CASE NOTE

CRIMINAL LAW—One Small Step for Juveniles, One Giant Leap for Juvenile Justice; *Graham v. Florida*, 130 S. Ct. 2011 (2010)

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Introduction

Precedent, science, and common sense all reflect the notion that juveniles are less culpable than adults.[1] The United States juvenile justice system, however, has cast aside its original role of caring for those who cannot care for themselves.[2] In response to widespread fear and misperception of rising crime rates, juvenile justice policy is now oriented toward protecting society from juvenile offenders.[3] Juvenile sentences have grown longer and harsher, with appellate courts reluctant to review juvenile sentencing practices.[4] All of this changed, however, in 2010 with *Graham*

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[1] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (stating the diminished culpability of minors disqualifies them from the worst class of offenders); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (noting a juvenile is less culpable than an adult who commits a comparable crime); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (commenting that laws and precedent reflect the reduced responsibility and maturity of minors); May v. Anderson, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect."); Hawkins v. Hargett, 200 F.3d 1279, 1283 (10th Cir. 1999) (noting that the chronological age of a defendant relates to his culpability); Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 83 (2000) (observing that adolescents are less culpable due to their diminished capacity for reasoning and moral judgment). *See generally* 21A Am. Jur. 2d *Criminal Law* § 886 (2010) (referring to the Court's decisions that juveniles have certain traits that render them less culpable as a class).

[2] *See* Graham v. Florida, 130 S. Ct. 2011, 2050 (2010) (Thomas, J., dissenting) ("States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders."); Bishop, *supra* note 1, at 83–84 (discussing the gradual shift of juvenile justice policy away from a *parens patraie* role to a more punitive orientation). After World War II, widespread fears about increased juvenile crimes led to an increase in the transfer of juvenile offenders to adult courts. *See* Daniel E. Traver, Comment, *The Wrong Answer to a Serious Problem: A Story of School Shootings, Politics and Automatic Transfer*, 31 Loy. U. Chi. L.J. 281, 287–88 (2000) (discussing the history of transfer post-WWII).

[3] *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601(a)(1) (2006) (finding a widespread consensus of high juvenile crime rates despite an overall decrease in actual crime rates); Ernestine S. Gray, *The Media—Don't Believe the Hype*, 14 Stan. L. & Pol'y Rev. 45, 46–47 (2003) (noting that despite increased media coverage, violent juvenile crime has actually been decreasing since 1994); Shannon F. McLatchey, *Juvenile Crime and Punishment: An Analysis of the Get-Tough Approach*, 10 U. Fla. J.L. & Pub. Pol'y 401, 406–07 (1999) (describing the recent "get tough" shift in juvenile justice policy brought about by public fear, politicians, and the media).

[4] *See* Rummel v. Estelle, 445 U.S. 263, 272–73 (1980) (describing how successful challenges to the proportionality of a sentence are quite rare); Antoinette Clarke, *The Baby and the Bathwater:*

v. Florida, when the United States Supreme Court prohibited life-without-parole sentences for juvenile non-homicide offenders.[5] The *Graham* decision offers such offenders the possibility of redemption—through demonstrated maturity and rehabilitation they now have a meaningful chance of release.[6]

This case note advocates extending *Graham*'s holding to prohibit juvenile life-without-parole (JLWOP) sentences altogether, due to the need for a more humanitarian Eighth Amendment to the United States Constitution and a lack of criminological justification for punitive juvenile justice.[7] The background section of this note outlines the development of Eighth Amendment jurisprudence and includes the history of juvenile justice in America.[8] Next, this note takes issue with *Graham*'s narrow scope, supported by a discussion of sentencing error and constitutional theory.[9] Finally, drawing support from international law and empirical research, this note advocates for the return to a more humane, effective system of juvenile justice.[10]

BACKGROUND

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[11] The

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Adolescent Offending and Punitive Juvenile Justice Reform, 53 U. KAN. L. REV. 659, 677 (2005) (noting that from 1992–1997, a widespread increase in removal of juveniles to adult courts allowed for the imposition of harsher punishments); Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 35–36 (2009) (describing how appellate courts have generally upheld sentences for a term-of-years despite the constitutional prohibition against cruel and unusual punishment).

[5] *See* 130 S. Ct. at 2034 (holding the Eighth Amendment prohibits the imposition of life sentences without the possibility of parole for juvenile non-homicide offenders); Mark Hansen, *What's the Matter with Kids Today*, 96 A.B.A. J. 50, 55 (2010) (quoting a statement that the Court has clearly embraced a "kids are different" view). *Graham* is the first case to ingrain redemption within the meaning of the Eighth Amendment, forbidding states from making the judgment that any juvenile is truly irredeemable. *See* Robert Smith & Ben G. Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 92 (2010). Essentially, *Graham* offers juvenile life offenders the possibility of hope in spite of cruel sentencing practices. *Id.* at 94.

[6] *See Graham*, 130 S. Ct. at 2030 (explaining that a state must provide "defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

[7] *See infra* notes 104–71 and accompanying text (advocating for a bright-line rule against all JLWOP sentences).

[8] *See infra* notes 11–59 and accompanying text (discussing categorical restrictions against cruel and unusual punishment, proportionality in sentencing, and principles of juvenile justice).

[9] *See infra* notes 104–52 and accompanying text (criticizing the scope of *Graham* based on concerns with sentencing error and the need for increased judicial activism).

[10] *See infra* notes 153–71 and accompanying text (discussing international models of juvenile justice).

[11] U.S. CONST. amend. VIII. The Court has construed "cruel and unusual punishments" to include barbarities such as torture and punishments excessive to the crime committed. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 239 (2d ed. 1995).

Framers of the United States Constitution intended the Cruel and Unusual Punishments Clause to proscribe certain methods of punishment.[12] But prior to *Graham* the United States Supreme Court only issued three categorical restrictions against cruel and unusual punishments.[13] One such categorical restriction forbids the use of capital punishment for non-homicide offenses against individuals.[14] In *Atkins v. Virginia*, the Court also prohibited the execution of mentally retarded defendants.[15] Most recently, the Court held in *Roper v. Simmons* the Eighth Amendment forbids capital punishment for crimes committed as juveniles.[16] The Court decided *Roper* and *Atkins* through its "evolving standards of decency" analysis—in which the Court interprets the Eighth Amendment through consideration of prevailing moral standards in today's society.[17]

Proportionality in Sentencing

In contrast to a few bright-line rules restricting capital punishment, the Court's application of the Eighth Amendment to noncapital crimes is imprecise.[18] Lower courts struggle with how and whether to apply the Eighth Amendment

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[12] *See* Harmelin v. Michigan, 501 U.S. 957, 979 (1991) (describing floor debates at the First Congress to show the original intent of the Cruel and Unusual Punishments Clause); Gregg v. Georgia, 428 U.S. 153, 169–70 (1976) (explaining how the Cruel and Unusual Punishments Clause was directed at prohibiting torture and barbarous punishment).

[13] *See* Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2982 (2009) (noting the Court has rarely adopted categorical exclusions to the death penalty for certain classes of offenders). The *Graham* majority expressed its reluctance to impose an additional categorical rule. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) ("Categorical rules tend to be imperfect, but one is necessary here.").

[14] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (holding that the Eighth Amendment prohibits capital punishment for the rape of a child); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that capital punishment is impermissible against a robber who does not commit or intend to commit homicide). The *Kennedy* Court concluded that non-homicide crimes are fundamentally different than first-degree murder in the context of capital punishment. 128 S. Ct. at 2660. Recently, the Court also concluded that capital punishment must be confined to the most serious crimes. Roper v. Simmons, 543 U.S. 551, 574 (2005).

[15] 536 U.S. 304, 321 (2002).

[16] 543 U.S. at 578.

[17] *See id.* at 560–61 (noting that interpretation of the Eighth Amendment requires consideration of evolving standards of decency); *Atkins*, 536 U.S. at 311–12 (observing that proportionality review is guided by evolving standards of decency). In *Trop v. Dulles*, the Court first used its "evolving standards of decency" analysis. *See* 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[18] *See Graham*, 130 S. Ct. at 2036 (Roberts, C.J., concurring) (describing the Court's struggles in applying the Eighth Amendment to noncapital crimes); Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (acknowledging unclear and inconsistent precedent in the area of sentencing proportionality); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 679–81 (2005) (describing sentencing proportionality review as "messy and complex").

to challenges of a term of years.[19] In the late nineteenth century, the Court held that punishments of torture and other unnecessarily cruel punishments are forbidden.[20] At that time, the Court refrained from clarifying the meaning of unnecessary cruelty, aside from describing a few choice examples.[21]

In a series of cases beginning around the turn of the century, the Court established its initial interpretation of the Cruel and Unusual Punishments Clause.[22] In *Weems v. United States*, the Court held a sentence of hard labor for twelve to twenty years was disproportionate to the crime of falsifying an official document.[23] Then, in *Trop v. Dulles*, the Court declared a sentence of denationalization unconstitutionally severe, even for the crime of wartime desertion.[24] Taken together, *Weems* and *Dulles* stand for the proposition that even a prisoner has the right to his dignity and humanity.[25] In 1976, the Court continued this line of reasoning in *Estelle v. Gamble*, holding the Eighth Amendment prohibits deliberate indifference to the medical needs of prisoners.[26] The *Gamble* Court also stated the Eighth Amendment embodies principles of humanity, decency, dignity, and civilized standards.[27]

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[19] *See* United States v. Farley, 607 F.3d 1294, 1336 (11th Cir. 2010) (discussing the difficulty in determining whether a sentence of years is constitutionally disproportionate); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 75 (2010) ("It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess.").

[20] Wilkerson v. Utah, 99 U.S. 130, 136 (1878). "Cruel and unusual punishment" is a phrase that brings to mind "the whipping post and the ducking stool." LON L. FULLER, THE MORALITY OF LAW 105 (Revised ed. 1969).

[21] *See Wilkerson*, 99 U.S. at 135–36 (noting the difficulty in determining an exact definition of the Eighth Amendment). This case described several punishments as unconstitutionally torturous, including: (1) being drawn and dragged to the place of execution; (2) being disemboweled alive, quartered, and then beheaded; (3) being dissected in public; and (4) being burned alive for treason. *Id.* at 135.

[22] *See* Eva S. Nilsen, *Decency, Dignity and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 140 (2007) (describing how the Court began applying the Eighth Amendment to criminal sentences in a series of decisions starting with *Weems v. United States*, 217 U.S. 349 (1910)).

[23] *See* 217 U.S. at 381. *Weems* also stands for the proposition that the Eighth Amendment safeguards against unrestrained governmental power through sentencing. *See id.* (describing how an unconstitutionally excessive sentence is the hallmark of an oppressive government).

[24] 356 U.S. 86, 101–03 (1958).

[25] Nilsen, *supra* note 22, at 140; *see Weems*, 217 U.S. at 411 (White, J., dissenting) (noting the Cruel and Unusual Punishments Clause was intended to prohibit barbarous and inhumane punishments); *Trop*, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[26] 429 U.S. 97, 103 (1976). In *Gamble*, the Court also prohibited punishments which constitute the "unnecessary and wanton infliction of pain." *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[27] *Id.* at 102–03.

A few years later, in *Rummel v. Estelle*, the Court began a pattern of deference to legislatively mandated terms of imprisonment.[28] *Rummel* involved the constitutionality of a mandatory life sentence for a white-collar criminal under Texas's recidivist statute.[29] The Court held such a sentence was not unconstitutionally disproportionate, despite thefts amounting to a total of less than $300.[30] The next decision, *Hutto v. Davis*, involved a challenge to a forty-year sentence imposed for possession and distribution of nine ounces of marijuana with a street value of about $200.[31] The Court upheld the sentence, noting that "'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'"[32]

Next, in *Solem v. Helm*, the Court set forth its "gross disproportionality" test.[33] Under this test, courts determine the constitutionality of a particular sentence by looking at three factors: (1) "the gravity of the offense and the harshness of the penalty;" (2) "sentences imposed on other criminals in the same jurisdiction;" and (3) "sentences imposed for commission of the same crime in other jurisdictions."[34] In *Harmelin v. Michigan*, the Court held that severe, mandatory penalties are not unconstitutionally excessive.[35] Most recently, in *Ewing v. California*, the Court

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[28] *See* 445 U.S. 263, 274 (1980) (reasoning that recent categorical decisions involving capital punishment and denationalization justify a reluctance to review a term of years alone). This case was the first in which the Court noted deference to legislatures regarding the "line-drawing process" in sentencing. *Id.* at 275, 284. Deference to the "line-drawing process" means that legislatures are generally free to determine sentences for a term of years, free of judicial review by lower courts. *See* Rachel A. Van Cleave, "*Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 238 (2003) (describing how *Rummel* sent a signal to lower courts that generally discouraged proportionality review).

[29] *Rummel*, 445 U.S. at 264–65.

[30] *Id.* at 265–66, 285.

[31] 454 U.S. 370, 375 (1982) (Powell, J., concurring).

[32] *Id.* at 374 (quoting *Rummel*, 445 U.S. at 272).

[33] 463 U.S. 277, 288–93 (1983) (recognizing the Eighth Amendment forbids punishments that are grossly disproportionate to the offense, and setting forth a proportionality analysis). Prior to the *Graham* ruling, *Solem* was the only case in which the Court found a prison term unconstitutionally disproportionate. *See id.* at 297–303 (holding that the crime of "uttering a 'no-account' check" for $100 was unconstitutionally disproportionate to a life without parole sentence, even for a defendant with a significant criminal history); Nilsen, *supra* note 22, at 148 (noting that since *Solem*, the Court has not reversed a non-capital sentence for gross disproportionality).

[34] *Solem*, 463 U.S. at 292.

[35] 501 U.S. 957, 994–95 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."). Justice Scalia wrote for the majority and even suggested the Eighth Amendment contains no guarantee of proportionality. *Id.* at 960, 966. The dissent criticized the majority for essentially discarding the second and third factors of its gross disproportionality test. *See id.* at 1020 (White, J., dissenting) (noting the plurality's abandonment of the proportionality test set forth in *Solem*).

upheld the constitutionality of California's "three strikes" law.[36] This case involved a life sentence for the theft of a few golf clubs, and the Court upheld the sentence, continuing its recent position of deference towards legislative policy.[37] All of these cases signify a strong trend towards judicial restraint in appellate review of noncapital sentences.[38]

Principles of Juvenile Justice

Juvenile justice in America began with a humanitarian, progressive outlook.[39] The first case delineating the *parens patraie* role of the state was *Ex parte Crouse*.[40] In this case, the Pennsylvania Supreme Court held that a state may intervene on behalf of children as the common guardian of the community.[41] Illinois established the first juvenile court in 1899, and the rest of the country followed suit.[42] The juvenile courts differed from their adult counterparts in three important respects: (1) the proceedings were separate from those for adult offenders; (2) parents were involved in the proceedings; and (3) children were not imprisoned in adult jails.[43]

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[36] 538 U.S. 11, 27–31 (2003). Well-publicized research in the early 1990s warned of an upcoming wave of juvenile "super-predators." Gray, *supra* note 3, at 46. This predicted crisis never occurred but prompted a hyper-punitive scheme of crime control which led to the "three-strikes law" challenged in *Ewing*. Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 753–54 (2001). California's "three-strikes law" mandates an indeterminate life imprisonment term for felony defendants who have two or more prior convictions for violent or serious felonies. *Ewing*, 538 U.S. at 11.

[37] *Ewing*, 538 U.S. at 25. The *Ewing* Court stated that it does not function as a "superlegislature" to second-guess policy choices of state legislatures. *Id.* at 28.

[38] *See* Castiglione, *supra* note 19, at 77 (describing how the Court's current model of proportionality review seldom results in overturned sentences); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 29 (2010) ("[O]nly one Supreme Court decision and a handful of lower court decisions have ever invalidated an adult prison term as cruel and unusual punishment."); Nilsen, *supra* note 22, at 116 (describing how noncapital sentences are inadequately scrutinized by appellate courts).

[39] *See* Audrey Dupont, *The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U. L. REV. 255, 257 (2000) (describing the progressive roots of the juvenile justice system). Progressive reformers envisioned a system that protected and nurtured juveniles, rather than holding them wholly accountable for their actions. *Id.*

[40] *See* 4 Whart. 9, 11 (Pa. 1839). *Parens patraie* means that the "state must care for those who cannot take care of themselves." Clarke, *supra* note 4, at 403.

[41] *Crouse*, 4 Whart. at 9–11.

[42] Clarke, *supra* note 4, at 667. By 1925, juvenile courts existed in every state except for Maine and Wyoming. *Id.* Maine and Wyoming established juvenile courts twenty years later. Jeffrey M.Y. Hammer et al., *Denying Child Welfare Services to Delinquent Teens: A Call to Return to the Roots of Illinois' Juvenile Court*, 36 LOY. U. CHI. L.J. 925, 929 n.21 (2005).

[43] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 115–16 (1909) (describing three key principles underlying juvenile-court legislation). This article also notes the revolution of juvenile justice around the turn of the twentieth century. *Id.* at 104.

America's fledgling juvenile justice system soon became an example for the rest of the world.[44] It progressively emphasized rehabilitation and reintegration into society—supported by principles of psychology and social science.[45] Lawmakers expected juvenile courts to determine the needs of a child rather than adopt a punitive approach to juvenile justice.[46] In the 1960s, the Supreme Court began to shape juvenile justice law, as Congress had not set mandatory regulations for the treatment of juvenile offenders.[47] The Court first spoke on the nature of juvenile justice in *Kent v. United States*, stating juvenile courts should provide guidance and rehabilitation instead of punishing criminal conduct.[48]

A series of Supreme Court decisions clarified the rights of juveniles in criminal proceedings.[49] In *Kent*, the Court for the first time held a juvenile defendant deserves at least the right to due process and fair proceedings.[50] Then, *In re Gault* enumerated the constitutional rights of juvenile defendants, including the right to counsel, confrontation and cross-examination of witnesses, timely notice of charges, and the privilege against self-incrimination.[51] Next, in *In re Winship* the

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[44] *See* Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 FLA. ST. U. L. REV. 471, 474 (2001) ("The creation of the juvenile justice system made the United States the moral and legal model for the world.").

[45] *See* Clarke, *supra* note 4, at 667–69 (describing several goals of the Progressive Reformers who were responsible for the creation of America's juvenile justice system).

[46] *See id.* (noting that early juvenile courts acted in the best interests of a child).

[47] *See* Jelani Jefferson & John W. Head, *In Whose "Best Interests?"—An International and Comparative Assessment of US Rules on Sentencing of Juveniles*, 1 HUM. RTS. & GLOBALIZATION L. REV. 89, 126–27 (2007) (noting juvenile justice law is found in Supreme Court decisions because there are no mandatory federal regulations regarding juvenile justice).

[48] *See* 383 U.S. 541, 554 (1966) (describing the objectives of juvenile court acts). *Kent* also stands for the proposition that juvenile court acts are rooted in the social welfare philosophy. *Id.* Thirty-four years earlier, the landmark case of *Powell v. Alabama* implied that young defendants deserve at least a fair trial. *See* 287 U.S. 45, 57–69 (1932) (describing due process concerns when a group of young, illiterate defendants were rushed into a capital trial without the benefit of counsel beforehand).

[49] *See* David W. Roush, *Cognitive Behavioral Intervention with Serious and Violent Juvenile Offenders: Some Historical Perspective*, 72 FED. PROBATION 30, 30 (2008) (describing a set of decisions in the 1960s that resulted in changes known as the "constitutionalization" of the juvenile justice system). The 1960s and early 1970s have also been described as a "due process revolution" with respect to juvenile justice. Clarke, *supra* note 4, at 669–70.

[50] *See* 383 U.S. at 562 (noting that a waiver hearing must at least satisfy the Due Process Clause). Justice Abe Fortas, who wrote for the Court in *Kent*, was an avid supporter of children's rights. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 261 (2005). As a young Washington lawyer, Abe Fortas argued for indigent defendants' right to counsel in front of the Supreme Court and won. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE PRINCIPLES, POLICIES AND PERSPECTIVES 954–55 (4th ed. 2010) (describing Abe Fortas' litigation of the seminal case *Gideon v. Wainwright*, 372 U.S. 355 (1963)).

[51] 387 U.S. 1, 32–57 (1967). In this case, the Court also stated that juveniles need the "guiding hand of counsel" at every stage of proceedings against them. *Id.* at 36.

Court held the government must prove any charges beyond a reasonable doubt in juvenile courts.[52] Finally, over thirty years later, the Court prohibited the execution of juveniles in *Roper v. Simmons*.[53]

During the past few decades, the American juvenile justice system has undergone a marked transition.[54] Beginning in the late 1980s, a "get tough on crime" movement gained momentum due to sharp increases in violent crimes, especially among young minorities.[55] Between 1992 and 1997, forty-four states changed their laws to facilitate the transfer of juveniles to adult courts.[56] A series of school shootings—including the Columbine massacre—stunned the country and fueled a wave of legislation intended to crack down on school violence.[57] The media's focus on violent crime fueled public fear and frustration, and campaign promises from politicians resulted in tougher laws and harsher sentences.[58] As a result of this transition, the United States juvenile justice system has shifted from its *parens patriae* role to a more punitive role of protecting society from juvenile offenders.[59]

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[52] 397 U.S. 358, 368 (1970). *Winship* also stands for the proposition that juvenile defendants are entitled to criminal due process safeguards. *See id.* at 365–66 ("Civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.").

[53] 543 U.S. 551, 578 (2005) (holding the Eighth Amendment forbids the execution of juvenile offenders). *Roper* extended the reach of *Thompson v. Oklahoma*, which struck down capital punishment for juveniles younger than sixteen at the time of their offense. *See Roper,* 543 U.S. at 574 ("The logic of *Thompson* extends to those who are under 18."); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (prohibiting the execution of offenders who were younger than sixteen at the time of their offense).

[54] *See* Graham v. Florida, 130 S. Ct. 2011, 2025 (2010) (describing how multiple states have moved away from their juvenile court systems).

[55] Bishop, *supra* note 1, at 84. At this time, the media and even some academics portrayed juvenile offenders as "vicious and savvy." *Id.*

[56] *Id.* In the late 1990s, nearly every state changed their transfer laws in order to bring more juveniles into adult courts. McLatchey, *supra* note 3, at 407. Additionally, the rate of judicial waiver—which allows judges to send juveniles into adult courts—increased at an astounding rate of sixty-eight percent between 1988 and 1992. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 992 (2008).

[57] *See* Traver, *supra* note 2, at 281–83 (describing the effect of a recent string of school shootings). Some academics have described the media's focus on school shootings as disproportionate to the actual occurrence of school violence. *See* Gray, *supra* note 3, at 49–50 (noting that only 0.16% of murders in the United States happen at schools, in contrast to the media's portrayal of school violence as widespread and endemic).

[58] *See* McLatchey, *supra* note 3, at 406 (describing how the media, politicians, and public attitudes have influenced juvenile justice policy).

[59] *See* Bishop, *supra* note 1, at 85 (noting a recent and substantial expansion in the number of juveniles transferred to adult courts); Clarke, *supra* note 4, at 674 (noting that lawmakers have put aside rehabilitative goals in favor of a more punitive model of juvenile justice); Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 217 (2007) (describing how a retributive shift in juvenile justice policy signifies a major departure from traditional goals of juvenile courts); McLatchey, *supra* note 3, at 406–07 (discussing how juvenile

PRINCIPAL CASE

Terrance Graham, the petitioner, was born in 1987 to parents who suffered from a crack cocaine addiction.[60] He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and began drinking and using drugs at an early age.[61] In 2003, at the age of sixteen, Graham and two accomplices attempted to rob a restaurant, and one of his accomplices struck the restaurant manager in the head with a metal pipe.[62] The State of Florida filed charges against Graham, including armed burglary with assault or battery and attempted armed robbery.[63] He pleaded guilty to the charges, and the trial court sentenced Graham to two concurrent three-year terms of probation.[64]

In December 2004, police arrested Graham for two additional robberies.[65] Police apprehended Graham after he fled the scene of a crime and found three handguns in his car during the subsequent arrest.[66] The State charged Graham with violation of probation, armed burglary, and armed home invasion robbery.[67] Graham's attorney requested the minimum sentence of five years, and the State asked for a forty-five year sentence, despite a presentence report's recommendation of four years.[68] The trial judge sentenced Graham to life imprisonment for armed burglary—the maximum sentence authorized by law.[69]

Due to Florida abolishing its parole system, Graham had no possibility of release.[70] Graham challenged his sentence under the Eighth Amendment, but the First District Court of Appeal of Florida affirmed.[71] The court concluded Graham

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justice policy has shifted towards a more punitive outlook). But there is a recent push towards juvenile justice reform in certain states and at a national level. *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601(a)(10) (2006) (recommending the implementation of programs that emphasize rehabilitation and effectively reintegrate juvenile offenders into the community); de la Vega & Leighton, *supra* note 56, at 1022–25 (describing the holistic and rehabilitative approach of several juvenile justice programs).

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

[61] *Id.*

[62] Graham v. State, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. 2008), *rev'd*, 130 S. Ct. 2011 (2010).

[63] *Id.*

[64] *Graham*, 130 S. Ct. at 2018.

[65] *Id.* at 2018–19.

[66] *Id.*

[67] Graham v. State, 982 So. 2d at 45.

[68] *Graham*, 130 S. Ct. at 2019.

[69] *Id.* at 2020.

[70] *Id.*; *see* FLA. STAT. § 921.002(1)(e) (2003) (stating parole provisions do not apply to persons sentenced under the Florida Criminal Punishment Code). Graham's chances of being pardoned were extremely rare. *See* United States v. Aguirre-Tello, 353 F.3d 1199, 1212 (10th Cir. 2004) (noting the rareness of executive clemency).

[71] Graham v. State, 982 So. 2d at 44–45, 51.

was incapable of rehabilitation and the sentence was not grossly disproportionate to his crimes.[72] Following a denial of review by the Florida Supreme Court, the United States Supreme Court granted certiorari.[73] In a five to four decision, the *Graham* court struck down juvenile life-without-parole (JLWOP) sentences for non-homicide offenders.[74]

Majority Opinion

Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Ginsburg, Breyer, and Sotomayor joined.[75] The Court first explained the typical approach for determining if an individual sentence is unconstitutionally disproportionate under the Eighth Amendment.[76] Next the majority detailed steps in determining a categorical restriction against certain types of cruel and unusual punishment.[77] As a starting point, the Court looked for any objective evidence of a national consensus against JLWOP sentences.[78] The Court examined actual sentencing practices and found that JLWOP sentences are rare.[79] Also, the majority noted that transfer laws may contravene legislative intent to allow JLWOP sentences and no other country in the world allows their imposition.[80]

Next, the Court considered the culpability of juvenile offenders along with the severity of JLWOP sentences.[81] It described JLWOP sentences as especially severe—second only to the death penalty.[82] Furthermore, it noted a juvenile non-homicide offender is far less blameworthy than an adult murderer, but the adult murderer may receive a lesser sentence in some cases.[83] The Court

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

[73] Graham v. Florida, 129 S. Ct. 2157 (2009) (mem.).

[74] *Graham*, 130 S. Ct. at 2017, 2027, 2034. After the Court's ruling in *Graham*, Florida Attorney General Bill McCollum stated that Terrance Graham would probably be resentenced to a "very long" prison term. *See* Hansen, *supra* note 5, at 55.

[75] *Graham*, 130 S. Ct. at 2017.

[76] *Id.* at 2021 (noting the Eighth Amendment "'forbids only extreme sentences that are 'grossly disproportionate' to the crime'" (quoting Harmelin v. Michigan, 501 U.S. 957, 959 (1991))).

[77] *See id.* at 2022–23.

[78] *Id.* at 2023.

[79] *See id.* (noting that although thirty-seven states, the District of Columbia, and the federal government allowed this sentencing practice, this alone was not dispositive). Only twelve jurisdictions actually impose life sentences without parole against juvenile non-homicide offenders, although thirty-eight jurisdictions are actually authorized to do so. *Id.* at 2023–24. Among these jurisdictions, Florida is responsible for a significant majority of JLWOP offenders. *Id.* at 2024.

[80] *See id.* at 2025, 2034 (describing how transfer laws make especially harsh sentences possible, but stating legislatures may not have originally intended such harsh sentences).

[81] *Id.* at 2026.

[82] *Id.* at 2026–27. A life sentence without parole is especially final and pronounced for a juvenile, who will serve more years than most adult offenders. *Id.* at 2028.

[83] *See id.* at 2027 (noting that in comparison to an adult murderer, a juvenile non-homicide offender has a twice diminished culpability).

then considered penological justifications for JLWOP sentences, including retribution, deterrence, incapacitation, and rehabilitation.[84] JLWOP sentences thwart the goal of rehabilitation, as juvenile lifers will have no meaningful hope of release and lessened access to rehabilitative programs.[85] Additionally, the goal of incapacitation is unjustified as it is nearly impossible to find completely corrupted juveniles.[86]

Finally, the Court established a categorical restriction against JLWOP sentences for non-homicide offenders, because anything short of a categorical rule would fail to prevent the imposition of arbitrary, unconstitutional sentences.[87] The majority found the subjective imposition of JLWOP sentences exposes juveniles to an unacceptable risk of sentencing error.[88] Forbidding the imposition of JLWOP sentences would give juvenile offenders a second chance—the opportunity to mature, reflect, and eventually become a contributing member of society.[89]

Concurring Opinion

Chief Justice Roberts concurred in the judgment but ultimately rejected a categorical restriction against JLWOP sentences.[90] Relying on Graham's youthful propensities and diminished culpability, Roberts concluded that the individual sentence was unconstitutionally disproportionate.[91] The concurrence argued for a case-by-case approach, emphasizing a need for JLWOP sentences against especially heinous non-homicide offenders.[92] Roberts also acknowledged the lessened culpability of juvenile offenders but declined to adopt a broad categorical restriction against JLWOP sentences.[93] According to Roberts those decisions

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[84] *See id.* at 2028 (describing the relevance of penological justifications).

[85] *See id.* at 2030 ("The penalty forswears altogether the rehabilitative ideal.").

[86] *See id.* at 2026 (commenting on the difficulty that even expert psychologists face in discerning incorrigible juveniles from others).

[87] *See id.* at 2030–32 (describing the insufficiency of proposed alternatives, such as state laws allowing for prosecutorial discretion in whether to charge juveniles as adults).

[88] *See id.* at 2032–33 (noting that juveniles face a risk of sentencing error influenced by the brutality of a crime). A categorical restriction also avoids the risk of grossly disproportionate punishment because many juveniles mistrust adults and have trouble obtaining effective assistance of counsel. *Id.* at 2032.

[89] *See id.* at 2033 ("The State has denied [Graham] any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.").

[90] *See id.* at 2038–40 (Roberts, C.J., concurring) (doubting the necessity of a categorical restriction against JLWOP sentences).

[91] *Id.*

[92] *See id.* at 2041 (noting an example of a juvenile offender who beat and raped his victim before leaving her to die under 197 pounds of rock).

[93] *See id.* at 2037–40 (describing precedent that acknowledges the lessened culpability of juveniles and proportionality review of non-capital sentences).

should be left for trial judges at sentencing, deferring to their judgment as to proportionality.[94]

Dissenting Opinion

Justice Thomas dissented, with Justices Scalia and Alito joining.[95] The dissent first contended the Court should defer to the moral judgments of the legislatures, judges, and juries in the thirty-nine jurisdictions permitting the sentencing practice at issue.[96] Justice Thomas continued with an originalist argument—the Framers did not intend to incorporate proportionality in sentencing into the Cruel and Unusual Punishments Clause.[97] Next, the dissent asserted that moral judgments about who deserves a particular type of punishment should be at the sound discretion of prosecutors, legislatures, judges, and juries.[98] Finally, Justice Thomas questioned the overall wisdom of a categorical restriction against a non-capital sentence.[99]

ANALYSIS

JLWOP sentences present a special risk of sentencing error due to several concerns: (1) the ineffective representation of many juvenile defendants; (2) the arbitrary and inconsistent sentences imposed by trial judges; and (3) the fact that most juveniles age out of any criminal tendencies.[100] Appellate courts should closely scrutinize these harsh sentences, rather than using the kind of narrow, majoritarian analysis seen in *Graham*.[101] Federal courts should also consider international norms in their interpretation of the Eighth Amendment, especially when every other nation rejects the sentencing practice at issue.[102] For the foregoing reasons, the United States Supreme Court should implement a bright-line rule against JLWOP sentences under any circumstances.[103]

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[94] *See id.* at 2042 (reasoning that America's justice system is premised on the concept that trial judges are competent to weigh the gravity of an offense at sentencing).

[95] *Id.* at 2043 (Thomas, J., dissenting).

[96] *Id.*

[97] *See id.* at 2044–45 (using a penal statute adopted by the First Congress to demonstrate that "proportionality in sentencing was not considered a constitutional command").

[98] *See id.* at 2045–46.

[99] *See id.* at 2046 ("'Death is different' no longer.").

[100] *See infra* notes 104–26 and accompanying text (describing several sources of sentencing error with JLWOP sentences).

[101] *See infra* notes 127–52 and accompanying text (describing the need for increased judicial restraint of problematic sentencing practices).

[102] *See infra* notes 153–71 and accompanying text (discussing the binding effect of international norms, especially the worldwide consensus against JLWOP sentences).

[103] *See infra* notes 104–71 (discussing the need for a bright-line rule against JLWOP sentences). *See generally* de la Vega & Leighton, *supra* note 56, at 987 (describing how JLWOP sentences are inhumane and lack any penological justification).

Sentencing Error

Based on the difficulty courts encounter in determining whether any juvenile is truly incorrigible, the Supreme Court should impose a categorical restriction against all JLWOP sentences.[104] In *Graham*, the trial court handed down a JLWOP sentence for a probation violation, despite the more lenient recommendations of the prosecutor and corrections officials.[105] This evidences the ad-hoc nature of JLWOP sentencing by state courts—justifying the need for a categorical restriction.[106] *Graham* was a step in the right direction, but the Court should have gone one step further and prohibited JLWOP sentences for all juveniles, including homicide offenders.[107] The *Graham* Court did not discuss this possibility, despite a number of *amicus curaie* briefs advocating for a bright-line rule prohibiting all JLWOP sentences.[108]

Successful challenges to a term of years based on sentencing error are rare.[109] Nevertheless, certain punishments such as JLWOP sentences bear an unacceptable

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[104] *See* Crawford v. Washington, 541 U.S. 36, 67 (2004) (stating that the Framers were "loath to leave too much discretion in judicial hands"); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) ("We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (discussing the difficulty in determining whether a juvenile defendant is beyond hope). In *Naovarath*, a seventh-grader faced a JLWOP sentence after killing a man who had sexually molested him. 779 P.2d. at 944–45. The Nevada Supreme Court overturned the sentence, holding the Constitution prohibited such a sentence for a mentally and emotionally disordered thirteen-year-old child. *Id.* at 948–49 n.6.

[105] *See* Graham v. Florida, 130 S. Ct. 2011, 2019–21 (2010) (describing Graham's sentencing hearing).

[106] *Compare* Graham v. State, 982 So. 2d 43, 49 (Fla. Dist. Ct. App. 2008), *rev'd*, 130 S. Ct. 2011 (2010) (holding that JLWOP sentences are not per se unconstitutional under the Eighth Amendment), *and* Blackshear v. State, 771 So. 2d 1199, 1200–01 (Fla. Dist. Ct. App. 2000) (holding that a JLWOP sentence for a probation violation was not cruel and unusual punishment), *with Workman*, 429 S.W.2d at 377–78 (holding that JLWOP sentences shock the conscience and are an unconstitutionally cruel and unusual punishment), *and Naovarath*, 779 P.2d at 948–49 (holding that a JLWOP sentence was unconstitutionally cruel and unusual punishment for a mentally disturbed child).

[107] *See Graham*, 130 S. Ct. at 2055 (Thomas, J., dissenting) (admitting that juvenile sentencing hearings are prone to error); *Workman*, 429 S.W.2d at 378 (noting that JLWOP sentences shock the conscience and defy principles of fundamental fairness). *But see* Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008) (describing how homicide offenses are more severe and irrevocable than non-homicide offenses).

[108] *See* Hansen, *supra* note 5, at 52–53 (describing several prominent organizations that filed amicus briefs in support of the petitioner, including the American Bar Association (ABA) and Amnesty International). The ABA argued that allowing JLWOP sentences would be inconsistent with the Court's holding in *Roper v. Simmons*. *Id.* at 53; *see* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that capital punishment is impermissible against juvenile offenders).

[109] *See* Solem v. Helm, 463 U.S. 277, 290 (1983) (noting that reviewing courts should substantially defer to the discretion of trial judges at sentencing); United States v. Millan-Torres, 139 F. App'x 105, 111 (10th Cir. 2005) (observing that sentencing error only meets the fourth prong of plain error in rare cases).

risk of sentencing error.[110] Capital punishment also raises similar concerns about sentencing error.[111] As the *Graham* Court noted, "life without parole is 'the second most severe penalty permitted by law,'" sharing characteristics with capital punishment.[112] But JLWOP sentences lack the "super due process" requirement of capital punishment.[113] In fact, empirical analysis indicates that judicial waiver—which transfers juvenile offenders into adult courts—occurs in an arbitrary, inconsistent, and discriminatory manner.[114] Our justice system also incarcerates juvenile minorities in overwhelming numbers, indicating an unacceptable risk of sentencing error in juvenile proceedings.[115]

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[110] *See* Jeffrey Fagan, Atkins*, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 253 (2003) (arguing for judicial action with punishments that present a high risk of sentencing error due to procedural concerns and the concept of fundamental fairness).

[111] *See* Hoffman v. Arave, 236 F.3d 523, 536 (9th Cir. 2001) (noting that Idaho's death penalty statute requires mandatory review of the entire record for sentencing error); Leona D. Jochnowitz, *Missed or Foregone Mitigation: Analyzing Claimed Error in Missouri Capital Clemency Cases*, 46 CRIM. LAW BULL. 347, 347 (2010) ("The high prevalence of sentencing error claims shows that structural overhaul of the capital trial may be needed."). In 2000, former Illinois Governor George Ryan imposed a moratorium on capital punishment due to concerns about sentencing error. Kandis Scott, *Why Did China Reform its Death Penalty?*, 19 PAC. RIM L. & POL'Y J. 63, 73–74 (2010).

[112] Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)). Life-without-parole sentences are similar to capital punishment in many ways, including their finality, irrevocability, and the defendant's utter lack of hope. *Id.*; *see also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008) (describing the severity and irrevocability of capital punishment).

[113] *See* United States v. Sauer, 15 M.J. 113, 118 (C.A.A.F. 1983) (Fletcher, J., dissenting) (describing how "super due-process" is required by the Eighth Amendment in capital trials); DRESSLER & THOMAS, *supra* note 50, at 1011 (noting that capital cases require an additional sentencing phase); Corrinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 414 n.273 (2009) (noting the Cruel and Unusual Punishments Clause mandates "super due process" with respect to capital punishment).

[114] Clarke, *supra* note 4, at 716. Some jurists have construed due process as a static, unyielding check on arbitrary or unfounded decisions of trial judges. *See* Crawford v. Washington, 541 U.S. 36, 67 (2004) (describing the Constitution as a restraint on improper judicial discretion); Duncan v. Louisiana, 391 U.S. 145, 168 (1968) (Black, J., concurring) ("Thus due process, according to my Brother Harlan, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country.").

[115] *See* Bishop, *supra* note 1, at 85–86 (concluding that minority youths are incarcerated in overwhelmingly disproportionate numbers—a trend likely to continue). Nearly every state has minority overrepresentation for incarcerated juveniles. De la Vega & Leighton, *supra* note 56, at 993–96. For example, in the state of Wyoming, African-American youths are detained at a rate of twelve to one when compared with whites. *Id.* at 995. This disproportionate sentencing of minorities reflects on how schools and our culture as a whole are handling diversity. *Your Neighbor's Child* (Wyoming PBS television broadcast Oct. 7, 2010).

Juvenile offenders face a heightened risk of sentencing error because of difficulties in obtaining effective assistance of counsel.[116] Recent cases clearly establish that juveniles deserve the effective assistance of counsel during a trial or adjudication of their guilt.[117] Juveniles, however, are often incapable of mature reasoning and have trouble navigating our justice system.[118] Attorneys and their juvenile clients often come from vastly different backgrounds, which may jeopardize the attorney-client relationship.[119] These issues undermine confidence in the verdicts of juvenile proceedings and justify the need for a categorical restriction against all JLWOP sentences.[120]

Perhaps the biggest risk of sentencing error derives from the fact that most juveniles will age out of crime.[121] The part of the brain regulating emotion, judgment, and impulse control does not fully develop until a person's early

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[116] *See Graham*, 130 S. Ct. at 2032 (noting several factors that can impair the fair and effective representation of juveniles). In addition to juveniles, mentally retarded defendants often have trouble understanding criminal proceedings, which can lead to an unfair trial. *See* Atkins v. Virginia, 536 U.S. 304, 306–07 (2002) (noting the impairments of mentally incapacitated defendants can "jeopardize the reliability and fairness" of capital proceedings against them).

[117] *See In re* Gault, 387 U.S. 1, 36 (1967) (holding that juveniles have the right to counsel at every stage of criminal proceedings); Powell v. Alabama, 287 U.S. 45, 57–58 (1932) (describing due process concerns when a group of juvenile defendants did not have the aid of counsel until trial). The right to counsel means the "right to the *effective* assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) (emphasis added).

[118] Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000). It is especially concerning that many juvenile offenders waive their right to counsel without understanding what they are doing. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[L]awyers in criminal courts are necessities, not luxuries."); *Your Neighbor's Child*, *supra* note 115 (describing juvenile defendants' limited understanding of criminal proceedings against them, including an inadvertent waiver of the right to counsel in many cases).

[119] *See* Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 608–11 (2008) (describing several disparities between children's attorneys and their clients). Juveniles also tend to mistrust adults, even their own lawyer. *See* Brief for the NAACP Legal Defense & Educational Fund, Inc., et al. as Amici Curiae Supporting Petitioner at 7–12, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621) (describing the adverse effect of adolescents' mistrust of adults upon attorney-client relationships).

[120] *See Graham,* 130 S. Ct. at 2032 (noting how a case-by-case approach does not account for difficulties encountered by juveniles' attorneys); *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (describing difficulties in assessing ineffective assistance of counsel after a conviction); DRESSLER & THOMAS, *supra* note 50, at 886 (noting how the right to effective assistance of counsel is violated when counsel's performance undermines confidence in the outcome of a trial); *Your Neighbor's Child*, *supra* note 115 (explaining how juveniles can be pressured by counsel into pleading out without fully understanding the consequences of a felony conviction).

[121] *See* Benjamin L. Felcher, *Kids Get the Darndest Sentences:* State v. Mitchell *and Why Age Should Be a Factor in Sentencing for First Degree Murder*, 18 LAW & INEQ. 323, 346 (2000) (noting extensive empirical research finding most juvenile offenders will "age out" of their criminality). Criminal activity by juveniles is typically the product of their antisocial tendencies, rather than the hallmark of young career criminals. *See* Clarke, *supra* note 4, at 713 (noting the problems with sentencing most adolescents as though they are career criminals).

twenties.[122] Recent research also suggests juvenile delinquency is strongly correlated with adolescence and will dissipate with maturity.[123] Even experts cannot readily discern a lifelong juvenile offender from one whose crimes reflect a fleeting pattern of immaturity.[124] Juvenile offenders have "enormous potential" to turn their lives around, and they deserve a second chance.[125] Consequently, JLWOP sentences are unconstitutionally cruel to those capable of rehabilitation, and thus the Court should establish a bright-line rule against JLWOP sentences.[126]

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[122] Clarke, *supra* note 4, at 710. Neuroscience has debunked the idea that a child's brain is fully developed by puberty—adolescents in particular have decreased frontal lobe function. *Id.* at 708–09. It follows that adolescence could relate to a defendant's culpability. *See* Hawkins v. Hargett, 200 F.3d 1279, 1283 (10th Cir. 1999) (stating the chronological age of a defendant relates to their culpability).

[123] Clarke, *supra* note 4, at 687, 708–11 (describing how adolescence relates to culpability). Since their frontal lobes are not fully developed, juveniles tend to engage in risky behavior and make impulsive, short-sighted decisions. *See* Johanna Cooper Jennings, *Juvenile Justice,* Sullivan*, and* Graham*: How the Supreme Court's Decision will Change the Neuroscience Debate*, 2010 DUKE L. & TECH. REV. 6, 7 (2010) (describing how decreased frontal lobe function in juveniles affects their decision-making abilities). Adolescents in particular have a limited capacity for long-term reasoning, which negates the likelihood of deterrence. Bishop, *supra* note 1, at 82.

[124] Roper v. Simmons, 543 U.S. 551, 573 (2005). Psychologists currently lack the diagnostic tools to distinguish "life-course-persistent" offenders from other adolescents. Clarke, *supra* note 4, at 724–25. Several former juvenile offenders filed an amicus brief in support of Terrance Graham, including a Broadway actor, two acclaimed authors, an Assistant United States Attorney, a software executive, and former Wyoming Senator Alan B. Simpson. Brief of Former Juvenile Offenders Charles S. Dutton et al. as Amici Curiae Supporting Petitioner at 1–3, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621). These former offenders described how they were able to turn their lives around after troubled backgrounds, most notably Senator Simpson who was given a second chance after assaulting a police officer. *Id.* at 7–32.

[125] *See Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring) ("We learn, sometimes, from our mistakes."); de la Vega & Leighton, *supra* note 56, at 983 (concluding that a JLWOP sentence "contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child's rehabilitation and redemption"). Adolescent crime is often the product of developmental immaturity and tends to decline with age. *See* Clarke, *supra* note 4, at 711 (concluding that adolescent participation in crime results from developmental influences on decision-making and abates with maturity).

[126] *See* Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (emphasizing that criminal proceedings must be "fundamentally fair in all respects"); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (affirming that the Eighth Amendment forbids torture and "all other punishments in the same line of unnecessary cruelty"); *Your Neighbor's Child*, *supra* note 115 (statement of former United States Senator Alan Simpson) ("Deal with [juvenile offenders] as fellow human beings, and you'll make some real progress."). Despair and hopelessness are the hallmark of JLWOP offenders, as they have no meaningful chance of rehabilitation or release. *See Graham*, 130 S. Ct. at 2030 (majority opinion) (describing how rehabilitative services are largely unavailable to those serving life terms); Naovarath v. State, 779 P.2d 944, 947 (Nev. 1989) (stating that hopelessness is the hallmark of a JLWOP sentence); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 988 (2001) ("[G]rants of clemency have become . . . rare.").

Fixing a Broken System of Punitive Policy

Graham establishes the first categorical rule barring a non-capital sentence, and it is only the second successful challenge to a prison term in history.[127] This represents a step in the right direction, but the *Graham* Court should have gone further and prohibited JLWOP sentences altogether.[128] Our hyper-punitive scheme of juvenile justice is fundamentally unsound, and legislatures are unlikely to address this problem.[129] Instead of deferring to legislative judgments, the Court should take a more active role to ameliorate problematic sentencing practices.[130]

The Supreme Court is unquestionably empowered to depart from the rigid doctrines of history and stare decisis.[131] Strict deference to past decisions is

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[127] *See Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting) (explaining that *Graham* represents the first categorical restriction against a non-capital sentence in history); Fisher, *supra* note 4, at 36 (stating the Court has found a prison term to be unconstitutionally disproportionate only once in its history). The Drafters attempted to enact a categorical restriction against torture, but unfortunately they did not define the contours of that category. Adam Lamparello, *Incorporating the Supreme Court's Eighth Amendment Framework into Substantive Due Process Jurisprudence Through the Introduction of a Contingent-Based and Legislatively-Driven Constitutional Theory*, 88 NEB. L. REV. 692, 731–32 (2010).

[128] *See* Nilsen, *supra* note 22, at 119 (stating that life-without-parole sentences are especially inhumane and degrading for children); de la Vega & Leighton, *supra* note 56, at 986–87 (describing how JLWOP sentences are inhumane, inappropriate, and lack any deterrent effect). In fact, many JLWOP offenders have been physically and sexually abused as children, highlighting the inherent cruelty of such a sentence. De la Vega & Leighton, *supra* note 56, at 984–85.

[129] *See* Beres & Griffith, *supra* note 36, at 765 (concluding that the widespread demonization of youth prevents the implementation of cost-effective, nonpunitive measures to reduce crime); Clarke, *supra* note 4, at 661 (describing how public concern with violent juveniles has led to an increasingly punitive scheme of legislation and juvenile justice policy); Gray, *supra* note 3, at 45, 56 (describing how excessive media coverage of juvenile crime leads to widespread fear that influences public policy); Jefferson & Head, *supra* note 47, at 89–90 (arguing that the United States juvenile justice system is questionable as it fails to comply with four key standards enumerated in the United Nations Convention on the Rights of the Child); Vanessa L. Kolbe, *A Proposed Bar to Transferring Juveniles with Mental Disorders to Criminal Court: Let the Punishment Fit the Culpability*, 14 VA. J. SOC. POL'Y & L. 418, 424 (2007) (observing that punitive legislative reform of the juvenile justice system is still ongoing). Mandatory minimums have also come under fire in recent years. *See* Luna & Cassell, *supra* note 38, at 1–4 (noting how various Presidents, lawmakers, and Supreme Court Justices have questioned the wisdom of mandatory minimums).

[130] *See Naovarath*, 779 P.2d at 947 (quoting unpublished draft opinion, Box 171, Harold Hitz Burton Papers, Library of Congress) ("More than any other provision in the Constitution the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary."); Lee, *supra* note 18, at 682–83 (criticizing judicial conservatism in the area of sentencing review, as the Eighth Amendment was intended as a "side constraint" on excessive punishment); Nilsen, *supra* note 22, at 140 (noting how the Court initially viewed the Eighth Amendment as a "moral bulwark to guide future generations"). In fact, one of the core purposes of the Bill of Rights was to prevent arbitrary and oppressive criminal prosecutions. *See* Williams v. Florida, 399 U.S. 78, 116 (1970) (Blackmun, J., dissenting) (describing a history of governmental oppression through the criminal process, which ultimately produced the Bill of Rights).

[131] *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (stating that historical premises, although persuasive, are not the ending point of the Court's analysis); Payne v. Tennessee, 501 U.S. 808, 828

unnecessary when previous rationale no longer withstands careful analysis.[132] This is particularly applicable to JLWOP sentences, because the chances of corrective legislation are extremely remote.[133] The substantial expansion in transfers of juveniles to adult courts is especially problematic, as these transfer laws tend to reflect widespread fear rather than sound criminological theory.[134] This expansion of juvenile transfers has no jurisprudential basis, places an undue burden on the justice system, and undercuts the legitimacy of criminal courts.[135]

Indeed, recent juvenile justice policy results from a flaw in the political process.[136] Due to the media's focus on violent juveniles, politicians have come under intense political pressure to crack down on juvenile crime.[137] In turn, politicians rely on a "get tough on crime" stance in order to get elected.[138] This

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(1991) ("Stare decisis is not an inexorable command."). Supreme Court decisions that overrule a previous constitutional command are not uncommon. *See Payne*, 501 U.S. at 830 (noting that the Court has overruled thirty-three constitutional decisions in the past twenty terms).

[132] Arizona v. Gant, 129 S. Ct. 1710, 1722–23 (2009). Stare decisis also holds less force with respect to constitutional questions. Dickerson v. United States, 530 U.S. 428, 443 (2000). However, some jurists would argue that stare decisis should play a bigger role in constitutional interpretation. *See* Crawford v. Washington, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., dissenting) (describing stare decisis as the "preferred course," even with constitutional interpretation).

[133] *See* Graham v. Florida, 130 S. Ct. 2011, 2025 (2010) (suggesting that transfer laws may not reflect legislative intent to allow JLWOP sentences for non-homicide offenses); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (noting how precedent holds less weight when "correction through legislative action is practically impossible"); Feld, *supra* note 59, at 190 (describing how politicians have pushed through "get tough" legislation in order to gain electoral advantage); McLatchey, *supra* note 3, at 406 ("Society has called for accountability from even the youngest violent youths, and most states have responded.").

[134] *See* Clarke, *supra* note 4, at 687–88 (describing how the "increasingly punitive approach" of the juvenile justice system has been brought about by public fear, hysteria, and misperception rather than sound criminological theory). The transfer of juveniles to adult courts is especially questionable, as it tends to actually increase recidivism. *See id.* at 680 (describing several issues with transfer laws). The imprisonment of juvenile offenders exposes them to criminal minds and ultimately results in recidivism. *See Your Neighbor's Child*, *supra* note 115 (discussing several problems with inappropriate juvenile facilities).

[135] *See* Bishop, *supra* note 1, at 85–86 (outlining the negative consequences associated with the widespread transfer of juveniles to adult courts). A sound alternative to criminal sanctions is a behavioral, skills-focused program that promotes intense social interaction over a period of several months. *Id.* at 86.

[136] *See* Clarke, *supra* note 4, at 725 ("Catch phrases and sound bites, while useful for politicians, cannot and should not inform juvenile justice policy."). Excessive media coverage of violent crimes does not reflect reality, as juvenile crime rates have actually fallen since 1994. *See* Gray, *supra* note 3, at 47–50 (discussing the effects of media coverage on public policy, especially the transition to a more punitive juvenile justice system).

[137] *See* Gray, *supra* note 3, at 45 (describing how inaccurate media coverage of juvenile crimes ultimately influences public policy). Disturbingly, juvenile crime news is much more common than media coverage of general issues surrounding children. *Id.*

[138] *See* Feld, *supra* note 59, at 190 (describing how politicians have advocated a tough stance towards youth crime in order to gain an electoral advantage); McLatchey, *supra* note 3, at 406 (noting how politicians rely on "get tough on crime" policies to win elections).

"get tough on crime" movement is fundamentally unsound, as lawmakers over-emphasize the accountability of juveniles in response to political pressure.[139] At oral argument, the respondent in *Graham* admitted that a five-year-old child could receive a life-without-parole sentence under Florida law.[140] Such laws clearly involve a defect in the democratic process and should be subject to close judicial scrutiny.[141]

The *Graham* Court should have acted independently and judiciously to correct such a bizarre and problematic sentencing practice.[142] Instead, the majority turned to a "lockstep" survey of actual sentencing practices across states.[143] The *Graham* Court found that only eleven states actually impose JLWOP sentences upon non-homicide offenders, thereby avoiding any counter-majoritarian difficulty.[144] The Court should go beyond this kind of firm majoritarian analysis,

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[139] *See* Clarke, *supra* note 4, at 725 (noting how politicians have over-emphasized the accountability of juveniles in response to political pressures). A comprehensive review of empirical research indicates that transfer laws have no deterrent value, general or specific. *See* Bishop, *supra* note 1, at 128–34 (describing the actual effects of transfer laws).

[140] *See* Graham v. Florida, 130 S. Ct. 2011, 2025–26 (2010) (noting how at oral arguments the State of Florida acknowledged a five-year-old child could theoretically receive a life-without-parole sentence under Florida's transfer provisions). Similarly to Terrance Graham, an astounding sixty-four percent of juvenile offenders are incarcerated for simple probation violations. *See Your Neighbor's Child*, *supra* note 115 (describing incarceration rates for juvenile offenders).

[141] *See* Wheat v. United States, 486 U.S. 153, 160 (1988) ("Federal courts have an independent interest in ensuring . . . that legal proceedings appear fair to all who observe them."); Clarke, *supra* note 4, at 686 (observing that children in elementary school can be charged as adults); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 808 (1999) ("[T]he Court should only intervene when the political process has malfunctioned."). According to representation reinforcement theory, the Court should correct laws which are the product of a defect in the democratic process. *Id.*

[142] *See* Roper v. Simmons, 543 U.S. 551, 552 (2005) (describing how the Court determines an unconstitutionally cruel and unusual punishment through its own independent judgment); Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting) (noting the Court exists to correct fundamentally unfair aspects of the criminal process); Clarke, *supra* note 4, at 688 (describing how the increasingly punitive approach to juvenile justice is fueled by public hysteria rather than scientific principles); Luna, *supra* note 141, at 808 (stating that malfunctioning legislation should be subject to strict scrutiny); Nilsen, *supra* note 22, at 116 (describing how prison terms do not get adequate judicial scrutiny under current Eighth Amendment jurisprudence).

[143] *See Graham*, 130 S. Ct. at 2023–24 (tallying actual sentencing practices across the country to determine that a national consensus had formed against JLWOP sentences); Lain, *supra* note 113, at 372–73 (describing the "evolving standards of decency" analysis as firmly majoritarian). *But see* Amanda M. Raines, Note, *Prohibiting the Execution of the Mentally Retarded*, 53 CASE W. RES. L. REV. 171, 185 (2002) (describing the evolving standards analysis as "'flexible and dynamic'" (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976))). The Supreme Court has previously relied on "lockstep" state-counting analyses, affirming the view that the Court is essentially a majoritarian institution. Lain, *supra* note 113, at 372–75.

[144] *See Graham*, 130 S. Ct. at 2024 (finding that only eleven jurisdictions nationwide impose JLWOP sentences); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201–02 (2002) (describing the "counter-majoritarian difficulty"—a theory that the power of judicial review contravenes the will

and take on a more heroic, independent role.[145] This has been seen before, when the *Roe v. Wade* Court struck down laws in many states, recognizing its duty to resolve issues independently and unemotionally.[146]

Legislative judgments as to the length of a sentence receive some degree of judicial deference, but the Court has the final say.[147] If the Court has reason to disagree with the judgment of legislatures, it may do so through its interpretation of the Eighth Amendment.[148] Although *Graham* had its shortcomings, the Court did interpret the Eighth Amendment as prohibiting all barbaric punishments—consistent with concerns of the Drafters.[149] *Graham* also stated that even criminals have a right to their dignity, which denotes the return to a humane interpretation

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of the people, expressed through their elected representatives). Alexander Bickel, who coined this phrase, asserted that the power of judicial review is inherently undemocratic. Friedman, *supra*, at 202.

[145] *See* Lain, *supra* note 113, at 419 (commenting that the Supreme Court is famous for its "heroic, countermajoritarian role"); Luna & Cassell, *supra* note 38, at 28–29 (criticizing current Eighth Amendment jurisprudence as providing inadequate checks on excessive punishment). As long as the Court remains firmly majoritarian, landmark rulings are exceedingly unlikely. *See* Lain, *supra* note 113, at 409 ("So long as the Supreme Court is counting states to determine the contours of constitutional protection, there is no chance of bold rulings that leave the states behind.").

[146] *See* 410 U.S. 113, 116 (1973) ("Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."). The *Roe* Court held unconstitutional a Texas statute criminalizing abortion and acknowledged that a majority of states had similar statutes. *Id.* at 118, 166. The *Roe v. Wade* decision affected laws in forty-six states total. William Mears & Bob Franken, *30 Years After Ruling, Ambiguity, Anxiety Surround Abortion Debate*, CNN.COM/LAW CENTER (Sep. 17, 2010, 5:18 PM), http://www.cnn.com/2003/LAW/01/21/roevwade.overview/. Similarly, in *Brown v. Board of Education* the Court struck down segregation laws in effect in many states at the time of the decision. *See* 347 U.S. 483, 495 (1954) (noting the wide applicability of the Court's ruling against the "separate but equal" doctrine); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 707–08 (3d ed. 2006) (describing the intense political backlash against *Brown* by a group of ninety-six Southern Congressmen).

[147] *See* Harmelin v. Michigan, 501 U.S. 957, 998–99 (1991) (noting how determinations about prison terms involve penological judgments that are generally left to legislatures); Rummel v. Estelle, 445 U.S. 263, 274 (1980) (noting the Court's reluctance to review legislatively mandated sentences); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (describing the Supreme Court as the "final authority" of constitutional interpretation).

[148] *See* Atkins v. Virginia, 536 U.S. 304, 311–13 (2002) (explaining the significance of any legislative consensus in an "evolving standards of decency" analysis). Objective evidence of sentencing practices, such as legislative trends, do not "wholly determine" the constitutionality of a particular sentence. *Id.* at 312. If there is reason to disagree with sentencing legislation, the Court may do so as a function of its own independent judgment. *See id.* at 313 (describing how the Constitution empowers the Court to determine the acceptability of punishments under the Eighth Amendment).

[149] *See Graham*, 130 S. Ct. at 2021 (observing that barbaric punishments are unconstitutional under all circumstances); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (noting that the very purpose of the Cruel and Unusual Punishments Clause is to proscribe torture and other "barbarous" methods of punishment). Even from an originalist perspective, the Eighth Amendment was intended to prohibit certain methods of punishment. *See Harmelin*, 501 U.S. at 979 (describing the Framers' intent to prohibit certain types of punishment).

of the Eighth Amendment.[150] After two decades of narrow proportionality review, the Court has returned to its initial concerns with humane sentencing practices, and for good reason.[151] The Court should place some outer limits on sentencing practices such as JLWOP sentences, consistent with the vision of dignity embodied in the Eighth Amendment.[152]

International Law as a Model for American Juvenile Justice

The *Graham* Court had an ideal opportunity to bring our juvenile justice system up to international standards by prohibiting all JLWOP sentences, but it failed to do so.[153] Our juvenile justice system was a model for the rest of the world at its inception, but we have recently fallen behind international standards—as acknowledged in *Graham* and *Roper*.[154] Other nations have implemented

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[150] *See Graham*, 130 S. Ct. at 2021 ("[The government] must respect the human attributes even of those who have committed serious crimes."); Trop v. Dulles, 356 U.S. 86, 100 (1958) (stating that the Eighth Amendment confines the State's power to punish within civilized standards); Nilsen, *supra* note 22, at 140–42 (arguing that the Court's initial understanding of the Eighth Amendment encompassed broad standards of humanity and dignity).

[151] *See* Nilsen, *supra* note 22, at 113 (noting that prior to *Harmelin*'s narrow proportionality review in 1991, life without parole sentences were unusual for non-homicide offenses); Smith & Cohen, *supra* note 5, at 88 ("Non-capital defendants have struggled greatly against the weight of the death-is-different philosophy."); Amy Vanheuverzwyn, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens*, 13 U. PA. J.L. & SOC. CHANGE 119, 123 (2009) (noting early Supreme Court decisions that reflected a belief in humane justice). *Graham*'s categorical restriction against JLWOP sentences defies some twenty-odd years of narrow proportionality review. *See* 130 S. Ct. at 2047 (Thomas, J., dissenting) (describing how the Court "hurtles" past its traditional proportionality analysis). In the concurring opinion, Chief Justice Roberts also criticized a categorical rule as unnecessarily broad. *See id*. at 2041–42 (Roberts, C.J., concurring) (advocating for the continuance of traditional proportionality review of JLWOP sentences).

[152] *See* Michael Pinard, *Collateral Consequences of Criminal Convictions; Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 521 (2010) (stating the United States justice system enshrines the concept of dignity as "an end point that cannot be passed"). In essence, the Eighth Amendment places outer boundaries on allowable punishment. *Id.* The Court's initial understanding of the Eighth Amendment "guarantees every citizen a right of human dignity against which all sentences should be assessed." Nilsen, *supra* note 22, at 140.

[153] *See* de la Vega & Leighton, *supra* note 56, at 990–91 (describing how the United States is the only country currently violating the international consensus against JLWOP sentences). The United States is singlehandedly responsible for 100% of offenders serving JLWOP sentences. *Id.* at 989.

[154] *See Graham*, 130 S. Ct. at 2034 (noting that JLWOP sentences are inconsistent with international principles of decency); Roper v. Simmons, 543 U.S. 551, 578 (2005) (acknowledging the "overwhelming weight of international opinion against the juvenile death penalty"); Annino, *supra* note 44, at 473–74 (describing how the United States pioneered the unique concept of a juvenile justice system, which was an example for the international community at its inception). But the United States recently failed to ratify the United Nations Convention on the Rights of the Child, which leaves us "conspicuously out of step with the international community." Jefferson & Head, s*upra* note 47, at 126. In fact, the laws of numerous U.S. states are "embarrassingly inconsistent" with international standards of juvenile justice. *Id.* at 96.

progressive juvenile justice standards, and their efforts have effectively reduced recidivism and incarceration rates.[155] For its part, *Graham* recognized the importance of redemption and rehabilitation in juvenile justice.[156] However, the Court did not adequately explain why JLWOP sentences provide an acceptable punishment for some offenders but not for others.[157]

The *Graham* Court even recognized that other nations universally oppose JLWOP sentences yet ultimately failed to follow their lead.[158] The United Nations Convention on the Rights of the Child—ratified by every country except the United States and Somalia—forbids JLWOP sentences and mandates the humanitarian treatment of juvenile offenders.[159] Furthermore, several United Nations Committees have expressed their disapproval of our country's imposition of JLWOP sentences.[160] The international community has spoken against all JLWOP sentences, and the *Graham* Court should have followed accordingly.[161]

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[155] *See* de la Vega & Leighton, *supra* note 56, at 1019–22 (describing several rehabilitative models of juvenile justice which effectively reduce recidivism). Germany's model of juvenile justice aims to educate juvenile offenders and only implements imprisonment as a last resort. *Id.* at 1020. Between 1982 and 1990, incarceration of juvenile offenders in Germany decreased by fifty percent. *Id.* New Zealand takes a restorative approach to juvenile justice, avoiding prosecution and focusing on collective responsibility for the offender's actions. *Id.* at 1020–22. As a result, an astonishing eighty-three percent of offenders are diverted from its criminal courts. *Id.* at 1022.

[156] *See* Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 28 I.L.M. 1448, 1459 (declaring that courts of law shall primarily consider the best interest of the child and only use imprisonment as a last resort against juvenile offenders); Smith & Cohen, *supra* note 5, at 92 (describing how *Graham* is the first case to explicitly integrate principles of redemption and rehabilitation into the Court's Eighth Amendment jurisprudence). The public also has an interest in a rehabilitative model of juvenile justice. *See Your Neighbor's Child*, *supra* note 115 (describing public outcry against the lack of education and job training in juvenile detention facilities).

[157] *See Graham*, 130 S. Ct. at 2022–23 (stating the case applies to a range of offenders without explaining why homicide offenders are excluded); *Roper*, 543 U.S. at 569 (noting juvenile offenders, as a whole, "cannot be reliably classified among the worst offenders"). *But see* Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008) (differentiating homicide offenders from those who did not kill or intend to kill). *Graham*'s concurrence also noted that juvenile offenders are generally less culpable than their adult counterparts. *See* 130 S. Ct. at 2040 (Roberts, C.J., concurring) (noting that Graham's age placed him in a wholly different category from adult offenders serving life terms).

[158] *See Graham*, 130 S. Ct. at 2033 (majority opinion) (noting a worldwide consensus against JLWOP sentences); de la Vega & Leighton, *supra* note 56, at 985 ("Based on the author's [research], there is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.").

[159] *See* Convention on the Rights of the Child, *supra* note 156, at 1470 (forbidding the use of life-without-parole sentences or inhumane punishment against children); de la Vega & Leighton, *supra* note 56, at 1009–10 (describing key provisions and the ratification of the Convention on the Rights of the Child).

[160] *See* de la Vega & Leighton, *supra* note 56, at 1010–12 (describing international disapproval of JLWOP sentences). For instance, the Committee on Human Rights oversees compliance with the International Covenant on Civil and Political Rights (ICCPR). *Id.* at 1010. That Committee determined JLWOP sentences violate the United States' obligations under the ICCPR. *Id.*

[161] *See* International Covenant on Civil and Political Rights, art. 10(3), Dec. 16, 1966, 31 I.L.M. 645, 651 (1992) ("[J]uvenile offenders [shall] be segregated from adults and be accorded

Although a controversial subject, customary international law can even be binding in some instances.[162] Nearly universal norms of international law—known as *jus cogens* norms—are binding upon nations regardless of consent.[163] For example, the Ninth Circuit Court of Appeals held the prohibition of torture is binding as customary international law.[164] Another circuit noted customary international law denounces enslavement and genocide, and this prohibition is binding on civilized nations.[165] Similarly, the widespread consensus against JLWOP sentences has become nearly universal and therefore risen to the level of a *jus cogens* norm.[166]

Although the *Graham* Court dismissed the possibility of a binding *jus cogens* norm, it should have given more weight to the persuasive international norm

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treatment appropriate to their age and legal status."); de la Vega & Leighton, *supra* note 56, at 1012 (noting that the United Nations General Assembly recently passed two resolutions against JLWOP sentences, opposed only by the United States).

[162] *See* Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 91 (Feb. 5) (stating that nations should be held responsible for violations of universal human rights); Jing Guan, *The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?*, 28 PENN ST. INT'L L. REV. 703, 715 n.96 (2010) (describing how the implications of customary international law have remained a controversial subject). *Barcelona Traction* has been construed to suggest that basic human rights give rise to obligations *erga omnes*. Theoder Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 1 (1986). Obligations *erga omnes* are rights owed to all, including the prohibitions against racial discrimination and genocide. *See Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 33, 34 (describing certain rights as the concern of all states).

[163] *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (describing *jus cogens* norms as peremptory, therefore permitting no derogation); 48 C.J.S. *International Law* § 2 ("*Jus cogens* norms are norms of international law that are binding on states, or nations, even if they do not agree to them."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (2010) (describing the binding effect of *jus cogens* norms). *But see* Suydam v. Williamson, 65 U.S. 427, 433 (1860) ("Every sovereign has the exclusive right to command within his territory.").

[164] *See* Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1017 n.15 (9th Cir. 2000) (commenting on the binding weight of international norms prohibiting torture). The Ninth Circuit Court of Appeals has also recognized *jus cogens* norms against torture, murder, genocide, and slavery. *See* United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th. Cir. 1995) (explaining why the prohibition against kidnapping cannot rise to the level of other *jus cogens* norms).

[165] *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1181 (D.C. Cir. 1994) (discussing the principle of *jus cogens* norms in the context of WWII concentration camps).

[166] Brief for Amnesty International, et al. as Amici Curiae Supporting Petitioner at 14–15, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter Amnesty Brief] (noting a worldwide *jus cogens* norm against JLWOP sentences followed by every country except the United States); de la Vega & Leighton, *supra* note 56, at 1015–16 (describing the prohibition against JLWOP sentences as a virtually universal *jus cogens* norm); *see also* Hansen, *supra* note 5, at 54 (noting the *Graham* Court's recognition of a global consensus against JLWOP sentences). America's recent and substantial expansion of adult prisoners serving life terms is also unheard of at an international level. Nilsen, *supra* note 22, at 119.

against JLWOP sentences.[167] Federal courts have consistently affirmed that domestic law can recognize the law of nations.[168] Courts should remain mindful of international human rights norms, because international law provides no means for redress of *jus cogens* violations.[169] In fact, the *Roper* Court recognized international norms as an instructive tool in its interpretation of the Eighth Amendment.[170] Although some courts and commentators would disagree, *jus cogens* norms should play a larger role in Eighth Amendment jurisprudence and the evolving standards of decency analysis.[171]

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[167] *See Graham*, 130 S. Ct. at 2034 (noting international norms are not binding or controlling); Roper v. Simmons, 543 U.S. 551, 578 (2005) (stating that it "does not lessen our fidelity to the Constitution" to acknowledge global affirmations of fundamental rights); Lawrence v. Texas, 539 U.S. 558, 576–78 (2003) (overruling a prior decision due to its irrationality and inconsistencies with international norms); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (1994) (concluding that the Court's death penalty jurisprudence demonstrate a lack of respect for international norms); Amnesty Brief, *supra* note 166, at 10 (arguing that international standards should weigh heavily in the Court's consideration of cruel and unusual punishment). However, some would argue that international standards are irrelevant to any interpretation of the Eighth Amendment. *See* Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989) (rejecting the sentencing practices of other countries as unimportant to the evolving standards of decency analysis), *abrogated by Roper*, 543 U.S. 551.

[168] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); Igartua-De La Rosa v. United States, 417 F.3d 145, 171–72 (1st Cir. 2005) (recognizing that our legal system encompasses international law). Federal courts also have the right to hear cases involving international treaties, although the disposition of *jus cogens* violations is a murkier subject. *See* U.S. CONST. art. III, § 2 (declaring that judicial power extends to all cases arising under treaties); M. Cherif. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 64–67 (1996) (describing significant uncertainty about the enforcement of *jus cogens* norms).

[169] *See* The Brig Amy Warwick, 67 U.S. 635, 670 (1862) (describing the law of nations as founded upon the common consent of the world); Meron, *supra* note 162, at 3 (1986) (noting the international community has no supreme legislature which sits above its constituent nations). The application and enforcement of *jus cogens* norms is especially difficult because of widespread disagreement about the nature of human rights. *See* Meron, *supra* note 162, at 4 (noting widespread controversy about international human rights). In fact, many of the principal human rights instruments—including the Political Covenant, the American Convention, and the European Convention—contain different lists of non-derogable rights. *Id.* at 15.

[170] 543 U.S. at 575. The *Roper* Court implicitly acknowledged a *jus cogens* norm against the execution of juveniles, without regard to whether it was binding or controlling. *See id.* at 578 ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.").

[171] *Compare* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (rejecting international norms as uninformative to constitutional interpretation), *and* Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (describing how even *jus cogens* violations like those committed by the Third Reich would not create an exception to the Foreign Sovereign Immunities Act), *with* Bassiouni, *supra* note 168, at 65 (describing *jus cogens* as universal duties rather than optional rights), *and* Blackmun, *supra* note 167, at 49 ("[P]erhaps [it] is appropriate to remind ourselves that the United States is part of the global community, that '[i]nternational law *is* part of our law,' and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with 'the customs and usages of civilized nations.'" (quoting The Paquete

CONCLUSION

The Supreme Court's decision in *Graham v. Florida* overturned a flawed sentencing practice—sentencing juvenile non-homicide offenders to life without parole—but failed to go far enough.[172] An undeniable and unjustified risk of sentencing error exists with regards to JLWOP sentences.[173] Congress has not set mandatory regulations for the treatment of juvenile offenders, and thus the Court is in the unique position to correct punitive juvenile justice standards.[174] The international community universally condemns JLWOP sentences, and the United States should follow suit.[175] Based on the above concerns, the *Graham* Court should have taken appropriate steps to safeguard our nation's children and prohibited JLWOP sentences under any circumstances.[176]

Habana, 175 U.S. 677, 700 (1900))). The opening passage of the Declaration of Independence even acknowledges "a decent Respect to the Opinions of Mankind." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[172] *See supra* notes 100–71 and accompanying text (describing several problems with JLWOP sentences).

[173] *See supra* notes 104–26 and accompanying text (noting the inherent risk of sentencing error with JLWOP sentences).

[174] *See supra* notes 127–52 and accompanying text (advocating for increased judicial activism with regards to unsound sentencing practices).

[175] *See supra* notes 153–71 and accompanying text (describing the weight given to international norms). *See generally* de la Vega & Leighton, *supra* note 56, at 988 (concluding that the United States should abolish JLWOP sentences).

[176] *See supra* notes 100–71 and accompanying text (taking issue with JLWOP sentences).