NOTES & COMMENTS

BURIED ALIVE: THE CONSTITUTIONAL QUESTION OF LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS CONVICTED OF HOMICIDE

by
Aryn Seiler[*]

In a string of recent cases, the Supreme Court has recognized the legal effect of juvenile defendants' diminished culpability. This has led to a shift towards a jurisprudence that protects juvenile offenders from the most severe penalties. This Note argues that, since Graham v. Florida, *juvenile life without parole is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, regardless of the offense. It first traces the development of contemporary juvenile justice, looking to the first system in New York and to early Supreme Court decisions regarding procedural due process rights for juvenile defendants. Next, the Note looks to the distinction that Eighth Amendment case law has made between capital and noncapital offenses and the abandonment of this distinction in* Graham. *It analyzes the two mandates from* Graham *and argues that the first mandate, that the court must consider youth as a mitigating factor in handing down a sentence, applies beyond sentencing considerations. The second mandate requires lower courts to guarantee the possibility of release of juvenile defendants, regardless of the severity of the offense or sentence. In the final Part, this Note applies the logic of* Graham *to* State v. Ninham, *a recent Wisconsin Supreme Court case. The author finds that juvenile life without parole is a violation of the Eighth Amendment's bar on cruel and unusual punishment in all circumstances, and this conclusion must inevitably disturb the current sentencing structure of the entire criminal justice system.*

[*] J.D. candidate, Lewis & Clark Law School, 2014. I would like to thank Professor Elaine Sutherland for her guidance and mentorship in the writing of this Note.

INTRODUCTION

The young have strong passions, and tend to gratify them indiscriminately. . . . They are changeable and fickle in their desires, which are violent while they last, but quickly over. Their impulses are keen but not deeply rooted. They are hot tempered, and apt to give way to their anger; bad temper often gets the better of them, and for owning to their love of honor they cannot bear being slighted. . . . While they love honor, they love victory still more, for youth is eager for superiority over others. . . . They are sanguine; nature warms their blood as though with excess of wine. Their lives are mainly spent

not in memory but in expectation. Their hot tempers and hopeful dispositions make them more courageous than older men are; their lives are ruled more by their character than by reasoning. . . . All their mistakes are in the direction of doing things excessively and vehemently. . . . They love too much and they hate too much, and the same with everything else. They think they know everything, and are always quite sure about it; this is, in fact, why they overdo everything. . . . They are fond of fun and therefore witty, wit being well-bred insolence. Such then is the character of the young.

—Aristotle, Rhetoric[1]

The best test of the strength of a legal principle is its ability to withstand the most arduous weight under the most adverse circumstances. In the case of Omer Ninham, the reprehensible acts of a 14-year-old boy bear down relentlessly like an immeasurable pressure on the Eighth Amendment, straining it to its limits. On September 24, 1998, when Omer Ninham was 14 years old, he, along with four other juvenile accomplices of about the same age, encountered 13-year-old Zong Vang, who was on his way to the grocery store to run an errand for his brother. One of Ninham's accomplices, 13-year-old Richard Crapeau, wanted to instigate a fight. The boys targeted Vang, verbally taunting him until the momentum of the encounter escalated into a physical attack. "Ninham punched Vang, knocking him down."[2] Vang got to his feet and ran from the four, who pursued him. Upon reaching Vang, Crapeau punched him in the face, even as Vang repeatedly begged to know why they were doing this to him, pleading with them to stop. The boys continued to punch and push Vang until they grabbed him and held him over the wall of a parking structure. Vang was suspended over the 45-foot drop when Crapeau released his hold on Vang's feet and told Ninham to "[d]rop him."[3] "Ninham let go of Vang's wrists, and in Crapeau's words, Vang 'just sailed out over the wall.'"[4] Vang died due to the "craniocerebral trauma" from the fall.[5] The four ran from the scene.[6]

This Note starts from the premise that since *Graham v. Florida*,[7] juvenile life without parole (JLWOP) is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment (CUP), regardless of offense. Even in the most heinous, atrocious, and cruel cases the imposition of life without parole (LWOP) for a juvenile offender is a violation of the Constitution. The basis of this principle rests primarily on the *de facto* and *de jure* diminished culpability of juveniles as deter-

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[1] ARISTOTLE, THE "ART" OF RHETORIC bk. II, ch. 12, ll. 3–16 (John Henry Freese ed. & trans., Harvard Univ. Press 1926) (author's translation).

[2] State v. Ninham, 797 N.W.2d 451, 457 (Wis. 2011), *cert. denied*, 133 S. Ct. 59 (2012).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 458.

[6] *Id.*

[7] 130 S. Ct. 2011 (2010).

mined by the rational legal mechanism of the courts, as well as the arational ethical mechanism of contemporary society. Though the Supreme Court has been progressing along this trajectory for quite some time, only a year ago it made a remarkably bold move to reify the Eighth Amendment's protective mandate to shield all juvenile offenders from the most severe penalties. The objective of this Note is to analyze the groundwork of precedents leading to that moment, the remarkable moment itself contained in *Graham*'s reasoning, and the implications for juveniles currently serving LWOP for homicide convictions, including the very recent 2012 Supreme Court case of *Miller* and *Jackson*[8] where the court diverged dramatically from its analysis in *Graham* without overruling it. The critical aim is to demonstrate that the Court's definitive direction is toward a new humanity that sees juvenile offenders as human beings with potential, subject to rehabilitation, and deserving of periodic review.

To begin, this Note will examine the historical background that lays the basis for contemporary juvenile justice, commencing with the first efforts of juvenile justice reform in New York, which drew a distinction between adult and juvenile offenders and led to the development of the first juvenile courts also concerned with the special needs that juvenile offenders present. This section will also discuss the early key Supreme Court decisions that carved out procedural due process rights for juveniles and opened the door for the question of substantive rights.

Subsequently, this Note will explore the terrain of the two lines of Eighth Amendment jurisprudence that have traditionally divided noncapital and capital cases into two distinct and absolute analytical domains. This analysis is indispensable to the larger project of this Note because the Court has always reserved capital-case review for challenges to impositions of the death penalty. That is until *Graham*, in which the Court not only used the test once reserved for death penalty challenges in a noncapital case, but it clearly articulated why it was important to apply capital-case jurisprudence to a noncapital case.[9]

Third, and the pivot of this Note, will be an exegetical foray into the Supreme Court decision that changed the momentum of juvenile justice and made the challenge to LWOP in cases of homicide possible. *Graham* clearly articulates two mandates for the lower courts. First, the courts must observe and inculcate the diminished culpability of juvenile offenders in sentencing.[10] This Note argues that the Court's first mandate radiates beyond sentencing and stipulates that youth is more than a mitigating factor. It is a concurrent state of being that bears upon the entirety of the case. Second, the lower courts must guarantee a possibility of release even when the offense is appalling and the sentence severe.[11]

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[8] Miller v. Alabama, 132 S. Ct. 2455 (2012) (consolidated cases).

[9] *See Graham*, 130 S. Ct. at 2022–23.

[10] *Id.* at 2026.

[11] *Id.* at 2030.

Finally, the logic of *Graham* will be applied to *State v. Ninham*, the recent Wisconsin Supreme Court case laid out in the introduction, which tests the strength not only of the Eighth Amendment in asking whether the imposition of JLWOP in cases of homicide presents a constitutional failure, but also tests the strength of the penological foundation upon which such a sentencing structure is built. This Note will bear that answer in the affirmative and show that juvenile life without parole is a violation of the Eighth Amendment's bar on cruel and unusual punishment. Moreover, this Note suggests that the prospect of that answer rattles the entire criminal-justice system, leaving small fissures in the cement walls of a sentencing structure that has long been a failure to those imprisoned unto death, and the rest of society as well.

I. Historical Background: Juvenile Justice

In 1967, the Supreme Court introduced procedural regularity into delinquency proceedings.[12] Following this decision the Supreme Court and many lower courts continued this trajectory of juvenile-law reform that *In re Gault* initiated. The unintended consequence of extending procedural rights to juvenile offenders was that *Gault* overturned over 100 years of juvenile-justice reform that was committed to upholding the fundamental difference between adult and juvenile offenders. The result was the contemporary trend to accept no distinctions between adult and juvenile offenders' culpability. *Gault* and its predecessor, *Kent v. United States*,[13] mark the second wave in the effort to reform the juvenile-justice system. The third movement is typified by a more pronounced adherence to a policy that makes little penological distinction between adults and juveniles in sentencing schemes.[14] The fourth wave, initiated by the Supreme Court in the 2010 case *Graham v. Florida*, granted the protection of the Eighth Amendment to juvenile offenders.[15]

The first monumental movement of juvenile-justice reformation in the United States occurred with the legislative act of March 29, 1824, which opened the doors of the New York House of Refuge, the first reformatory in the nation.[16] In 1820, a philanthropic Quaker association,[17]

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[12] *See In re* Gault, 387 U.S. 1, 27–28 (1967).

[13] 383 U.S. 541 (1966).

[14] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604–08 (1978) (noting that the offender's age was simply one of many possible mitigating factors to be considered in an "individualized" sentencing determination).

[15] *Graham*, 130 S. Ct. at 2034.

[16] *See* Act of Mar. 29, 1824, ch. 126, 1824 N.Y. Laws 110.

[17] The Quaker reformers had a long history of charity and reform. As Sanford Fox notes, the Quakers had "achieved penal law revisions greatly diminishing the scope of capital punishment by replacing death and corporal penalties with sentences to newly erected prisons; they had created schools for the poorer classes, and engaged in widespread efforts to alleviate the suffering of the poor in their

the Society for the Prevention of Pauperism, conducted an extensive survey of the nation's prisons. The results of the study revealed the deplorable treatment of prisoners, a prison system that did not discern a difference between adults and juveniles, and illogical sentencing schemes. In response, the Society established the juvenile reformatory.[18]

In 1849, a second House of Refuge was opened, which initiated the opening of several similar reformatories in other large American cities.[19] The juvenile reformatory was a complex, ambivalent development that was in effect a de facto retrenchment of adult correctional practices, a back-pedaling of law policy, a reaction to immigration and poverty, and a reflection of the alarming side of religious education, despite the public view that reformatories marked humanitarian progress.[20]

Illinois passed the Juvenile Court Act in 1899, which would steer the juvenile justice system in a different direction until *Kent* in 1966.[21] The establishment of a court system distinct from adult jurisdiction resulted in six important outcomes. First, a separate court system stipulated that procedure could be bypassed.[22] Second, the court stressed the fundamental differences between adults and juveniles.[23] Third, hearings were to be informal with unique, individualized solutions unhampered by formal procedures.[24] Fourth, due process rights were largely ignored, "with the rationale that determining guilt or providing punishment was much less a concern than identifying the child's needs and administering appropri-

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communities." Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1188 (1970) (footnotes omitted).

[18] *See New York House of Refuge: A Brief History*, NEW YORK STATE ARCHIVES, http://www.archives.nysed.gov/a/research/res_topics_ed_reform_history.shtml.

[19] *Id.*

[20] Fox, *supra* note 17, at 1195, 1199–1202.

[21] Act of Apr. 21, 1899, 1899 Ill. Laws 131 (regulating the treatment and control of dependent, neglected and delinquent children). A few years later the Supreme Court, in *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), posited three reasons why juveniles should be treated distinctly from adults: (1) vulnerability, (2) inability to make informed, mature, critical decisions, and (3) the presence and importance of the parent. In the 1970 case *In re Winship*, 397 U.S. 358 (1970), the court created a changing standard of proof, replacing the preponderance of evidence with beyond a reasonable doubt in juvenile criminal cases. In the 1982 case, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court again insisted on the juvenile–adult difference and the necessity for different standards. The Court affirmed that "adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." *Id.* at 104 n.11 (alteration omitted) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)) (internal quotation mark omitted).

[22] *See* Fox, *supra* note 17, at 1212–15.

[23] *See id.* at 1211–12.

[24] *See id.* at 1212.

ate treatment and rehabilitative measures."[25] Fifth, the court created a language distinct from that used in criminal court. Adjudication and disposition replaced trial and sentence.[26] Lastly, the court sought alternatives to incarceration, created an early form of juvenile probation, and served as a social services hub.[27]

However problematic the juvenile court was, it was remarkable for several reasons. The Act established the confidentiality of juvenile records, required juveniles be housed separately from adult inmates, and barred the imprisonment of children under the age of 12.[28] The general success of the juvenile court spread and so did the model. As Sanford Fox notes, "[t]he establishment of the court was hailed as a new era in our criminal history, and it was widely imitated in other states."[29]

The juvenile courts operated without much scrutiny until a 1956 decision that emphasized the point of adjudication was to determine criminal responsibility and that such a determination required minimum procedural standards.[30] In response, several states enacted legislation that focused on due process in juvenile court actions.[31] In the midst of this shift of focus, the Supreme Court entered the discussion with *Kent* and *Gault* to announce a "revolution in the procedural aspects of juvenile courts."[32] *Kent* introduced to the juvenile proceeding the right to a hearing, to counsel, to counsel's access of court records, and the adherence to specific requirements of a juvenile waiver to adult jurisdiction.[33] *Kent* was followed by *Gault*, which introduced to the juvenile proceeding the right to notice of charges, a further expansion of the right to counsel, the right to confront witnesses, and the right to claim privilege against self-incrimination.[34] The juvenile court system, much like the House of Refuge and other reformatories, was intended to benefit juveniles and society, but was laden with systemic weakness and constitutional issues. The

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[25] David L. Myers, Boys Among Men: Trying and Sentencing Juveniles as Adults 26 (2005).

[26] Fox, *supra* note 17, at 1214–15.

[27] *See id.* at 1211–12.

[28] Act of Apr. 21, 1899, §§ 3, 9, 11, 1899 Ill. Laws 131, 132, 134–35; s*ee also id.* at 1222–29.

[29] *Id.* at 1229.

[30] The Municipal Court of Appeals of the District of Columbia found that "[t]he purpose of [delinquency] proceedings is not to determine the question of guilt or innocence, but to promote the welfare of the child and the best interests of the state." Shioutakon v. District of Columbia, 114 A.2d 896, 898–99 (D.C. 1955) (footnote omitted). The court was reversed by the Court of Appeals for the D.C. Circuit, which highlighted that a trial to adjudicate criminal responsibility was the point of the judicial action. Shioutakon v. District of Columbia, 236 F.2d 666, 669–70 (D.C. Cir. 1956); *see also In re* Contreras, 241 P.2d 631, 633 (Cal. Dist. Ct. App. 1952).

[31] *See, e.g.*, Act of Jul. 14, 1961, ch. 1616, sec. 2, § 634, 1961 Cal. Stat. 3459, 3475; Family Court Act, ch. 686, § 249, 1962 N.Y. Laws 3043, 3064.

[32] Fox, *supra* note 17, at 1235.

[33] Kent v. United States, 383 U.S. 541, 561–62 (1966).

[34] *In re* Gault, 387 U.S. 1, 55–56 (1966).

matrix of these inherent flaws and the fear of criminal youth became the target of new reform.

The late seventies, eighties, and nineties marked the third sea change in juvenile justice reform, and a return to pre-Enlightenment ideas about juvenile justice.[35] The shift from juvenile offenders who are seen as products of a pathological environment to juvenile offenders who are intrinsically evil and not worthy of rehabilitative initiatives is signified by a series of juvenile offender laws that swept the country beginning with New York in 1978.[36] Judges could no longer apply the *Kent* standard of assessing the juvenile's age, social background, or availability of programs that would be of benefit to the juvenile and her particular problems. "The traditional rehabilitative goal of juvenile sanctions [was] de-emphasized in favor of straightforward adult-style punishment and long-term incarceration with fewer allowances for individual circumstances and [the] special needs of juveniles."[37]

Just as New York's House of Refuge served as a model for the development and maintenance of other reformatories, New York's juvenile offender laws served as a model for similar laws in almost every state. It appears the juvenile offender laws were created to solve perceived problems inherent in the juvenile court system, but failed in their efforts to effectively deal with the problem of juveniles in the criminal justice system.[38] In the fourth wave of juvenile justice reform, signaled by *Graham*, the Supreme Court took the lead and ushered in a more humane and successful approach to juvenile justice. The Court based its rationale on a nexus of understanding that acknowledges juvenile offenders present different needs and issues than their adult counterparts, and juvenile offenders are entitled to constitutional rights and safeguards. Part II of this Note will deal with the fourth wave as it manifests in *Graham*.

II. *Graham v. Florida* and the Shift in Cruel and Unusual Punishment Jurisprudence

A. *Introduction*

Graham marks a radical development in Eighth Amendment CUP jurisprudence. Moreover, it signals a tectonic shift in the terrain of juvenile

[35] "A new ideal of children as dependent, lacking the mental and physical capacities of adults, and in need of guidance arose and was universally accepted" throughout the seventeenth, eighteenth, and nineteenth centuries when childhood became a social category. Aaron Kupchik, Judging Juveniles: Prosecuting Adolescents and Adult and Juvenile Courts 1 (2006).

[36] The site of New York for the first juvenile offender legislation is a particularly ironic given that New York was the testing ground for the first reformatory. *See* Fox, *supra* note 17.

[37] Michael A. Corriero, Judging Children as Children: A Proposal for a Juvenile Justice System 129 (2006).

[38] *See id.* at 138.

justice, and suggests the imposition of LWOP is now subject to a new jurisprudential review. From *Kent* and *Gault* the Supreme Court moved along a trajectory mapped by a rational policy progression culminating in *Graham*. There is nothing remarkable in this *ideological* judicial progression save the Court's methodology, which is, however, astonishing. In order to reach its ruling in *Graham*, the Court had to jump the rails of jurisprudence and break with three decades of precedential theory, undermining a long established legal principle that 'death is different' based on its irrevocability and finality.[39] The basis of this division was built upon the theoretical foundation that "death is different", in part because it is irrevocable, and thus deserving of a different, more absolute, test.[40] In *Graham*, the Court not only effaced the margin of demarcation that had established the theory and practice that death is different, and so subject to a separate Eighth Amendment review process; it also applied that review process, once reserved only for capital offenses, to a noncapital case. With the boundary of the imposition of death under erasure, the Court brought within the purview of capital review the sentence of LWOP, indicating life without any possibility of parole is a *de facto* death sentence.[41]

The issue before the Supreme Court, raised by *Graham*, was whether the CUP clause of the Eighth Amendment categorically precluded the imposition of LWOP in the case of a juvenile non-homicide offender.[42] The Court held that the Eighth Amendment does categorically ban JLWOP in cases of non-homicide, and the State must give a juvenile non-homicide offender a meaningful opportunity to obtain release.[43] What is remarkable about this case is the Court's departure from the previous Eighth Amendment CUP jurisprudence. For 30 years, the Court relied on precedent in which it typically applied a two-step categorical test to capital cases to determine when to adopt an absolute ban on the death penalty for either classes of offenders or classes of offenses.[44] For nearly as long, the Court had made use of a distilled two-step balancing test for noncapital offenses, which under a case-by-case analysis determined, in light of all the circumstances, whether a particular sentence was disproportionate to the crime committed.[45] If it was held that a particular sentence for a particular offender was in violation of the Eighth

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[39] Furman v. Georgia, 408 U.S. 238, 346 (1972).

[40] *See* Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting).

[41] "[Y]et life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, 130 S. Ct. at 2027.

[42] *Id.* at 2017–18.

[43] *Id.* at 2034.

[44] Alison Siegler & Barry Sullivan, *"Death is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 328–29 (2011).

[45] *Id.* at 329.

Amendment's ban on CUP, the ruling only applied in the particular, extant case. However, a ruling under the categorical ban created a precedent and bright line rule effective for all members belonging to a class of offenders, based on characteristics, or effective for all offenders having committed a certain offense.[46]

Graham abolished the capital/noncapital review distinction and applied the two-step categorical test to a noncapital case. Prior to *Graham* it was virtually impossible for a juvenile offender to meet the onerous threshold requirements of the first step of the balancing test to challenge a LWOP sentence in a non-homicide case.[47] After *Graham*, the court's holding ensured that no juvenile offender would serve LWOP for a non-homicide offense. Furthermore, the decision opened the door to the potential extension of the Eighth Amendment's protection to the entire class of juveniles convicted of LWOP under any circumstances.[48] Even more remarkable, but beyond the scope of this Note, *Graham* created micro-fractures in the foundation of a sentencing scheme that makes use of LWOP for all offenders.

B. Statement of the Facts

At age 16, Terrance Jamar Graham was first arrested with three juvenile male accomplices for attempted robbery, and under Florida law was charged as an adult for armed burglary with assault, which carried a potential sentence of life in prison without parole.[49] He was also charged with a second burglary offense and faced an additional 15-year sentence.[50] Graham negotiated a plea agreement in which he pled guilty to both charges and submitted to the court a heartfelt letter attesting to his commitment to lead a better life. In response, the court withheld adjudication of guilt on both charges and reduced the sentence to two concurrent three-year terms of probation with the first 12 months being spent in county jail. Graham was released on June 25, 2004.[51]

Within six months Graham was again arrested with two adult male accomplices, and charged with home invasion robbery. Graham and his accomplices knocked on the door of the home of Carlos Rodriguez, forcibly entered, held Rodriguez and his friend at gunpoint, ransacked the home and then locked Rodriguez and the other man in the closet before leaving. Graham and his two accomplices were alleged to have attempted a second robbery during which one of Graham's accomplices was shot. Graham drove the other two men to the hospital in his father's vehicle

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[46] *Id.*

[47] *Id.*

[48] *Id.* at 370.

[49] Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

[50] *See id.* Under Florida law, prosecutors have discretion in deciding whether to charge 16- and 17-year-olds as juveniles or adults. *Id.*

[51] *Id.*

and in driving away was pursued by a police officer in a high-speed chase. Following a collision with a telephone pole, Graham tried to escape by foot but was apprehended.[52]

The trial court found that Graham violated his probation in attempting to flee, committing a home invasion robbery, possessing firearms, and associating with persons engaged in criminal activity. At the sentencing hearing, Graham's attorney recommended a sentence of five years' imprisonment. The Florida Department of Corrections recommended Graham receive a minimum four years' imprisonment. The State recommended 30 years' imprisonment for the armed burglary count and 15 years' imprisonment on the attempted robbery.[53]

The trial court judge explained the sentence by stating he did not understand why Graham had thrown his life away.[54] He further stated:

> 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.
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> . . . .
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> . . . [T]he only thing I can do now is to try and protect the community from your actions.[55]

Graham was convicted on the earlier burglary and attempted robbery charges and sentenced to life imprisonment plus an additional fifteen years for the attempted robbery.[56] He received the harshest sentence possible under Florida law, and since Florida has abolished a parole system,[57] there existed no possibility of release before death except by rarely granted executive clemency.[58]

Graham's motion challenging his sentence in the trial court was denied, and the First District Court of Appeals of Florida affirmed on the basis that Graham's sentence was not grossly disproportionate to the offenses.[59] The Florida Supreme Court denied review.[60]

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[52] *Id.* at 2018–19.

[53] *Id.* at 2019.

[54] *Id.*

[55] *Id.* at 2020.

[56] *Id.*

[57] FLA. STAT. ANN. § 921.002(1)(e) (West 2003).

[58] *Graham*, 130 S. Ct. at 2020.

[59] *Id.*; *see also* Graham v. State, 982 So.2d 43, 51–53 (Fla. Dist. Ct. App. 2008).

[60] *Graham*, 130 S. Ct. at 2020; *see also* Graham v. State, 990 So.2d 1058, 1058 (Fla. 2008) (declining discretionary jurisdiction).

C. *Two Classifications of Eighth Amendment Jurisprudence*

Since the Supreme Court reinstated the death penalty in *Gregg v. Georgia*,[61] following a four-year hiatus initiated with *Furman v. Georgia*,[62] there have been two overarching classifications of Eighth Amendment jurisprudence. The first classification applies to constitutional challenges to the length of a particular sentence in light of the circumstances of the case.[63] This application has not always been reserved for noncapital cases, and makes use of a balancing test. The second classification applies to cases in which the Court implemented the proportionality standard by certain categorical restrictions, such as the collateral defenses of infancy[64] or mental impairment.[65] The second type of review has always been reserved for capital cases. The two classifications make use of different, but somewhat similar tests.

1. *Balancing Test and Noncapital Offense Jurisprudence*

"In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive."[66] The balancing test has been distilled into two stages, the first of which is a threshold analysis to determine whether the defendant has established an inference of "gross disproportionality."[67] This assessment is comprised of an inquiry into the gravity of the offense as it balances against the severity of the penalty.[68] The second step of the balancing test consists of intra-jurisdictional and inter-jurisdictional analyses. Under the inter-jurisdictional analysis, the Court examines the sentences for the same crime in other jurisdictions. Under the intra-jurisdictional analysis, the Court examines sentences imposed on other criminals in the same jurisdiction.[69] For both of these analyses the Court looks at the legislatively available sentencing and judicial practices, or the actual sentencing outcomes.[70]

The measure for gross proportionality is ultimately derived from Kennedy's controlling opinion in *Harmelin v. Michigan*.[71] First, the Court must compare the gravity of the crime with the severity of the sentence. If the case makes it past this threshold question, the Court must then en-

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[61] 428 U.S. 153 (1976).

[62] 408 U.S. 238 (1972).

[63] *Graham*, 130 S. Ct. at 2021.

[64] *See* Roper v. Simmons, 543 U.S. 551, 571 (2005); Thompson v. Oklahoma, 487 U.S. 815, 822–23 (1988).

[65] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[66] *Graham*, 130 S. Ct. at 2021.

[67] *Id.* at 2022 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[68] *Id.*

[69] *Id.*

[70] *See id.* at 2023.

[71] *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

gage in the intra-jurisdictional and inter-jurisdictional analyses.[72] As Justice Kennedy notes in *Graham*, quoting himself from *Harmelin*, "If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual."[73] However, precedent shows it is highly unlikely any defendant could meet this threshold inquiry to survive to the intra and inter-jurisdictional analyses.

Indeed, *Graham* would most likely not have survived the threshold analysis. Disproportionality under the Eighth Amendment is not demonstrated sufficiently unless it is so severe as to shock the conscience.[74] Prior to *Graham*, there were several unsuccessful cases in which the penalty seemed grossly disproportionate to the crime. Nevertheless, the Court upheld the lower courts' sentencing in near total deference.[75]

The Court has been notably less favorable to defendants under the balancing test because at its base it is a stringent threshold test. Since the 1980 case, *Rummel v. Estelle*, in which the prototype balancing test was outlined in Justice Powell's dissent, there has only been one successful case analyzed under the balancing test.[76] In *Solem v. Helm*, the Court held it unconstitutional to sentence an offender to LWOP for the crime of writing a bad check.[77] *Solem* is an isolated example. In most cases the threshold the defendant must meet to challenge the proportionality step is onerous.[78] In *Harmelin*, the defendant was sentenced to LWOP for drug possession on the basis that the Eighth Amendment has a narrow proportionality principle that does not require strict proportionality between crime and sentence, and only precludes extreme or grossly disproportionate sentences.[79] Furthermore, in *Ewing v. California*, the Court upheld a 25-years-to-life sentence for a defendant charged with the theft of three golf clubs valued at $399 each under three-strikes recidivist sentencing.[80] In addition, *Rummel* upheld a LWOP sentence for obtaining money by false pretenses following two prior non-violent felony convictions.[81]

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[72] *See Graham*, 130 S. Ct. at 2022.

[73] *Id.* (quoting *Harmelin*, 501 U.S. at 1005).

[74] *See* United States v. Gonzalez, 922 F.2d 1044, 1053 (2d Cir. 1991) ("The Eighth Amendment condemns only punishment that shocks the collective conscience of society.").

[75] *Graham*, 130 S. Ct. at 2021–22 (citing Ewing v. California, 538 U.S. 11 (2003) (upholding sentence of 25 years to life for the theft of three golf clubs under California's three-strikes rule)); *Harmelin*, 501 U.S. 957 (1991) (majority opinion) (upholding life without parole for possession of a pound and a half of cocaine); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding sentence of life without parole for third nonviolent offense of obtaining money by false pretenses)).

[76] Rummel v. Estelle, 445 U.S. 263, 295 (1980) (Powell, J., dissenting); *see also* Solem v. Helm, 463 U.S. 277 (1983).

[77] *Solem*, 463 U.S. at 279, 281, 303.

[78] *Graham*, 130 S. Ct. at 2021.

[79] *Harmelin*, 501 U.S. at 1001.

[80] Ewing v. California, 538 U.S. 11, 17, 30 (2003).

[81] *Rummel*, 445 U.S. at 265–66, 285 (majority opinion).

2. Categorical Test and Capital Offense Jurisprudence

The second classification, traditionally reserved for capital cases, applies categorical rules to Eighth Amendment standards. This classification is further broken down into two subsets. First, there are the cases in which the Court is asked to consider the nature of the offense. For example, in *Kennedy v. Louisiana* the Court held that the Eighth Amendment's CUP clause precludes the death penalty as a sentence for non-homicide cases, specifically where the defendant is convicted of the non-homicide rape of a child.[82] Another example is *Enmund v. Florida*, in which the Court held the Eighth Amendment also precluded the death penalty for felony offenders who did not kill, or intend to kill, in the course of committing the felony crime but an accomplice did kill.[83]

In the second subset, the Court considers the characteristics of the offender. *Roper* held that the Eighth Amendment categorically bars the death penalty for any person who committed the offense while under the age of 18.[84] Before *Roper*, *Atkins* held that the Eighth Amendment barred the execution of mentally challenged offenders.[85] Precedent shows that the Court is more amenable to a categorical ban than it is to vacating a discrete and particular sentence. The Court has been more favorable in its opinions on what constitutes CUP when the question was posed for an entire class of offenders or an entire class of offense, rather than when the challenge came from a singular offender in reference to an offender's particular offense.

Under the categorical analysis, the Court, following the reasoning it set out in *Trop v. Dulles*[86] first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice"[87] in order to surmise if there is a national consensus on the particular issue. The second step involves the Court's own independent judgment as guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[88] As *Roper* indicated, the Court must use its own judgment to determine whether the penalty violates the Eighth Amendment's ban on CUP.[89]

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[82] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the Eighth Amendment bans the death penalty in the non-homicide rape of an adult woman).

[83] Enmund v. Florida, 458 U.S. 782 (1982).

[84] Roper v. Simmons, 543 U.S. 551 (2005).

[85] Atkins v. Virginia, 536 U.S. 304 (2002).

[86] 356 U.S. 86 (1958).

[87] *Roper*, 543 U.S. at 563.

[88] Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008).

[89] *Roper*, 543 U.S. at 563.

D. *Opinion of the Court*

Justice Kennedy, writing for the Supreme Court in a 6–3 decision, with Justices Stevens, Ginsburg, Breyer, and Sotomayor joining, outlined the new categorical test by which JLWOP cases would be reviewed.[90] Chief Justice Roberts wrote a concurrence in the judgment, arguing the Court would have reached the same holding had it adhered to precedent and applied the balancing test in the extant non-homicide case rather than the once-reserved categorical test;[91] though it is highly improbable given that *Graham* would not likely have surpassed the onerous threshold requirements of the first step of the balancing test.[92]

1. *Step 1: Objective Indicia of a National Consensus on a Sentence of LWOP for a Non-homicide Juvenile Offender*

Graham begins its categorical analysis with a review of the "objective indicia of national consensus."[93] *Atkins* determined that the most reliable indicator of the national consensus, the objective indicia of the public pulse, is legislation.[94] The numbers the Court considered presented a nation that is *not* clearly opposed to LWOP sentencing for juveniles convicted of non-homicide felony offenses. Six jurisdictions completely bar the sentence.[95] Seven allow JLWOP only in the case of homicide.[96] However, 37 states, the District of Colombia, and Federal law permit sentences of JLWOP for offenders convicted of non-homicide crimes.[97] This metric would appear to show a consensus in favor of the sentence. But, and this is crucial, the Court does not read the data as such.

The Court finds this information is "incomplete and unavailing."[98] Quoting *Kennedy*, the Court notes, "There are measures of consensus other than legislation."[99] Following *Enmund*, *Thompson*, *Atkins*, *Roper*, and *Kennedy*, judicial practice is also a part of the equation.[100] In every jurisdiction that, on its face, supported LWOP sentences for juvenile offenders, a closer analysis of the actual sentencing practices revealed a decided consensus against it. The number of juveniles actually serving life without pa-

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[90] Graham v. Florida, 130 S. Ct. 2011, 2017 (2010).

[91] *Id.* at 2036–41 (Roberts, C.J., concurring in the judgment).

[92] *But see id.* at 2040 (arguing Graham passes the threshold requirement because, while Graham's crimes were serious and deserving of punishment, he was not "*particularly* dangerous—at least relative to the murderers and rapists for whom the sentence of life without parole is typically reserved").

[93] *Id.* at 2023 (majority opinion).

[94] Atkins v. Virginia, 536 U.S. 304, 312 (2002) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

[95] *Graham*, 130 S. Ct. at 2023.

[96] *Id.*

[97] *Id.*; *see also id.* at 2034–35 (collecting statutes).

[98] *Id.* at 2023.

[99] *Id.* (quoting Kennedy v. Louisiana, 128 S. Ct. 2641, 2657 (2008)) (internal quotation marks omitted).

[100] *Id.*

role sentences is very low, even lower for those serving sentences for non-homicide offenses, though the penalty is widely available.[101] Of those juveniles serving life without parole a vast majority of them live in Florida.[102] The Court notes its own research yielded a total of "11 jurisdictions nationwide in fact impose life without parole sentences on juvenile non-homicide offenders—and most of those do so quite rarely."[103] Thus, most of the states that legislatively authorize the sentence never impose it. Even more important to this metric is the fact that the number would be representative of all of the sentences going back quite some time since it is likely a juvenile sentenced to die in prison would in fact be there for decades, making the numbers seem inflated.[104] In terms of national consensus on LWOP for juvenile offenders convicted on non-homicide offenses, the Court concludes, "it is fair to say that a national consensus has developed against it."[105] Though the Court has in its sights the offense qualification of "non-homicide," its inevitable focal point and the ultimate basis of its decision is life without parole qua life without parole imposed upon juvenile offenders.

2. Step 2: The Independent Judgment of the Court

The second step in the categorical test is the "judicial exercise of independent judgment."[106] The Court's own independent judgment is couched in several subset analyses. First, the Court must examine the culpability of the offender in light of the crime. Next, the Court analyzes the severity of the punishment.[107] Finally, the Court considers the penological justifications for the sentence and whether the goals of the sentence are met: deterrence, retribution, incapacitation, and rehabilitation.[108]

a. Juvenile Culpability

The Court notes that since *Roper*, juveniles are regarded as having diminished culpability and thus are held less accountable for their crimes and ultimately less deserving of the most severe punishments.[109] *Roper* made several comparative analyses that bear upon *Graham*. Juveniles have a "lack of maturity and an underdeveloped sense of responsibility," and they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" moreover, their characters are

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[101] *Id.* at 2023–24.
[102] *Id.* at 2024.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 2026 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)) (internal quotation marks omitted).
[106] *Id.*
[107] *Id.*
[108] *Id.* at 2026, 2028.
[109] *Id.* at 2026 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

"not as well formed."[110] These qualities make it particularly problematic to assess maturity and psychological development. It is difficult for a trained psychologist to determine the difference between juvenile offenders who are temporarily caught in "transient immaturity" and "the rare juvenile offender whose crime reflects irreparable corruption."[111] As such, there is no way to reliably classify juvenile offenders as the worst of the worst, deserving of the most severe penalties, without risking those juveniles unfortunate enough to suffer from their "transient immaturity."[112]

Roper emphatically denied its aim was to absolve juvenile offenders of responsibility for crimes committed, but it did assert that a juvenile offender cannot be held to the same standards of culpability as an adult, and therefore cannot be sentenced to the same penalty as an adult.[113] Similarly, *Thompson* affirmed that a juvenile offender's transgressions are "not as morally reprehensible as that of an adult."[114] In fact, several of *Graham*'s amici briefs show that as social science research has become more sophisticated and technology has advanced to allow a more complex understanding of the mechanics of the brain in an effort to understand the mind, the difference between juveniles and adults has become irrepressible.[115] The results of these advanced studies show fundamental differences between adult and juvenile cognitive abilities.[116] There are multiple differences between an adult brain and a juvenile brain. While juveniles have more difficulty making sound decisions than average adults, they are also more amenable to change and thus "their actions are less likely to be evidence of 'irretrievably depraved character.'"[117] As to the categorical culpability of juveniles, the Court concludes, "[i]t 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.'"[118]

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[110] *Roper*, 543 U.S. at 569–70 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[111] *Id.* at 573.

[112] *Graham*, 130 S. Ct. at 2026.

[113] *Roper*, 543 U.S. at 571.

[114] Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

[115] *See, e.g.*, Brief of the Sentencing Project as Amicus Curiae in Support of Petitioners at 9–11, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412 & 08-7621) (for juveniles who are most in need of and most receptive to rehabilitation); Brief of Amici Curae J. Lawrence Aber et al. in Support of Petitioners at 28–31, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412 & 08-7621) (finding a juvenile offender's sentence becomes all the more disproportionate when there are no rehabilitative opportunities or treatment available).

[116] *Graham*, 130 S. Ct. at 2026.

[117] *Id.* (quoting *Roper*, 543 U.S. at 570).

[118] *Id.* at 2026–27 (second alteration in original) (quoting *Roper*, 543 U.S. at 570).

b. Penological Justifications

The Court then assesses the severity of the punishment and its justification. The Court notes that LWOP is the second harshest penalty available by law to offenders convicted of felonies.[119] While LWOP is not the same as a death sentence per se, it does share some marked characteristics: finality and irrevocability. As with the death penalty, LWOP "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, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."[120] The Court quotes *Naovarath v. State* in positing that LWOP "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."[121]

In terms of juvenile sentencing, since *Roper*, the state no longer executes the juvenile offender, but the sentence of LWOP promises the juvenile he or she will die in prison barring near miraculous clemency. It appears to be a very long, drawn out, and hopeless death sentence. The Court asserts, that, in the case of a juvenile, LWOP is especially harsh because the young age of the offender ensures a much longer life in prison then many adults would suffer. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. . . . This reality cannot be ignored."[122] In this regard, LWOP is a much harsher penalty for a juvenile offender than it would be for an adult offender convicted of the same crime, with the result that juvenile offenders are held to a higher culpability standard or subject to more severe penalties than their adult counterparts.

The Court next considers the penological justifications of the sentence. *Graham* finds that there are no penological justifications for JLWOP.[123] Again, the Court has in mind non-homicide juvenile offenders, but its focal point is the imposition of life without parole. The Court notes that while legislatures can choose which goals undergird the sentencing schemes they enact,

> [i]t does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions. A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect to life without parole for juvenile non-homicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—

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[119] *Id.* at 2027 (citing Harmelin v. Michigan, 501 U.S. 957, 996 (1991)).

[120] *Id.* (citing Solem v. Helm, 463 U.S. 277, 300–01 (1983)).

[121] *Id.* (alteration in original) (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)) (internal quotation marks omitted).

[122] *Id.* at 2028.

[123] *Id.* at 2030.

> retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.[124]

The Court works through each penal sanction, looking for a measure of justification to legitimize the sentence of LWOP for juvenile offenders.

c. Retribution

The Court acknowledges that retribution, a severe sanction imposed to express condemnation of a crime, is a legitimate reason to penalize. However, retribution cannot support a sentence of JLWOP because the foundational theory of retribution is the idea that the criminal sentence must be directly related to the culpability of the offender; and the culpability of a juvenile offender is de facto diminished.[125] "[A]s *Roper* observed, '[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.'"[126] Most importantly, "*Roper* found that '[r]etribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer," because the juvenile murderer is still less culpable than the adult murderer and thus must not be subject to the most severe penalty available.[127]

d. Deterrence

Like retribution, deterrence, the negative calculus in the balancing of the decision to commit the crime or not, cannot support a sentence of JLWOP. The source of a juvenile's diminished culpability will also likely be the source of a lack of forethought in the juvenile's decision-making repertoire. "[T]hey are less likely to take a possible punishment into consideration when making decisions."[128] This is especially the case when the punishment is so rarely imposed and particularly when the juvenile operates under the misconception that juveniles are exempt from adult punishment.[129] Due to the juvenile offenders' diminished culpability, "any limited deterrent effect provided by life without parole is not enough to justify the sentence."[130]

e. Incapacitation

Incapacitation cannot support a sentence of life without parole for a juvenile offender, though it does provide a legitimate reason for imprisonment when recidivism is likely and public safety is a concern.[131] In

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[124] *Id.* at 2028 (citation omitted).

[125] *Id.*

[126] *Id.* (second alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).

[127] *Id.* (alteration in original) (quoting *Roper*, 543 U.S. at 571).

[128] *Id.* at 2028–29.

[129] *See id.* at 2029.

[130] *Id.*

[131] *Id.*

terms of juvenile offenders, the goal of incapacitation, the avoidance of future repetitions of violent crimes and protection of the community, is undermined by the fact that there does not exist an assessment to determine, with accuracy, which juvenile offenders will reoffend.[132] To justify LWOP, the most severe incapacitation, the Court must be extremely positive the offender is one who will most likely reoffend. There is no reliable way to make that assessment of juveniles due to their mercurial and developing characters and maturity levels, as well as their abilities to adapt and develop under different circumstances.[133] An assessment of a juvenile as forever a danger to society is a dangerous assumption because, as *Roper* noted, it 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."[134] *Graham* finds that LWOP precludes any possibility that a juvenile might grow and mature; and furthermore, there is a conceptual problem in determining the future unfolding of an entire life without any real basis. As the Court notes, "Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset."[135] Even if there is some merit to the absolute and total life incapacitation of a juvenile offender, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[136]

f. Rehabilitation

Rehabilitation forms the basis of the parole system, and it used to form the basis of the juvenile justice system. Florida not only transfers juveniles into adult criminal court for certain felony offenses, but Florida law also abolished the parole system, and in so doing abolished any goal of rehabilitation for offenders serving life sentences. Thus, a life sentence without parole has no relation to rehabilitation.[137] As *Graham* notes, "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."[138]

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[132] *Id.*; *see also* Amanda Tufts, Comment, *Born to Be an Offender? Antisocial Personality Disorder and its Implications on Juvenile Transfer to Adult Court in Federal Proceedings*, 17 LEWIS & CLARK L. REV. 333, 343–46 (2013) (discussing difficulty of determining future dangerousness for juveniles diagnosed with antisocial personality disorder).

[133] *See Graham*, 130 S. Ct. at 2029.

[134] Roper v. Simmons, 543 U.S. 551, 573 (2005).

[135] *Graham*, 130 S. Ct. at 2029.

[136] *Id.*

[137] *See id.* at 2029–30.

[138] *Id.* at 2030.

Arguably, LWOP is not appropriate for any juvenile offender regardless of offense. Furthermore, juvenile offenders are most in need of rehabilitation, and the absence of such opportunities "makes the disproportionality of the sentence all the more evident."[139]

Graham finds no penological justification for JLWOP in non-homicide cases.[140] The diminished culpability and the severity of the sentence indicate that the punishment is cruel and unusual for this class of offender.[141] The Court holds that the Eighth Amendment prohibits such sentences for non-homicide juvenile offenders.[142] The Court further holds that the State must give juvenile defendants a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[143] The Court then goes on to explain why its analysis and holding are categorical and must apply to the entire class of offenders sentenced to LWOP rather than merely apply to individuals on a case-by-case basis: "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment."[144] The entire class of juvenile offender post-*Graham* has, by definition, diminished culpability.

The Court concedes that a categorical rule will lead to the release on parole of a few juvenile offenders who truly should not be placed amidst the public due to incurable psychopathy or an essential corruption that may present a danger to individuals or the community.[145] However, the Court counters with the assertion that the Constitutional principle of the Eighth Amendment overrides that consideration because of the subjective nature of determining which juvenile offenders are "incorrigible" and "irredeemably depraved."[146] The Court notes,

> [E]ven if we were to assume that some juvenile non-homicide offenders might have "sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity," to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distin-

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[139] *Id.*

[140] *Id.* at 2028–30.

[141] *Id.* at 2030.

[142] *Id.*

[143] *Id.*

[144] *Id.* The Court tempers this position by asserting that in no way does the Eighth Amendment's Cruel and Unusual Clause guarantee a release from prison. If a juvenile offender cannot demonstrate growth and maturity and his crimes are "truly horrifying" his irredeemable quality may preclude him from early release or parole. *Id.* The Court is not radically reading the Eighth Amendment in light of juvenile non-homicide offenders; it is merely saying the State cannot bury a juvenile offender alive, throw away the key, or permanently exile him to a prison cell until he meets his death. The Court is saying there must be a time for review.

[145] *Id.* at 2032.

[146] *Id.* at 2031.

> guish the few incorrigible juvenile offenders from the many that have the capacity for change.[147]

The subjectivity involved in determining the true character of a juvenile offender is also problematic because in many cases the heinous nature of the crime, or the very age of the offender, will operate as an aggravating factor diminishing the mitigating factor that the age of the offender should be.[148] *Roper*, in making a determination on the death penalty, concluded:

> An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.[149]

Moreover, there are unavoidable procedural problems because a juvenile offender cannot be a fully functioning part of his own defense due to his immaturity and cognitive capabilities. The Court refers to an amicus brief submitted by the NAACP to draw attention to the issues encountered by counsel representing juvenile offenders. As the amicus notes, "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. . . . They are less likely than adults to work effectively with their lawyers to aid in their defense."[150] The Court further notes the likelihood of the "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . all [of which] can lead to poor decisions by one charged with a juvenile offense."[151] A categorical rule prevents the possibility of an assumption that a juvenile is sufficiently culpable, mature enough to have a meaningful role in the process, and deserving of the most severe sentence a juvenile can receive.[152]

g. International Consensus

Finally, world consensus views JLWOP for non-homicide *and* homicide offenders as cruel and unusual punishment. While international opinion is not dispositive of the meaning of the Constitution, it "is also 'not irrelevant.'"[153] In *Roper*, *Atkins*, *Thompson*, *Enmund*, *Coker*, and *Trop*, the Court "looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. [Here, the Court] continue[s] that longstanding practice in noting the

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[147] *Id.* at 2032 (second alteration in original) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

[148] *See id.* at 2031–32.

[149] *Roper*, 543 U.S. at 573.

[150] *Graham*, 130 S. Ct. at 2032 (citing Brief for the NAACP Legal Defense & Educ. Fund, Inc. et al. as Amici Curiae in Support of Petitioners at 7–12, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412 & 08-7621).

[151] *Id.*

[152] *Id.* at 2030–33.

[153] *Id.* at 2033 (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)).

global consensus against the sentencing practice in question."[154] The Court notes that only 11 nations authorize the sentence under any circumstance, and only the United States and Israel impose the punishment.[155] Moreover, Israel has only seven juvenile offenders serving a life sentence without parole, and the sentence itself is subject to a periodic review process.[156] The Court further notes: "that Article 37(a) of the United Nations Convention on the Rights of the Child, ratified by every nation except the United States and Somalia, prohibits the imposition of 'life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.'"[157]

3. Conclusion of Graham

The Court concludes that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[158] The State must provide a reasonable opportunity to such an offender to obtain release based on growth of character and maturity.[159] Since the Court held that the challenge *Graham* raised questioned the appropriateness of a particular penalty for an entire class of offenders, the first stage of the balancing test, the threshold analysis, would not advance the Court's present inquiry.[160] The Court stated the best approach was the categorical test utilized in *Atkins*, *Roper*, and *Kennedy*.[161] "By citing these three decisions in this way, the Court gave the impression that *Graham* followed naturally from established case law," even though those cases were all capital cases and the Court had a long tradition of treating capital and noncapital cases dissimilarly.[162]

The majority gave three primary justifications for employing a categorical approach. The first reason was based on institutional competen-

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[154] *Id.* (citations omitted).

[155] *Id.*

[156] *See id.* "However, Israeli officials have confirmed that the seven individuals serving these life without parole sentences are now entitled to parole review, leaving the U.S., with its nearly 2,500 cases, all alone in the world." Ian S. Thompson, *Congress to Examine Juvenile Life Without Parole—A Human Rights Stain for the U.S.*, ACLU BLOG OF RIGHTS (Sept. 11, 2008, 2:13 PM), http://www.aclu.org/blog/defending-targets-discrimination/congress-examine-juvenile-life-without-parole-human-rights. It seems there remains some dispute as to the exact use of the review process, and furthermore that such a review process is subject to political changes in Israel. However, that Israel has opened up discussion on the topic and left room for the possibility of a review process is an indicator of the changing penological ideology in the one remaining "Western" or "democratic" country, other than the United States, that has retained the imposition of JLWOP.

[157] *Graham*, 130 S. Ct. at 2034 (quoting United Nations Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3, 55 (entered into force Sept. 2, 1990)).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 2023.

[161] *Id.*

[162] Siegler & Sullivan, *supra* note 44, at 354.

cies. The Court found that there was no reliable test of corruption that could be applied to a juvenile to determine which juveniles would reoffend and which were amenable to rehabilitation.[163] Therefore, any judgment of a juvenile offender that was based on future dangerousness or essential corruption would be faulty at best. The second concern, also under institutional competencies, was the fact that the same cognitive capacities that rendered a juvenile less culpable, also rendered a juvenile less able to be a meaningful part of his own defense.[164] The final justification the Court relied on in its opinion was that "a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform," whereas an individualized balancing test addresses one particular instance and the difficulty of meeting the threshold requirements would likely preclude the vast majority of juvenile offenders from raising legitimate CUP challenges.[165]

The Court also took under consideration the subjective nature of a balancing test and the likelihood that the heinousness of a crime would act as an aggravating factor. The Court, citing the trial judge, noted that he had reached "a discretionary, subjective judgment . . . that the offender [was] irredeemably depraved," without taking into account the possibility that he had diminished culpability, which undermined the imposition LWOP.[166] Moreover,

> [b]ecause a sufficiently heinous or grotesque offense can always trump the generally diminished culpability of juveniles, maintaining the balance test would result in a whole cadre of juvenile offenders being subjected to life-without-parole sentences despite a lessened culpability which . . . should have saved them from that fate.[167]

Despite the potential release of a few juveniles not deserving of parole under a categorical test, a balancing test will undoubtedly ensure many juveniles not deserving of LWOP will receive such a sentence. Following Blackstone's Ratio,[168] and the long legacy of the legal principle of the presumption of innocence,[169] commentators have noted, "As a matter

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[163] *Graham*, 130 S. Ct. at 2031–32.

[164] *Id.* at 2032.

[165] *Id.*

[166] *Id.* at 2031.

[167] Siegler & Sullivan, *supra* note 44, at 365.

[168] The English Jurist William Blackstone articulated what became known as Blackstone's Ratio: "[B]etter that ten guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

[169] Aristotle notes, "Again, every one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty in a case of enslaving or murder. . . . Whenever there is any doubt one should choose the lesser of two errors." 2 ARISTOTLE, PROBLEMS bk. 29, ch. 13, ll. 951a37–951b5 (W.S. Hett ed. & trans., Harvard University Press 1937) (author's translation). In the 12th century, the legal theorist Moses Maimonides argued "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death." 2 MAIMONIDES,

of constitutional policy, the Court's choice could be justified on the ground that an overinclusive rule provides more effective enforcement of Eighth Amendment values than an underinclusive balancing test."[170] "[T]he Court recognized that the only effective alternative to the balancing test . . . was a categorical test which gave no discretion to sentencing authorities and required that everyone eighteen and under would win if the test were met."[171] *Graham* marks a clear break with precedent and the creation of a new standard of review in noncapital cases that utilizes the categorical test and promises far reaching implications for other noncapital challenges, particularly the timely question of the sentence of JLWOP in cases of homicide.

E. Miller *and* Jackson*: Exchanging the Categorical Rule for Proportionality in Juvenile Life Without Parole*

Almost exactly two years after the landmark decision holding JLWOP in cases of non-homicide unconstitutional, the Supreme Court departed from its categorical rule—as laid out in *Graham v. Florida*—and disregarded *Graham*'s warning as to the dangers of applying the proportionality principle to juvenile sentencing. On June 25, 2012, the Court decided *Miller v. Alabama* and *Jackson v. Hobbs* in a consolidated opinion.[172] Both cases involved a 14-year-old offender ultimately charged as an adult, convicted of murder, and sentenced to a mandatory term of life without the possibility of parole.[173]

Kuntrell Jackson was charged as an adult with capital felony murder and aggravated robbery for his role as an abettor in an armed robbery that resulted in the shooting death of a store clerk. One of Jackson's co-conspirators shot and killed the clerk. Evan Miller, who was originally charged as a minor and removed to adult jurisdiction, was ultimately charged as an adult with murder in the course of arson. Miller and a

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THE COMMANDMENTS 270 (Charles B. Chavel trans., Soncino Press 1967). Approximately 200 years later, the English Lawyer, Sir John Fortescue, in *De Laudibus Legum Angliæ*, stated that "one would much rather that twenty guilty persons should escape than that one innocent person should be condemned to suffer." JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE ch. 27, at 64 (S. B. Chrimes ed. & trans., Hyperion Press 1979) (author's translation). Approximately 200 years following, during the Salem witch trials, Increase Mather argued, "It were better that Ten Suspected Witches should escape, than that one Innocent Person should be Condemned." INCREASE MATHER, CASES OF CONSCIENCE CONCERNING EVIL SPIRITS 66 (Boston 1693). Finally, Benjamin Franklin echoed this principle by stating in a letter to Benjamin Vaughan, dated March 14, 1785, "it is better a hundred guilty persons should escape than that one innocent person should suffer." Letter from Benjamin Franklin to B. Vaughan (Mar. 14, 1785), *in* 9 THE COMPLETE WORKS OF BENJAMIN FRANKLIN 80, 82 (John Bigelow ed., New York & London, G.P. Putnam's Sons, 1888).

[170] Siegler & Sullivan, *supra* note 44, at 357.

[171] *Id.* at 365.

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

[173] *See id.* at 2460.

friend followed a neighbor back to his home, smoked marijuana, and played drinking games until the neighbor passed out. The boys removed the neighbor's wallet from his pocket and stole $300. The neighbor awoke when the boys tried to replace it and a struggle ensued. The boys beat the neighbor with a baseball bat and left. They later returned to hide the crime and set the house on fire. The neighbor succumbed to a combination of his injuries from the beating and smoke inhalation.[174]

The backbone of the reasoning in *Graham* is that categorical rules are necessary when an Eighth Amendment challenge implicates a particular sentence as it applies to an entire class of offenders who have committed a range of crimes. In such cases, the court has traditionally relied on a categorical analysis.[175] In *Miller*, the particular sentence at issue was life without parole. The class was comprised entirely of juvenile offenders, and homicide covers a range of varied offenses and crimes.[176] The Court should have extended the reasoning in *Graham* to *Miller*.

Graham requires adherence to a categorical rule in the sentencing of juveniles for several reasons. First, laws requiring a proportionality analysis allow the imposition of sentences based on a discretionary, subjective judgment that the juvenile offender is irredeemably depraved at the same time holding the juvenile offender to the same standards as an adult counterpart; but there is no reliable way to make this determination and it ignores the diminished culpability of juveniles.[177] Thus, laws that allow proportionality tests to determine juvenile sentencing are insufficient to prevent the most severe sentence available despite diminished culpability and insufficient assessment of permanent incorrigibility.[178] Second, a case-by-case approach where the offender's age is weighed against the seriousness or heinousness of the crime would not allow courts to distinguish with sufficient accuracy the few juveniles who may qualify as mature and depraved enough to warrant an irrevocable sentence, and those juveniles who may have the capacity for change.[179] Third, a proportionality approach does not take into consideration special difficulties that arise with juvenile representation, such as

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[174] *Id.* at 2461–63.

[175] *See* Graham v. Florida, 130 S. Ct. 2011 (2010) (holding the Eighth Amendment prohibits the sentence of life without parole for juvenile offenders convicted of non-homicide offenses); Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (holding that the Eighth Amendment bars the execution of non-homicide offenders); Roper v. Simmons, 543 U.S. 551 (2005) (holding the Eighth Amendment prohibited the execution of juveniles under the age of 18); Atkins v. Virginia, 536 U.S. 304 (2002) (holding the cruel and unusual punishment clause of the Eighth Amendment prohibits the execution of mentally incapacitated defendants).

[176] In Jackson's case, involving the 14-year-old who was an abettor in an armed robbery, Jackson did not commit a murder but was nonetheless pulled into the charge of felony murder by his co-conspirator function in the crime. *See Miller*, 132 S. Ct. at 2461.

[177] *See Graham*, 130 S. Ct. at 2031–32.

[178] *Id.* at 2031.

[179] *Id.* at 2031–32.

impulsiveness, inability to calculate future outcomes, inability to understand procedures, or ability to effectively communicate with counsel.[180] A categorical rule avoids these risks and ensures that a court or jury will not erroneously conclude that a juvenile offender is sufficiently culpable to deserve the most severe and irrevocable penalty. A categorical rule allows a juvenile offender to mature and change.[181]

The *Miller* Court dispensed with *Graham* in favor of a proportionality principle. *Miller* is divided into two sections. The first section follows the logic and reason of *Graham*, arguing that juveniles have a de facto and de jure diminished culpability status.[182] The Court does not seem to take issue with the precedent that *Graham* establishes. However, the holding in *Miller* gravitates around the qualification of the sentence as "mandatory:"

> By requiring that all children convicted of homicide receive lifetime incarceration without the possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.[183]

The second part of the opinion explains how proportionality factors into the constitutional analysis of the sentence,[184] and is the undoing of *Graham*.

The second half of the decision relies on a line of precedent from the late 1970s. Those cases established that statutes mandating the death penalty for first-degree murder violated the Eighth Amendment.[185] The court reasons that since *Graham* likened juvenile life without parole to a death sentence, and the death sentence following *Woodson* and *Lockett* requires a consideration of mitigating factors, JLWOP must employ a proportionality test that considers age as a mitigating factor.[186] However, mandatory sentencing schemes preclude any mitigation or proportionality consideration.

It is unclear why the Court refused to extend *Graham*'s categorical rule to all juvenile offenders because the Court offered no expanded explanation. The Court merely stated that it anticipated the sentence would be uncommon once courts and juries were required to consider age as a

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[180] *Id.* at 2032.

[181] *Id.* at. 2032–33.

[182] Miller v. Alabama, 132 S. Ct. 2455, 2463–65 (2012).

[183] *Id.* at 2475.

[184] *See id.* at 2467–68.

[185] *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978); Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976). These cases together held that sentencing authorities are required to consider the characteristics of a defendant and the details of the offense before sentencing him to death. The aim was to apply mitigating factors where they existed. *See Miller*, 132 S. Ct. at 2463–64.

[186] *Miller*, 132 S. Ct. at 2466–67.

mitigating factor in a proportionality analysis.[187] The Court further noted that the current ruling was sufficient to address the two cases before it.[188] Following *Miller*, it is likely that many juvenile offenders who could have been rehabilitated, who would have matured and changed, will be sentenced to life without parole. The Court has circumscribed, and potentially neutered, the categorical rule set out in *Graham*, leaving many juvenile offenders subject to the arbitrary, subjective discretion of courts and juries who may be shocked by both the heinousness of a crime and the age of an offender. As problematic as it is hopeful, the *volte-face* analysis of *Miller* and *Jackson* does not clearly overrule *Graham*, seemingly leaving courts and juries with sentencing options and the wide range of discretion the *Graham* court warned against. Since *Miller* did not overrule *Graham*, *Graham's* reasoning can and should still be the basis for creating a categorical rule against LWOP for juvenile offenders under the age of 18.

III. Application: Reading *State v. Ninham* Through *Graham*'s Eyes

Graham represents a new strategy available to defendants who can convince the Court to apply the categorical test, rather than the balancing test, to a noncapital Eighth Amendment challenge. The categorical test begins when the Court considers the evolving standards of decency as indicated by the objective indicia, showing legislative authorization of a penalty for a particular class of offender and judicial practice that utilizes such penalty, in order to assess the national consensus on the issue.[189] The Court then exercises its own independent judgment based on a balance of the culpability of the offender and the nature and harshness of the penalty.[190] When the court considers the culpability of the offender, it also takes into consideration the penological justifications of the punishment (deterrence, retribution, incapacitation, and rehabilitation).[191] Though not probative of the Court's interpretation of the Eighth Amendment's CUP provision, the Court also considers the international consensus in an effort to bolster its own conclusion.[192]

The two-step process of the categorical test can be applied to other noncapital cases so long as the defendant's challenge rests on the Court's acceptance of him as a member of a recognized and distinct class.[193] He is considered a member of a class (offender or offense) if one or both of the following factors are met: he can show diminished culpability as an offender, or CUP. The strongest case a juvenile could make in his or her

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[187] *Id.* at 2469.
[188] *Id.*
[189] *See* Graham v. Florida, 130 S. Ct. 2011, 2023–26 (2010).
[190] *See id.* at 2026–28.
[191] *See id.* at 2028–30.
[192] *See id.* at 2033–34.
[193] *See id.* at 2022–23.

Eighth Amendment challenge to LWOP rests on diminished culpability. Following *Graham*, youth is such a strong mitigating factor that it undermines any possible penological justification for LWOP. In fact, youth is more than a mitigating factor; being a juvenile is a collateral defense that should result in a lesser sentence than an adult could expect under similar circumstances, and a differential treatment throughout the entire process. To build a case upon this factor the defendant should point out to the Court the "dilemma of juvenile sentencing"[194] under the balancing test: the case-by-case nature of the balancing test has no boundaries of application and provides little guidance to the lower courts; mitigating factors may actually be undermined by heinous crimes as juvenile offenders are presented as bad seeds by the state with the youth of the offender presented as an aggravating factor; and finally, the insufficient metric of the characteristics of the offender as a juvenile render any psychological tests of future dangerousness and essential corruption suspect.[195]

The precedent that *Graham* sets applies to JLWOP for homicide offenses because the culpability of the juvenile offender is diminished in the homicide case just as it is diminished in the non-homicide case. Culpability belongs to the offender, not the offense. The categorical ban in *Graham* asserted the bottom line lower culpability for juvenile offenders based on their class as juveniles. Furthermore, the punishment of JLWOP is CUP in light of the lack of penological justifications of the sentence for the juvenile's particular class and the comparatively longer sentence a juvenile offender could expect, in relation to that of a comparable adult counterpart, because of his young age.

A. *Introduction*

Graham should have set a strong precedent for *State v. Ninham*,[196] a recent Wisconsin Supreme Court case, in answering the question of whether LWOP for a juvenile offender convicted of intentional homicide violates the Eighth Amendment's CUP provision.

B. *Procedural History*

Ninham's June 14, 1999 charge of first-degree intentional homicide and physical abuse of a child subjected him to the jurisdiction of Wisconsin's criminal court.[197] In October of 1999, Ninham was further charged with making threats to a judge and to several of his accomplices, and to intimidating witnesses.[198] Ninham continued to maintain he had nothing

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[194] *See id.* at 2031–32.
[195] *Id.*
[196] 797 N.W.2d 451 (Wis. 2011), *cert. denied*, 133 S. Ct. 59 (2012).
[197] *Id.* at 458.
[198] *Id.*

to do with the offense.[199] A pre-sentence investigation revealed his "extremely dysfunctional family structure," and a household of substance abuse and domestic violence.[200] Ninham himself was a substance abuser since grade school, drinking "alcohol every day, often alone, and usually to the point of unconsciousness."[201] On June 29, 2000, the circuit court sentenced Ninham to life imprisonment without the possibility of parole on the first-degree intentional homicide count.[202] As to the second count—physical abuse of a child—the court sentenced Ninham to five years' imprisonment consecutive to the first sentence.[203]

The circuit court based its decision on three factors. First, the court considered the "gravity of the offense," and determined it was "beyond description," and "indisputably horrific."[204] Next, the court looked at the character of Ninham, referring to him as a "frightening young man," and a "child of the street who knew what he was doing."[205] Finally, the court reasoned that the community must be protected from Ninham.[206] The court's decision was not affected by any mitigating factors presented by Ninham, as it declined to view mitigating factors, referring to them as poor excuses.[207]

On November 16, 2000, Ninham filed a motion for post-conviction relief, which the circuit court denied with the court of appeals affirming.[208] In October of 2007, following the Supreme Court's decision in *Roper*, Ninham filed a motion for sentencing relief on the basis that his sentence was a violation of the Eighth Amendment's ban on CUP.[209] The circuit court denied Ninham's motion.[210] Ninham introduced a new factor: "new scientific evidence . . . on adolescents cited by the Supreme Court in *Thompson*."[211] The court of appeals affirmed the lower court, finding that *Roper* did "not support Ninham's argument that sentencing a

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[199] *Id.*

[200] *Id.* at 459.

[201] *Id.*

[202] *Id.* at 460.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *See id.* There is some question, however, as to whether the circuit court was influenced by a plea on the part of the Vang family to release the tortured soul of Zong Vang, which they argued could not "be set free to go in peace until the perpetrators be brought to justice." *Id.* at 478. The circuit court judge commented on the Vang family's entreaty, "I find it incredibly interesting and somewhat significant that not only am I being asked to impose a sentence in this matter, which is my obligation and my responsibility, but I'm being asked to release a soul." *Id.* at 460. While this aspect of the case is suspect and interesting, the issues it raises are not the central concern of this Note.

[208] *Id.* at 461.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 461–62.

14-year-old to life imprisonment without parole is unconstitutional."[212] Furthermore, the court of appeals rejected Ninham's contention that his penalty was a violation of the Eighth Amendment, and denied his new factor for consideration on the basis that the lower court was well aware of the new scientific findings but found them, nonetheless, irrelevant in this case.[213]

On May 20, 2011, the Supreme Court of Wisconsin, in reviewing *Ninham*, held that a life sentence of imprisonment without parole for intentional homicide imposed upon a juvenile was "not categorically unconstitutional," on the basis that it was neither unduly harsh nor excessive;[214] and that Ninham had failed to convincingly show a new factor of a body of scientific research showing that the adolescent brain "is not fully developed . . . and that making impulsive decisions and engaging in risky behavior is an inevitable part of adolescence."[215]

C. The Categorical Analysis

The Supreme Court of Wisconsin explicitly stated that the *Graham* decision guided its own approach to *Ninham*,[216] and therefore the court applied a categorical test based on *Graham*, which was, however, categorical in name only, or at best, a mutilated categorical test. Furthermore, the court disregarded the results of its own analysis to draw a non sequitur finding that ignored all the points that worked in Ninham's favor. Disregarding the Court's logic in *Graham*, the Supreme Court of Wisconsin overlooked Ninham's diminished culpability as a juvenile and the severity of the sentence given the lack of penal justifications upon which the sentence was based. Since the Wisconsin Supreme Court "stayed Ninham's petition for review pending the Supreme Court's decision in *Graham*" and granted his review on the basis of the finding in *Graham*,[217] it is curious that the court then chose not to apply the logic of *Graham* to its analysis of *Ninham* or give an explanation for its departure from the precedent it claimed held sway over the present case. Perhaps the best way to outline the Supreme Court of Wisconsin's incorrect holding and its analytical failure is to juxtapose it with the reasoning of *Graham*—a holding and rationale that should have guided the Supreme Court of Wisconsin, in more than name only, in its treatment of *Ninham*.

In his appeal, Ninham sought modification of his LWOP sentence on the grounds that the "sentence [was] unduly harsh and excessive;" that findings of recent research on the developing adolescent brain present a new factor for consideration and frustrate the sentence and the

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[212] *Id.* at 462.
[213] *Id.*
[214] *Id.* at 478.
[215] *Id.* at 475–76, 478.
[216] *Id.* at 478.
[217] *Id.* at 462.

culpability factors that underlie it; and finally, because "the circuit court relied on an improper factor when imposing the sentence."[218] The crucial question before the court was whether sentencing a 14-year-old to LWOP for intentional homicide is a sentence that meets the definition of CUP under the Eighth Amendment, and is thus categorically unconstitutional.[219] Under Wisconsin state law, a juvenile ten years old or older who commits intentional homicide is subject to adult jurisdiction in criminal court.[220] A person who commits a first-degree homicide is guilty of a class A felony[221] and may be subject to a penalty of life imprisonment.[222] All sentences of life in prison for crimes committed on or after August 31, 1995, but before December 31, 1999, are subject to judicial discretion in terms of parole eligibility.[223] The circuit court was within its statutory authority when it sentenced Ninham to life in prison without the possibility of parole, though it was not mandated by statute to impose such a severe sentence.

1. Categorical Test, Step 1: Objective Indicia of a National Consensus

The state supreme court did look to the objective indicia. However it first asked a series of other questions the Supreme Court did not consider in *Graham*. First, it asked whether it was historically constitutional to sentence a 14-year-old to life without parole.[224] To answer this question the court looked to the year 1791, when the Bill of Rights was adopted.[225] It found that juveniles as young as seven years old were "subjected to the same arrest, trial, and punishment as adult offenders."[226] It further noted that in 1855 and then again in 1885 juveniles as young as ten years old were hanged.[227] Finally, referring to the writings of William Blackstone, the court reasoned, "once a child turned 14 years old, he or she no longer benefited from the presumption of incapacity to commit a capital, or any other, felony."[228] Blackstone's widely consulted treatise, *Commentaries on the Laws of England* (1786) was the only text to treat the topic of punishment at the time and largely influenced the spirit of the Bill of Rights,[229] but the court fails to mention that Blackstone's England draws and quarters, beheads, burns and mutilates,[230] and thus imparts a stand-

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[218] *Id.*
[219] *Id.* at 463.
[220] WIS. STAT. ANN. § 938.183(1)(am) (West 2009).
[221] *Id.* § 940.01(1) (West 2005).
[222] *Id.* § 939.50(3)(a).
[223] *Id.* § 973.014(1)(c) (West 2007).
[224] *Ninham*, 797 N.W.2d at 465–66.
[225] *Id.* at 465.
[226] *Id.*
[227] *Id.* (citing Thompson v. Oklahoma, 487 U.S. 815, 828 n.27 (1988)).
[228] *Id.* at 465–66; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *23.
[229] *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 862 (1969).
[230] *See id.* at 863–64.

ard quite different form the one presently used by the Supreme Court. Moreover, the Supreme Court did not factor archaic standards of juvenile justice into its reasoning in *Graham*. Nevertheless this antiquated metric forms the basis of the state supreme court's holding, and on this discrete issue finds that "Ninham cannot establish that sentencing a 14-year-old to life imprisonment without parole was considered cruel and unusual at the time the Bill of Rights was adopted."[231] The burden falls to Ninham to demonstrate that the sentence is, however, contrary to the "evolving standards of decency that mark the progress of a maturing society."[232]

According to the post-*Graham* Supreme Court, the analysis of the evolving standards of decency, as applied in noncapital cases, incorporates the two-step process in which the court looks to the national consensus through the lens of objective indicia comprised of authorizing legislation and judicial practice which indicates frequency of imposition. The Court then looks inward to its own independent judgment. The Court's judgment, however, is not without guidelines. It is based upon three factors: a balancing test between the severity of the crime and the severity of the penalty with culpability at the fulcrum; the penological justifications of the penalty; and though not dispositive, international consensus.[233]

The Court has determined that the best yardstick by which to measure the national consensus is to examine legislation. Claiming to follow suit, the *Ninham* court looked to legislation in its determination and found that, regarding juveniles, "44 states, the District of Columbia, and the federal government permit life without parole sentences for homicide crimes," and further, "36 of those 44 states permit life without parole sentences for offenders who were 14 years old or younger at the time of offense."[234] The *Ninham* court found that the punishment was authorized by legislation.[235] The *Ninham* court, then, pointed out that in *Graham* the statistical findings were similar, with 37 states and the District of Columbia permitting juvenile life without parole in non-homicide cases.[236] The Supreme Court, however, maintained in *Graham* that "[t]here are measures of consensus other than legislation," such as actual sentencing practices.[237] The *Ninham* court cited this analysis in *Graham*, but refused

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[231] *Ninham*, 797 N.W.2d at 466.

[232] *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted).

[233] Graham v. Florida, 130 S. Ct. 2011, 2026–34 (2010).

[234] *Ninham*, 797 N.W.2d at 468 (citing AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 18 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf).

[235] *Id.*

[236] *Id.* at 467–68.

[237] *Graham*, 130 S. Ct. at 2023 (quoting Kennedy v. Louisiana, 128 S. Ct. 2641, 2657 (2008)) (internal quotation marks omitted).

to employ it. The *Ninham* court instead reasoned that "rarity" of a sentence is not "necessarily demonstrative of a national consensus" and rather that it appears to be a rarely imposed sentence because not that many juveniles actually commit such "horrific and senseless" crimes.[238] On this basis, the Supreme Court of Wisconsin found that Ninham "failed to demonstrate that there is a national consensus against sentencing a 14-year-old to life imprisonment without parole for committing intentional homicide."[239]

The Supreme Court does not take the metric of legislation at face value. It balances the "law on the books," or the number of states that legislatively authorize the penalty against the "law in action," or the number of states that actually impose the penalty, and how often it is imposed.[240] In the case of Ninham, the argument could have been that even though there are only six states that categorically ban LWOP for juvenile offenders convicted of homicide, the sentence itself is rarely imposed.[241] Looking at a specific block of time from 1980–2006, the FBI reports juvenile offenders committed 42,043 homicides.[242] However, in 2009 only an estimated 2,574 juveniles were serving life sentences without the possibility of parole.[243] Most likely the Court would find that the penalty, though largely authorized, is so rarely used as to make it truly unusual. Moreover,

> [o]f the forty-four states which authorize life-without-parole sentences for juvenile homicide offenders, twenty-eight jurisdictions (twenty seven states and the District of Columbia) have ten or fewer persons sentenced for homicides committed as juveniles serving that sentence, while only seven states have one hundred or more persons who are serving such terms imposed for crimes committed as juveniles.[244]

The Court would likely find there is no national consensus to support the use of this penalty for this class of offender based on the complex analysis of authorization and frequency of use.

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[238] *Ninham*, 797 N.W.2d at 468.

[239] *Id.*

[240] *Graham*, 130 S. Ct. at 2023.

[241] Siegler & Sullivan, *supra* note 44, at 370–71. The states that prohibit the sentence are Alaska, ALASKA STAT. § 12.55.015(g) (2010); Colorado, COLO. REV. STAT. § 18-1.3-401(4)(b) (2012); Kansas, KAN. STAT. ANN. § 21-4622 (2007); Kentucky, KY. REV. STAT. ANN. § 640.040(2) (LexisNexis 2008); Montana, MONT. CODE ANN. § 46-18-222(1) (2009); and Texas, TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2011).

[242] *Easy Access to the FBI's Supplementary Homicide Reports: 1980–2010*, http://ojjdp.gov/ojstatbb/ezashr/asp/off_selection.asp (select 1980 through 2006 for Year of Incident and 0 to 11 and 12 to 17 for Age of Offender).

[243] *Juvenile Life Without Parole (JLWOP)*, NAT'L CONFERENCE OF STATE LEGISLATORS (Feb. 2010), http://www.ncsl.org/documents/cj/jlwopchart.pdf.

[244] Siegler & Sullivan, *supra* note 44, at 372.

2. Categorical Test, Step 2: Court's Independent Judgment

The *Ninham* court acknowledged the importance of the Supreme Court's balancing test to the formulation of its independent judgment, which looks to the severity of the crime and the severity of the punishment in light of the culpability of the offender. The court further acknowledged the finding in *Thompson*, where the Court determined

> first, that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult," and second, that the application of the death penalty to offenders 15 years old and younger does not measurably contribute to the goals that capital punishment is intended to achieve."[245]

The *Ninham* court then cited the three differences between adults and juveniles, which were outlined in *Roper*, that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders": (1) juveniles' lack of maturity and underdeveloped sense of responsibility, which results in impulsive actions; (2) the vulnerability to which juveniles are subject often leaves them susceptible to peer pressure and the forces of their surroundings; and (3) juveniles' character is often not fully formed.[246] However, the court refused to apply *Roper* and *Thompson* to *Ninham*. Moreover, even though the *Ninham* court stated that it would follow the approach set forth in *Graham*, it refused to apply the *Graham* logic to *Ninham*.

a. Juvenile Culpability

The *Ninham* court, following *Graham*, turns to the question of juvenile culpability. The *Ninham* court does not disagree with *Graham* or *Roper* that juvenile offenders are less culpable than adult offenders. However, it nuances the question of culpability. The *Ninham* court asserts, "the constitutional question before us does not concern only the typical 14-year-old offender. Rather, the question before us concerns *all* 14-year-old offenders, typical or atypical, who commit intentional homicide."[247] It is unclear if the court considers it typical of 14-year-olds to commit homicide, or where the court is going with this logic. Furthermore, it is not clear, and the court offered no explanation, as to why it has rewritten the question thus. In fact there is a complete lacuna of explanation; it is completely absent from the court's opinion, leaving one to speculate why the court finds that 14-year-olds are not "categorically less deserving of life imprisonment without parole."[248]

The court further misreads the *Graham* decision when it understands diminished moral culpability of juveniles sentenced to LWOP for non-

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[245] State v. Ninham, 797 N.W.2d 451, 469 (Wis. 2011) (quoting Thompson v. Oklahoma, 487 U.S. 815, 835, 838 (1988)).

[246] *Id.* at 469–70 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted).

[247] *Id.* at 472.

[248] *Id.*

homicide offenses to be, in part, dependent upon the offense. The *Ninham* court seems to interpret the Supreme Court to mean that determining diminished moral culpability must be a two-step process, first, the age factor; second, the offense factor. At no point does the Supreme Court, in *Graham* or elsewhere, find that diminished culpability depends upon both age *and* offense. In *Atkins*, *Roper*, *Thompson*, and *Graham* the Supreme Court finds that diminished culpability depends upon, and only upon, class of the offender (age), not the offense (homicide). Nevertheless, the Supreme Court of Wisconsin found that there was no precedent to show a juvenile who commits homicide had diminished culpability. Furthermore, the court failed to see 14-year-olds as a distinct class, "such that a different constitutional analysis applies."[249] The court based its rationale upon the presence of competing, but unnamed, studies, some of which show juveniles are "never culpable enough to deserve life imprisonment without parole" and some "psychologists" who have "promoted scientific evidence that arrives at the precise opposite conclusions."[250] Thus, the court finds that evidence on both sides of the argument simply cancels out the consideration, and that "Ninham has failed to demonstrate that 14-year-olds who commit intentional homicide cannot reliably be classified among those offenders deserving of life imprisonment without parole."[251]

The *Graham* precedent would have required the court to look to its own independent judgment based on the three factors, mentioned, but not adhered to, in the state supreme court treatment. The first factor, the seriousness of the crime, would be extremely difficult to argue in Ninham's favor since the offense is disturbing and difficult to face. However, nowhere in Eighth Amendment CUP jurisprudence does the Court state all of the factors must be in the defendant's favor. The Court makes its assessment based on all factors taken together as they relate to each other to create a holistic picture.

The second factor is concerned with the culpability of the offender, or offender class. This is the strongest point of Ninham's case and the crux of the constitutional question it poses. Following *Graham*, a juvenile offender has lowered culpability, which is constitutionally sufficient, and his diminished responsibility de facto prohibits LWOP for juvenile homicide offenders for several reasons. The first is that life without parole is the most severe sentence a juvenile can suffer; therefore it cannot be applied because offenders with diminished culpability can never face the imposition of the most severe penalty. It is likely the Court would also find that a juvenile sentenced to die in prison would spend many more years there than an adult counterpart in his forties, thereby punishing the juvenile offender who has the lesser culpability with the harsher sentence. Finally, *Graham* reminds us that "the similarities between life with-

[249] *Id.*
[250] *Id.* at 473.
[251] *Id.*

out parole sentences and death sentences, noting that the comparison is especially apparent when the sentences are imposed upon juveniles."[252]

Regardless of whether the juvenile offender committed a homicide or not, he or she is still a juvenile and by that fact vastly different from the average adult offender in cognitive capacity, character development, and potential for maturation and change. As *Graham* noted, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[253] Furthermore, a juvenile homicide offender is just as likely as a non-homicide offender to be an insufficiently functioning member of his own defense. It is highly likely the Court would find a juvenile's reduced culpability status strong enough to override any benefits of safety to individuals or society at large that the state may argue makes the sentence necessary.

b. Penological Justification

Part of the analysis of the juvenile offender's culpability is concerned with the penological justifications of the punishment. Following *Graham*, it seems the Court would not find the justifications of the punishment able to withstand the Eighth Amendment challenge in a case of a juvenile homicide offender.[254] First, in terms of deterrence, the same issues of immaturity that reduce the culpability of a juvenile offender also make it highly likely that a juvenile offender is not going to engage in a sophisticated cost–benefit analysis of his behavior prior to committing the crime.[255] *Graham* found that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[256] The average juvenile's inability to complexly and comprehensively calculate into the future what it means to act in the present undermines the penological goal of deterrence. The Court further reaffirmed its holding in *Roper*, and found that deterrence doesn't function for juveniles in a way it might for adults because the deterrent effect of a sentence such as LWOP is outweighed by diminished culpability.[257]

Moreover, the *Graham* Court reasoned that penological theory undergirding incapacitation depends upon an ultimate determination that the offender is absolutely beyond reform.[258] However, the Court notes that the "characteristics of juveniles make that judgment questionable."[259] Remarkably, the *Ninham* court noted that *Graham* found that "even if the state's judgment that a juvenile is incorrigible is later confirmed by the

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[252] *Id.* at 470.

[253] Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

[254] *See id.* at 2028–30.

[255] *See id.* at 2028.

[256] *Id.* (alteration in original) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)) (internal quotation marks omitted).

[257] *Id.*

[258] *Id.* at 2029.

[259] *Id.*

juvenile's misbehavior in prison . . . the sentence of life without parole would still be disproportionate because the judgment was made at the outset, before the juvenile has a meaningful opportunity to demonstrate maturity."[260] Again, the *Ninham* court disregarded the Supreme Court's reasoning. In addition, *Graham* found that rehabilitation is undermined because there is no hope, which is a necessary component of rehabilitation, that good behavior will result in any other reality than life imprisonment, especially when the offender is a juvenile who possesses the capacity for change and maturity.[261]

Retribution is, perhaps, the only argument the state could make on its behalf, but both *Roper* and *Graham* found that retribution isn't as valid a goal in terms of minors,[262] precisely because the foundation of retribution is based on the theory that the most severe retribution "must be directly related to . . . personal culpability."[263] Therefore, retribution cannot be justified when the offender has diminished culpability. The Supreme Court's line of reasoning in *Graham* did not, however, guide the Supreme Court of Wisconsin.

The *Ninham* court began and ended its analysis of the penological justifications of JLWOP in homicide cases by noting that it does not recognize Ninham as being a part of a class of offender deserving of diminished culpability because the offense is homicide. As mentioned before, the Supreme Court of Wisconsin misunderstood how the Supreme Court has typically treated "class of offender" for the purpose of determining diminished moral culpability. The *Ninham* court then concludes that "sentencing a 14-year-old to life imprisonment without parole for committing intentional homicide serves the legitimate penological goals of retribution, deterrence, and incapacitation."[264]

c. International Consensus

Though the Supreme Court of Wisconsin completely disregarded the international consensus, there is a long line of precedent showing that world opinion has a peripheral role in the Court's capital and noncapital case reasoning. Had the state supreme court employed a more contemporary, international opinion than Blackstone, it would have found what the Supreme Court would find if *Ninham* was argued before it. The Court would look to the international consensus and find that only 11 other countries legislatively authorize the imposition of LWOP for juvenile homicide offenders.[265] Among those countries only the United States and Israel actually institute the punishment.[266] Moreover, as we

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[260] State v. Ninham, 797 N.W.2d 451, 471 (Wis. 2011).

[261] *See Graham*, 130 S. Ct. at 2030.

[262] *See id.* at 2028; Roper v. Simmons, 543 U.S. 551, 571 (2005).

[263] *Graham*, 130 S. Ct. at 2028 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

[264] *Ninham*, 797 N.W.2d at 473.

[265] *Graham*, 130 S. Ct. at 2033.

[266] *Id.*

have seen, Israel only has seven prisoners currently serving such a sentence. Israel also incorporates a review process into its extended sentences, making the United States a lone wolf in its imposition of the sentence.[267] It is highly likely the Court would consider the international consensus showing the punishment to be cruel and unusual to be a valid indicator of a general and global evolving standard of decency that could serve to clarify the Court's analysis of the national consensus and bolster its own independent judgment that JLWOP for homicide offenders is a violation of the Eighth Amendment's prohibition against CUP.

D. Conclusion of Ninham

In sum, there is no indication in the majority's opinion in *Graham* that it sought to limit the *Graham* holding only to juveniles who had been convicted of non-homicide offenses, or that it specifically intended to exclude juveniles who had been convicted of homicide from benefitting from the *Graham* ruling, or its extension. In fact, it seems the Court is willing to consider that LWOP is analogous to the death penalty, that it is a long, drawn out death penalty that precludes hope of any other kind of life or rehabilitation. Even though some juveniles convicted of homicide may be unduly released on parole, a categorical ban on the sentence will ensure that no juvenile is condemned to die in prison. Moreover, a sentence that provides for periodic review of an offender does not necessitate the offender's release. It is likely the Court would consider the constitutional principle of the Eighth Amendment far more valuable and important to protect than the individual legislatures' enactments of CUP sentencing schemes for juveniles.

Conclusion

JLWOP does not ask of the Eighth Amendment what it cannot give. The Amendment is made of stronger stuff than that and certainly bears the weight of a test like the one *Ninham* presents, just as it stood the test of *Graham*. *Graham* guaranteed constitutional protection to juvenile offenders serving LWOP for non-homicide cases because the basis of the issue was, and remains in *Ninham*, the diminished culpability of the juvenile offender. Moreover, under a categorical analysis, that diminished culpability instituted by the Supreme Court depends entirely on the class of offender and has nothing to do with the class of the offense. The shift in jurisprudence that dominates *Graham*, the application of a categorical test to a noncapital case, signifies the nexus of the legal and socio-ethical understanding of juveniles as distinct from adults. The genealogy of juvenile justice that began with the first reformatories and earliest juvenile courts was an attempt to address the specific and distinct needs of juveniles with the ultimate aim of rehabilitation and preparation for reentry

[267] *Id.*

into the community as vital and valuable members of society. The procedural gains made by *Kent* and *Gault*, despite the unintended consequences of legally equating juvenile offenders with their adult counterparts, can now be coupled with the recognition, promulgated by the early reformers, that juvenile offenders are a distinct class wholly deserving of different penological standards and praxis. With *Graham*, the Supreme Court assured that juvenile offenders would be guaranteed procedural safeguards as well as distinct and absolute diminished-culpability status. The Court's decision expanded the application of youth, as a mitigating factor subject to importance in sentencing schema, to become a concurrent factor important from the outset and crucial to bear in mind throughout the entire process. *Graham* opens the door for *Ninham* and all similarly situated juvenile offenders who are denied diminished culpability, subjected to the most severe penalties traditionally reserved for the worst adult offenders, and thereby denied the protection of the Eighth Amendment. Ultimately, *Graham* calls into question the long held belief that the answer to society's criminological ills resides in the practice of hiding behind insufferable walls a significant percentage of society's "undesirables," most of whom are poor and minorities. However, throwing away the key does nothing to address the inherent problems that plague contemporary society, and has no penologically justified basis. In the case of juvenile offenders, a life sentence with no possibility of release prematurely determines that certain human beings are without value. The Supreme Court, in *Graham*, rejected that dark fatalism for a gentler flame in its enlightened conviction that juveniles are an important part of our collective future, that their actions point to endemic problems in society that are not addressed by imprisonment, and that the curative for those individuals and society at large is rehabilitation rather than a long, drawn out, meaningless, tortuous, and hopeless existence unto death. What could that possibly ever improve? We are reminded of Emerson's hopeful articulation that every obstacle carries within it a solution, for "every wall is a gate."[268]

[268] 9 RALPH WALDO EMERSON, THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 137 (Ralph H. Orth & Alfred R. Ferguson eds., 1971).