[160] There, following writ relief that invalidated the defendant's life without parole sentence for his role in an aggravated kidnapping, the trial court imposed a sentence that required the defendant to serve 175 years before he qualified for a parole

154. *Id.* at 882.

155. *Id.*

156. *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2023 (2010)).

157. *Id.* at 883.

158. *Id.* (citing *Graham*, 130 S. Ct. at 2030).

159. *Id.* (citing *Graham*, 130 S. Ct. at 2034).

160. 125 Cal. Rptr. 3d. 616 (Ct. App. 2011).

hearing.[161] The court concluded that this sentence constituted cruel and unusual punishment under the Eighth Amendment as the Court interpreted in *Graham*:

> A term of years effectively denying any possibility of parole is no less severe than [a life without parole] term. Removing the [life without parole] designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an [life without parole] sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.[162]

The *Nunez* court expressed explicit agreement with the reasoning in *Mendez*[163] and rejected the formalistic approach that was taken by *Caballero*[164] and its progeny. Whether the *Mendez* or *Caballero* approach shall prevail will soon be determined by the California Supreme Court, which granted review in *Caballero* on April 13, 2011.[165]

2. Does *Graham* Apply to Juveniles "Who Did Not Kill or Intend to Kill" but Have Been Convicted of Homicide Under Felony-Murder Statutes or Accomplice Liability?

a. Felony murder and accomplice liability

Felony murder "is a legal fiction that transfers intent to commit the underlying felony to the homicide that occurs in the course of that felony."[166] If charged under a felony-murder statute, an individual can be convicted of first-degree murder without any proof of premeditation, deliberateness, or willfulness because "those elements are presumed to exist if the state proves participation in the

161. *Id.* at 617.

162. *Id.* at 624.

163. *Id.* at 625.

164. *Id.* at 618 n.1.

165. People v. Caballero, 250 P.3d 179 (Cal. 2011).

166. Levick, *supra* note 59, at 3.

underlying felony."[167] Under section 190.2(d) of the California Penal Code, for example, a person who is not the actual killer but who acts "with reckless indifference to human life and as a major participant, aids abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony" that results in the death of someone "shall be punished by death or imprisonment in the state prison for life without the possibility of parole."[168] Thus, it is irrelevant that the individual did not physically commit the murder.[169] Moreover, the statute does not even require that the individual had prior knowledge that a homicide was intended.[170]

Like felony murder, accomplice liability is a theory of criminal liability.[171] Because there is no legal distinction between being convicted as a principal or as an accomplice under American criminal law, the accomplice faces the exact same punishment as does the principal.[172] In other words, while there may be a large variation in culpability between participants, the substantive law regarding accomplice liability does not attempt to account for this difference.[173] For this reason, it is entirely possible that an individual who acts as a lookout, driver, or provider of supplies (e.g. a weapon) will face the same penalty that the principal actor faces.[174]

b. The relevance and applicability of Graham

An overwhelming number of convictions that result in life without parole are predicated on either theory of criminal liability, or on both. According to a survey that Human Rights Watch and Amnesty International conducted, as many as 45 percent of respondents reported that they did not physically commit the murder

167. 40 AM. JUR. 2D *Homicide* § 65 (2010). "Accomplice liability may also be termed complicity, vicarious liability, or aider and abettor liability." SAMUEL H. PILLSBURY, HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE 305 (2009).

168. CAL. PENAL CODE § 190.2(d) (West 2008).

169. HUMAN RIGHTS WATCH & AMNESTY INT'L, "WHEN I DIE THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 22 (2008) [hereinafter HRW WHEN I DIE THEY'LL SEND ME HOME].

170. Levick, *supra* note 59, at 3.

171. 21 AM. JUR. 2D *Criminal Law* § 162 (2010). In California, the applicable statute is section 190.2(c) of the California Penal Code.

172. PILLSBURY, *supra* note 167, at 306.

173. *Id.* at 311.

174. *Id.* at 306, 311.

for which they are serving life without parole.[175] In addition, it is estimated that between one-fourth and one-third of all juveniles who are currently serving life without parole in the United States were sentenced under felony-murder statutes for homicides that did not involve premeditation.[176]

In *Graham*, the Court acknowledged that, compared to an adult murderer, a juvenile offender "who *did not kill or intend to kill* has a twice diminished moral culpability."[177] As such, it would seem that life without parole, the most severe punishment permitted by law for any juvenile offense after the Court's decision in *Roper*,[178] should be reserved for the "worst of the worst." If defendants who are convicted under felony-murder and accomplice-liability theories lack a clear manifestation of an intent to kill, there now may be an argument against the constitutionality of life without parole as applied to them—at least on a case-by-case basis where the "limited role and reduced blameworthiness of a particular juvenile . . . support[s] the invalidation"[179] of the sentence at issue.

Despite the viability of this argument, lower courts have been reluctant to extend *Graham* to life without parole for homicide offenses, regardless of whether the conviction resulted from prosecution under a felony-murder statute or an accomplice-liability theory.[180] Nonetheless, the issue has been vigorously debated. For instance, in *Jackson v. Norris*, the Arkansas Supreme Court was divided on whether the petitioner should be granted habeas relief under *Graham* for his involvement as an accomplice in an aggravated robbery that resulted in the death of the victim.[181] The dissent contended that *Graham* required the court to grant relief to the petitioner because his conviction "was only obtained by proving that he was an accomplice, and his accomplice took someone's life in

175. HRW WHEN I DIE THEY'LL SEND ME HOME, *supra* note 169, at 21.

176. Levick, *supra* note 59, at 3.

177. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (emphasis added).

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

179. Levick, *supra* note 59, at 3.

180. *See, e.g.*, People v. Hernandez, No. B218507, 2010 Cal. App. Unpub. LEXIS 5603 (Ct. App. July 16, 2010); People v. Khalifa, No. G040331, 2010 Cal. App. Unpub. LEXIS 2512 (Ct. App. Apr. 7, 2010).

181. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011). Jackson was sentenced to life without parole after being convicted of capital murder and aggravated robbery under Arkansas's felony-murder statute. *Id.* at *1.

the course of a felony, the aggravated robbery."[182] In addition, the dissent noted the factual similarities between this case and *Graham*—the only significant difference being that "the victim in *Graham* did not die from [the] accomplice's physical attack."[183] Echoing Justice Kennedy's language, the dissent concluded that because the petitioner *did not kill or intend to kill* the victim, *Graham* was controlling.[184]

VII. THE PAROLE BOARD: THE STATES' MECHANISM FOR COMPLIANCE WITH *GRAHAM*

A state's parole board is an executive branch agency that decides, on a case-by-case basis, whether prisoners are ready to be released back into the community.[185] The decision to release an offender from prison may be either discretionary or mandatory.[186] If release is mandatory, the prisoner must be released at the expiration of a certain time period.[187] Where release is discretionary, however, the decision falls within the judgment of the parole board.[188] While *Graham* creates the opportunity for parole, it does not guarantee eventual freedom.[189] As a result, state parole boards will ultimately decide whether individuals have demonstrated sufficient maturity and rehabilitation to warrant release back into the community.

A. Compliance in States That Have Abolished Parole

The American Probation and Parole Association reports that at least sixteen states have either abolished parole entirely or have had the power of the state parole board greatly diminished.[190] The state

182. *Id.* at *10 (Danielson, J., dissenting).

183. *Id.* at *9. The dissent took this observation one step further, noting that "Jackson's involvement in the robbery was no more, if not less than, Graham's involvement had been." *Id.* at *10.

184. *Id.*

185. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST. JUSTICE POLICY CTR., BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 2 (2002).

186. 59 AM. JUR. 2D *Pardon and Parole* § 105 (2002).

187. TODD REIMERS, SENATE RESEARCH CTR., PAROLE: THEN & NOW 2 (1999).

188. *Id.*

189. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

190. *Probation and Parole FAQs*, AM. PROB. & PAROLE ASS'N, http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VB_FAQ (last visited Sept. 24, 2011).

parole boards that have had their power greatly diminished only have discretion over a small or diminishing parole-eligible population. Much of this reform was prompted by a "get tough on crime"[191] campaign that was launched by constituents and legislative representatives who felt that overall sentencing and release laws were too "soft" on criminals.[192]

Florida, for example, abolished parole in 1983 after the early release of several high-profile criminals sparked public outrage.[193] As a result of this legislative change, Florida's Parole Commission only reviews cases that predate 1983.[194]

Given *Graham*'s requirement that the states provide a meaningful opportunity for release to all juveniles serving life without parole for nonhomicide crimes, states such as Florida have found themselves in a difficult situation. Not only are they categorically barred from imposing JLWOP unless they reestablish parole for this particular group of offenders[195] but they also need to establish an efficient solution for resentencing individuals who are currently serving these sentences.

In Florida alone, there are seventy-seven individuals who must be resentenced under *Graham*'s ruling.[196] Until legislation eliminates the need for resentencing hearings, "the onus falls on trial judges to resentence individual defendants."[197] This solution is fraught with

191. REIMERS, *supra* note 187, at 1.

192. *Id. at* 3.

193. David Ovalle, *Ruling on Young, Violent Lifers Puts Florida Justice on the Spot*, THE MIAMI HERALD (Sept. 26, 2010) (on file with *Loyola of Los Angeles Law Review*).

194. *Id.*

195. Nina Totenberg, *Court Rejects Life Without Parole for Some Juveniles*, NPR (May 17, 2010), http://www.npr.org/templates/story/story.php?storyId=126894305.

196. THE SENTENCING PROJECT, TESTIMONY OF ASHLEY NELLIS, PH.D. RESEARCH ANALYST 4 n.3 (2010) [hereinafter THE SENTENCING PROJECT, TESTIMONY OF ASHLEY NELLIS], *available at* http://sentencingproject.org/doc/publications/jj_ANjlwopPATestimony.pdf.

197. Ovalle, *supra* note 193. To date, Florida has failed to pass legislation bringing its current sentencing practices into compliance with *Graham*. In late 2010, Florida legislators proposed the "Graham Compliance Act," which provided that a juvenile offender who was under age eighteen at the time that he or she committed a nonhomicide offense and who was sentenced to life imprisonment would be eligible for parole only after serving a minimum of twenty-five years of incarceration. H.B. 29, 2011 Leg., Reg. Sess. (Fla. 2010); S.B. 160, 2011 Leg., Reg. Sess. (Fla. 2010); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 38–39 (2011). The bill also required an eligibility interview to determine whether the juvenile offender demonstrated the reform and maturity that were required for parole. Fla. H.B. 29; Fla. S.B. 160. As of May 7, 2011, any further action on this bill was indefinitely postponed and withdrawn from

difficulties and carries with it the significant risk that juveniles across the country will face widely disparate sentences for identical crimes.

B. Compliance in States with Indeterminate Sentencing and Parole Boards

In states that have indeterminate sentencing and functioning parole boards, the *Graham* ruling simply requires that state legislatures amend sentencing statutes to include the possibility of parole for individuals who are serving life without parole for nonhomicide offenses.[198] Following *Graham*, state legislatures in Iowa,[199] California,[200] and Pennsylvania[201] have introduced (or reintroduced) legislation that would bring their states' sentencing practices into compliance with the decision. In California[202] and Pennsylvania,[203] the proposed legislation goes one step further, affording a meaningful opportunity for release to all juveniles who are sentenced to life without parole, regardless of whether they were convicted of a homicide or nonhomicide offense.

1. Iowa

In January 2011, Iowa State Senators Wally Horn, Pam Jochum, and Bill Dix introduced Senate Study Bill 1058,[204] which would establish a parole procedure for individuals who are convicted of nonhomicide class "A" felonies that they committed while they were under age eighteen.[205] Under the bill, these individuals would be

consideration in both the state house and senate. *H.B. 29: Parole for Juvenile Offenders*, FLA. HOUSE OF REPRESENTATIVES, http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44803&SessionIndex=-1&SessionId=66&BillText=&BillNumber=&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=0 (last visited July 22, 2011); *see S.B. 160: Parole for Juvenile Offenders*, FLA. SENATE, http://www.flsenate.gov/Session/Bill/2011/160 (last visited July 22, 2011).

198. *See* Green, *supra* note 197, at 17.

199. S.B. 1058, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

200. S.B. 9, 2011–12 Leg., Reg. Sess. (Cal. 2011).

201. H.B. 1999, 2009–10 Leg., Reg. Sess. (Pa. 2011).

202. Cal. S.B. 9.

203. Pa. H.B. 1999.

204. Lynda Waddington, *Bill Changes Iowa's Sentencing Laws for Some Juvenile Felons*, IOWA INDEP. (Jan. 26, 2011, 1:00 PM), http://iowaindependent.com/51404/bill-changes-iowas-sentencing-laws-for-some-juvenile-felons.

205. S.B. 1058, 84th Gen. Assemb., Reg. Sess. (Iowa 2011).

eligible for parole after they serve a minimum term of twenty-five years.[206] If it is enacted, this bill would grant six of the individuals in the nation who are directly impacted by *Graham*'s express holding (i.e., those serving life without parole for nonhomicide offenses) the opportunity to present their case to the parole board.[207]

2. California

In December 2010, California State Senator Leland Y. Yee introduced Senate Bill 9, commonly known as SB9.[208] If it is enacted, the bill would allow individuals who were under eighteen at the time of the offense for which they were sentenced to life without parole to submit a petition for resentencing after they serve between ten and twenty-five years.[209] The bill requires that juvenile offenders prove to both a judge and a parole board that they are worthy of parole consideration.[210] This bill would extend far beyond the four individuals who were sentenced to life without parole for nonhomicide offenses in California, reaching approximately 227 of the people who were sentenced to life without the possibility of parole.[211]

3. Pennsylvania

In Pennsylvania, State Representative Kenyatta J. Johnson introduced House Bill 1999.[212] If it is enacted, this bill would abolish life without parole sentences for juveniles and allow all individuals who are serving life sentences for crimes that they committed when they were under age eighteen the opportunity to go before a parole

206. *Id.*

207. THE SENTENCING PROJECT, TESTIMONY OF ASHLEY NELLIS, *supra* note 196, at 4 n.3.

208. *Senate Bill 9-California Fair Sentencing for Youth*, FAIR SENTENCING FOR YOUTH, http://www.fairsentencingforyouth.org/legislation/senate-bill-9-california-fair-sentencing-for-youth/ (last visited Feb. 26, 2011).

209. S.B. 9, 2011-12 Leg., Reg. Sess. (Cal. 2011); *Senate Bill 9-California Fair Sentencing for Youth*, *supra* note 208.

210. Priya Sanger, *RE: Support for SB9-The Fair Sentencing for Youth Act*, THE BAR ASS'N OF S.F., http://www.sfbar.org/newsroom/20110218.aspx (last visited Feb. 26, 2011).

211. THE SENTENCING PROJECT, TESTIMONY OF ASHLEY NELLIS, *supra* note 196, at 4 n.3; *see* HRW WHEN I DIE THEY'LL SEND ME HOME, *supra* note 169, at 2.

212. Chris Togneri, *Legislators Hear Both Sides of Juvenile-Lifer Question*, PITTSBURGH TRIBUNE-REVIEW (Aug. 5, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/breaking/s_693427.html.

board at age thirty-one and then every three years thereafter.[213] This bill was first introduced on September 22, 2009,[214] but Pennsylvania's House Judiciary Committee did not hold its first hearing on the bill until August 4, 2010—after the Court decided *Graham*[215] Although Pennsylvania does not currently have any individuals who are serving life without parole for nonhomicide offenses,[216] this far-reaching bill would provide approximately 450 juveniles who are currently serving life without parole the chance to have their case reviewed by a parole board.[217]

C. Practical Problems Remain: Ensuring "Meaningful" Parole Review

While each of these legislative proposals offers individuals who are sentenced to JLWOP the opportunity for parole, practical problems remain that may frustrate their ability to obtain meaningful parole review. Incorporated into each bill is the notion that any "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"[218] will rely on the determination of a state's parole board. From the outset, critics have questioned how meaningful the right to a parole hearing actually is, given that in many states, "parole hearings have become a sort of charade in which the prisoner can never actually win release, because the parole board routinely denies parole eligibility based solely upon the facts of the underlying crime, which is the one thing that the prisoner . . . can never change."[219]

In California, for example, suitability for parole release is evaluated by the parole board based on the board's determination of

213. H.B. 1999, 2009-10 Leg., Reg. Sess. (Pa. 2011).

214. *Id.*

215. Dana DiFilippo, *State House Committee Hears Debate over Life Without Parole for Juveniles*, PHILA. DAILY NEWS at 7 (Aug. 5, 2010), http://articles.philly.com/2010-08-05/news/24971361_1_juvenile-offenders-adult-system-juvenile-law-center.

216. THE SENTENCING PROJECT, TESTIMONY OF ASHLEY NELLIS, *supra* note 196, at 4.

217. *Id.* at 2.

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

219. Jean Casella & James Ridgeway, *Supreme Court Decision Limits Juvenile Life Without Parole (Within Limits)*, SOLITARY WATCH (May 17, 2010), http://solitarywatch.com/2010/05/17/supreme-court-limits-juvenile-life-without-parole-but-the-limits-have-their-limits/ (citing commentary by Sara Mayeux on Prison Law Blog, following the *Graham* decision).

the "threat to public safety" posed by the offender.[220] As contemplated above, one of the factors that is used to evaluate this threat is "whether the commitment offense was heinous, atrocious, or cruel."[221] In practice, this "catchall" factor ensures that almost no one who is serving a sentence for a serious and violent offense is released.[222] Each year, only 1 percent of parole-eligible prisoners are released from California prisons.[223] Because a vast majority of the states "still impose sentences terminating in discretionary parole release"[224] and also "retain[ ] some form of discretionary parole release,"[225] the practice of routinely denying parole release is not an isolated phenomenon. In fact, statistics establish that "nationwide, discretionary parole release has decreased as a percentage of released prisoners" in recent years.[226]

The illusory existence of "meaningful" parole release, as exemplified by the current situation in California, raises the issue of what should be done when a state technically allows for parole but structures the parole system in a way that makes the opportunity for release virtually unattainable. Like a term of years sentence that operates as a functional equivalent to a life without parole sentence, the creation of a parole structure that provides for no "realistic" or "meaningful" opportunity for release, as *Graham* requires, would directly contravene the Supreme Court's interpretation of the Eighth Amendment.[227]

VIII. CONCLUSION

Graham marks a significant departure from the Supreme Court's Eighth Amendment jurisprudence by categorically barring life

220. W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 902 (2009).

221. *Id.*

222. *Id.* at 903. A recent California case reviewing 2,700 parole denials found that in each and every one, the parole board deemed the commitment offense to be heinous, atrocious, and cruel, using these criteria to deny parole across the board. *Id.*

223. Sasha Abramsky, *Barred for Life*, SF WEEKLY (Aug. 15, 2007), http://www.sfweekly.com/2007-08-15/news/barred-for-life/full.

224. Ball, *supra* note 220, at 900. For instance, New York is currently facing a lawsuit brought by parole-eligible prisoners who contend that the state's parole board has an "unwritten policy of rejecting parole." *Id.* at 901.

225. *Id.*

226. *Id.* at 901.

227. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

sentences for youths who are convicted of nonhomicide crimes based on the unique amenability of juveniles to rehabilitation, rather than on the nature of the punishment itself. Despite any remaining uncertainty regarding to whom the decision applies and what should be done to overcome practical problems inhibiting state compliance, *Graham* is a game-changing victory for juveniles and juvenile-rights advocates alike. It would be a mistake to assume that *Graham* is inapplicable to a larger juvenile population given that *all* juveniles, even those who are convicted of the worst offenses, are cognitively, behaviorally, and emotionally different from adults in ways that make them less culpable.

The United States has approximately 2,570 individuals serving life without parole for crimes that they committed when they were under the age of eighteen.[228] Although only a very small percentage of those individuals will directly benefit from *Graham*'s holding,[229] the Court's *reasoning* can and should be used to challenge life without parole for the other 95 percent of juveniles serving life without parole.[230] Advocates for juveniles need to seize on *Graham*'s transformative potential and push for additional reform that, until recently had no solid foundation in Supreme Court precedent.

228. HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 1 (2012), *available at* http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

229. THE SENTENCING PROJECT, *supra* note 16, at 1.

230. This percentage was arrived at by taking the overall number of individuals who are currently serving life without parole for crimes committed when they were under the age of eighteen (approximately 2,570), *see supra* note 228 and accompanying text, and subtracting the number of individuals who were serving life without parole for non-homicide crimes that they committed when they were under the age of eighteen when *Graham* was decided (123), *see supra* note 110 and accompanying text. The resulting figure is 2,447, which is 95 percent of 2,570.