



# **JUVENILE CRIMINAL RESPONSIBILITY: CAN MALICE SUPPLY THE WANT OF YEARS?**

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## Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?

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### *Abstract*

Can the young be held accountable for their crimes? At common law, juveniles were entitled to a presumption of incapacity, but were subject to criminal liability on an individualized basis: demonstrated malice supplied the want of years. In *Graham v. Florida*, the United States Supreme Court rejected this principle, and held that juveniles categorically could not be sentenced to life without parole for crimes other than homicide. Embedded in the Court's holding, this Article argues, are a simplifying assumption about the relative maturity of juveniles and adults and a moral claim about the culpability of homicides and nonhomicides, and both this assumption and this claim are demonstrably false in a nontrivial number of cases.

This Article focuses on the facts of some of these cases. One cannot assess the culpability of particular defendants unless one considers, without artful euphemisms or convenient elisions, what they did. And what certain crimes reveal is that there are violent juvenile offenders—fortunately rare—who are as least as mature and culpable as the typical adult violent offender. The Article also considers lower court applications of *Graham* and finds, for the most part, marked skepticism. The Supreme Court's general theory of juvenile immaturity has failed to impress judges confronting particular cases. The Court's central claim about the relative culpability of adult and juvenile offenders originates from a failure to confront inconvenient facts and a belief that human nature is sufficiently captured by the three standard deviations that surround one's own experience in the world. Lower court judges have access to a wider data set in reaching contrary conclusions.

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## Table of Contents

	Page
I. Introduction.....	1
II. Punishing Juvenile Criminals: A Short Introduction .....	8
A. The Common Law: “Malice Supplies the Want of Years” .....	8
B. Toward a Categorical Eighth Amendment Jurisprudence .....	16
C. <i>Graham v. Florida</i> .....	24
1. Community Consensus .....	24
2. The Criminal .....	26
3. The Crime .....	29
4. The Punishment .....	31
5. A Categorical Rule.....	32
III. True Crime Lessons .....	35
A. Why Study Crimes .....	35
B. Case Studies.....	40
1. Nonhomicides .....	40
2. Homicides .....	44
C. Graham and Sullivan.....	53
D. An Alternative Theory of Violent Juvenile Criminals.....	56
IV. <i>Graham</i> ’s Reception in the Lower Courts .....	67
A. A Narrowly Construed Decision.....	68
B. The (Unintended) Beneficiaries .....	75
C. The Costs .....	83
V. Conclusion .....	91

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I would describe you, as have others, as violently savage and vicious, unnaturally sadistic, and relentlessly inhumane and totally incorrigible. I am convinced beyond all doubt that even at your age you are beyond rehabilitation. Society must be protected from the likes of you.

*Page v. State*, 995 A.2d 934, 937 (R.I. 2010) (sentencing hearing of 18-year-old)

Perhaps at times “innate depravity” is more than a fiction.

*People v. Roper*, 259 N.Y. 170, 177 (1932)

### **I. Introduction**

In *Graham v. Florida*,<sup>1</sup> the Supreme Court announced that “when compared to an adult murderer, a juvenile [nonhomicide] offender has a twice diminished moral culpability.”<sup>2</sup> This would seem to underestimate the matter. Exhibit A is 30-year-old contract killer; Exhibit B is a 15-year-old shoplifter. “Twice” does not begin to distinguish the two in moral culpability.

Yet this is a stylized comparison. “Homicide” and “murder” are capacious legal categories. Yoked together by a result—a dead body—they contemplate causal acts that span a range of moral culpability. Likewise, “juvenile” is a staggeringly broad term. No one would

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<sup>1</sup> 130 S.Ct. 2011 (2010).

<sup>2</sup> *Id.* at 2027.

regard two 16-year-olds as identical in maturation because they share a birth date. So let us restate the comparison. Ryan Holle: Hungover one morning, Holle, aged 20, lent his Chevrolet Metro to a buddy who planned to burglarize a marijuana dealer; with Holle a mile away, the burglary turned violent, and one of the dealer's relatives was killed.<sup>3</sup> Nathan Walker and Jakaris Taylor: Aged 16, Walker and Taylor invaded a home while armed, gang-raped a woman, forced her to perform oral sex on her 12-year-old son, and doused both victims with chemicals.<sup>4</sup> Holle: adult murderer. Walker and Taylor: juvenile nonhomicide offenders.

Human nature is wide, vastly wider than most of us, in our day-to-day dealings, can possibly know. Embedded in the Court's doubly categorical statement, this Article argues, are a simplifying assumption about the relative maturity of juveniles and adults and a moral claim about the culpability of homicides and nonhomicides, and both this assumption and this claim are demonstrably false in a nontrivial number of cases. It is not hard to identify actual cases of juvenile nonhomicide offenders who merit, if anyone does,<sup>5</sup> a life sentence without the possibility of parole. When considered with close attention to horrific detail, such cases launch us deep into the uncomfortable truth, reluctantly conceded in an early twentieth century case, that "at times 'innate depravity' is more than a fiction."<sup>6</sup>

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<sup>3</sup> See Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES, Dec. 4, 2007. Holle was convicted of felony murder and sentenced to life without parole.

<sup>4</sup> See Susan Spencer-Wendel, *A Look Into the Life of Jakaris Taylor*, PALM BEACH POST, Nov. 9, 2009. Walker and Taylor were both sentenced to life without parole.

<sup>5</sup> One can score easy points mocking the incarceration of persons who have aged to the point that they pose little, if any, threat to society. See *United States v. Jackson*, 835 F.2d 1195, 1198 (1988) (Posner, J., concurring) ("A civilized society locks up [habitual armed robbers] until age makes them harmless, but it does not keep them in prison until they die."). If life without parole is ever a justified sentence, it must be on retributive and possibly general deterrence grounds.

<sup>6</sup> *People v. Roper*, 259 N.Y. 170, 177 (1932).

Decided almost a year ago, we are now in a position to evaluate not only the rationale of the *Graham* opinion, but also its reception in the lower courts. Potentially at least, the case is of great significance. For the first time since *Solem v. Helm*,<sup>7</sup> the Court invalidated a sentence other than that of death. The immediate beneficiary was Terrance Graham, who at the ages of 16 and 17 committed between three and five armed robberies and home invasions, the final one at the age of 17 years, 11 months. After several hearings,<sup>8</sup> during which Graham's mother and father testified, as well as some of his victims and collaborators in crime, an experienced trial judge concluded that Graham was irredeemable, and sentenced him to life in prison. As Florida, like several other states, had abandoned a formal parole procedure, Graham effectively was sentenced to "life without parole," or in the infelicitous acronym, LWOP.

Graham's sentence was a severe one, but his case would not have aroused such marked interest had it not been artfully joined, when the Supreme Court granted certiorari, with that of Joe Sullivan. His case provided more compelling copy. Over the course of two years, Sullivan

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<sup>7</sup> 463 U.S. 277 (1983). Prior to *Solem v. Helm*, inmates challenging their sentences under the Eighth Amendment were well advised to abandon all hope. See Steiker & Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2009) ("Eighth Amendment challenges to excessive incarceration [are] essentially non-starters"). The prohibition against cruel or unusual punishment—except as it applied to capital cases—was almost never construed to invalidate a criminal conviction or sentence. There was a feint towards a more ambitious Eighth Amendment jurisprudence in *Solem*, when the Court threw out a life sentence imposed on a recidivist who had written a bad \$100 check; but the severity of the penalty in that case in comparison with the triviality of the crime made *Solem* easily distinguishable. In any event, *Solem* as meaningful precedent was extinguished within a decade by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Court upheld a life sentence for cocaine possession.

<sup>8</sup> Graham committed armed robbery when he was sixteen years old. As part of a plea agreement, the state withheld adjudication of guilt and Graham was sentenced to probation. He continued on his violent ways, and was picked up after an armed home invasion and burglary a little over a year later. The transcripts of the hearings are reprinted in the joint appendix to his certiorari petition, available at 2009 WL 2163259 and 2009 WL 2163260.

was charged with over a dozen felonies, including robbery and aggravated assault. The crime spree culminated in an armed home invasion during which he raped and sodomized an elderly woman. Sullivan’s sentence of LWOP would seem, at least to many Americans, richly deserved had it not been for one complication: he was 13 years old at the time he committed his final depredation on civil society. The prospect of so young a defendant sentenced to LWOP seemed to some to be an intolerable result in any civilized society, and several Justices at oral argument seemed receptive, at least in principle, to Sullivan’s plea.

Although Sullivan’s case was temporarily barred on procedural grounds,<sup>9</sup> the story of a 13-year-old dispatched forever to a cage, at least when told with sufficient abstraction from the facts of his case, lent a medieval aura to the issue. For those inclined to view the American criminal justice system as unnecessarily retributive, the idea that mere juveniles could be sentenced to life in prison without the possibility of parole, and not even for homicide, seemed to cry out for correction. Fortunately, in this view, the Supreme Court was willing to step in and provide guidance where 37 state legislatures had proven morally obtuse.<sup>10</sup> Yet the guidance is ambiguous. Although the Court emphasized the need to articulate a “categorical rule” with respect to juvenile nonhomicide offenders, the nutshell holding—what a professor might expect of a student in a class or that might, in its clarity, foster the rule of law—is not easy to recapitulate. For present purposes, the following suffices: the Eighth Amendment prohibits the imposition of a sentence of life without parole on any juvenile for any crime other than homicide, with the caveat that the State can, in fact, imprison said juvenile for his natural life if

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<sup>9</sup> 130 S.Ct. 2059 (2010) (Mem.) (dismissing certiorari as improvidently granted).

<sup>10</sup> See Appendix I to the *Graham* opinion, 130 S.Ct. at 2034 (37 states, plus the federal government and the District of Columbia, permit the imposition of LWOP on juveniles for nonhomicides and homicides alike; another 7 states authorize LWOP for juveniles convicted of homicide alone).

he fails to demonstrate maturity and rehabilitation in the course of an indeterminate stay in prison.

As several observers have noted, and even lamented, the Supreme Court's pronouncements can be a mix of the Delphic and Olympian.<sup>11</sup> At turns cryptic and lofty, the *Graham* opinion fits neatly into this mold. Trial judges throughout the country have been confronting requests for reduced sentences from inmates citing *Graham*, and this Article tracks their success. The data is trickling in, and it must be disappointing to those who had touted the opinion as a turning point in the law of the Eighth Amendment and in particular this country's treatment of juvenile offenders. Very few defendants have benefitted from *Graham*: courts have rejected arguments that its rule be extended in even minor respects. Juveniles sentenced to LWOP for homicide, for example, have had no success citing *Graham*.

Even more interesting, many juveniles convicted of nonhomicides, who were sentenced to LWOP or its effective equivalent, have not obtained meaningful relief. Sullivan's own sentence, for example, was recently reduced to 80 years in prison, making him eligible for release in 2043, at the age of 68.<sup>12</sup> In another noteworthy case, a court held that *Graham* did not apply to a juvenile rapist named Michael Bell, who was sentenced to 54 years in prison, because he would be eligible for release at age 70, or, given current life expectancies, a few months

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<sup>11</sup> See, e.g., Craig S. Lerner and Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1284-85 (2010); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 411.

<sup>12</sup> See Kris Wernowsky, *Teen Rapist Sentenced to 80 years*, Jan. 28, 2010, available at <http://www.pnj.com/article/20110128/NEWS01/101280321/1006/NEWS01/Teen-rapist-sentenced-to-80-years>. The trial judge, who at the original sentencing had proclaimed that he wanted to ensure Sullivan would never be released, was unrepentant. He sentenced Sullivan to the maximum sentence for each rape count (40 years) and ran them consecutively. Graham's resentencing has been postponed indefinitely.

before he died.<sup>13</sup> In yet another case, a judge dispensed with even this technical compliance with *Graham*: a Florida trial judge resentenced Jose Walle, a 13-year-old kidnapper and rapist, to 65 years in prison, which, running consecutively with a 27-year sentence on another count, will make him eligible for release in the year 2083.<sup>14</sup>

This Article will emphasize the facts of the crimes under consideration. This is often unpleasant and is generally disfavored, at least by several Supreme Court Justices. Inflamed by righteous indignation, the argument runs, one loses sight of the narrow legal issue presented.<sup>15</sup> Whatever the merits of this argument in some contexts, it does not apply here. The legal question posed in many cases reviewed in this Article is the culpability of particular defendants. One cannot assess this question unless one considers carefully, without artful euphemisms or convenient elisions, what the defendant did. And what certain crimes suggest is that there are violent juvenile offenders—fortunately rare—who are as least as mature and culpable as the typical adult violent offender.

An older approach to juvenile offenders accommodated this possibility by not categorically excluding juveniles from punishment, but presuming an incapacity that could be rebutted by facts. The *Graham* opinion rejected this older view, wrapping itself in what it imprecisely refers to as “brain science,” but it is, this Article argues, unscientific. It begins with

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<sup>13</sup> See *Bell v. Haws*, WL 3447218, \*3-5 (C.D.Cal. 2010).

<sup>14</sup> See Alexandra Zayas, *Teenage Rapist Jose Walle Resentenced to 65 Years in Prison*, ST. PETERSBURG TIMES, Nov. 18, 2010.

<sup>15</sup> See, e.g., *Uttecht v. Brown*, 551 U.S. 1, 35 n.1 (2007) (Stevens, J., dissenting) (criticizing the majority opinion’s “graphic description of the underlying facts of [Brown’s] crime”); *Thompson v. Oklahoma*, 487 U.S. 815, 819 (1987) (“Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary.”); *Wainwright v. Witt*, 469 U.S. 412, 441 (1985) (Brennan, J., dissenting) (“However heinous [defendant’s] crime, the majority’s vivid portrait of its gruesome details has no bearing on the issue before us.”).

a theory—the so-called “diminished culpability” of juvenile nonhomicide offenders—and then ignores contrary facts. It is as if in the *Graham* opinion the Supreme Court announced to those judges who sentenced juveniles to LWOP that the Court’s theory disproved those judges’ observed facts—that is, the culpability and maturity of particular defendants. This is not, to put it delicately, what has been hailed as the modern scientific method. It would not be surprising if judges on the ground responded in a manner that suggested they were unimpressed by the Court’s theory, at least in those cases in which it is tested and disproved. The Court’s central claim about the relative culpability of adult and juvenile offenders originates from a poverty of the imagination and an assumption that human nature is sufficiently captured by the three standard deviations that surround one’s own comfortable experience in the world. Joe Sullivan’s sentencing judge had access to a wider data set in reaching a contrary conclusion.

The plan is as follows. Part II begins by sketching an older approach to juvenile crime, which allowed judges to focus on the attributes of particular defendants: presuming incapacity in those of tender years, evidence of malice and wickedness could overcome that presumption on an individualized basis. Over the course of the twentieth century, influenced by various intellectual developments (progressivism, “social science,” “brain science”), the Supreme Court has become more inclined to categorically exclude juveniles from certain punishments, a trend that culminated in the *Graham* decision. Part III subjects the central premise of the *Graham* decision as a testable hypothesis: is it really true that juvenile nonhomicide offenders sentenced to LWOP are less culpable than adult homicide offenders sentenced to LWOP? I consider ten case studies and then propose an alternative theory of juvenile criminal responsibility. Part IV tracks *Graham*’s reception in the lower courts over the past year. The case has been narrowly construed; indeed, juveniles sentenced for nonhomicides to long prison terms that amount to

LWOP have obtained little relief. Yet lest one dismiss *Graham* as a symbolic decision of negligible importance, the Article assesses its costs in promoting legal uncertainty and fueling a misguided ideology of adolescent immaturity.

## **II. Punishing Juvenile Criminals: A Short Introduction**

This section sketches the development of juvenile criminal law, from early common law through the *Graham* decision. The common law approach, which emphasized individualized assessments of each juvenile defendant’s capacities and culpability, was first swept aside by a wave of progressive thinking at the turn of the twentieth century. While struggling to recover from that onslaught, the common law approach has lately been pummeled by critics emerging from another quarter—that of “science,” originally “social science,” and more recently, “neuroscience.” Such “science,” purporting to demonstrate the categorical differences between young people and adults, has proven influential; and yet despite the wonders of modern science, an accurate sorting of human beings, including juveniles, by capacity, culpability, and depravity remains as elusive today as it ever was. The result in *Graham* is a puzzling opinion, in which Justice Kennedy trumpets the categorical differences between juveniles and adults, but then constructs a rule that, given the rhetorical buildup, is narrowly confined.

### **A. The Common Law: “Malice Supplies the Want of Years”**

Anglo-American law long recognized the need to carve out rules tailored to the capacities of minors.<sup>16</sup> In the criminal law, these rules were applied on a case-by-case basis. Young offenders were tried in adult courts (no juvenile courts existed until the twentieth century), but the defendant’s age could be an excusing consideration in guilt determinations or a mitigating

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<sup>16</sup> See generally A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. Rev. 364 (1937).

factor in punishment. For these purposes, each defendant's maturity was an issue entrusted to the consideration of the judge or jury.

Viewed with modern eyes, the early common law approach to juvenile crime seems barbaric. Blackstone refers to the hanging of an 8-year-old boy convicted of barn-burning.<sup>17</sup> It is doubtful this punishment would have been inflicted on a youth of that age in Blackstone's own day, either in England or America, although there are rare instances of preadolescent children executed for murder in the early years of our republic.<sup>18</sup> Drawing upon and simplifying Hale's elaborate division of minors into four categories, graded by capacity,<sup>19</sup> Blackstone proposed that in felony prosecutions of those aged 7 to 14 an infancy defense would be available to those who possessed a "defect of understanding." This required an individualized assessment of the defendant, with inferences drawn from reports of his character and the nature of his crime.<sup>20</sup>

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<sup>17</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES 23 (noting that this was in the "last century," and adding that it appeared the boy displayed "malice, revenge, and cunning").

<sup>18</sup> See, e.g., Henry Channing, God Admonishing His People of Their Duty, as Parents and Masters. A Sermon, Preached at New-London, December 20th, 1786. Occasioned by the Execution of Hannah Ocuish, a Mulatto Girl, Aged 12 years and 9 Months. For the Murder of Eunice Bolles, Aged 6 Years and 6 Months 29-31 (New-London, T. Green 1787) (describing a 12-year-old murderer as having "a maliciousness of disposition which made the children in the neighbourhood much afraid of her" and "...a degree of artful cunning and sagacity beyond many her years"); *Execution of a Negro Girl for the Murder of a White Child*, N.Y. Times, Feb. 14, 1868, at 6 (reporting that a 13-year-old girl killed another girl "deliberately and remorselessly"). These cases are discussed in Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. 3 (1989); Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983).

<sup>19</sup> Sir Matthew Hale, 1 The History of the Pleas of the Crown 16-29 (1680). The evolution from Hale to Blackstone is developed in *Exploding the Superpredator Myth: Why Infancy is the Best Defense in Juvenile Court* in 75 N.Y.U. L. Rev. 159, 198 (2000).

<sup>20</sup> One wrinkle in this approach was the creation of an irrebuttable presumption that a juvenile was incapable of committing rape. American courts in the 19th century struggled with the dubious physiological grounding for this rule. See *Commonwealth v. Green*, 19 Mass. 380, 381 (2 Pick 380, 381) (1824) ("[f]emales might be in as much danger from precocious boys as

Although a presumption of *doli incapax* existed throughout the range, particularly in the earlier years, an individualized factual determination was expected; after all, in Blackstone's words, "the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."<sup>21</sup> The state could overcome the presumption of a juvenile's incapacity, but "in all such cases the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction."<sup>22</sup>

What Blackstone intended by "malice" in this context gave rise to confusing accounts, as illustrated by Broom's Legal Maxims from the 1870s:

Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem*-- malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,) supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment."<sup>23</sup>

The first and second sentences are not entirely consistent. "Malice" is equated in the first sentence with "its legal sense," which calls to mind the classic mens rea ("malice aforethought") required for a murder conviction. At common law, however, malice is not necessarily "malevolence to the deceased particularly"<sup>24</sup>; gross recklessness, such as that displayed by one

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from men, if such boys are to escape with impunity from felonious assaults"). *See also Williams v. State*, 14 Ohio 222 (1846) (in upholding minor's conviction for attempted rape, the opinion acknowledged the common law approach, but then articulated a rule that made the presumption of incapacity rebuttable).

<sup>21</sup> BLACKSTONE, *supra* note 17, at 23. *See* Walkover, *supra* note 17 at 510-11.

<sup>22</sup> BLACKSTONE, *supra* n. 17, at 24.

<sup>23</sup> Quoted in *Angelo v. People*, 1880 WL 10095, 2 (Ill. 1880).

<sup>24</sup> BLACKSTONE, *supra* note 18, at 198.

playing Russian roulette with a consenting friend, could be deemed sufficient “malice” to support a murder conviction.<sup>25</sup> The second sentence in the passage from Broom’s Legal Maxims, however, suggests that something more than recklessness in that legal sense would be necessary to impute “malice” to juveniles under the age of 14. Thus, the mens rea that would suffice for a felony conviction an adult might be insufficient in a juvenile.

That would seem to be how many American courts of appeals construed the common law adage that malice supplies the want of years. For example, in *State v. Adam*,<sup>26</sup> a 12-year-old and a 17-year-old got in a verbal and physical altercation, culminating in the younger boy stabbing the older one with a penknife. The aroma of self-defense or possibly provocation hovered in the air, but the evidence supported the jury’s murder verdict. The Missouri Supreme Court reversed the conviction, however, holding that the jury instructions failed to clarify the need for “evidence strong and clear and beyond all doubt and contradiction” to overcome the presumption that those under the age of 14 are presumed incapable of the malice required in a finding of murder. In another case, the North Carolina Supreme Court noted that while ignorance of the law might not be a defense for adults, it did apply in the context of juvenile defendants.<sup>27</sup> To be sure, there were cases in which courts of appeal inferred malice on the part of a juvenile, and affirmed felony convictions,<sup>28</sup> even involving the death penalty,<sup>29</sup> but it is striking how often courts of

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<sup>25</sup> See, e.g., *Commonwealth v. Malone*, 354 Pa. 180 (1946).

<sup>26</sup> 76 Mo. 355 (1882).

<sup>27</sup> *State v. Yeargan*, 117 N.C. 706 (1895) (gambling conviction reversed because ignorance of the law is an excuse for a 13-year-old).

<sup>28</sup> See, e.g., *State v. Goin*, 28 Tenn. 215 (1848) (“The proof in this record shows that the defendant had sufficient capacity to commit crime, and that the battery was prompted by malice and revenge, and committed upon an infant incapable of self-defense.”). One case notably unsympathetic to a juvenile’s plea of incapacity is *Hicks v. State*, 125 N.C. 636 (1899) (affirming

appeal reached the contrary result, rigorously demanding evidence that overcame a presumption of incapacity.<sup>30</sup>

In the late nineteenth and early twentieth century, progressive reformers, fueled in part by romantic notions of youth's intrinsic goodness and malleability, pushed for an overhaul of the criminal justice system for juveniles.<sup>31</sup> State legislatures across the country were persuaded, embracing a categorical approach that abandoned an individualized infancy defense and dispatched juveniles as a class to newly created courts that promoted the penological goal of

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murder conviction of 11 year old although evidence of malice in the burning death of a baby was less than overwhelming; sentenced to life without parole).

<sup>29</sup> See, e.g., *Godfrey v. State*, 31 Ala. 323, 326 (1858) (affirming a 12-year-old's murder conviction and death sentence; "if, on the whole evidence, [the jurors] were satisfied beyond a reasonable doubt that [the defendant] was fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent design and malice in its execution, they would be authorized to return a verdict of guilty"); *State v. Guild*, 10 N.J.L. 163, 167 (N.J. Sup. Ct. 1828) (affirming in a lengthy opinion a 12-year-old's murder conviction and death sentence after introducing the legal standard that malice can supply the want of age contained detailed findings that the defendant merited full criminal responsibility because he fully understood the wrongful nature of his act and its consequences, a conclusion supported by testimony that the defendant "is reputed a cunning smart boy" and "is accounted smarter than common black boys of his age; full of mischief;...ingenious to get out of a scrape.").

<sup>30</sup> See, e.g., *See, e.g., Martin v. State*, 8 So. 858 (Ala. 1891) (reversing minor's manslaughter conviction because the lower court committed reversible error by refusing jury instructions that would have created a question of infancy and responsibility); *State v. Toney*, 15 S.C. 409 (1881) ("Out of tenderness to infants—the ease with which they may be misled—their want of foresight and their wayward disposition, no doubt, the evidence of malice, which is to supply age, should be strong and clear beyond all doubt and contradiction."); *Angelo v. People*, 96 Ill. 209 (1880) (reversing murder conviction of 11 year old when there was no strong and clear evidence of capacity); *Wusnig v. State*, 1871 WL 7309 (Tex. 1870) (reversing manslaughter conviction of 12 year-old when the instruction "withdrew from the jury any consideration of the question of infancy and responsibility"). In yet other cases, courts avoided the problem by reversing the conviction on other grounds. See, e.g., *State v. Solomon*, 4 N.J. 231 (1818); *McCormack v. State*, 102 Al. 156 (1894).

<sup>31</sup> The Supreme Court took approving judicial notice of these "early reformers" in *In re Gault*, 387 U.S. 1 (1967). The first statutory success was the Illinois Juvenile Court Act of 1899 (codified as amended at 705 Ill. Comp. Stat. Ann. 405/1-2).

nonjudgmental rehabilitation.<sup>32</sup> The rapidity with which states abrogated the common law approach to juvenile crime is illustrated by the New York experience.<sup>33</sup> In 1903, separate juvenile criminal courts were founded; two years later, the legislature provided that for juveniles (defined as those under 16 years of age), crimes other than those punishable by death or life imprisonment were to be treated as misdemeanors; and then in 1909, the legislature decriminalized all juvenile conduct, again other than crimes punishable by death or life imprisonment.<sup>34</sup>

The striking, and perhaps unintended, results of the 1909 statute are illustrated in *People v. Roper*.<sup>35</sup> In connection with an early-morning armed robbery of a tavern, in the course of which a customer was shot and killed, prosecutors charged a 15-year-old with felony murder. On appeal, his capital conviction was overturned, the court reasoning that the state, in a felony murder charge, had proved only that the defendant had committed robbery; and because a robbery committed by a 15-year-old was not a felony (or even a crime), it could not serve as a predicate for felony murder. The opinion evinces discomfort with the result, meandering from the observation that “sometimes a spirit of innocent mischief, sometimes evil associations, not of

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<sup>32</sup> See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

<sup>33</sup> One of the last New York cases to apply the common law approach to infancy was *People v. Squazza*, 81 N.Y.S. 254 (N.Y. County Ct. 1903) (setting aside an 11-year-old’s manslaughter conviction because there was no evidence that the defendant acted maliciously).

<sup>34</sup> See Merill Sobie, *Pity the Child: The Age of Delinquency in New York*, 30 PACE L. REV. 1061, 1069 (2010). See, e.g., *People v. Hopkins*, 129 N.Y.S.2d 851 (N.Y. County Ct. 1954) (ordering the removal of a 15-year-old defendant to the Children’s Court when he picked up a rifle and shot and killed a rival gang member); *People v. Adomaitis*, 112 N.Y.S.2d 38 (N.Y. Sup. Ct. 1952) (reversing a 15-year-old’s conviction for grand larceny because he was, as a matter of law, incapable of committing the crime).

<sup>35</sup> 259 N.Y. 170 (1932)

his own choice,” lay behind a juvenile’s crimes, to the more grim assessment that “[d]oubtless at times the causes which have led a child into ‘juvenile delinquency’ are too deep-seated to be removed by . . . corrective treatment. Perhaps at times ‘innate depravity’ is more than a fiction.”<sup>36</sup> In recognition of this latter possibility, the court allowed the state to retry the minor, and possibly face the death penalty, but only if he was charged directly with murder in the first or second degree.<sup>37</sup> The stark binary outcome was thus that convicted of felony murder, the defendant was guilty of nothing more than juvenile delinquency; but retried for murder, the death penalty loomed as a possibility. This oddity was grist for Judge Nathaniel Sobel three decades later, when the identical issue was presented. Judge Sobel astutely concluded, “It is difficult to understand why a ‘child’ deemed incapable of committing robbery or rape should be deemed capable of committing design murder.”<sup>38</sup>

Considerations such as those expressed by Judge Sobel became commonplace by the 1960s. The juvenile justice system’s supposed lack of procedural protections aroused the concern of the United States Supreme Court,<sup>39</sup> but the public’s alarm mounted in a different direction. The antiquated notion took hold that certain juveniles might possess the requisite “malice,” as demonstrated by their character and the nature of their crimes, to merit not tender concern but punishment.<sup>40</sup> By the 1970s, most state legislators had abandoned the romantic

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<sup>36</sup> *Id.* at 177.

<sup>37</sup> *Id.* at 179-80.

<sup>38</sup> *People v. Rooks*, 243 N.Y.S. 301 (Supreme Court Kings County 1963).

<sup>39</sup> See, e.g., *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970).

<sup>40</sup> See generally JAMES Q. WILSON, THINKING ABOUT CRIME (1985).

notions of youth's goodness that had inspired their predecessors decades earlier.<sup>41</sup> The categorical treatment of minors as somehow incapable of full responsibility for criminal acts was abandoned, and again New York's experience is illustrative. The Juvenile Offender Act of 1978 provided that the presumptive age of criminal responsibility for a number of crimes, basically the common law *malum in se* crimes, was lowered to 13.<sup>42</sup> Juveniles charged in ordinary criminal courts with such crimes could seek a transfer to juvenile courts, or could raise the defense of "lack of criminal responsibility."<sup>43</sup>

In sum, at the local level, where crimes are investigated, prosecuted, and punished, the common law approach to juvenile capacity has made something of a return. To be sure, the age ranges associated with juvenile status have shifted a few years, although this may be consistent with the increasingly delayed adolescence commonplace in the modern world.<sup>44</sup> But the notion of categorical incapacity has been jettisoned in favor of a more individualized approach. Oddly, while this development has been occurring at the local level, the United States Supreme Court, at least in the context of punishment, has been moving in a contrary direction.

## B. Toward a Categorical Eighth Amendment Jurisprudence

Soon after the Second World War, this section will show, the Supreme Court hinted that categorical rules for juveniles would be needed in judging whether confessions complied with

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<sup>41</sup> See Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's Juvenile Injustice System*, 22 PEPP. L. REV. 907, 921 (1995); Christine Chamberlin, Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System, 42 B.C. L. REV. 391, 399-405 (2001).

<sup>42</sup> N.Y. Penal Law § 30.00 (McKinney 2009).

<sup>43</sup> *Id.*

<sup>44</sup> For a criticism of this trend, see ROBERT EPSTEIN, THE CASE AGAINST ADOLESCENCE (2007).

the 5<sup>th</sup> amendment privilege against self-incrimination. Despite these hints, it was only last Term, in 2011, that the Supreme Court carved out *Miranda* rules specific to juveniles. By contrast, for over two decades, the Court has held that the Eighth Amendment mandates categorical rules for the punishment of juveniles. Buttressing these arguments, members of the Court have invoked scientific data in various forms, including evidence from the nascent field of neuroscience.

In a pair of pre-*Miranda* cases, the Court questioned the voluntariness of confessions made by young defendants under the 5<sup>th</sup> amendment. In *Haley v. State of Ohio*,<sup>45</sup> the Court threw out the confession of a young African American, who had been interrogated for five hours without his counsel or parents present. Justice Douglas mused that, “[a]ge 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.”<sup>46</sup> These broad reflections on adolescent frailty were unaccompanied by any citations to scientific literature; they were presented as a matter of common sense, entitled to judicial notice. Fourteen years later, Justice Douglas reaffirmed the holding in *Haley* and observed that “a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police.”<sup>47</sup> Again, no scientific evidence was cited in the opinion, or even references in any of the briefs, about the special characteristics of juveniles.

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<sup>45</sup> 332 U.S. 596 (1948).

<sup>46</sup> *Id.* at 599-600.

<sup>47</sup> *Gallegos v. Colorado*, 370 U.S. 49, 53-54 (1962).

Yet these blanket observations about juvenile vulnerability to police pressure, which seemed to point to the need for special rules protecting juveniles, did not soon materialize. Much to the contrary, the Court rejected a plea for such categorical rules in *Fare v. Michael D.*<sup>48</sup> The Court focused on the individual characteristics of the particular juvenile involved, which strongly weighed against a finding of involuntariness:

Further, no special factors indicate that respondent was unable to understand the nature of his actions. He was a 16 1/2-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.<sup>49</sup>

*Fare* went on to note the practical difficulties that would arise were the Court to carve out special rules for juveniles, but of relevance here is the Court's emphatic rejection of the argument that juveniles, as a class, are frail creatures, and thus easy prey for Machiavellian interrogators.<sup>50</sup> Of course, this may be true of many juveniles (and adults), but not all. Although *Fare* has attracted hostility in the academic literature,<sup>51</sup> its approach has been adopted in a majority of jurisdictions.<sup>52</sup> The Supreme Court reaffirmed the principle of *Fare* in *Yarborough v.*

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<sup>48</sup> 442 U.S. 707 (1979).

<sup>49</sup> *Id.* at 726-27.

<sup>50</sup> *Id.* at 727-28.

<sup>51</sup> See, e.g., Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel, in Youth on Trial: A Developmental Perspective on Juvenile Justice*, 33, 38-40 (Thomas Grisso & Robert G. Schwartz eds., 2000).

<sup>52</sup> See Kenneth King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 452.

*Alvarado*,<sup>53</sup> but in 2011 the Court at last backtracked and held that age must be considered in determining the voluntariness of a confession.<sup>54</sup>

Notwithstanding the Court’s reluctance for many years to craft special rules for juveniles in the context of the 5<sup>th</sup> Amendment (as well as the 4<sup>th</sup> and 6<sup>th</sup>), the 8<sup>th</sup> Amendment has proven to be an outlet for the Supreme Court’s apparent need to ruminate on the vulnerability of youth and categorical need for protection. The first inklings could be seen in *Lockett v. United States*,<sup>55</sup> which involved a 21-year-old murderer. The Court overturned a state capital punishment scheme that did not permit judges to make individualized assessment of all mitigating circumstances, including the offender’s relative youth. The prohibition against cruel and unusual punishment was understood to require the consideration of age as a mitigating factor, at least in capital cases.

Four years later, in *Eddings v. Oklahoma*,<sup>56</sup> the Court applied *Lockett* to overturn a death sentence imposed on a defendant who was 16 years old at the time of his crime. The Court found that the trial judge did not consider the defendant’s youth as a mitigating factor, and cited this as the basis for reversing the sentence. The opinion did not make a single reference to any scientific literature. Justice Powell ruminated on the “specialness” of youth, invoking as authority one of his predecessors on the Court: “As Justice Frankfurter stated, ‘[c]hildren have a very special place in life which law should reflect’ [citing *May v. Anderson*, 345 U.S. 528 (1953) (concurring opinion)].”<sup>57</sup> The citation to *May* could be generously categorized as inapposite.

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<sup>53</sup> 541 U.S. 652 (2004) (in determining whether a suspect is in custody for *Miranda* purposes, no account should be made for his status as a juvenile).

<sup>54</sup> *J.D.B. v. North Carolina*, 564 U.S. \_\_ (2011).

<sup>55</sup> 438 U.S. 586 (1978).

<sup>56</sup> 455 U.S. 104 (1982).

<sup>57</sup> *Id.* at 116 n.12.

That case was a custody dispute involving children aged 5, 8 and 12. *Eddings* involved a 16-year-old young man, already guilty of several burglaries and robberies, who sawed off a shotgun, orchestrated a car theft and then, over the repeated objections of his unwilling accomplices, pulled out the weapon and murdered a state trooper. The plight of pre-teenagers caught in a bitter divorce would seem to cast little light on the character and moral culpability of the 16-year-old Eddings.

The Court in *Eddings* did not address the issue, urged by several amici, that executing 16-year-olds is necessarily unconstitutional, but this lacuna was filled a decade later in *Thompson v. Oklahoma*.<sup>58</sup> *Thompson*, or more precisely, Justice Stevens's plurality opinion, is important for our purposes in two respects: for the first time a plurality of Justices suggested that the Eighth Amendment carved out special rules for categories of criminals (as opposed to crimes); and secondly, scientific evidence, including a glancing reference to the brain, were invoked as relevant to the issue of criminal responsibility. The latter point is buried in footnotes. In the text of the opinion, Justice Stevens observed that "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."<sup>59</sup> Despite the author's claim that the argument is "too obvious" to justify extended argument, both of the above sentences were graced with elaborate footnotes, the second of which quotes a presentation to the American Academy of Child and Adolescent Psychiatry:

"Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology . . ." Lewis, Pincus, Bard, Richardson,

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<sup>58</sup> 487 U.S. 815 (1988).

<sup>59</sup> *Id.* at 835.

Prichep, Feldman, & Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States 11 (1987).<sup>60</sup>

The initial sentence makes a broad claim about the stress of “adolescence,” but the supporting “data” consists of a study of 14 adolescents, all of whom committed conspicuously vicious crimes. Surely, this is a small and unrepresentative sample upon which to base claims about “adolescence” generally. One might, analogously, claim that humanity is predisposed to commit acts of cruelty, and then cite a study of 14 serial killers.

Justice Stevens’ plurality opinion also represents a break-through in Eighth Amendment jurisprudence in its suggestion that the special characteristics of a criminal, or even his group cohort, could prevent the state from implementing the death penalty. Starting with *Weems v. United States*,<sup>61</sup> the Court had framed Eighth Amendment issues as whether a prescribed punishment was proportional to a committed *crime*. For the first time in *Thompson* a plurality of the Court exempted an entire class of *criminals*—that is, those younger than 16 years of age—from capital punishment. As Nita Farahany has argued, the categorical disqualification of one (among many) heterogeneous group of persons from punishment immediately gave rise to Equal Protection concerns, given that two equally vicious criminals might be treated differently.<sup>62</sup> Indeed, under the plurality’s opinion in *Thompson*, the calculating 15-year-old would be exempt from the death penalty, but the naïve 16-year-old would be eligible.

The two seeds buried in *Thompson* (the evidentiary value of brain science and categorical rules for classes of criminals) failed to break ground for some time. Neurological evidence at

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<sup>60</sup> *Id.* at 835 n.42.

<sup>61</sup> 217 U.S. 349 (1910).

<sup>62</sup> Nita A. Farahany, *Cruel and Unusual Punishments*, 86 WASH. U. L. REV. 859 (2009).

last returned to the Supreme Court Reports in 2002. Dissenting from the Court’s summary denial of habeas corpus relief for a petitioner sentenced to the death penalty for a crime committed when he was 17 years, 4 months old, Justice Stevens wrote:

Neuroscientific evidence of the last few years has revealed that adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group. Scientific advances such as the use of functional magnetic resonance imaging—MRI scans—have provided valuable data that serve to make the case even stronger that adolescents are more vulnerable, more impulsive, and less self-disciplined than adults.<sup>63</sup>

Absent is clarification as to what recent “neuroscientific evidence” is being referenced in the first sentence; alas, to this claim, where it might be illuminating, no footnote is appended.

Furthermore, the second sentence undercuts the first with the suggestion that the neuroscientific evidence simply makes the case “even stronger” that adolescents are by nature vulnerable and impulsive. The case for adolescent frailty, Justice Stevens suggests, is compelling even without the annual expenditure of millions of dollars scanning, probing, and radiating their brains. And although this evidence of adolescent vulnerability and frailty is never specified, presumably Justice Stevens intends the reader to understand that it is a matter of common observation. But if so, does the “neuroscientific evidence” add much to what we already know, or think we know?

Of what relevance, if any, is this evidence in a court of law?<sup>64</sup>

Although a majority of the Court seemed reluctant to embrace the value of neuro-evidence in the context of criminal punishment, a pair of cases suggested a growing receptivity to categorical rules for classes of criminals and the lessons of social science. In *Atkins v.*

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<sup>63</sup> *In re Stanford*, 537 U.S. 968 (2002) (Mem.).

<sup>64</sup> Justice Stevens also alluded to neuroscience in *Gall v. United States*, 552 U.S. 38 (2007), in which he quoted approvingly from the district court’s opinion: “Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five.” *Id.* at 58.

*Virginia*,<sup>65</sup> the Court, per Justice Stevens again, overturned the death penalty for a defendant with an IQ of 59 and sweepingly invalidated the death penalty for all mentally retarded defendants. Stevens recapitulated many of the arguments offered in his *Stanford* dissent that purport to weigh against the gravest of punishment for adolescents—that is, the supposed vulnerability, plasticity, and impulsivity of the mentally retarded, all of which, as with juveniles as a class, somehow mitigate their culpability and undermine deterrence and retributive rationales for punishment.<sup>66</sup> Yet nowhere in *Atkins* is any reference made to neurological evidence. The Court contents itself with a pair of footnotes, festooned with citations to psychologists, for the proposition that the mentally retarded tend to be impulsive, and have difficulty communicating, processing information, and thinking abstractly.<sup>67</sup> None of these findings come as great surprises: a doctorate in psychology, and certainly not a brain scan, is necessary to know that the mentally retarded are somehow cognitively and emotionally different.

Neurological evidence was also absent in *Roper v. Simmons*,<sup>68</sup> in which the Court invalidated the death penalty for all those under the age of 18.<sup>69</sup> The *Roper* opinion is, however, peppered with citations to social science data to support the propositions that adolescents are immature, have an “underdeveloped sense of responsibility,” are especially “vulnerable or susceptible to . . . peer pressure,”<sup>70</sup> and have characters that are not well formed. As with the

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<sup>65</sup> 536 U.S. 304 (2002).

<sup>66</sup> *Id.* at 318-21.

<sup>67</sup> *Id.* at 318 n.23 & n.24.

<sup>68</sup> 543 U.S. 551 (2002).

<sup>69</sup> See Stephen Morse, *Brain Overclaim Syndrome and Criminal Responsibility*, 3 OHIO ST. J. CRIM. L. 397, 410 (2007).

<sup>70</sup> 543 U.S. at 569.

*Atkins*' Court take on the mentally retarded, it is unclear what work, if any, the social science is doing in the *Roper* opinion.

*Roper* reflected the first time that a majority of the Court embraced a categorical rule invalidating the death penalty for any age group, which on its face is more problematic than the categorical rule announced in *Atkins*. For all those with IQs of less than 70, it flows inexorably that the thinking process is somehow defective compared to that of the typical adult. But categorical judgments about the thinking and maturity of those less than 18 years of age are impossible, as Justice Kennedy himself acknowledged:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.<sup>71</sup>

After flagging an intractable difficulty embedded in the opinion, the Court added cryptically, “[f]or the reasons we have discussed, however, a line must be drawn.”<sup>72</sup> It is unclear what in the preceding portion of the opinion is being referenced. The preceding passages had discussed the immaturity and vulnerability of the typical juvenile, but given that this does not apply, by Justice Kennedy’s own admission, to all juveniles, why is a categorical rule imperative? The public would not have to wait long for the Court’s second foray into the problem.

### C. *Graham v. Florida*

In *Graham v. Florida*, the Court held that the Eighth Amendment prohibits the sentence, but not necessarily the imposition, of life without parole for juveniles convicted of crimes other than homicide. The Court’s arguments run along the following lines: The Eighth Amendment reflects evolving community standards of what is cruel and unusual. In ascertaining community

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<sup>71</sup> *Id.* at 574.

<sup>72</sup> *Id.*

standards, the Court considers first “objective” criteria (the laws and practices of the States), and then subjective criteria, (philosophy, psychology, moral theory, social science), to ensure proportionality between criminal, crime, and punishment. In weighing all these factors, the Court in *Graham* concluded that a categorical rule of some sort was appropriate governing juveniles convicted of crimes other than homicides. I follow this general plan below, concluding each subsection with a question or flagging an issue to which I return in the Article’s more analytical sections.

### **1. Community Consensus**

The starting point in an Eighth Amendment inquiry is “objective” evidence from the States,<sup>73</sup> and the natural place to look for the community’s view of appropriate punishment is the authoritative pronouncements of State legislatures. The Court here stumbles upon an inconvenient fact: thirty seven states, the District of Columbia, and the federal government all permit the imposition of an irrevocable life sentence on juveniles convicted of nonhomicides.<sup>74</sup>

After a nod in this direction, however, the Court considers “sentencing practices.”<sup>75</sup> This is problematic for an obvious reason: homicide and other heinous crimes are low-probability events; and even among such crimes only a fraction are deemed so appalling that legislature, judge, and jury find LWOP an appropriate sentence. So almost by definition it is the rare juvenile convicted of nonhomicides who is sentenced to life without parole.

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<sup>73</sup> 130 S.Ct. at 2023.

<sup>74</sup> *Id.* Another seven permit the imposition of a life sentence of juveniles convicted of homicide. *Id.* at 2035 (Appendix II).

<sup>75</sup> *Id.*

Yet exactly how rare? The question proves insoluble. A provisional answer was provided by an article written by two professors at Florida State University.<sup>76</sup> The study concluded that an “estimated”<sup>77</sup> 109 juveniles convicted of nonhomicides have been sentenced to life without parole, 77 of whom are from Florida.<sup>78</sup> There were, however, gaps in the study, and the Supreme Court took it upon itself to investigate and identified 20 more cases.<sup>79</sup> The Court’s attempt to complete the project itself raises issues. Here are two: First, there are other uncounted juveniles convicted of nonhomicides sentenced to extraordinarily long prison terms that operate, under relevant state law, as an LWOP sentence. How are we to code, for example, the 92-year sentence imposed on Jose Walle, entitling him to release at the age of 91?<sup>80</sup> Second, there are at least three juvenile offenders convicted of both homicide *and* aggravated kidnapping, but who were, because of a vagary of state law, sentenced to LWOP for the kidnapping but not the homicide.<sup>81</sup> They were coded in the Florida State study as juvenile nonhomicide LWOP and the Supreme Court accepted this designation, but in fact these offenders were guilty of homicide.

No one doubts that LWOP is seldom imposed on juveniles for nonhomicides (or at all), but it also true that no one knows how rarely the sentence is imposed. And year after year, the odd cases trickle in. Oklahoma, for example, appears as a “zero” in the Florida State study, but weeks before the Court issued its decision in *Graham*, 16-year old Keighton Budder was

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<sup>76</sup> See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation* (Sept. 14, 2009).

<sup>77</sup> *Id.* at 14.

<sup>78</sup> 130 S.Ct. at 2024.

<sup>79</sup> See *supra* at note 14.

<sup>80</sup> This was the result under Iowa law, in which sentence for murder in the second degree was 50 years, and the sentence for kidnapping in the first degree is LWOP. See Communication from Lettie Prell, Iowa Department of Corrections, Nov. 3, 2010 (on file with author).

sentenced to LWOP for rape and aggravated assault.<sup>81</sup> As argued more fully below, the rarity of the juvenile LWOP (or “JLWOP”) sentence does not undercut the argument that it is indispensable in precisely those cases where it is imposed.

## 2. The Criminal

Perhaps sensing how perilous the argument from State practice is, Justice Kennedy breathes more easily as he leaves “objective” criteria of community standards for the subjective ones. The Eighth Amendment, he writes, demands the “judicial exercise of independent judgment,”<sup>82</sup> that is, it would seem, exercise unconstrained by stubborn facts about the laws actually adopted by the state legislatures of America. In this exercise, Justice Kennedy weights three variables—criminal, crime, and punishment—which we take these up in turn.

With respect to juvenile criminals, Justice Kennedy begins by restating the position previously articulated in *Roper* that juveniles “have lessened culpability” and are less deserving “of the most severe punishments,” due to their immaturity, vulnerability to peer pressure, and changeability.<sup>83</sup> He continues that “no recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”<sup>84</sup> The sentence suggests that Justice Kennedy surveyed the “data” since *Roper* was decided in 2003 and found that no studies indicate that juveniles are, in fact, fully mature, invulnerable to peer pressure, and possess characters etched in stone. Unlike *Roper*, which is filled with citations to social science articles on the

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<sup>81</sup> 130 S.Ct. at 2024; *id.* at 2051 (Thomas, J., dissenting).

<sup>82</sup> *Id.* at 2026.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

character of youth,<sup>85</sup> the Court in *Graham* treats the matter as settled. It is no longer necessary to cite Erik Erikson, for example, on the nature of juveniles; it is sufficient to cite Anthony Kennedy (citing Erik Erikson). And although the social science data is apparently overwhelming, emerging data about brains cements the matter:

As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27.”<sup>86</sup>

The latter sentence is not easily parsed. Which “parts of the brain” do Justice Kennedy have in his mind? Virtually every part of the brain is “involved in behavior control” in some way. Shorn of the citations to the AMA and APA briefs, one might guess this a reference to the amygdala, the part of the brain’s limbic system that scientists claim “activates” in response to fear and anger. Checking the AMA and APA briefs suggests that it is the “prefrontal cortex” that is the particular focus of Justice Kennedy’s attention.<sup>87</sup> According to both briefs, the adolescents’ frontal lobes are “undeveloped” in two principal ways: first, “pruning,” by which gray matter is lost; and second, “mylenation,” which refers to accumulating mylenan facilitating electrical transmissions between axons. The claim seems to be that these processes improve the thinking process, prior to which the adolescent brain is a chaotic jumble. The impression left by

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<sup>85</sup> *Roper*, 543 U.S. at 569-70; 573.

<sup>86</sup> 130 S.Ct. at 2026.

<sup>87</sup> See Brief for American Medical Association et. al. as Amicus Curiae, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (“AMA Graham Brief”) at 15; Brief for American Psychological Association et. al. as Amicus Curiae, *Graham v. Florida*, 130 S.Ct. 2011 (2010) at 24.

both briefs is that it is remarkable that anyone survives to adulthood: adolescence, according to the AMA, is like “starting the engines without a skilled driver at the wheel.”<sup>88</sup>

Justice Kennedy signs onto this view. Immediately after his reference to the adolescent brain, he continues:

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>89</sup>

Each of these sentences is making provocative behavioral and criminological claims, among them that criminal acts, even of a particularly heinous nature, committed in adolescence, are less predictive of future criminal acts than criminal acts committed later in life. Here is where science could provide helpful guidance, with empirical studies exploring this hypothesis. Alas, none is forthcoming, as discussed below. The only support for these claims Justice Kennedy offers is his own opinion in *Roper v. Simmons*.<sup>90</sup> And in *Roper*, as in *Graham*, Justice Kennedy seems to be making a crucial assumption: Even if everything said about the adolescent brain and juvenile immaturity is generally true, why would assume that juveniles who commit heinous crimes are typical juveniles?

### **3. The Crime**

At this point, the opinion narrows focus to the category of crimes under review—which consists of all crimes other than homicide—and the nature of the contemplated punishment—life without parole. With respect to crimes, Justice Kennedy writes: “Serious nonhomicide crimes

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<sup>88</sup> AMA Graham Brief at 31.

<sup>89</sup> 130 S.Ct. at 2036.

<sup>90</sup> 130 S.Ct. at 2026-27.

“may be devastating in their harm . . . but *in terms of moral depravity* and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability.”<sup>91</sup>

This is a remarkable claim, for which the supporting citation is *Kennedy v. Louisiana*, written by Justice Kennedy.<sup>92</sup> That case involved the brutal rape of an 8-year-old girl by a man who had raped another 8-year-old girl a few years earlier.<sup>93</sup> Contrast Patrick Kennedy, nonhomicide offender, in terms of “moral depravity,” with Clyde Forrest, murderer. Despondent about the slow death of his terminally ill father, driven to despair by the callous indifference to his father’s suffering by those charged with caring for him, Forrest resorted to crime:

Alone at his father’s bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father’s temple, and fired. . . .

Following the shooting, defendant, who was crying and upset, neither ran nor threatened anyone. Moreover, he never denied shooting his father and talked openly with law enforcement officials. Specifically, defendant made the following oral statements: “You can’t do anything to him now. He’s out of his suffering.” “I killed my daddy.” “He won’t have to suffer anymore.” “I know they can burn me for it, but my dad will not have to suffer anymore.” “I know the doctors couldn’t do it, but I could.” “I promised my dad I wouldn’t let him suffer.”<sup>94</sup>

Forrest was convicted of murder in the second degree and sentenced to life imprisonment, which was affirmed on appeal.

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<sup>91</sup> *Id.* at 2027.

<sup>92</sup> 554 U.S. 407 (2008).

<sup>93</sup> *Id.* at 413.

<sup>94</sup> *State v. Forrest*, 362 S.E.2d 25 (N.C. 1987).

Homicide is, of course, generally regarded as the most heinous of crimes. Yet homicide is a legal category, and as such it necessarily captures a spectrum of crimes that vary in their moral depravity. Accomplice liability and felony murder rules, as well as a general disregard for motives, results in many crimes falling under the header of “homicide” and “murder,” which undermine Justice Kennedy’s categorical claim about the relative moral depravity of homicides and nonhomicides.

Furthermore, the legal punishment for homicide, which includes felony murder and accomplice murder, is almost always severe, sometimes with little calibration to the culpability of the offender. It has long been argued that when a crime culminates in death, even not through design, the punishment sometimes *exceeds* the moral culpability of the act itself.<sup>95</sup> What this suggests is that when comparing homicides and nonhomicides that result in equally severe sentences, it is by no means clear that the moral culpability of the latter categorically exceeds the moral culpability of the former. When one guilty of rape or kidnapping is sentenced to LWOP, it may reflect a conscious decision, on the part of the legislature rating a subcategory of crimes and a judge or jury evaluating a particular defendant, that the crime is truly shocking, evidencing a level of depravity that exceeds that of the typical rapist or kidnapper. Given that the criminal justice system makes more of an effort to calibrate culpability and punishment in nonhomicides, is it possible that nonhomicides *sentenced to LWOP* involve more, not less, moral culpability than homicides?

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<sup>95</sup> This is a much-lamented, albeit persistent, feature in homicide law. See, e.g., Model Penal Code § 210.2 cmt. 6 at 37-39 (1980) (“[p]rincipled argument in favor of the felony-murder doctrine is hard to find”); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 120-40 (1985); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1448-49 (1994).

#### 4. The Punishment

With respect to punishment, Justice Kennedy quotes himself yet again (this time a concurring opinion in *Harmelin*), observing that “life without parole is ‘the second most severe penalty permitted by law.’”<sup>96</sup> This seems indisputable, but Justice Kennedy obscures the issue in at least two ways. First, he depicts LWOP as “irrevocable” in a way that “extinguishes hope” in the defendant.<sup>97</sup> This is not quite accurate, as Justice Kennedy concedes, for there is always the “remote possibility” of “executive clemency.”<sup>98</sup> It is not always that remote. Juveniles serving long sentences have received the attention of governors seeking inmates worthy of a commuted sentence. Consider Maurice Clemens, sentenced to over 100 years in prison for several felonies committed as a juvenile, whose sentence was commuted by Governor Huckabee after nine years in prison.<sup>99</sup>

Through much of the remainder of the opinion, the possibility of executive clemency is forgotten and LWOP is repeatedly characterized as “irrevocable.” In the very final paragraph of the opinion, the careful reader detects an allusion to executive clemency when the Court rejects LWOP for juveniles because it fails to provide a “realistic opportunity to obtain release.”<sup>100</sup>

What is unreal about executive clemency.

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<sup>96</sup> 130 S.Ct. at 2027.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Mike Huckabee, *Why I Commuted Maurice Clemons’ Sentence*, WASH. POST, Dec. 7, 2009. After his release, Clemens disappointed the hopes of those who sought and obtained his pardon: he committed, among other crimes, child rape, aggravated assault, and four murders. See Wikipedia, Maurice Clemons, available at [http://en.wikipedia.org/wiki/Maurice\\_Clemons](http://en.wikipedia.org/wiki/Maurice_Clemons) (last visited January 28, 2011).

<sup>100</sup> 130 S.Ct. at 2027.

Second, the Court finds that LWOP “is an especially harsh punishment” for a juvenile, noting that “[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”<sup>101</sup> This is not a meaningful comparison: it is hard to identify more than a handful of persons in their 70s who have been sentenced to LWOP. The appropriate comparison would be the severity of LWOP imposed on a 16-year-old and a 24-year-old.<sup>102</sup> Initially, the difference would seem to be 8 years, but that may not be accurate: a 16 year-old-sentenced to LWOP is more likely to receive a commutation of sentence, so from an *ex ante* perspective, one cannot say that JLWOP is a more severe sentence, measured by years incarcerated, than LWOP imposed on a young adult.

## 5. A Categorical Rule

Having sketched the criminal, crime, and proposed punishment, Justice Kennedy then proposes to weight them all in light of “penological justifications for the sentencing practice.”<sup>103</sup> The opinion surveys the classic justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation), and finds each fails to justify the imposition of life without parole for juvenile homicide offenders. “In sum,” Justice Kennedy writes:

[P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual.<sup>104</sup>

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<sup>101</sup> *Id.* at 2028.

<sup>102</sup> These two age groups commit violent crimes at roughly the same rate. *See infra* at note 121.

<sup>103</sup> 130 S.Ct. at 2028.

<sup>104</sup> *Id.* at 2030.

This would seem to be a place to end the opinion: a categorical assessment that the diminished culpability of juveniles, the lesser depravity associated with nonhomicides, and the severity of a life sentence renders such punishment unconstitutional.

Yet this is not the Court’s conclusion, and in fact the opinion turns in what one might call an epistemological direction. Justice Kennedy’s concern, it emerges, is that sentencing judges are incapable of knowing which juveniles are capable of maturing and rehabilitation and which are irretrievably depraved. In this vein, he criticizes the “subjective judgment” displayed in the sentencing of Graham and Sullivan. Swayed by the heinous nature of the defendants’ crimes, the judges failed to see the possibility of reform:

For even if we were to assume that some juvenile nonhomicide offenders might have “sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,” to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.<sup>105</sup>

The Court’s final “categorical rule” is thus rooted in concerns about knowing, at sentencing, the true depravity of a juvenile criminal. Although the State is not required to guarantee the eventual freedom of an incarcerated juvenile criminal, it must afford him some “meaningful” or “realistic” opportunity for release. In the absence of secure, objective knowledge, the State must, as a categorical matter, stay its hand at sentencing, rendering a punishment that is conditional upon the revelation of more information of a criminal’s true character.

Yet this objection to juvenile LWOP, if taken seriously, extends to *every* sentencing hearing, indeed every human interaction. How can one extrapolate, with “objective” certainty, from another person’s behavior—good or ill—at t-0 to his future behavior at t-1? Predictions of this sort are doubtless difficult for juveniles, but they are difficult for adults as well. The real

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<sup>105</sup> *Id.* at 2032.

issue is whether sorting the irretrievably criminal from those capable of rehabilitation is easier when crimes are committed at age 16, say, than age 24.

Here, then, is the rub: criminologists have long noted, and lamented, the difficulty in distinguishing criminals of any age who are likely to commit future crimes from those who are likely to repent and conform their behavior to societal and legal norms.<sup>106</sup> Apparently unbeknownst to Justice Kennedy, the problem is not restricted to juveniles. In theory and perhaps eventually in practice, modern science could shed some genuine light (as opposed to buttressing hoary common sense), but at least to date, notwithstanding its statistical studies and penetrating brain scans, we operate in a fog of uncertainty. Science of the sort respected by Justice Kennedy has failed us; in the following section, I propose a less sophisticated sort of science that might actually provide some guidance.

### **III. True Crime Lessons**

The *Graham* Court asserts that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”<sup>107</sup> The two embedded assumptions are that (1) “in terms of moral depravity” nonhomicides cannot be compared to murder, and (2) in terms of culpability, juveniles cannot be compared to adults. This section subjects both assumptions to scrutiny by considering actual crimes. It is only

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<sup>106</sup> The literature is voluminous. See, e.g., Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What works!*, 34 Criminology 575 (1996) (the touted LSI-model is 95% accurate in predicting 33% of recidivism); John Monahan, The Clinical Prediction of Violent Behavior 47-49 (1981) (predictions rights about 60-70% of the time). The failure to reliably predict future dangerousness is much noted. See, e.g., Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1455, 1456 (2007); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1450 (2001). For a recent sophisticated effort to craft a better model, see Andreas Markos, et. al, *Assessment of Risk of Violent Recidivism Through Multivariate Bayesian Classification*, 16 PSYCH, PUB. POL’Y, AND LAW 418 (2010).

<sup>107</sup> 130 S.Ct. at 2027.

through a careful consideration of a crime that conclusions can be drawn about a particular defendant's maturity and moral culpability. This was the implicit claim of the common law approach sketched above. Nor should this approach be disparaged as somehow unscientific. Forensic pathologist W.I. Beveridge observed that "more discoveries have arisen from intense observation of very limited material than from statistics applied to large groups."<sup>108</sup> Following Beveridge, this section provides a detailed account of ten crimes, five nonhomicides (including Graham and Sullivan) and five homicides. These crimes throw into question the basic premises of the *Graham* decision, and the final section of this part offers an alternative theory of juvenile culpability at least as consistent with the observed data.

#### A. Why Study Crimes

There are several reasons not to recount violent crimes in detail. There is, first of all, a natural repugnance, at least among those of healthy souls: The truly best among us instinctively recoil from an account of a heinous crime as the rest of us do from the sight of a gangrenous wound.<sup>109</sup>

Perhaps a more serious objection is that, in resolving some legal questions, the facts of a crime are irrelevant, and their recitation obscures the narrow issue presented. In *Uttecht v. Brown*,<sup>110</sup> for example, Justice Kennedy introduced the opinion with a two sentence account of the crime: "Coburn Brown robbed, raped, tortured, and murdered one woman in Washington. Two days later, he robbed, raped, tortured, and attempted to murder a second woman in

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<sup>108</sup> W. I. BEVERIDGE, THE ART OF SCIENTIFIC INVESTIGATION 101. See also RICHARD RHODES, WHY THEY KILL 111 (2000) (quoting criminologist Lonnie Athens arguing that "it is better to study fifty people in depth than to study 5,000 people superficially").

<sup>109</sup> Cf. JANE AUSTEN, MANSFIELD PARK (Penguin ed. 466) ("Let other pens dwell on guilt and misery. I quit such odious subjects as soon as I can.").

<sup>110</sup> 551 U.S. 1 (2007).

California.”<sup>111</sup> This was deemed excessive by Justice Stevens, who objected to the “graphic description of the underlying facts of [Brown’s] crime, perhaps in an attempt to startle the reader or muster moral support for its decision . . . .”<sup>112</sup> In Justice Stevens’ view, the issue was whether the habeas petitioner was denied a right to an impartial jury, as guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> amendment; the details of the crime had no bearing whatsoever.<sup>113</sup>

Whatever the merits of his objection in *Uttecht*, Justice Stevens’ aversion to detailed accounts of crimes carries over to cases where the facts of the crime would seem relevant to the legal issue. At the beginning of the opinion in *Thompson v. Oklahoma*,<sup>114</sup> holding the death penalty unconstitutional for those under the age of 16, Justice Stevens wrote, “Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary.”<sup>115</sup> The opinion turned in large part on claims about adolescent immaturity and vulnerability.<sup>116</sup> Yet “adolescents” as a class were not the issue in *Thompson*; Thompson was. Or more broadly, the issue concerned the moral culpability of a subclass consisting of those juveniles whose crimes were so heinous that the legislature

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<sup>111</sup> *Id.* at 4-5.

<sup>112</sup> *Id.* at 35 n.1. (Stevens, J. dissenting). For a criticism of Justice Steven’s approach, see Lester Jackson, *Fact Suppression and the Subversion of Capital Punishment: What Death Penalty Foes on the Supreme Court and in the Media Do Not Want the Public to Know*, available at <http://ssrn.com/abstract=1346142>.

<sup>113</sup> Similarly, in *Wainwright v. Witt*, 469 U.S. 412 (1985), Justice Brenan criticized a relatively terse crime narrative: “However heinous [defendant’s] crime, the majority’s vivid portrait of its gruesome details has no bearing on the issue before us.” *Id.* at 441 (Brennan, J. dissenting).

<sup>114</sup> 487 U.S. 815 (1988).

<sup>115</sup> *Id.* at 819.

<sup>116</sup> *Id.*

authorized the death penalty, and the judge and jury imposed it. And it is relevant in resolving that issue to consider what exactly it was that those adolescents did. Even Justice Steven's three-sentence account of the crime undercuts the broad generalizations about adolescents that follow. We learn, for example, that Thompson, far from being an unwilling accomplice, "actively participated" in a torture-murder.<sup>117</sup> Had Justice Stevens recounted additional facts about the crime and the defendant, we would have learned that Thompson was self-possessed, a natural leader, and notable in his appetite for violence from an early age.<sup>118</sup>

Recounting the facts of the crime, where a claim of juvenile immaturity is raised, is essential in clarifying the kind of juvenile being discussed. In this respect, it is worth noting an argument, repeated often by petitioners and amici and implicitly credited by the Court in *Roper* and *Graham* that virtually all juveniles commit crimes—indeed, to fail to do so makes one aberrational—and therefore juvenile criminals are typical of their age cohort.<sup>119</sup> This argument is tenable only if one abstracts from the facts of the particular cases. Given the comprehensiveness and intrusiveness of the laws and regulations governing juvenile behavior (curfews, driving restrictions, alcohol consumption and purchase prohibitions, etc.), few Americans navigate their teenage years without committing multiple crimes. And given youth's sensitivity to personal honor and proneness to physical confrontation, it is likely that many American teenagers commit acts that, construed by an ambitious prosecutor, fall under the

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<sup>117</sup> *Id.*

<sup>118</sup> See Brief for Respondent, *Thompson v. Oklahoma*, 551 U.S. 1 (2007) (No 86-6169), at 5 - 10 (noting more than a half dozen arrests for violent felonies and Thompson's calculation, which he shared with his friends, that because he was 16 he was unlikely to be punished).

<sup>119</sup> See Brief for Respondent, *Roper v. Simmons*, at 16 ("it is statistically aberrant to refrain from crime during adolescence."); APA Graham Brief at 8 (same); Brief of Respondent, *Sullivan v. Florida*, 130 S.Ct. 2059 (No. 08-7621) (Sullivan Brief) at 15 (same).

header of assault or battery. But it is the extraordinarily rare juvenile who commits or attempts murder, rape, kidnapping or armed robbery.<sup>120</sup> Indeed, it is as roughly as rare for a 16-year-old to commit these crimes as it is for a 24-year-old.<sup>121</sup> One would not treat 24-year-old murderers or rapists as a typical subgroup of 24-year-olds generally, and it equally bizarre to treat juveniles guilty of such heinous crimes as typical of their age cohort. Recounting the specific facts of the crime can dispel the idea that juveniles like Thompson, Simmons, Graham, and Sullivan are typical adolescents; it should alert one to the possibility that 16-year-old murderers and rapists are atypical. So alerted, one might be inoculated from facile claims that defendants in such cases are just adolescents behaving badly.

The following two sections recount ten crimes: five nonhomicides and five homicides. Each crime resulted in at least one of the perpetrators, although not necessarily the juvenile, receiving a sentence of the death penalty or LWOP or the effective equivalent of LWOP. In so doing, I test the assumptions that “in terms of moral depravity” nonhomicides cannot be compared to murder, and in terms of moral culpability juveniles cannot be compared to adults.

With respect to diminished culpability, Justice Kennedy has focused on three factors: (1) that juveniles evidence a “lack of maturity and underdeveloped sense of responsibility”; (2) that

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<sup>120</sup> Sullivan’s brief claims that “roughly a quarter million adolescents under age 15 have been arrested for crimes for which a life-without-parole sentence could have been imposed.” Sullivan Brief at 51. The claim is absurd on its face, unless we are to believe that 250,000 Americans aged 15 or younger have committed murder, rape, aggravated kidnapping, or multiple armed burglaries. If so, readers are well advised to put this article aside and reinforce the barricades in their homes.

<sup>121</sup> Department of Justice statistics reflects that the peak age for violent crime is 18-19 years of age. 17-year-olds and 22-year-olds have comparable rates, as do 16-year-olds and 24-year-olds. See U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001, pp. 4, 6 (2003). The point is made in Brief for Criminal Justice Legal Foundation as Amicus Curiae, *Graham v. Florida*, 130 S.Ct. 2011 (2010) at 16.

they are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and (3) that their characters are” not as well formed.”<sup>122</sup> The first factor is not easily parsed: All criminals, not simply juveniles, evidence a lack of responsibility. All make bad decisions, both from the perspective of society and themselves. If immaturity and lack of responsibility simply connote bad decisionmaking, then every criminal could claim safe harbor.

The immaturity of juvenile criminals must be understood to be something different from the immaturity of adult criminals. But how? The second factor suggests that juvenile criminals are tragically prone to bad associations. Of course, the same could be said for many adult criminals, so Justice Kennedy’s point would appear to be that peer pressure is more likely to be responsible for juvenile crime than for adult crime. Is there support for such a claim?

The third factor—a juvenile’s plasticity—is the one that is ultimately most significant in shaping the actual holding of *Graham*, denying to sentencing judges the possibility of certainty in relegating juveniles indefinitely to prison. According to Justice Kennedy, a heinous crime committed at age 16 is less appalling than the same crime committed by an adult, because the juvenile’s character is “not as well formed” and the criminal act therefore less indicative of the juvenile’s true character. Of course, our characters, like our brains, are never fully formed, in the sense of reaching an end state from which there is no possibility of evolution. Justice Kennedy’s implication, however, is that the serious juvenile criminal is less likely to be intractably depraved than the adult criminal: both may be rehabilitated, but we are more skeptical of this happy result when contemplating the hardened adult criminal than the naïve juvenile.

In a generalized sense, there is some truth to this. Consider, for example, Alan Simpson, who committed several acts of aimless violence in his teens, culminating in an assault on a police

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<sup>122</sup> 130 S.Ct. at 2026-27.

officer. He would later become a United States Senator. Yet it suffices to note that Simpson was not sentenced to LWOP; he was, in fact, sentenced to one day in jail for all his crimes, a detail he recounts in an amicus brief filed on behalf of Terrance Graham.<sup>123</sup> The criminal justice system did not consider Simpson's crimes even remotely as culpable and depraved as those of Graham. Who are some of the juveniles, and what are some of the crimes, that the American criminal justice system has deemed worthy of LWOP, or its effective equivalent?

## B. Case Studies

### 1. Nonhomicides

(a) *Calvin Breakfield.* In the early afternoon hours of Sunday, May 5, 2007, the victim, A.H., was outside her home in Shreveport, Louisiana. At the time she was 83 years old. A young black male, later identified as Calvin Breakfield, came out of A.H.'s next-door neighbor's garage and asked to use A.H.'s bathroom—she refused. Breakfield then told A.H. that her neighbor was his grandmother and asked if he could use A.H.'s phone to call his grandmother. A.H. agreed to bring her phone to Breakfield so that he could make the telephone call, but told him that he could not come into the house.

After A.H. entered her house, Breakfield followed her in, knocked her down, and kicked her. When A.H. attempted to get up, Breakfield hit her. A.H. later testified that “it was just anger on his face . . . I knew if I said another word, he would have killed me.” The defendant ripped A.H.’s clothes off, including the chain around her neck. He then dragged A.H. down the hallway, through her own blood, to her bedroom.

After dragging A.H. to the bedroom, Breakfield lay on top of her and attempted to rape her, but because A.H. had a prolapsed bladder, Breakfield was unable to fully penetrate her vaginally. He then turned A.H. over onto her stomach and sodomized her. A.H. then felt what she believed to be Breakfield urinating on her.

Breakfield demanded money from A.H. and broke a bank found on the floor, which held some change. A.H. then lost consciousness. When she awoke, Breakfield was gone, and she was able to make her way to the telephone and call for help. The officer responding to the scene found A.H. in her house, naked and covered in blood.<sup>124</sup>

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<sup>123</sup> Brief for Former Juvenile Offenders Charles S. Dutton et al., *Graham v. Florida*, 130 S.Ct. 2011 (2010).

<sup>124</sup> *State v. Breakfield*, 21 So.3d 1014, 1016-1017 (La. App. 2 Cir. 2009).

(b) *Chaz Bunch.* M.K., a twenty-two year-old Youngstown State University student, arrived at a group home for mentally handicapped women to report to work for the evening; she worked the night shift.

Upon arriving, she exited her vehicle and went to get her belongings out of the trunk of her car . . . At this point, she also saw a tall man running through the grass . . . The man wearing a mask, later identified as Brandon Moore, pointed a gun at her and instructed her to give him all her money and belongings. The porch light of the group home then came on and Moore instructed her to get into the passenger seat of her car . . . Moore climbed over M.K., positioned himself into the driver's seat, and drove away with her in the car . . .

Upon leaving the driveway, Moore, driving M.K.'s car, began following the black automobile. Shortly thereafter, Moore stopped the car and a second gunman exited the black automobile in front of them and entered the victim's car through the rear passenger's side door. The second gunman, later identified as Bunch, put a gun to her head and demanded her money and belongings. She now had two guns pointed at her, one from Moore and one from Bunch. After Bunch had entered the vehicle, Moore began to drive and continued to follow the black automobile.

Eventually, Moore drove down a dead-end street near Pyatt Street in Youngstown, Ohio, and both automobiles pulled into a gravel lot. Bunch ordered M.K. out of the car. Moore and Bunch then took turns orally raping her; one of them would have his penis in her mouth, while the other would force her head down. Guns were pointed at her while this was occurring.

After Moore and Bunch were finished orally raping her, they forced her at gunpoint to the trunk of the car. At the trunk of the car she was anally raped. . .

After the anal rape occurred, Bunch threw M.K. to the ground and then Moore and Bunch vaginally and orally raped her. While one of them vaginally raped her, the other would orally rape her, and then they would switch places. Both were armed as this occurred. . . .

Bunch wanted to kill M.K., [but one of his confederates demurred]. Prior to her leaving, Moore and Bunch told her that they knew who she was and threatened to harm her and her family if she ever told what happened.<sup>125</sup>

(c) *Michael Bell.* Petitioner [Bell] and his accomplice rang the doorbell at the home of E.M. and her son, a few houses down the block. Petitioner had previously lived in a house in back of Ms. M's, and she recognized him. When Ms. M answered the door, Petitioner and his accomplice asked if they could use her phone. She declined and closed the door, but it remained partly open. When she moved to shut it fully, Ms. M saw Petitioner and his accomplice inside the house, the accomplice holding an automatic handgun. She demanded to know what they were doing, and they told her to shut up, one of them saying, "I'm going to kill you." Petitioner's accomplice pointed the gun at Ms. M's eight-year-old son and told him not to

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<sup>125</sup> *Bunch v. Smith*, 2009 WL 5947369, 1 -2 (N.D. Ohio 2009).

scream. The accomplice demanded to know where Ms. M's money was, and she informed him and told him to take it.

Petitioner then took the gun from his companion. He asked where the clip was, and the accomplice told him it was loaded. Petitioner put the gun to Ms. M's head and told her that she was going to give him "head." He forced her into the kitchen, ripped open her sweater, and ordered her to remove her pants, which she did, along with her underwear. Petitioner sat on a chair and made her unbuckle his pants and open them. Holding the gun to her head, he forced her mouth onto his penis. Ms. M saw her son pressing his head into a pillow on a couch, as Petitioner had commanded. Petitioner then made her lie on the floor, saying, "You're going to like this." He proceeded to rape her, then dismounted her and recommenced, the gun still at her head.

During the acts, Petitioner's accomplice reappeared, stepped over Petitioner and Ms. M, and inquired if there were any "brewskies." Referring to Ms. M, Petitioner asked the accomplice if he wanted "some of this." The accomplice declined. [After Mrs. M. tried to escape, Petitioner's accomplice raped her.]

When the accomplice stopped and went to Ms. M's bedroom, she sat down with her son, who tried to cover her with a blanket. Petitioner appeared, pointed the gun at her, and ordered her to remove her gold jewelry and give it to him, which she did. . .

Petitioner's accomplice then asked to use Ms. M's car, which was in her driveway, and she gave him the keys, telling him he could take it. Handing the Petitioner the gun, he went to the car. Petitioner then took Ms. M, who was still naked, back into the kitchen, and raped her again. Ms. M heard the car's horn honking, but Petitioner did not get off of her until his accomplice returned and told him, "C'mon."<sup>126</sup>

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One might try to style these crimes as evidencing the sort of immaturity and undeveloped sense of responsibility typical of adolescents, but if one simply recounted the facts of each case, most people would probably guess the defendants were in their 20s. In fact, Breakfield and Bunch were 16-years-old at the time of their crimes; Bell was 15-years-old. In none of the accounts is there any evidence of a particular vulnerability to peer pressure. Breakfield acted alone. Bunch and Bell were the apparent leaders of their criminal gangs and had attained their "alpha male" status despite the presence of older co-conspirators. Far from being immature, they

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<sup>126</sup> *Bell v. Haws*, 2010 WL 3447218, 3 -5 (C.D.Cal. 2010).

were precocious, possessing a confidence and charisma that catalyzed others. Furthermore, Bunch and Bell were not only the leaders of the groups, but the most brutal; they might have propelled the episodes into fatal outcomes but for the intervention of their co-conspirators.

Breakfield's crime highlights another point: an adeptness at manipulating adults and playing upon stereotypes about juvenile incapacity. His victim, who was roughly the age of most Supreme Court Justices, may well have harbored an image of youth as an age of dependence and vulnerability: she fell for his plea to use the phone to reach his grandmother. In fact, he had already firmly settled into a life of violent crime.<sup>127</sup> One might contrast the septuagenarians and octogenarians on the Supreme Court, whose views of youth derive from introspective memories of a very distant past or perhaps from glimpses of their granddaughter's recent Sweet Sixteen party, with the trial judge and the jury in all three cases, whose judgments were formed not by Wordsworthian reflections on childhood, but hard data placed before them. Breakfield was sentenced to LWOP;<sup>128</sup> Bunch was sentenced to 89 years in prison;<sup>129</sup> Bell was sentenced to 54 years (with eligibility for release when he is 70 years old).<sup>130</sup>

## 2. Homicides

(d) *Tim Kane.* Tim Kane accompanied four older young men, led by Alvin Morton and Bobby Garner, both three to five years older than Tim. There was a plan to burglarize a house which [defendant] believed to be unoccupied. Prior to entering the house, two of the five young men withdrew from the plan and left. Defendant entered the house with Morton and Garner.<sup>131</sup>

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<sup>127</sup> See *State v. Breakfield*, 21 So.3d at 1016.

<sup>128</sup> *Id.*

<sup>129</sup> *Bunch v. Smith*, 2009 WL 5947369 at \*7.

<sup>130</sup> *Bell v. Haws*, 2010 WL 3447218 \*11 (C.D. Cal. 2010).

<sup>131</sup> *Kane v. State*, 698 So.2d 1254, 1255 (Fla.App. 2 Dist. 1997).

Morton carried a shotgun and [Garner] possessed a “Rambo” style knife. They began looking around the living room for something to take when Bowers and Weisser entered the room from another area of the house. Morton ordered the two of them to get down on the floor, and they complied. Bowers agreed to give them whatever they wanted and pleaded for his life but Morton replied that Bowers would call the cops. When Bowers insisted that he would not, Morton retorted, “That’s what they all say,” and shot Bowers in the back of the neck, killing him. Morton also attempted to shoot Weisser, but the gun jammed. He then tried to stab her, but when the knife would not penetrate, Garner stepped on the knife and pushed it in. Weisser ultimately was stabbed eight times in the back of the neck and her spinal cord was severed. Before leaving the scene, either Garner or Morton cut off one of Bowers’ pinky fingers. They later showed it to their friend Jeff Madden.<sup>132</sup>

(e) *Leon Miller.* Arthur Beckom and Kentrell Stoutmire observed people walking through their neighborhood that they believed belonged to a rival gang. Beckom and Stoutmire approached defendant [Miller], who was standing outside on a corner in the neighborhood, and asked him to stand as a lookout. Defendant saw that both Beckom and Stoutmire had guns in their possession, and although defendant never handled or touched the guns, he agreed to stand as a lookout. One minute later, Beckom and Stoutmire fired gunshots in the direction of Jones and Alexander, who both died as a result of their injuries. Once the shooting began, defendant ran to his girlfriend’s house.<sup>133</sup>

(f) *Quantel Lotts.* Petitioner [Lotts], who was fourteen years old, along with his younger brother Dorell and Michael Barton, spent the night with thirteen-year-old Teddy Thomure at the Thomure home in Leadington, Missouri. Petitioner, Dorell, and their father, Charlie Lotts, lived with Michael Barton and Michael’s mother, Tammy Summers, and petitioner and Michael considered themselves “brothers.” Petitioner and Teddy Thomure had known each other since the fifth grade and were good friends, and Michael, who was seventeen, was the best friend of Teddy’s older sister Chastity.

At approximately 9:30 or 10:00 am the following morning, petitioner, Teddy, and Dorell got up and ate breakfast. A little while later, petitioner and Michael got into an argument while playing with a blowgun. Petitioner blew a dart at Michael but missed. Michael responded by blowing a dart that hit petitioner in the arm, causing him to bleed.

Petitioner began cursing, and Teddy’s mother, Ginger, went downstairs to see what had happened. Petitioner showed Ginger his wound and Ginger cleaned and bandaged it. Petitioner continued to curse and directed some curse words at Michael. Teddy and Ginger tried to get petitioner to calm down. Petitioner stopped breathing heavily, quit pacing, and sat down and listened to Teddy and Ginger. Petitioner appeared calmer, so Ginger went upstairs.

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<sup>132</sup> *Morton v. State*, 689 So.2d 259, 261 (Fla. 1997).

<sup>133</sup> *People v. Miller*, 781 N.E.2d 300, 302-303 (Ill. 2002).

Petitioner continued to mumble and then got “fired up” again. Petitioner grabbed Teddy’s bow and arrow and went upstairs. Petitioner drew back the bow and pointed it at Michael and said, “I’m going to kick your fucking ass.” Ginger’s boyfriend, Bruce Dalton, grabbed the bow, hit petitioner in the head, and told petitioner to pack his things and go home. Petitioner replied that his father was going to “whoop [Dalton’s] ass,” and then went downstairs to Teddy’s room. Petitioner “mouthing off” as he went downstairs and appeared very angry. Teddy accompanied petitioner and heard petitioner mumble and curse.

Ginger went downstairs, and petitioner told her he did not want to leave and would behave if he could stay at the house. Ginger told petitioner he could stay if he would behave, and petitioner appeared happy. Mr. Dalton saw that Ginger had petitioner “pretty well calmed down,” and petitioner apologized to Mr. Dalton and shook his hand. Shortly thereafter, Ginger and Mr. Dalton left the house and went to the store.

Petitioner and Teddy were downstairs playing cards while Michael was upstairs making Teddy’s younger sister Tara an omelet. Petitioner became angry again and he got a knife from Teddy’s two-knife set. The set contained a twelve-inch blade and six-inch Bowie knife, and petitioner took the larger knife. Petitioner began to walk upstairs but Teddy stopped petitioner and told petitioner to give him the knife. Petitioner complied but mumbled that he was “going to get that bastard.” Teddy then tossed the knife under his bed and told petitioner to calm down and that he was acting crazy. Petitioner appeared to calm down again. As they walked upstairs, Teddy patted down petitioner’s pockets to check for other weapons, and he found none.

Petitioner and Teddy started watching television in the living room. Tara, who was also watching television in the living room, saw petitioner tuck something into his sleeve that she believed was a knife. Petitioner saw Tara and put his finger to his mouth and said, “shhh.” Tara went into the kitchen and told Michael that petitioner had a knife. Michael stated that he “wasn’t afraid of [petitioner] with a knife.” Michael then walked into the living room and said something about the omelet he had made for Tara. Petitioner pulled a knife when Michael entered. Petitioner and Michael began “mouthing” at each other, got chest to chest and pushed each other. Michael said something like, “Let’s take this outside,” and he, petitioner, Teddy and Dorell stepped outside. As soon as they walked outside, Tara shut and locked the door.

Petitioner and Michael went down to the sidewalk, while Teddy stood on the porch step and Dorell stood on the porch. Petitioner held a knife but Teddy saw no weapon on Michael. Petitioner’s back was to Teddy, and petitioner and Michael were “mouthing,” and pushing each other. Petitioner swung the knife and stabbed Michael in the left leg. Michael bent down, and petitioner stabbed Michael in the left side of his chest. Michael stumbled backwards and fell, and petitioner turned and “took off” towards the house.<sup>134</sup>

(g) *James Fuller.* James Fuller and the victim had had an intense and troubled romantic relationship for two years preceding the killing. In the last year each had dated other people, and this increased the tension between them. Fuller spoke several times of killing the victim, to her and to others. In the months before the killing, he had discussed with his friends

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<sup>134</sup> *Lotts v. Larkins*, 2010 WL 681327, 2 -4 (E.D.Mo. 2010)

ways for the victim to procure an abortion without her having to obtain parental consent, having someone beat Amy so as to cause a miscarriage, or having her killed. The day before the killing the victim had taken a trip to Gloucester with two girls and two boys. When the defendant learned about this he is reported to have said, “I’m getting sick of this. I swear I’m going to kill her . . . This shit’s got to stop . . . She won’t be around to go out with anyone anymore . . . I’m going to fucking kill her.” The next morning he called her repeatedly and insisted that she come to his house to meet him. On the day of the killing, before she arrived, the defendant met Dominic Sciola and later Mark DeMeule. Sciola testified that the defendant said he was going to kill the victim and that he invited Sciola to come along. He later told Mark DeMeule the same thing. When DeMeule taunted him that he “didn’t have the balls to do” it, the defendant replied, “You’ll see.”

The defendant and his two friends met the victim. They were joined by Michael Maillet and briefly by Scott Ward. This group walked out of the defendant’s house and along a path into a field. The defendant and the victim separated from the others. The others heard screams, and when the defendant rejoined them he said, “It’s done.” He was bloody and had “a smirk on his face.” He showed the others his knife and said it had broken during the attack. He also said to DeMeule, “The bitch shouldn’t have messed with me.” DeMeule testified that as the group walked away from the scene Fuller described how he had killed the victim. Fuller reported to the group that ‘he placed his hand over her mouth and said, ‘I love you,’ and then stabbed her in the stomach and then got behind her and pushed [so that] he could feel the point [of the knife] hit his stomach. Then he . . . stabbed her in the back and she had tried to pull away and she bit . . . his hand and then she screamed . . . [S]he tried to run and he grabbed her by her hair and pulled her back and covered her mouth again and then cut her throat . . . When she was on the ground,,she kept saying, ‘I love you, Jamie,’ and she was gargling on her own blood and he said it pissed him off so he stomped on her head.”

There was further testimony about Fuller’s conduct after the killing. At Sciola’s house he washed the blood off his arms, drank red Kool-Aid because it was “right for the occasion,” took Maillet to see the body, and then warned his companions that they would “be next” if they “were to say anything.” Later that day Fuller led his friends in the task of disposing of the victim’s body. They obtained two trash bags, two cinder blocks, and lobster line (which would not fray in the water), and he and Maillet threw the weighted body into Shoe Pond. Thereafter he denied knowing the victim’s whereabouts to the police and to his friends and joined in searching for her. Finally, on August 28, five days after the killing, Maillet led the police to the victim’s body, and Fuller was arrested. At the time of his arrest, he “put on a half-smile smirk and began to chuckle.” During questioning Fuller was calm and accused his friends of killing her.<sup>135</sup>

(h) *Dale Craig.* Defendant [Craig] and three accomplices abducted the victim, Kipp Gullet, a freshman at Louisiana State University, at gunpoint from the parking lot of Kirby Smith Dormitory on the Baton Rouge campus of the university. The victim cried and begged for mercy as defendant and his accomplices drove the victim around in his truck. Defendant expressed his decision to kill the victim, but appeared to acquiesce to the suggestions of his accomplices to beat the victim unconscious, rather than kill him. After driving to a secluded construction site,

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<sup>135</sup> *Com. v. Fuller*, 657 N.E.2d 1251, 1254 (Mass. 1995)

defendant and James Lavigne marched the victim at gunpoint out to a grassy area. Lavigne used the butt of his gun to strike the victim in the head, causing the victim to fall to the ground. Lavigne then walked away. While the victim lay on the ground in a fetal position, the defendant knelt at his side and fired three bullets into his head, killing him. Defendant threatened to kill his accomplices if they said “one f---ing word.” He also asked them if the group should kill anyone else while they were at it, but answered his own question by responding, “No, the game warden might get pissed.”<sup>136</sup>

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These five crimes present a more complicated picture of moral culpability. One might guess from the recitation of Kane’s case that he was a young man, and indeed he was only 14-years-old at the time of the double murder. There was no evidence he had ever committed a crime before. His role in this crime consisted of hiding behind the dining room table while the murders occurred.<sup>137</sup> He was a bright young man from a supportive family whose misfortune was to fall into companionship with the alluringly dangerous Morton and Garner, aged 17 and 19. Yet the passive voice in the prior sentence needs to be qualified: Kane was the only one of the three younger men who accompanied Morton and Garner that night. The other two recognized at a minimum the wrongness of burglary and perhaps also the possibility of violence. They withdrew from the scheme; Kane, by contrast, made a very bad choice. Nor can one deny that Kane bears some responsibility for murder. Although he never shot or stabbed anyone, or even handled a weapon, his presence may have emboldened Morton and Garner. Would they have proceeded with their plan if all three younger accomplices had fled? Would that unanimous disapproval have forced a reconsideration on their part? Did they in fact persist in the plan in part to impress Kane? In short, Kane bears some responsibility for the double murder, but it is of course not remotely similar to the moral culpability of Breakfield, Bunch and Garfield.

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<sup>136</sup> *State v. Craig*, 944 So.2d 660, 661-662 (La.App. 1 Cir. 2006).

<sup>137</sup> At least this is Kane’s account, which seems not to have been contradicted at trial. See Adam Liptak, *Jailed for Life After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005.

Although his co-conspirators were sentenced to the death penalty, Kane received a 25-year sentence (eligible for parole after 17 years).<sup>138</sup>

Miller's crime seems worse than Kane's. Unlike Kane, he knew his accomplices were bent on murder. Furthermore, his responsibility for the crime, as a designated look-out, is less speculative than that of Kane. When Miller, aged 15 at the time, assented to the plan of Beckom and Stoumire he knowingly chose to abet murder. Perhaps more culpable than Kane, Miller's crime nonetheless evinces nothing resembling the utter depravity of our first three examples.

Although Miller's accomplices were sentenced to the life without parole, the trial judge recognized his lesser culpability and sentenced him to 50 years in prison (eligible for parole after 17 years).<sup>139</sup>

The Lotts case starts out as a minor domestic squabble and culminates in the sort of murder to which the adjective "needless" is often appended. Quantel Lotts, aged 14 at the time of the crime, has been widely cited as a poster child for the immorality of juvenile life without parole.<sup>140</sup> The circumstances of the crime lend some support for this claim, especially when they are presented as follows:

It began as horseplay, with two teenage stepbrothers chasing each other with blow guns and darts. But it soon escalated when one of the boys grabbed a knife. The older teen, Michael Barton, 17, was dead by the time he reached the hospital,

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<sup>138</sup> *Kane v. State*, 698 So.2d 1254, 1256 (Fla.App. 2 Dist. 1997).

<sup>139</sup> *People v. Miller*, 781 N.E.2d 300, 310 (Ill. 2002).

<sup>140</sup> See Equal Justice Institute, Cruel and Unusual: Sentencing 13 Year Olds and 14 Year Olds to Die in Prison, available at <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>, at 8.

stabbed twice. The younger boy, Quantel Lotts, 14, would eventually become one of Missouri's youngest lifers.<sup>141</sup>

Euphemisms, the artful use of the passive voice, and the omission of certain details, render, in this account, the punishment incomprehensible.<sup>142</sup> Comparing the CNN account with the fuller account drawn from the appellate opinion is therefore necessary. "Horseplay" conjures up images that do not include the use of blow guns. Furthermore, it was Lotts who initiated the "horseplay," although one should add that the victim responded and succeeded in injuring Lotts. The use of "soon" in the next sentence in the CNN account suggests that the struggle escalated seamlessly into the fatal incident. In fact, at least one hour separated the blow gun incident and the knifing. Lotts simmered in rage, despite the repeated attempts of various third parties to calm him down. Forcibly prevented at one point from using a bow and arrow, Lotts collected a knife with a 12-inch blade, and instigated the final encounter, although it should be acknowledged that the victim seemed to some extent a willing participant. In the final struggle, Lotts was not content with inflicting a leg wound; he thrust the foot-long blade into the victim's chest.

As a legal matter, Lotts committed murder, and there is not a remotely plausible argument for allowing a provocation defense to mitigate the crime to manslaughter. Lotts was in fact convicted of murder and sentenced to LWOP.<sup>143</sup> Nonetheless, an acknowledgment of the emotional dynamics of the situation, the willing participation of the victim in two violent

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<sup>141</sup> Stephanie Chen, *Teens Locked Up for Life Without A Second Chance*, April 8, 2009, at [http://articles.cnn.com/2009-04-08/justice/teens.life.sentence\\_1\\_parole-hearing-parole-for-first-degree-murder-life-sentences?\\_s=PM:CRIME](http://articles.cnn.com/2009-04-08/justice/teens.life.sentence_1_parole-hearing-parole-for-first-degree-murder-life-sentences?_s=PM:CRIME).

<sup>142</sup> For other examples of accounts of juvenile crimes that are scrubbed of material details, see Charles D. Stimson and Andrew Grossman, *Adult Crime for Adult Time*, available at <http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens>.

<sup>143</sup> *Lotts v. Larkins*, 2010 WL 681327, \*1 (E.D.Mo. 2010).

confrontations that morning, and Lotts's relative youth are all atmospherically mitigating factors. Lotts's crime was a serious one, but whether it evidences a depraved heart is open to question. One could thus make an argument that a determinate prison sentence short of Lotts's natural life would have been appropriate. Undercutting this argument are additional facts, which may have swayed the judge and jury, and curiously omitted from the CNN account: Three witnesses reported that Lotts showed no remorse or even shock after the murder; rather, he licked the bloody knife and announced, "I finally got the bastard."<sup>144</sup> When a police officer arrived, Lotts immediately told him, before he was posed a single question, "I did it and I'd do it again."<sup>145</sup>

The Fuller case involves a more classic version of premeditated murder. A plan crafted over several months; the crime; steps to conceal evidence; threats to those in a position to disclose what happened; and, once charged, a lack of remorse. Of course, jealousy—an emotion familiar to anyone—propelled the crime. Without downplaying the heinousness of Fuller's acts, or suggesting jealousy is a legally mitigating factor, most of us can, with effort, imagine how a spurned lover commits murder; in a sense, then, the three nonhomicide cases (a), (b), and (c) seem further removed from the moral universe most people inhabit than that of 16-year-old Jamie Fuller. With the final case, Dale Craig, aged 17, we return to the almost incomprehensible moral universe of the first three crimes. Both Fuller and Craig received LWOP sentences.<sup>146</sup>

A review of the eight cases collectively suggests that the American criminal justice system apportioned sentences reasonably calibrated to the culpability of the offenses. Another observation is that those juveniles sentenced to LWOP, or its effective equivalent, for crimes

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Com. v. Fuller*, 657 N.E.2d 1251, 1254 (Mass. 1995); *State v. Craig*, 944 So.2d 660, 661-662 (La.App. 1 Cir. 2006).

other than homicide, cases (a), (b), and (c), display roughly the same, or possibly greater, depravity as those juveniles sentenced to LWOP for their role in homicides, cases (g) and (h). Indeed, with the possible exception of Graham and Sullivan themselves, discussed below, juveniles convicted of crimes other than homicide who were sentenced to LWOP often display the shocking quality of the first three examples above. Here are some:

Milagro Cunningham, aged 17, raped 8-year-old girl, who was left to die under a pile of rocks in a remote landfill.<sup>147</sup>

Nathan Walker and Jakaris Taylor, aged 16, invaded a home while armed and raped a woman, who was then forced to perform oral sex on her 12-year-old son.<sup>148</sup>

Marcus Colston, aged 17, invaded a home while armed, maced victims, handcuffed them to bed, and kicked one in the face.<sup>149</sup>

Alden Stevenson, age 15, posed as salesman, then forced his way into a home, raped a woman; then did the same thing a few days later to a pregnant woman.<sup>150</sup>

James Bowers, aged 16, invaded home, stuffed rag in the mouth of an elderly woman, stabbed her 60 times.<sup>151</sup>

Jackie Berger, aged 17, kidnapped husband and wife at gunpoint, held them hostage for 17 hours.<sup>152</sup>

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<sup>147</sup> See *Graham v. Florida*, 130 S.Ct. at 2041 (Roberts, C.J., concurring)

<sup>148</sup> *Id.*

<sup>149</sup> See *Colston v. State*, 894 So.2d 300 (Fla. App. 4<sup>th</sup> Dist. 2005); Attorney General Press Release, at [http://www.myfloridalegal.com/newsrel.nsf/\\$\\$swp/0753D86B2B5936AC85256D9700718FA0](http://www.myfloridalegal.com/newsrel.nsf/$$swp/0753D86B2B5936AC85256D9700718FA0) (last visited February 18, 2010). Technically, Colston will be eligible for parole at age 75, although he is included in the Florida Department of Corrections includes him in the list of inmates that they categorize as JLWOP. See Communication from Lee Robinson, Florida Assistant States Attorney, Feb. 9, 2011 (on file with author).

<sup>150</sup> See David Ovalle, *Ruling on Young Juvenile Lifers Puts Florida Justice on the Spot*, MIAMI HERALD, Mar. 1, 2011.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

Daryl Tindall, aged 17, sexually assaulted a 6-year-old girl and a 7-year-old girl.<sup>153</sup>

Robert Louis Robertson, aged 15, who became known as the Riverside Rapist, raped 15 women, some at gunpoint.<sup>154</sup>

Kadeem Hart, aged 15, raped and robbed a woman while armed, and later committed an armed carjacking.<sup>155</sup>

Asa Harris, aged 16, committed multiple armed robberies and at least one rape.<sup>156</sup>

Although Justice Kennedy infers from the rarity of the sentence that it conflicts with community norms, another conclusion would be that the rarity points to the care, and even reluctance, with which this sentence has been imposed.<sup>157</sup> Recall that most juvenile offenders, even those guilty of relatively serious crimes, are not subject to the adult criminal justice system; those so charged typically receive leniency in charging and plea bargaining decisions; those that are convicted of serious crimes typically receive leniency in sentencing decisions; and so it is only the rare juvenile offender whose crimes so shocks the judge and jury that the demand for punishment overwhelms a compassion towards youth. When a juvenile commits a crime other

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<sup>153</sup> See *Tindall v. State*, 45 So.3d 799 (Fla. App. 4<sup>th</sup> Dist. 2010).

<sup>154</sup> See Paul Pinkham, *Duval Inmates, Including Riverside Rapist, Now Qualify for Resentencing*, Jacksonville Times, May 18, 2010.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> The least egregious crime I was able to find that resulted in a LWOP sentence for a nonhomicide involves Kenneth Young, who at the age of 15 committed a series of armed robberies. His claim is that his accomplice, a 25-year-old man, always held the gun and pressured him into the crimes. For a sympathetic profile of Kenneth Young, see <http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/> (last visited February 18, 2010).

than homicide and nonetheless receives an LWOP sentence one hypothesis is that it reflects a sober judgment as to the defendant's moral culpability.

### C. Graham and Sullivan

This brings us to Graham and Sullivan. In affirming the need for a categorical rule disqualifying LWOP sentences for juvenile nonhomicides, Justice Kennedy criticizes the Florida statutory scheme for permitting the imposition of such a sentence "based on a *subjective* judgment that the defendant's crimes demonstrate irretrievably bad judgment."<sup>158</sup> One can only assume that Justice Kennedy would tolerate such a sentence if it resulted from an *objective* judgment, but what is intended by this adjective here: how can a sentencing decision be anything other than "subjective?" He then pronounces that "specific cases are illustrative" and the reader readies himself for concrete examples to clarify the meaning. Only two are provided: Graham and Sullivan. With respect to Graham, Justice Kennedy writes:

In Graham's case the sentencing judge decided to impose life without parole-a sentence greater than that requested by the prosecutor-for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: "[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you . . . . We can't do anything to deter you."<sup>159</sup>

This is the entirety of the discussion of the facts of Graham's case in this section of the opinion. No argument is offered to rebut the sentencing judge's conclusion; its wrongness is taken as self-evident. One is invited to read the entirety of the sentencing proceedings in Graham.<sup>160</sup> Graham committed a violent armed robbery at age 16. The sentencing judge suspended punishment in light of his stable family structure and presumably in recognition of all the qualities of juveniles

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<sup>158</sup> 130 S.Ct. at 2031.

<sup>159</sup> 130 S.Ct. at 2020.

<sup>160</sup> 2009 WL 2163259 (Joint Appendix I); 2009 WL 2163260 (Joint Appendix II).

that Justice Kennedy emphasizes in the Graham and Roper opinions—their immaturity, diminished sense of responsibility, plasticity, etc. Graham responded to this reprieve by engaging in between two and four armed house invasions and burglaries. He picked vulnerable victims, principally illegal aliens, who were expected to be reluctant to seek assistance from police. During the last crime, committed just weeks before Graham's 18<sup>th</sup> birthday, a conspirator was shot and needed hospitalization; had he died, Graham could have been liable for felony murder.

Hearings in Graham's case included many witnesses, including the defendant, his mother and father, as well as the victims and collaborators in crime. The trial judge openly agonized over his decision, at one point even commiserating with the defendant's mother. Interesting facts, which emerged over the course of the hearings, conflict with the nebulous idea of juvenile immaturity that runs through the *Graham* opinion. Although Graham, at age 17, was the youngest of a group of three armed men who invaded the victim's apartment, eyewitness testimony suggests that he was the leader of the group, and the most violent.<sup>161</sup> By contrast, one of his compatriots, age 21, was described as immature for his age.<sup>162</sup> Although it is true that, as a concurring Justice Roberts notes, the prosecution proposed that Graham receive a 25-year sentence, what seemed to provoke the trial judge is that Graham steadfastly refused to concede his role in the crimes.<sup>163</sup> To sum up, then, Graham, who came from a relatively settled home, committed between 3 and 5 violent armed robberies in the span of 18 months, the last and age 17

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<sup>161</sup> See Appendix II at 82.

<sup>162</sup> See *id.* at 101-2.

<sup>163</sup> See *Graham v. Florida*, 130 S.Ct. at 2041 (Roberts, C.J., concurring)

years and 11 months. He surely received a sentence on the high end of what might expect, but what was offensively subjective about it?

Turning to the only other example Justice Kennedy offers of “subjective” sentencing:

The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan’s past encounters with the law, the sentencing judge concluded that, although Sullivan had been “given opportunity after opportunity to upright himself and take advantage of the second and third chances he’s been given,” he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. The judge sentenced Sullivan to life without parole.<sup>164</sup>

This is the entirety of Justice Kennedy’s discussion of Sullivan. Some additional details might be helpful. At the age of 13, three youths, with Sullivan acting as instigator, broke into an elderly woman’s house to steal her valuables.<sup>165</sup> Later that day, Sullivan and one accomplice returned; and while the victim was distracted, Sullivan entered through a rear door, threw a hood over the victim’s head, and threatened to kill her.<sup>166</sup> He then took her to a bedroom, beat her, and raped her, vaginally and orally. In the two years preceding the rape, Sullivan had committed 17 criminal offenses (or at least 17 known to authorities) including a burglary in which he killed a dog and an assault on a counselor unenviably tasked with helping him.<sup>167</sup> He had also spent time in a detention facility, where he had assaulted other juveniles. After being sentenced, Sullivan committed multiple crimes in prison.<sup>168</sup>

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<sup>164</sup> 130 S.Ct. at 2031.

<sup>165</sup> Brief of Respondent, at 5.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Although Sullivan was sentenced to LWOP in 1988, it is possible he would have received a more lenient sentence today.<sup>169</sup> That said, it is unclear how the trial judge erred in finding Sullivan so morally culpable as to merit LWOP, and the *Graham* opinion is opaque on this point. Is it Justice Kennedy's claim that no 13-year-old can ever possess the moral culpability to merit LWOP? What is the scientific basis for this claim? Justice Kennedy's claim originates from an erroneous belief that human nature is sufficiently captured by the three standard deviations that surround one's own comfortable experience in the world. Sullivan's sentencing judge had access to a wider data set in reaching a contrary conclusion.

#### **D. An Alternative Theory of Violent Juvenile Criminals**

Implicit in the *Graham* and *Roper* decisions is a picture of juvenile abilities that is usefully made explicit. But before doing so, some clarification as to what is intended by "juvenile" and "juvenile criminal" is necessary. "Juvenile," like "child," "infant," or "youth" can encompass a 7-year-old boy, several years before the onset of puberty, and a 17-year-old woman, several years past menarche. The maturational differences between the two can be rhetorically effaced by referring to both as "juveniles." As noted above, in *Eddings*, for example, the Court embraced a capacious concept of "youth," such that it could include a 5-year-old boy, caught in a custody dispute, and a 16-year-old young man, capable of burglary, sawing off a shotgun, and murder.<sup>170</sup> Cast in this manner, "youth" has virtually no meaning, and no generalizations about it would be possible.

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<sup>169</sup> Lionel Tate, who body-slammed and murdered a 6-year old girl at the age of 12, was originally sentenced to LWOP, but the sentence aroused such an outcry that the sentence was reduced to 30 years, which effectively became 6 years. Released from prison at age 18, Tate was arrested for drug trafficking at age 19 and sentenced to 30 years in prison. See Wikipedia, Lionel Tate, available [http://en.wikipedia.org/wiki/Lionel\\_Tate](http://en.wikipedia.org/wiki/Lionel_Tate) (last visited February 3, 2011).

<sup>170</sup> 455 U.S. 104 (1982). See *supra* at text accompanying note 57.

Furthermore, we are here considering those young people who commit the gravest crimes and are sentenced to the severest of punishments, either the death penalty or LWOP. This is extraordinarily rare, at least over the past few decades, for 13- and 14-year-olds; the vast majority of juveniles sentenced to LWOP are 16 to 18 years old.<sup>171</sup> The *Graham* and *Roper* opinions argue that such juveniles are significantly less mature than the ordinary adult sentenced to LWOP or the death penalty, and from this fact flows significantly less moral culpability, even when juveniles commit the most heinous of crimes. Yet how old are the adults to whom these juveniles are being compared? The peak age for violent crime in the United States is 18 to 19 years old,<sup>172</sup> but the median age of criminals sentenced to the death penalty or LWOP is roughly 27 years old.<sup>173</sup> Likewise, the briefs cited by the majority in *Graham* rely on sources that suggest that full maturation and brain development is not realized until well into one's 20s.<sup>174</sup> Essentially, this is the view adopted by the Court in *Gall v. United States*, where youth as a mitigating condition was deemed to extend to those in college, with brain maturation not complete until age 25.<sup>175</sup> So the unstated question posed by the *Graham* and *Roper* decisions, is: exactly how different, in maturation and brain development, and therefore culpability, are those aged 16 to 18, or "older juveniles," from those aged 25 to 27, or mature but "young adults"?

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<sup>171</sup> Of the 77 persons under 18 years reportedly convicted to LWOP for nonhomicides in Florida, 63 or 82% are 16 and 18. See Annino, *supra* note 76 at 18.

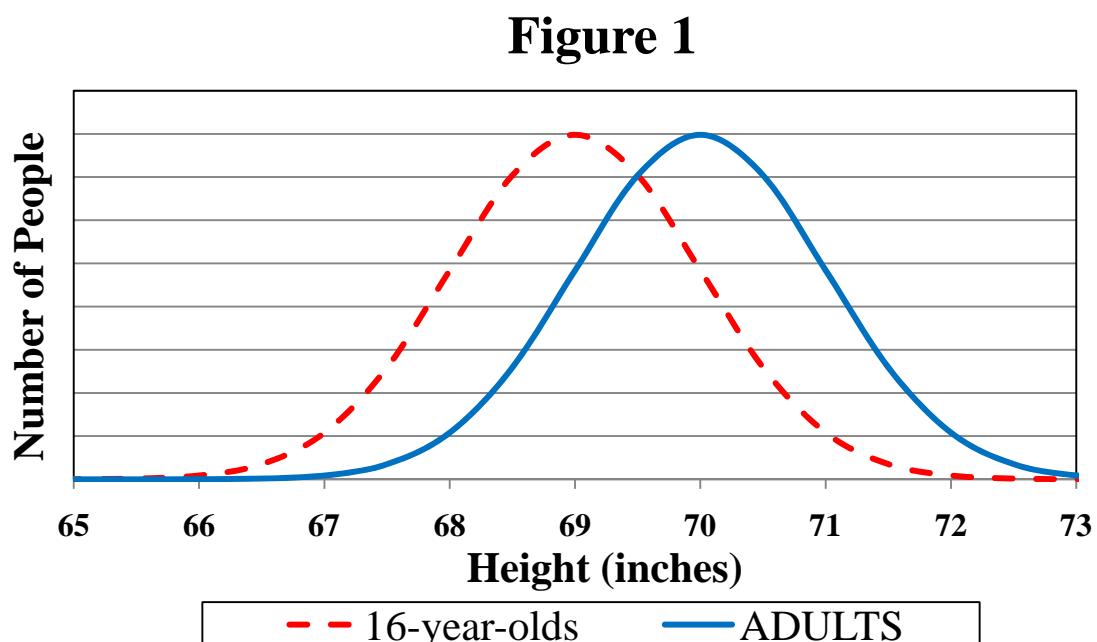
<sup>172</sup> See U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001, pp. 4, 6 (2003).

<sup>173</sup> I considered all those sentenced to death in Florida for crimes committed between the years 2003 and 2008. The median age of the offender at the time of the offense was 27 years. See <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>.

<sup>174</sup> See, e.g., AMA Graham Brief at 4-31.

<sup>175</sup> 552 U.S. 38, 58 (2007).

It is a difficult question to answer. First consider a comparison of these two groups with respect to one manifestation of maturation: height. (I here limit myself to males as they constitute about 90% of the violent criminals and an even higher percentage of those sentenced to the death penalty or LWOP.) Given the heterogeneity of any human population, the distribution of each group would be governed by a bell curve, and if those two curves were laid next to one another, the result would be<sup>176</sup>:



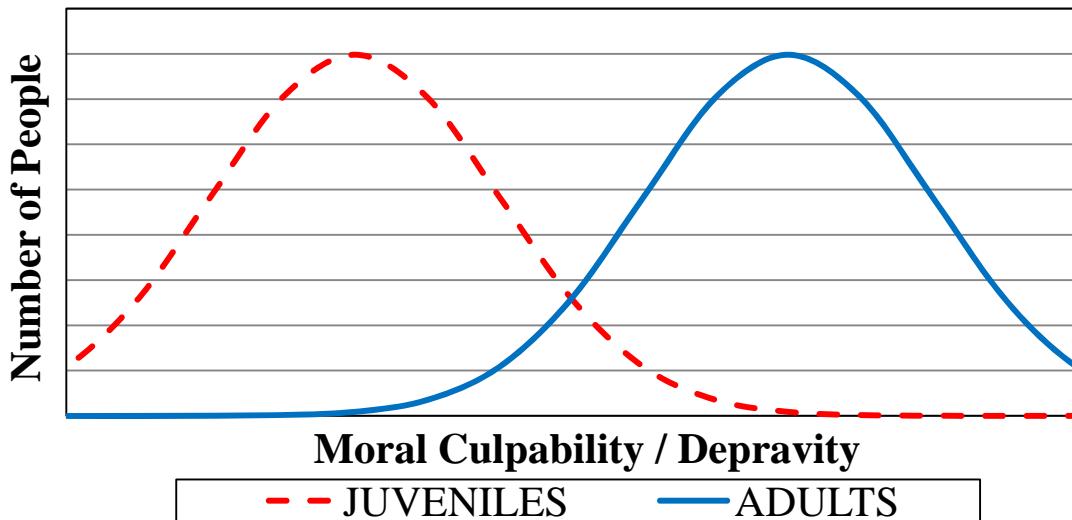
Obviously, one cannot draw any meaningful distinction between older juveniles and young adults with respect to height. If maturation or neuro-development tracked height, the *Graham* and *Roper* decisions would be indefensible. It would seem that these decisions are premised on a vision of older juveniles and young adults as follows<sup>177</sup>:

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<sup>176</sup> Figure 1 loosely tracks the data one could find at <http://www.kidsgrowth.com/stages/viewgrowthcharts.cfm?id=BH318>.

<sup>177</sup> Figures 2 through 5 depict graphically the assumptions about juvenile responsibility that support, or undercut, the *Graham* decision. They are conceptual, not empirical.

## Figure 2



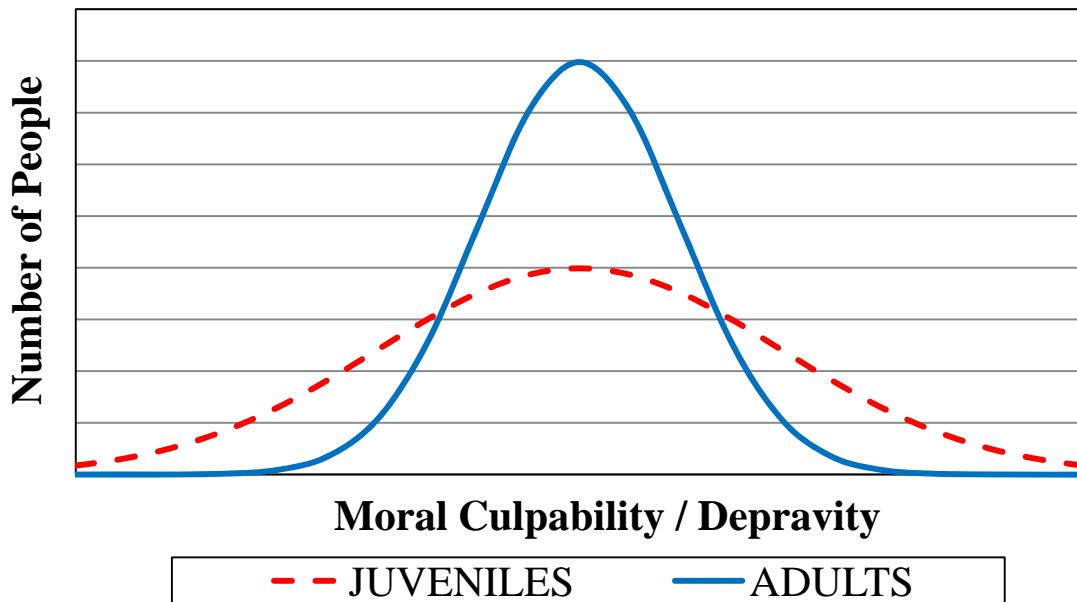
The bell curves overlap at the right and left tails, but overwhelmingly the two groups are distinct. It is hard to point to a single variable, or at least one that can be neatly quantified, for which the above graphical depiction is accurate. Given the aspiration of the *Graham* and *Roper* Courts to cloak their conclusions in the garb of science, it is striking how inchoate and even unscientific the notions of “moral culpability” and “depravity” are.

In any event, comparing juveniles and adults as a general matter is not the issue. Again, we are here considering juveniles who commit extraordinarily grave crimes and who have, by doing so, a revealed preference for aberrational conduct. It is therefore possible, though unlikely, that they are altogether typical of their age in the respects deemed relevant to criminal responsibility (“moral culpability” and “depravity”). It is also possible that juvenile murderers, rapists and armed burglars are even more removed from adults in these respects, seemingly bolstering the conclusion reached in *Graham* and *Roper*. This would be true if, for

example, juvenile criminals are more likely to have underdeveloped brains, whatever that might mean, than ordinary juveniles.

Another possibility is that the mean for juvenile criminals with respect to maturity and culpability is the same as adult criminals, but the variance is greater.

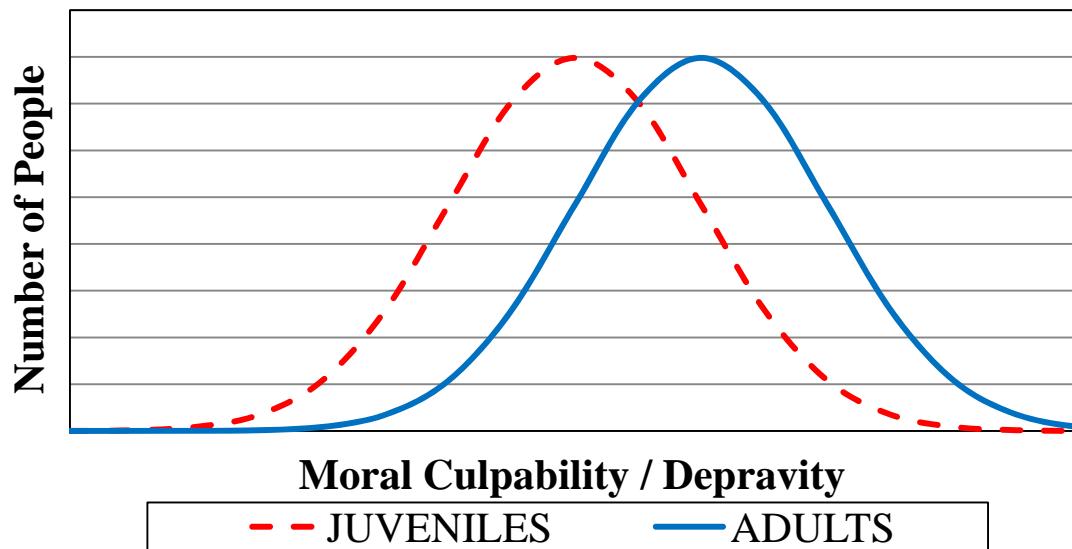
**Figure 3**



On the one hand, the rationale for *Graham* would be undercut if the overlap between young adults and older juveniles was substantial: after all, the assumption that juvenile criminals lacked those adult characteristics meriting severe punishment would be less tenable. On the other hand, the wider variance in juvenile abilities would suggest possible support for the ultimate (or epistemological) holding in *Graham*. The logic would be that there is less certainty in concluding that any given juvenile criminal is mature and morally culpable than there is for any given adult criminal.

Yet another possibility is that juvenile violent criminals are not less, but more mature than juveniles generally, and in fact their distribution approaches that of adults:

**Figure 4**



This would strongly undercut the conclusion in *Graham*. In fact, the evidence from the preceding section is consistent with Figure 4, at least with respect to juveniles sentenced to LWOP, or its effective equivalent, for nonhomicides: Breakfield, Bunch, and Bell all seemed to display a precocious maturity.

This may be discounted as merely “anecdotal evidence,” but curiously there is some support from “brain science.” The Court’s basic argument, in this context, is that juvenile brains are undeveloped, as evidenced by incomplete myelination and not fully pruned prefrontal lobes, and there is somehow a causal relationship between this “immaturity” and a juvenile’s reckless decisionmaking. There are reasons to be skeptical,<sup>178</sup> but even if this were true, one would

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<sup>178</sup> See Robert Epstein, The Myth of the Teen Brain, available at Scientific American Mind, April/May 2007, at <http://drrobertepstein.com/pdf/Epstein-THE-MYTH-OF-THE-TEEN-BRAIN-Scientific-American-Mind-4-07.pdf>. Epstein argues that “most of the brain changes that are observed during the teen years lie on a continuum of changes that take place over much of our lives.” *Id.* at 60. In addition, not a single study “establishes a *causal* relation between the properties of the brain being examined and the problems we see in teens.” *Id.*

expect that those juveniles who engage in dangerous and possibly illegal behavior would have less mature brains in these respects than their age-peers. Recent studies find the opposite. One study concluded that those aged 12 to 18 years who act recklessly have “more mature frontal white matter tracts” than their age-group peers.<sup>179</sup> As a consequence, “It is difficult to reconcile this increased maturity with the theory that adolescent risk-taking occurs because of immature cognitive control systems.”<sup>180</sup> Another study undercuts the basic neurological premise of the *Graham* decision: “There is virtually no direct evidence to support a relation between natural maturation in brain structure during adolescence and impulsive behavior.”<sup>181</sup>

One might at this point raise a fifth possibility: juveniles who commit the sort of heinous crimes deemed worthy of LWOP are not less, but more mature and culpable, than the typical adult criminal:

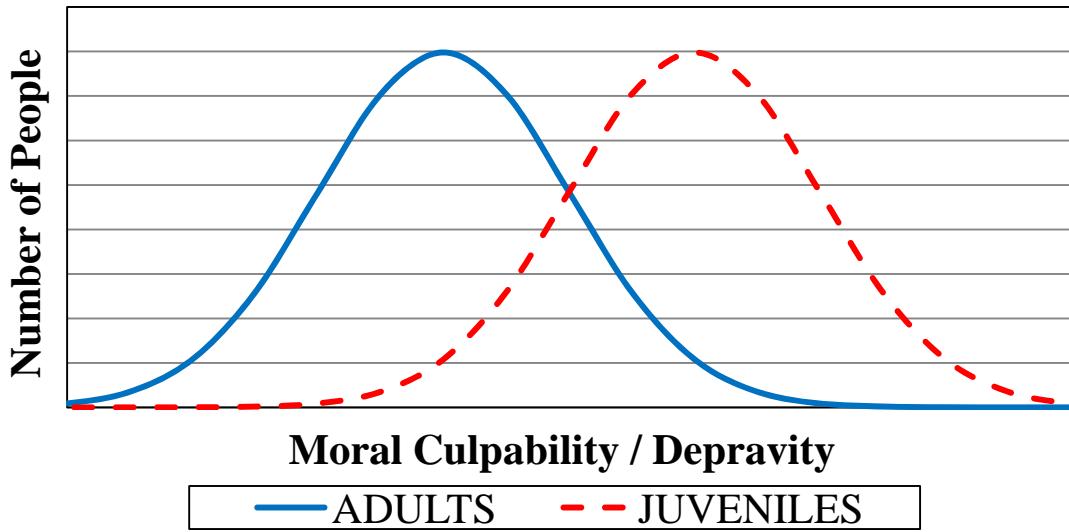
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<sup>179</sup> See Berns, Moore, & Capra, *Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex*, 4 PLoS ONE 9, v.4(8) (2009).

<sup>180</sup> Id.

<sup>181</sup> Daniel Romer, *Adolescence Risk Taking, Impulsivity, and Brain Development: Implications for Prevention.*, in DEVELOPMENTAL PSYCHOBIOLOGY 270, available at <http://onlinelibrary.wiley.com/doi/10.1002/dev.20442/pdf>. Yet another paper, this one in the Journal of Neuroscience, notes: “Neuromigaing studies cannot definitively characterize the mechanism of such developmental changes (e.g., *synaptic pruning, mylenation*). However, these volume and structural changes may reflect refinement and fine-tuning of reciprocal projections from these brain regions (PFC and striatum) during maturation. *Thus, this interpretation is only speculative.*” Adriana Galvan, Todd A. Hare, Cindy E. Parra, Jackie Penn, Henning Voss, Gary Glover, and B.J. Casey, *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 (25) JOURNAL OF NEUROSCIENCE 6885 (2006) (italics added).

## Figure 5



This might seem implausible, but it is a hypothesis consistent with observations in other contexts. Consider: Two people score an 800 on the math SAT exam, Angela (aged 13) and Bob (aged 18). Who is more likely to be a physics professor at Cal Tech at age 30? The better guess, of course, is Angela. Her score puts her a minimum of 5 or so standard deviations above the mean in mathematical ability, whereas Bob's score puts him a minimum of 3 standard deviations above the mean. Angela's mathematical ability may decline, or her interest in exploiting that ability may diminish, but everything else being equal, spectacular performance at age 13 is more, not less, reflective of profound ability and attainment later in life.

Perhaps a taste and capacity for violence and cruelty at a young age is likewise the sort of precocity that portends notable accomplishments in later life. Although the peak age for crime in America today is 17, the peak age for violent crime is 1.5 years later. In that sense, a violent crime committed at age 16 or 17, at least one so heinous as to be deemed worthy of LWOP, could be deemed more suggestive of human depravity than the same crime committed at age 25.

At a minimum, when a 16-year-old commits an appalling crime, such as those surveyed in the preceding section, it is not clear why society should find such a person at least as threatening, and worthy of condemnation, as a 25-year-old who commits the same crime.<sup>182</sup>

Ironically, the case of Christopher Simmons lends support for this last possibility. In the Supreme Court opinion invalidating Simmons' death penalty and culminating in ruminations on juvenile immaturity, the introduction consists of an elaborate summary of Simmons' calculating crime. The facts of Simmons' crime call into question the premises of the decision. Simmons, aged 17, found conspirators younger than himself; he formed a plan to burglarize a house, tie up a victim, and murder her; he boasted to his collaborators that they would "get away with it" because they were minors; they burglarized a house at night; they used duct tape and electrical wires to cover the victim's mouth and bind her limbs; they carried her away from the house; and Simmons himself dumped her, alive, from a railroad trestle into a river, where she drowned to death while struggling to free herself.<sup>183</sup> This is not a case of an "adult" resorting to murder after battling demons in his head for years, or after being debilitated by a decade of drug abuse, or

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<sup>182</sup> Sociopathic qualities that reflect permanent features in a person's character can be evident at young age. Consider the reflections of one experienced psychiatrist:

I felt that he was a psychopath in the making. We tend to reserve such a label for adults and we talk about juveniles who act out in violent ways as suffering a conduct disorder. The use of the term psychopath or antisocial personality is perhaps prematurely pejorative and we don't ordinarily see the necessary signs and symptoms in one so young and someone so small. So we don't use that terms [sic] . . . when we talk about juveniles. I certainly have never used that term before. But this young man was so evidently suffused with all of the findings, that, when they fully blossomed later in life, will call for this diagnosis, that I was comfortable in talking about him having a nascent sociopathic personality. Or a psychopath in the making.

Cynthia Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 474 (2006).

<sup>183</sup> 543 U.S. 551, 556-57 (2006).

after being laid off from a job, or spurned by a lover, or suffering any of the hard knocks life cruelly deals out. It is the story of a 17-year-old acting with cold-hearted calculation, embarking on a torture-murder aware of its costs and benefits. Simmons would seem more mature, not less, than the typical murderer.

Simmons's case was thrust into the lap of the United States Supreme Court when the Missouri courts engaged in a patent misreading of the relevant precedent and overturned his death sentence.<sup>184</sup> Thus, his case, with inconvenient facts, became an untidy vehicle for establishing the proposition that juvenile murderers categorically lack the culpability warranting the death penalty. The *Graham* and *Sullivan* cases are more typical of how Eighth Amendment challenges to juvenile sentences are likely to wind their way to the United States Supreme Court: Identified by organizations seeking to reduce juvenile sentences, they likely reflect among the most compelling cases nationwide in this effort. Alternatively put, Bunch, Breakfield, and Bell may be more typical of juvenile nonhomicide offenders sentenced to LWOP.

Given the almost assuredly atypical nature of the *Graham* and *Sullivan* cases, even more caution than commonplace would have been appropriate. In other contexts in the criminal procedure field, the Court has eschewed categorical rules when petitioners failed to identify a pattern of cases that warranted dramatic judicial intervention. For example, in *Texas v. Cobb*,<sup>185</sup> the Court rejected an extension to *Miranda* with the observation that that there was “no evidence

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<sup>184</sup> In *State ex rel Simmons v. Roper*, 112 S.W.3d 397 (2003), the Missouri Supreme Court held, implausibly, that *Atkins v. Virginia*, 536 U.S. 304 (2002), which invalidated the death penalty for mentally retarded defendants somehow overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>185</sup> 532 U.S. 162, (2001).

that such a parade of horribles had transpired anywhere in America.”<sup>186</sup> Justice Kennedy presented himself as sympathetic to this cautious approach. In *Hudson v. Michigan*, rejecting the categorical application of the exclusionary rule to evidence obtained in violation of the knock-and-announce rule, he wrote that “[i]f a widespread pattern of violations were shown . . . there would be reason for grave concern.”<sup>187</sup> But he discerned no such pattern, and concurred in the majority’s judgment in that case. In *Graham*, however, Justice Kennedy insisted on the necessity of categorical rule in the absence of any showing of a “widespread pattern” of improvident juvenile LWOP sentences. At most, he found two.

It is perhaps a concession to the possibility that the majority of juveniles sentenced to LWOP involve crimes far more appalling than those of Graham or Sullivan that Justice Kennedy’s categorical rule, after much fanfare, turns out to be so modest. States can, in fact, incarcerate a juvenile for his natural life as punishment for a nonhomicide; what is prohibited is transparency when they are pronouncing a sentence. In other words, a juvenile “life” sentence is constitutional; it’s calling it “without parole” that *Graham* prohibits. Stated thus, the decision may be negligible in its implications. The next section considers its reception in the courts.

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<sup>186</sup> *Id.* at 169. Analogously, in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), the Court rejected the argument that police officers can automatically arrest persons for misdemeanors, even minor traffic infractions, committed in their presence, for such a rule created a “grave potential for abuse. The Court noted that, “[N]oticeably absent from the parade of horribles is any indication that the “potential for abuse” has ever ripened into a reality. In fact, as we have pointed out in text, there simply is no evidence of widespread abuse of minor-offense arrest authority.” *Id.* at 353 n.25.

<sup>187</sup> 547 U.S. 586, 604 (2006).

#### **IV. *Graham's Reception in the Lower Courts***

*Graham* has already been featured as part of an orchestrated effort to revamp penalties for juvenile criminals.<sup>188</sup> Almost a year after the case was decided, we now can evaluate the initial success of these advocacy efforts. Having to choose between the Court's sweeping rhetoric and its narrow holding, courts have regarded the latter as more relevant to their work. Even as they dutifully follow the precise holding of *Graham*, some judges seem to be almost gleefully trampling upon its spirit. But those who taunt the Supreme Court do so at their peril, and one likely development of the *Graham* decision will be judges becoming less forthright about their motivations at sentencing hearings, lest they be rebuked for epistemological certainty about a juvenile criminal's innate depravity. There are a few inmates whose sentences have been amended as a result of *Graham*, but they are generally not among the intended class of beneficiaries. Given the rarity with which JLWOP is imposed for any crime, *Graham's* direct impact may be small; however, the concluding section explores the decision's costs, in undermining the clarity of the law and perpetuating a misguided theory of juvenile immaturity.

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<sup>188</sup> Groups lobbying state legislatures to eliminate JLWOP sentences have cited the *Graham* decision. Consider, for example, the efforts of the Juvenile Law Center to change the relevant law in Pennsylvania. See <http://www.jlc.org/jlwop/>. Doubtless emboldened by the *Graham* decision, a California State Senator introduced a bill in the legislature to authorize any inmate, who was sentenced as a juvenile and who had been incarcerated as few as 10 years, to petition for resentencing. <http://www.aroundthecapitol.com/billtrack/text.html?bvid=20110SB999INT> (discussing SB 9). Somewhat more modestly, there are also litigation efforts on behalf of juveniles convicted of felony murder,, arguing that because such defendants did not have the intent to kill, *Graham* precludes an LWOP sentence. See, e.g., *Brief of Amicus Curiae Juvenile Law Center, Commonwealth v. Knox*, Case 801 WDA 2009, at 5. Finally, academics have argued that *Graham's* ruminations of adolescence have implications for juvenile transfer decisions. See, e.g., Neelum Arya, *Using Graham to Challenge Judicial Transfer Laws*, 71 LA. L. REV. 99 (2010).

### A. A Narrowly Construed Decision

Justice Kennedy's opinions are often adorned with reflections on extralegal issues; and consistent with past performance, *Graham* is hardly a technical legalistic opinion. There is language in the opinion that sweeps broadly on issues of adolescence and punishment. The opinion culminates, however, in a narrow holding, applicable only to JLWOP for nonhomicides. Which will control in the lower courts, the rhetoric or the holding?

Let us first consider how the litigants themselves have fared. Terrance Graham's resentencing, originally set for March 1, 2011, had been indefinitely postponed.<sup>189</sup> Joe Sullivan's resentencing occurred on January 27, 2011, twenty two years after he was first sentenced to LWOP.<sup>190</sup> It was his misfortune that the judge who oversaw his trial, and sentenced him originally, was still on the bench. In 1989, Circuit Judge Nick Geeker pronounced that Sullivan "is beyond help."<sup>191</sup> Nothing in the intervening decades caused him to reassess this view. Judge Geeker resentenced Sullivan to the maximum term, or 40 years, for each of the two rape counts, and ran them consecutively.<sup>192</sup> He is eligible for release in 2043, or at age 68.<sup>193</sup>

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<sup>189</sup> Telephone conversation with law clerk at Creed & Gowdy, on March 2, 2011. The reason for the postponement has emerged: the State of Florida, after securing an LWOP sentence, voluntarily withdrew other charges against Graham. On April 26, 2011, those charged, including other counts of armed robbery and home invasion, were reinstated.

<sup>190</sup> The resentencing is described in Kris Wernowskey, 80 Years for Rape, January 27, 2011, at <http://www.pnj.com/article/20110127/NEWS01/110127009/80-years-for-rape> (last visited February 11, 2011). Although a transcript is not yet available, I spoke with Bridgette Jensen, the state attorney representing Florida at the hearing on February 9, 2011.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Fortunately for Sullivan, Florida law as of 1989, under which he was resentenced, was more lenient in allowing release prior to the expiration of an inmate's term. Under Florida law today, he would be required to serve 85% of his term, thus making him be eligible for release in 2057.

Let us now consider the value of the precedent to others, beginning with juveniles convicted of crimes other than homicide. Those sentenced to life *with* the possibility of parole have thus far obtained no relief from *Graham*.<sup>194</sup> And the “eligibility for parole” that removes a defendant from the protection of *Graham* can be highly speculative. In *Angel v. Commonwealth*,<sup>195</sup> the 16-year old defendant was convicted of abduction with intent to defile, malicious wounding, and object sexual penetration, and was sentenced to consecutive life terms. The Virginia Supreme Court unanimously rejected the argument that *Graham* applied, invoking a state law that provided:

“Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony . . . who reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.”<sup>196</sup>

Because none of the crimes that Angel was convicted of qualified as Class 1 felonies, he “may petition the Parole Board” at age 60, which the court deemed a “meaningful opportunity to obtain release,” as required by *Graham*.<sup>197</sup> It is worth noting, however, that the Parole Board,

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<sup>194</sup> See *Warren v. Smith*, 2010 WL 2837002 (N.D. Ohio) (rape and kidnapping conviction; life sentence affirmed); *Hall v. Thomas*, 611 F.3d 1259 (11<sup>th</sup> Cir. 2010) (robbery and kidnapping conviction; life sentence affirmed).

<sup>195</sup> *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011)

<sup>196</sup> Va. Code § 53.1-40.01

<sup>197</sup> A similar result was reached in *Cunningham v. State*, 2011 WL 613698 (Fla. App. 3<sup>rd</sup> Dist. 2011), in which the defendant was sentenced by a Florida court in 1983 to a life sentence for nonhomicide offenses. Under the law at the time, which still governs his case, he will be eligible for parole consideration in 2026, when he turns 60. A unanimous 3-judge panel held this sufficient under *Graham*.

regularly denies parole to inmates in their 60s and even 70s, citing as a reason the “serious nature and circumstances of the offense.”<sup>198</sup>

Juveniles convicted of nonhomicides and sentenced to prison terms so long that they are, essentially, LWOP have proven to be the most problematic category of defendants. Many have not received meaningful relief.<sup>199</sup> The case of Michael Bell, discussed above,<sup>200</sup> is illustrative. The trial judge sentenced Bell to the maximum term permissible under state law, 54 years to life, with the stated intent of ensuring his incarceration for the remainder of his life.<sup>201</sup> The term will probably fall just short of accomplishing this goal, for he will eligible for release two months shy of his 70<sup>th</sup> birthday, and his life expectancy is between 70 and 71 years. Rejecting his habeas petition,<sup>202</sup> the court noted that, given current life expectancies, Bell could expect to spend a few of his golden years, or perhaps just months, in freedom, assuming he is released at the first permissible date.<sup>203</sup> At least the court considering Bell’s sentence found it to be in technical

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<sup>198</sup> Consider, for example, the January 2011 monthly decisions of the Virginia Parole Board, which can be found at <http://www.vadoc.state.va.us/resources/vpb/decisions/2011/decisions-jan11.pdf>. In denying the application for parole of Charles Edward Bevill, aged 64, convicted of sexual assault, rape, and robbery, the board references the “serious nature and circumstances of the offense.” See also the denials of Loren Neal Duffield (murder), aged 74, Larry Griffin Alexander (sex crimes), aged 63, Bruce Goodwin (sex crimes), aged 61, Bobbie Caldwell Webber (murder), aged 69, etc. The list of denials goes on and on and swamps the roughly dozen parole grants.

<sup>199</sup> For two exceptions, see Victor Mendez, discussed *infra* at text accompany notes 234 to 240, and Antonio Nunez, discussed in note 241.

<sup>200</sup> See *supra* at text accompanying note 126.

<sup>201</sup> *Bell v. Haws*, 2010 WL 3447218, \*1 (C.D. Cal. 2010).

<sup>202</sup> The magistrate judge opinion contained a “Facts” section of 1,349 words, *id.* at \*3 -5, detailing the crime, which he then drew upon in neutralizing Bell’s attempts to mitigate the severity of his crime.

<sup>203</sup> Bell’s parole date would be two months shy of his 70<sup>th</sup> birthday; according to defendant’s proffered actuarial statistics he can expect to live to sometime between his 70<sup>th</sup> and

compliance with *Graham*. Chaz Bunch’s 89-year sentence, for a crime recounted above, was given less scrutiny, the judge noting the absence of evidence that he would not, at some point, be eligible for release.<sup>204</sup> Other cases, involving sentences of 110 and 120 years imposed on juvenile nonhomicide offenders, have been found to pass muster, with courts curtly noting that a term-of-years sentence, of whatever length, is by definition not a LWOP sentence.<sup>205</sup>

The case of Jose Walle is the most striking. In sentencing Walle, who was 13 years old at the time of his crimes, to what amounts to a 92-year sentence, the trial judge was honest about his motivations and his goal. Dispensing even with the fiction that Walle, like Bell or Bunch, might someday be released, Judge Tharpe pronounced, “Walle knew the difference between right and wrong. . . He has forfeited his right to live in a free society.”<sup>206</sup> It is hard to imagine a lower court judge more forthrightly engaged in judicial nullification of a Supreme Court opinion. Notwithstanding Justice Kennedy’s ruminations on adolescent immaturity and the impossibility of certainty about a juvenile’s culpability, Judge Tharpe evinced great confidence that Walle was mature and culpable. In arriving at this assessment, it was doubtless relevant that Judge Tharpe had heard evidence that Walle, *at the age of 13*, had committed five separate crimes in a three-

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71<sup>st</sup> birthday. See *id* at \*9-11 and nn. 8 & 9. The judge held: “Despite the trial judge’s intent that Petitioner remain in prison for the duration of his natural life, there is a date certain upon which Petitioner will be eligible for release on parole. The trial judge’s intent does not alter that date or transform his sentence into LWOP.” *Id.* at 9.

<sup>204</sup> See *Bunch v. Smith*, 2010 WL 750116, \*2 (N.D. Ohio 2010) (“there is no indication in the record that Bunch will not be eligible for parole some time before completing his aggregate sentence”).

<sup>205</sup> *People v. Ramirez*, 2011 WL 893235 (Cal. App. 2<sup>nd</sup>. 2011); *People v. Caballero*, 191 Cal.App. 4<sup>th</sup> 1248 (2011). The California Supreme Court granted a petition for review in *Caballero*, so whether this approach prevails in California remains to be seen.

<sup>206</sup> Quoted in Zayas, *supra* note 14. The trial judge mocked the Eighth Amendment argument made by Walle’s lawyer: “Is it not cruel and unusual punishment for the victims to have endured the rage, the brutality, the terror that your client exacted upon them?” *Id.*

week period, which collectively gave rise to over a dozen counts of: armed sexual battery, aggravating kidnapping, armed robbery, grand theft auto, and armed carjacking. It will be interesting to see whether Judge Tharpe is rebuked on appeal.<sup>207</sup>

Let us turn now to juveniles convicted of homicide. Not a single one has obtained relief from *Graham*.<sup>208</sup> For those guilty of premeditated murder, the result is little surprising, given the circumstances of their crimes, which several courts have painstakingly recounted.<sup>209</sup> In *Miller v. State*, for example, a 14-year-old schemed with a confederate to burglarize a neighbor, then

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<sup>207</sup> See *infra* at text accompanying notes 234 to 240.

<sup>208</sup> See, e.g., *Medoux v. State*, 325 S.W.3d 189 (Tex. App. 2010) (16-year-old murderer sentenced to LWOP; 7-2 decision); *People v. Adderly*, 2011 WL 817751 (Cal. App. 2<sup>nd</sup> Dist. 2011) (16-year-old murderer sentenced to LWOP; unanimous 3-judge panel); *Paolilla v. State*, 2011 WL 723849 (Tex. App. 2011) (17-year-old murderer sentenced to LWOP; unanimous 3-judge panel); *Cox v. State*, 2011 WL 737307 (Ark. 2011) (14 year old murder sentenced to LWOP; per curiam opinion of state supreme court); *State v. Andrews*, 329 S.W.3d 369 (Mo. 2010) (15-year-old murderer sentenced to LWOP; 4-3 decision); *People v. Hernandez*, 2011 WL 539448 (Cal. App. 2<sup>nd</sup> Dist. 2011) (17-year-old accomplice to felony murder sentenced to LWOP); *State v. Windom*, 2011 WL 891318 (Idaho 2011) (16-year-old murderer sentenced to LWOP; 4-1 decision); *People v. Perez*, 2011 WL 222120 (Cal. App. 5<sup>th</sup> Dist. 2011) (16-year-old murderer sentenced to LWOP; unanimous 3-judge panel); 796 N.W.2d 198 (Neb. 2011) (17-year-old murder sentenced to LWOP; unanimous state supreme court opinion). There have been dissenting judges in the above decisions, and often the *Graham* Court's discussion of juvenile immaturity is prominently argued in their opinions, but so far they have not prevailed. For still more opinions affirming LWOP sentences for juvenile murderers, see cases cited *infra* at note 209.

In *People v. Perez*, 2011 WL 521319 (Cal. App. 4<sup>th</sup> Dist. 2011), a 14-year-old, guilty of being an accomplice to murder, was successful in challenging his 50-year sentence. However, the court rejected the argument that the sentence violated the federal constitution under *Graham*, and grounded its decision on the California constitution and on a statutory analysis. Perez's sentence was reduced to 25 years.

<sup>209</sup> In *Gonzales v. State*, for example, the court saw fit to note that the 16-year-old defendant stabbed the victim, a 49-year-old man in poor health, weighing 109 pounds, 12 times. *Gonzalez v. State*, 2010 WL 4365956 (Fla. App. 1 Dist. Nov. 5, 2010). For other extravagant accounts of the crime that gave rise to a juvenile LWOP sentence, see *Miler v. State*, 2010 WL 3377692, \*1-2 (Ala. Crim. App. 2010); *Espie v. Birkett*, 2010 WL 2994010 (E.D. Mich. 2010) \*1-2; *Browner v. Jasquez*, 2010 WL 3419806, \*1 (C.D. Cal. 2010); *People v. Hernandez*, 2010 WL 2598265 (Cal. App. 2d 2010).

assaulted the victim with a baseball bat, leaving him badly injured on the floor. As the victim pleaded for his life, the defendant set fire to the trailer home, announcing: “I am God and I have come to take your life.” The Alabama appellate court’s account of the crime, stretching over 2,000 words, seems to be precisely the sort of overindulgent narrative criticized by Justice Stevens in *Uttecht*.<sup>210</sup> Yet the circumstances of the crime prove relevant when the court addressed Justice Kenney’s critique of juvenile immaturity in *Graham*. Given the horrific crime, and Miller’s apparent maturity, the Alabama court held the LWOP sentence was fully merited.<sup>211</sup>

A few homicide cases involving LWOP sentences presented more compelling material for leniency. Erik Jensen, often featured by advocacy groups, is an example.<sup>212</sup> The 17-year-old was convicted of conspiracy to commit murder and sentenced to LWOP.<sup>213</sup> The case involved the murder of Jensen’s best friend’s mother. According to one version of events, Jensen had no knowledge of the crime until after it was committed, and was simply an accessory after the fact in the crime’s concealment. Other versions, including the one credited by the judge and jury, implicated him in the plan prior to its commission. In any event, Jensen’s habeas petition argued that *Graham*’s prohibition on LWOP sentences should extend to juveniles convicted merely of

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<sup>210</sup> See *supra* at text accompanying notes 110 to 113.

<sup>211</sup> In *People v. Soto*, 2011 WL 1303400 (Cal.App.3<sup>rd</sup> Dist. 2011), another 14-year-old murder (named Juan Torres) was sentenced to over 100 years in prison for murder and other offenses. The court of appeals dismissed a challenge to the sentence, distinguishing another case in which the defendant was an “unusually immature youth.” Torres, by contrast, “had created [the] situation” that culminated in his committing “willful, deliberate, and premeditated murder.” See also *People v. Cabanillas*, 2011 WL 1143230 (Cal.App.5<sup>th</sup> Dist. 2011) (affirming sentence of determinate term of 17 years plus indeterminate term of 115 years to life imposed on 14-year-old murderer).

<sup>212</sup> A PBS Frontline segment, “When Kids Get Life,” profiles, among others, Erik Jensen. See <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/five/nateerik.html> (last visited February 16, 2011).

<sup>213</sup> *Jensen v. Zavaris*, 2010 WL 2825666 (D. Colo. 2010).

complicity in murder. The curtness with which a distinguished federal judge (Richard Maitch) dismissed this claim must be discouraging to those who had hoped the *Graham* decision would spur a greater receptivity to constitutional claims of excessive punishment.<sup>214</sup>

Even more striking are cases involving immature defendants who committed crimes of violence, including homicide, that have the apparent character of one-off events not reflective of deep depravity. Sentenced to harsh prison terms, albeit short of LWOP, they have received no relief from the *Graham* decision. The case of Larry Lewis is illustrative.<sup>215</sup> Lewis, aged 16 years, was a bystander in a fist fight between two high school classmates. A gun fell out of one the combatant's pockets, Lewis scooped it up, and—in a manner disputed at trial—shot one of the youths in the head. After a bench trial, the judge accepted the defendant's account of the firing (that it was accidental), and threw out the murder charge, but convicted Lewis of manslaughter. At sentencing, the judge even embraced the view of juveniles adopted by the *Graham* Court, noting young defendants, although tried as adults, “still think with sixteen-year-old brains. They don’t think with thirty-year-old brains.”<sup>216</sup> Yet bound by Louisiana law, and accepting the need for retribution, the judge sentenced Lewis to 30 years, which makes him ineligible for release for 25½ years. In his appeal to the Louisiana Supreme Court, Lewis found that *Graham*, far from providing support for his claim of excessive punishment, worked against him. The Louisiana Supreme Court quoted from the *Graham* opinion that “there is a line between homicide and other serious offenses,” foreclosing review of his sentence.<sup>217</sup>

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<sup>214</sup> *Id.* at \*1.

<sup>215</sup> *State v. Lewis*, 48 So.3d 1073, 107-75 (La. 2010).

<sup>216</sup> *Id.* at 1076.

<sup>217</sup> *Id.*

The *Lewis* and *Jensen* cases raise the possibility of a most unexpected development.

When presented with claims that convicted juvenile murderers received excessive punishment, it will no longer be necessary for judges to immerse themselves in nettlesome discussions of culpability and proportionality. A brief citation to the language in the *Graham* opinion that upheld the constitutionality of LWOP sentences *for homicide* will be sufficient. It would be an irony, rich for those inclined to savor it, that a decision touted as one ushering in a more “humane” approach to juvenile criminals would in fact hinder movement in that direction.

#### B. The (Unintended) Beneficiaries

Who has benefitted from *Graham*? In a robust sense, the answer is: no one. Not a single inmate has been released as a result of the *Graham* decision.

Of course, the decision is less than a year old, and its immediate effects are likely to be more modest—that is, the psychic benefit an inmate may derive from having an LWOP sentence replaced with a life sentence *with* the possibility of parole. This category of inmates includes Calvin Breakfield,<sup>218</sup> for example, although Breakfield has not yet secured, or even requested, a judicial declaration amending his sentence. In any event, the likelihood that he will be released soon is an asymptotic approximation of zero.

That said, there are several inmates who have achieved an amended sentence and, as cataloged below, it is doubtful that many of them were contemplated by *Graham*.

(1) *Juvenile Murderers in Iowa*. One summer night in 1993, 17-year-old Jason Means, together with five other teens, planned to rob a convenience store.<sup>219</sup> They arrived at a

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<sup>218</sup> See *supra* at text accompanying note 124.

<sup>219</sup> *Iowa v. Means*, Case No. FECR 167295 (Iowa Dist Ct. Scott County Sept. 30, 2010), available at <http://www.iowacourts.gov/wfdata/frame11222-2093/File93.pdf>. For the facts of the crime, as recounted in the Article, see *id.* at 1-2.

party where Michelle Jensen was present and pressured her to turn over the keys to her car, intending to use it for their robbery. When she declined, Means and another man returned with a shotgun and forced her outside. Jensen was later discovered dead, with a shotgun blast to the head. The astute reader may be wondering what relevance *Graham* has to this case, given that Means was guilty of murder, or at a minimum felony murder, regardless of whether he or an accomplice fired the shotgun. The answer to this question plunges us into the vagaries of Iowa criminal law. A jury convicted Means of second degree murder, as well as first degree kidnapping, first degree robbery, criminal gang participation, conspiracy to commit robbery, and (presumably for good riddance) unauthorized possession of an offensive weapon. The judge sentenced Means to 50 years for murder, which was the maximum sentence, and lesser terms for all of the other counts except kidnapping. Under Iowa law, however, a first degree kidnapping conviction resulted in a *mandatory* life sentence; furthermore, Iowa makes parole available as a matter of right only to those sentenced to a term of years. Accordingly, for the kidnapping charge, Means received LWOP.

An Iowa court concluded that Means's LWOP sentence for *kidnapping* was precluded by *Graham*, despite the fact that Means also committed murder.<sup>220</sup> This is a literal application of the rule announced in *Graham* (no juvenile LWOP for nonhomicides) inconsistent with pervasive language in the opinion that "homicide is different," that is, the moral culpability of those who commit homicide, which Means did, authorizes a LWOP sentence. Although there is nothing necessarily offensive about Iowa's relative grading of first degree kidnapping and

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<sup>220</sup> *Id.* at 9-11. Another beneficiary of this oddity in Iowa law is William Barbee, who at the age of 17, kidnapped a woman at knifepoint, and killed her. He is now eligible for parole. See *Sioux City Man Serving Life Sentence Now Eligible For Parole*, available at [http://www.siouxcityjournal.com/news/local/crime-and-courts/article\\_dc96531f-13b7-537f-8e2d-afa7a4bc1b7e.html](http://www.siouxcityjournal.com/news/local/crime-and-courts/article_dc96531f-13b7-537f-8e2d-afa7a4bc1b7e.html) (visited February 8, 2011).

second degree murder, one can question whether the imposition of a *mandatory* LWOP sentence on a juvenile for any crime is consistent with the common law approach to juvenile crime sketched earlier, which necessitates an individualized assessment of culpability.<sup>221</sup> That said, given the nature of his crime, it is doubtful that Means (who was convicted of homicide) has compelling grounds under *Graham* to object to the mandatory sentence as applied to him.

Yet another case that demonstrates the perils, apparently either dismissed or ignored, of affixing a grand-sounding principle (“no LWOP for juvenile nonhomicides”) atop the varied details of the American criminal justice system is that of Julio Bonilla, aged sixteen, who was convicted by an Iowa court in 2005 of first degree kidnapping and sentenced to LWOP.<sup>222</sup> Seeking post-conviction relief under *Graham*, Bonilla hit the jackpot. The Iowa Supreme Court severed the offensive language from the Iowa code authorizing LWOP for juveniles, and discovered, when the statutory dust had settled, that Bonilla is eligible for parole *now*. Bonilla is fortunate that he was not convicted of second degree kidnapping, which would have required him to serve at least 17 years of a 25-year sentence.<sup>223</sup> This anomaly has provokes efforts in the state legislature, still unrealized, to change the law.<sup>224</sup>

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<sup>221</sup> See *supra* at Part II.A.

<sup>222</sup> Bonilla v. State, 791 N.W.2d 697 (Iowa Dec 30, 2010).

<sup>223</sup> Id. at 702 & n.3.

<sup>224</sup> See <http://iowaindependent.com/51404/bill-changes-iowas-sentencing-laws-for-some-juvenile-felons>.

(2) *Adult criminals on probation for juvenile offenses.* The case of David Garland plunges us into the nuances of the law of probation in Florida.<sup>225</sup> Garland, at the age of 15, committed sexual battery on a person under the age of 12. Allowing, one can only assume, for the immaturity of adolescents, the trial judge imposed the relatively lenient sentence of 5 years imprisonment followed by 10 years probation. About a year after his release from prison, at the age of 21, Garland committed armed robbery. The trial judge revoked probation and sentenced him to life without parole.

Yet again, the reader may be wondering how *Graham* is relevant: after all, we are unmistakably dealing with an adult crime. While *Graham* was pending before the United States Supreme Court, an intermediate state appellate court rejected Garland's constitutional challenge with the terse observation that he "was not sentenced as a juvenile. He was given a second chance, but he committed another violent act at the age of 21, demonstrating his inability to rehabilitate."<sup>226</sup> After *Graham* was decided, however, the panel had second thoughts, withdrew the opinion, and ordered him resentenced.<sup>227</sup> Whether *Graham* applies in such circumstances has emerged as a matter of debate. On the one hand, the trial judge who imposed LWOP was, as a technical matter, doing so as part of probation revocation hearing bottomed on Garland's juvenile crime. This, indeed, was the holding, of another intermediate appellate court, which presented with a case raising similar facts overturned an LWOP sentence.<sup>228</sup> On the other hand,

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<sup>225</sup> *Garland v. State*, 28 So.3d 925 (Fla. App. 1<sup>st</sup>. Dist. 2010) (*Garland I*), reversed *Garland v. State*, 2010 WL 2671904 WL (Fla. App. 1<sup>st</sup> Dist. 2010) (*Garland II*). The facts below are drawn from *Garland I*.

<sup>226</sup> *Garland I*, 28 So.3d. at 926.

<sup>227</sup> *Garland II*.

<sup>228</sup> *Lavrick v. State*, 48 So.3d 1029 (Fla. App. 2<sup>nd</sup> Dist. 2010). Lavrick was sentenced to 5 years probation for armed robbery and carjacking at the age of 16. After turning 18, he

the *Graham* opinion is premised on the argument that juvenile criminals must be afforded a “meaningful opportunity” to demonstrate an improvement in their character. Garland easily passes this test: he was given an *actual* opportunity, and *as an adult* committed yet another violent crime. *Graham*’s application to his case, viewed in this light, would seem doubtful. We can only wait to see which line of reasoning will prevail.

(3) *Attempted murderers*. The *Graham* opinion failed to clarify where attempted murder falls along the homicide/nonhomicide divide. Stray comments in the opinion provide fodder, presumably unintentional, for both views. On the one hand, some language points to the consequence (death) as decisive. The astute observation that “[l]ife is over for the victim of the murderer,” which the Court contrasts with the victim of “even a very serious nonhomicide crime” would seem to categorize “attempted murder,” whose victim, of course, survives, as a nonhomicide.<sup>229</sup> Other language, however, focuses on the *intentions* of the offender, and appears to include those who actually kill someone with those who intended to kill, grouping these offenders together as “categorically . . . deserving of the most serious forms of punishment.”<sup>230</sup> The latter view is perhaps more strongly supported in the text, as in the blanket statement that,

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committed another armed robbery. The trial judge revoked probation and sentenced him to LWOP. The appellate court reversed and ordered resentencing under *Graham*.

<sup>229</sup> See *Graham*, 130 S.Ct. at 2027.

<sup>230</sup> *Id.* (“The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”) The authors of the Florida State study, upon which the *Graham* majority relies, excluded attempted murderers from the category of nonhomicides—that is, to put the matter positively, they treated attempted murderers as “homicides” when calculating the number of juveniles nonhomicide offenders sentenced to LWOP.

“It follows that, when compared to an adult murderer, a juvenile offender who did not kill *or intend to kill* has a twice diminished moral culpability.”<sup>231</sup>

One court followed this logic, holding that a juvenile attempted murderer was guilty of homicide and could be sentenced to LWOP.<sup>232</sup> Other courts have treated attempted murder as “nonhomicide,” rendering a juvenile convicted of this offense ineligible for LWOP.<sup>233</sup> In these cases, the conclusion hinged in part on whether attempted murder was treated as homicide under state law. Summing up, although it would seem that attempted murderers were not contemplated by the *Graham* Court, at least one has benefitted from the decision, a windfall flowing in part from the happenstance of state homicide law.

(4) *Transparent Sentencing Judges.* Another beneficiary of the *Graham* decision is Victor Mendez.<sup>234</sup> Mendez was part of a gang of four young men who, in the course of a single night, committed one armed carjacking and three separate armed robberies. In two of the crimes, Mendez brandished a handgun at the victims; in the other two he remained in the car that served as the base of operations for the roving crime spree. Whereas the prosecution’s case involved an elaborate account of menacing gang activities, the defense was content to secure a stipulation that Mendez was 16 years old at the time of his most recent crimes.<sup>235</sup>

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<sup>231</sup> 130 S.Ct. at 2027.

<sup>232</sup> *State v. Twyman*, 2010 WL 4261921 (Del. Super. Oct. 19, 2010).

<sup>233</sup> *Manuel v. State*, 2010 WL 4365956 (Fla. App. 1 Dist. Nov. 5, 2010); *McCullum v. State*, 2011 WL 1501997 (Fla. App1. Dist. 2011).

<sup>234</sup> *People v. Mendez*, 114 Cal.Rptr.3d 870 (Cal.App. 4th Dist. 2010). For the facts of the case, as recounted in the Article, see *id.* at 873-74.

<sup>235</sup> *Id.* at 876-77.

That no one had yet died at Mendez’s hands (assuming this is the case) seems to have been a matter of luck. The jury convicted him of all counts, and the trial judge, appalled by what he saw and heard over the course of the trial, loaded up sentences to the maximum, ran them all consecutively, culminating in a sentence of 84 years, with parole not eligible to Mendez until age 88.<sup>236</sup> The trial judge was transparent in his rationale:

“You know, when I was a young attorney, I used to appear in front of a judge who used the term ‘sociopath.’ He overused the term, because he used it for everyone who came before him who was sentenced on a serious case. I haven’t used the term much, either as an attorney or much as a judge. Then I opened Mr. Mendez’s probation report, and I looked at his juvenile record since age ten, and I saw that he was sent to the Youth Authority for robbery at age twelve in Los Angeles County. Then I saw the crime spree that I witnessed this defendant do [including seven armed robberies and carjackings]. I’m totally convinced that this particular defendant has no conscience, has no conscience for society or other people’s lives or property. He just doesn’t understand the importance of being a law-abiding member of society, not at all, and he’s proven that since age ten.”<sup>237</sup>

The California appeals court waffled as to *Graham*’s applicability to the case. After noting that Mendez’s sentence was “materially indistinguishable” from LWOP, the court acknowledged his sentence was “not technically” life without parole.<sup>238</sup> Proceeding to note that Mendez’s case is “not controlled” by *Graham*, the court returned to its starting point in this carousel, proclaiming that it was “guided” by the “principles” articulated in *Graham*.<sup>239</sup> And the principle that proved most illuminating, and which required reversal, is that which prohibits a sentencing judge from judging at the “outset” that a juvenile violent criminal is “irredeemable.”<sup>240</sup>

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<sup>236</sup> *Id.* at 882.

<sup>237</sup> *Id.* at 883.

<sup>238</sup> *Id.* at 882

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

It is an odd use of the word, “outset.” In general, the trial judge’s responsibility terminates at sentencing; he or she is not charged with monitoring the inmate’s path, if any, toward rehabilitation. The sentencing judge appraises the defendant’s culpability not at the “outset,” but at the culmination of a criminal trial. In any event, the take-away lesson from the Mendez case may be a simple one: sentencing judges should avoid words like “sociopath” or “irremediable” or “evil,” even when they think them appropriate. The sentencing judge could have issued the same sentence, but introduced it as follows:

“You are a young man, with many chances to reform. For several years, you have been subject to bad influences and removed from those influences your prospects will brighten. Because of many criminal acts you have committed, I am sentencing you to a long prison term, but in no sense can this be called life without parole. I’m totally convinced that you are capable of reform, and expect you will do so.”<sup>241</sup>

In another article, I argued that judicial pronouncements on what constitutes a permissible *Terry* stop have influenced how police officers testify at suppression hearings, but may less robustly shape how they act on the streets.<sup>242</sup> My argument was that in many instances police officers will, notwithstanding the Court’s solemn injunctions, stop people when they have

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<sup>241</sup> The judge who presided over the trial of Antonio Nunez may also be in need of reeducation along these lines. See *People v. Nunez*, 195 Cal. App. 4<sup>th</sup>. 414 (2011). At the age of 14, Nunez along with an older defendant, kidnapped a man at gunpoint; and, after their ambitious ransom plans went frustrated, he fired multiple volleys from an AK-47 while being chased by police along southern California highways. Miraculously, no one was injured. Nunez was convicted of aggravated kidnapping, attempted murder, and other charges, and the judge originally sentenced Nunez to LWOP. In 2008, before *Graham* was decided, the court of appeals reversed on state law grounds, but the trial judge persevered in his original design. In resentencing Nunez to 175 years in prison, the judge announced, “There is clearly a tension between the Father Flanagans of the world and victims of gang violence. Mr Nunez is not Mickey Rooney, and I don’t believe in the saying that there is no such thing as a bad boy.” This did not sit well with the court of appeals, which reversed, again, this time relying in part on *Graham* and noting the scant possibility that Nunez would survive to be paroled.

<sup>242</sup> See Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 57 VAND. L. REV. 407 (2006).

a “mere hunch” that criminal activity afoot, confident that, if it ever becomes necessary, it will be easy to reverse-engineer the permissible “reasons” for the stop when cross-examined by a defense lawyer. Likewise, one wonders whether *Graham* will not, in many cases, affect the actual sentences issued by trial judges; what it will affect is what the judges say at those hearings. When sentencing juveniles to very long terms in jail, the effective equivalent of LWOP, the major lesson of *Graham* is to avoid certain buzzwords, such as “irremediable.” The lesson to trial judges is to emphasize that the sentence is not, technically LWOP, and that there are opportunities for reform. It is doubtful that the sentencing judge in *Mendez*, on remand, will reconsider his judgment that the defendant is a sociopath; what he will reconsider is his transparency in arriving at his sentence.

### C. The Costs

In the past decade, perhaps 8 to 10 persons under the age of 18 have been sentenced to LWOP for crimes other than homicide each year.<sup>243</sup> One might argue that, assuming lower

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<sup>243</sup> Florida, which is apparently responsible for roughly  $\frac{1}{2}$  to 2/3 of the nation’s JLWOP nonhomicide cases, has complete records, which I reviewed. See Robinson Communication, *supra* note 149. Here is a tentative analysis of six recent years:

Year/JLWOP Nonhomicide	Number of cases
2008	4
2007	7
2006	2
2005	14
2004	1
2003	5

Any attempt to code this data is fraught with difficulty. For example, when offenders committed multiple crimes as juveniles, I used the year of the most recent crime. And when offenders who were sentenced to LWOP were convicted of crimes as juveniles and as adults, I excluded them. The average was 5.6 JLWOP cases per year, which extrapolating from Florida, means roughly 10 cases nationwide per year.

courts do not extend *Graham*, it is simply a symbolic gesture, articulating the need for measured punishment for offenders of diminished culpability.

This argument underestimates the costs of the decision. Let us begin with deterrence.

Life without parole is a terrible sentence; according to the famed criminologist Cesare Beccaria, it stirs even greater terror in potential criminals than the death penalty:

But he who foresees that he must pass a great number of years, even his whole life, in pain and slavery, a slave to those laws by which he, was protected, in sight of his fellow-citizens, with whom he lives in freedom and society, makes an useful comparison between those evils, the uncertainty of his success, and the shortness of the time in which he shall enjoy the fruits of his transgression. The example of those wretches, continually before his eyes, makes a much greater impression on him than a punishment, which instead of correcting, makes him more obdurate.<sup>244</sup>

The modern reader is apt to regard this argument as unsophisticated. As academic observers have not tired of pointing out, deterrence arguments assume that criminals know the law, appreciate the penalties, and adjust their actions in some rational way accordingly.<sup>245</sup> Hardened criminals, particularly young ones, the argument runs, simply do not possess the requisite knowledge, or do not care to acquire that information, or discount the chances of being caught, or doubt that they will be severely punished, or are, to put the matter simply, so constituted as to be reckless of the criminal penalties, whatever they might be.<sup>246</sup>

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<sup>244</sup> CESARE BECCARIA, OF CRIMES AND PUNISHMENTS, Chapter 28 (1764).

<sup>245</sup> See, e.g., Neal Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2447 (1997) (“Implicit in the discussion up to this point was the assumption that people actually know the cost of an activity despite the costs of obtaining such information.”); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1160 (2000) (“Sanction-based deterrence, however, has proven to be a highly ineffective and inefficient means of ensuring compliance.”).

<sup>246</sup> See, e.g., Carla Cesaroni and Nicholas Bala, *Deterrence as a Principle of Youth Sentencing: No Effect on Youth, But A Significant Effect on Judges*, 34 QUEEN'S L.J. 447, 471-74 (2008) (collecting studies).

Even leaving aside the personal characteristics of such criminals, given the rarity with which LWOP is imposed on juveniles, no one would assign a large number to its direct deterrent effect as a prospective penalty. Yet if JLWOP caused one criminal to pause one second every thousand years before committing a crime then one would be obliged to say that the sentence exercises a positive marginal deterrent effect.<sup>247</sup> Even “a madman” calculates, Jeremy Bentham reminds us,<sup>248</sup> and there is ample evidence that juveniles are capable of rationality, including responses to changes in law enforcement and increases in criminal penalties.<sup>249</sup> How deterrence operates is extraordinarily complex,<sup>250</sup> but one would certainly expect, and evidence confirms, that deterrence operates most effectively when the law’s message is clear.<sup>251</sup> Life without parole is a terrible sentence, and the terror in part arises from its clarity. The sentence is not “50 years,” which might mean 45 years or just 15. Apart from the death sentence, LWOP expresses a finality that is absent in the criminal justice system. If any message can penetrate the minds of the offenders described in Section III.B, this is it.

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<sup>247</sup> The idea is borrowed, essentially verbatim, from Daniel Polsby, *Recontextualizing the Death Penalty*, 44 BUFF. L. REV. 527, 528 (1996).

<sup>248</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE MORALS AND LEGISLATION 100-01 (“I would not say, that even a madman does not calculate.”).

<sup>249</sup> See Moin Yahya, *Deterring Roper’s Juveniles*, 111 PENN ST. L. REV. 53, 81-84 (2006); William Harbaugh, Kate Krause, & Timothy R. Berry, *GARP for Kids: On the Development of Rational Choice Behavior*, 91 AM. ECON. REV. 1539, 1543-44 (2001); Steven D. Levitt, JUVENILE CRIME AND PUNISHMENT, 106 J. POL. ECON. 1156, 1181 (1998). The psychological literature tends to assume that adolescents engage in more risk-taking than adults, but one notable dissent from this view is Lita Furby and Ruth Beyth-Marom, Risk-Taking in Adolescents: A Decision-Making Perspective, 12 Developmental Rev. 1 (1992).

<sup>250</sup> See David Crump and Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. PUB. POL’Y, 369, 370.

<sup>251</sup> *Id.* See generally ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975); JAMES WILSON, THINKING ABOUT CRIME (1977).

A significant harm flowing from the *Graham* decision is the way in which it complicates the law, compounding ambiguity with confusion, further diluting whatever deterrent effect the law can possibly have. As the preceding section illustrated, there are now a welter of uncertainties, and it is doubtful the Supreme Court will resolve them anytime soon, if ever. Is a 50-year sentence for rape committed as a juvenile constitutional? Does it depend on the honesty of the sentencing judge? Can attempted murderers be sentenced to JLWOP? Can adults be sentenced to LWOP when probation is revoked for crimes committed as juveniles? Can juveniles be sentenced to LWOP for crimes other than homicide if they also committed a homicide? Can young adults be sentenced to LWOP with juvenile crimes serving as aggravating or enhancing bases for punishment?<sup>252</sup> Can young and immature adult defendants claim any support from the *Graham* decision?<sup>253</sup>

After the Supreme Court pronounced the death penalty unconstitutional for the mentally retarded,<sup>254</sup> states legislatures were presented with the nettlesome problem of implementing this holding;<sup>255</sup> the result is a patchwork of confusing and invariably difficult-to-apply laws, at least

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<sup>252</sup> Courts have so far rejected arguments that *Graham* forecloses the use of juvenile convictions when sentencing adult defendants. See, e.g., Cao v. Taylor, 2010 WL 5598518 (C.D. Cal. 2010) (defendant challenged use of juvenile convictions in Three-Strikes sentencing); Dunn v. State, 936 N.E.2d 873 (Ind. App. 2010) (19-year old defendant challenged sentencing judge's reliance on extensive juvenile history).

<sup>253</sup> The answer so far is yes. See, e.g., State v. Uzelle, 2011 WL 705152 (N.C. Ct. App. 2011) (Graham does not foreclose LWOP sentence imposed on immature 18-year-old with history of mental illness and poor upbringing).

<sup>254</sup> Atkins v. Virginia, 536 U.S. 304 (2002).

<sup>255</sup> See Richard Bonnie and Katherine Gustafson, The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811 (2007).

some of which have the apparent design of undercutting the Supreme Court holding.<sup>256</sup>

Likewise, the implementation of *Graham* will provoke a daunting variety of responses, and one can assume that some legislatures will throw up a smokescreen of compliance to conceal a less obedient design.<sup>257</sup> For any state legislature interested in taunting the United States Supreme Court, here is a simple drafting addition to the criminal code: “In any crime other than homicide, notwithstanding any other provision to the contrary, if the defendant was less than 18 years old at the time of the offense, the maximum sentence is 60 years in prison.” In a state in which release is permitted after serving 85% of a determinate sentence, this will mean that juveniles will serve roughly 51 years in prison. This, of course, provides a “meaningful” expectation of release prior to the expiration of the defendant’s life, albeit by a year or two. An alternative statutory addition is suggested by the Virginia code:<sup>258</sup> “Any person serving a life sentence for a crime other than homicide committed as a juvenile may petition the Parole Board for release at age 65.” This provides even less relief, in that there is no certainty of release; however, the ability to apply for release would arguably comply with the strict dictates of *Graham*.

The American criminal justice system, certainly as it is experienced by offenders, has a lottery aspect to it, given the happenstance not simply of apprehension, but the lightning-strike possibility of a successful suppression motion, and the lurking chance of a favorable plea bargain. For juveniles, this uncertainty is amplified, given the seemingly random manner in

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<sup>256</sup> The development is lamented in Judith M. Barger, Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court’s Mandate, 13 Berkeley J. Crim. L. 215 (2008).

<sup>257</sup> It is also likely that some state legislatures will, inspired by the *Graham* decision, provide more meaningful relief to juvenile defendants than is required by the decision. See *supra* at note 188 (discussing SB in California).

<sup>258</sup> See *supra* at text accompanying note 196.

which crimes are investigated and punished. Joe Sullivan's story is illustrative. It is hard to imagine a criminal justice system doing less to deter him. After committing an armed home invasion, he received no meaningful penalty. After committing aggravated assault, he received no meaningful penalty. So on, and so forth, for more than a dozen felonies.<sup>259</sup> The claim that

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<sup>259</sup> Or consider the following life story:

Defendant was born in 1976. A petition alleging that when he was 11 years old, a girl teased him and he "produced a knife and stabbed her leg," was sustained. The report continues that when he was 13, "a man apprehended the defendant after he attempted to steal a bicycle. The incident was reported to the police and officers searched the defendant. He had a bank card that was taken during a residential burglary the previous day. He also violated his probation by failing to report as directed and by staying away from home overnight without permission." Also when he was 13, a petition alleging burglary of three residences was sustained. Included in the loot taken was a gun and ammunition.

When defendant was 14 years old, two petitions were sustained. In one, he violated probation. The other was another residential burglary during which another gun and ammunition were stolen.

Another petition was sustained when defendant was 15. The report states he "threw his mother on the ground, straddled and attempted to choke her. He also punched holes in the walls of their home, threatened to 'bash' his mother's head with a baseball bat and held a knife near her face while moving it in a stabbing motion."

Still while he was 15 years old, another petition was sustained. The report reads: "According to the police report, the defendant and a companion approached a man who was parking his car. The defendant held a .12-gauge shotgun against the man's head and told him to leave the car. He and his companion forced the man into the car trunk, and then drove the car for a mile before releasing the man. The car was discovered approximately two hours later and it was crashed into a curb with the engine running. Police found the defendant and three companions in a van. The defendant had shotgun shells in his possession, and the gun was located in a nearby trash can."

While he was still 15, defendant was sentenced to 33 years and eight months in the California Youth Authority. The report states "the defendant entered a woman's residence while she bathed. He struck her face, knocked her on the floor and placed a pillow over her head. He tore off her panties, and then threatened to kill her if she looked at him. He unsuccessfully attempted intercourse, asked for her purse and pretended to leave her residence. He returned a few minutes later, raped and threatened to kill her again. The victim required 100 stitches and plastic surgery to treat her facial injuries."

Sullivan and those like him are somehow “beyond deterrence” is gets it exactly wrong. When he embarked upon his final crime, one could argue he was acting “rationally,” at least in the sense that he could have reasonably expected that no serious penalty would result.

Furthermore, in considering deterrence it is best to think more broadly than the law’s effect on a narrow class of hardened criminals. The criminal justice system reinforces social solidarity and achieves voluntary obedience when it is perceived as legitimate.<sup>260</sup> The Supreme Court’s decision to truncate the range of punishments, notwithstanding society’s own judgments, renders the criminal law itself suspect. One might argue that given how rarely JLWOP is imposed for any crime the impairment of legitimacy is negligible. Yet the punishment is likely to be sought in precisely the most noteworthy of crimes. A toolbox is filled with tools that, though rarely used, are on certain occasions indispensable. It is, fortunately, the rare juvenile offender whose crimes merit the forfeiture of freedom for the duration of his life. But instances arise, at least in the opinion of a majority of state legislatures, and in such instances, *Graham* constrains judges in arriving at an appropriate punishment.

Justice Kennedy dismisses such concerns with the complacent observation that “for the victim of even a very serious nonhomicide crime, life . . . is not over and normally is not beyond repair.” That life is not over in a nonhomicide crime is tautological; that life is “normally” not beyond repair is likely also true. But normally is not never, and we should contrast Justice

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The police reported that defendant admitted he raped the woman, and that he stated he was “angry and wanted to hurt someone.”

Defendant was released from CYA several months prior to his 25th birthday . . . People v. Wilkins, 191 Cal. Appl 4<sup>th</sup> 780, 806 (2011). A few years after his release from prison, Wilkins committed felony murder.

<sup>260</sup> See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 62-66 (W.D. Halls trans. 1894).

Kennedy's observation with the words of a trial judge at the sentencing hearing of Chaz Bunch and his collaborators:

I want you to know that I've been here 27 years, first as a bailiff and then as a lawyer, doing the same thing these lawyers have done in this case, and now as a Judge. And I've seen and learned things that in criminal cases I pray my sons and my family never have to see and learn. But in all my time I've never seen a crime so vicious or so evil or so unforgivable. As I listened to this victim's testimony, I felt her fear. I felt her shame. I felt the terror that you [rained] down upon her. I've never felt that in a case before. As you let her go after threatening to kill her and holding the gun to her face, I think I felt a relief, but it's not much relief because what you did will forever alter her life and the lives of all those close to her, and even the lives of every person in this community. You have imposed a life sentence of a very different sort upon this victim and upon her family.<sup>261</sup>

This was the prelude to announcing an 89-year sentence for Bunch.

Retribution as a basis for punishment is generally disfavored in the modern academy.<sup>262</sup>

The impulse to cage Bunch for the duration of his life can easily be categorized as a bloody and atavistic urge that should itself be analyzed and reformed.<sup>263</sup> We have only a transcript of an excerpt of Bunch's sentencing hearing, but there is nothing to suggest lust for revenge or even anger. There is an emotional cast to his words, but what one detects mostly are: sadness, compassion for the victim, a sense of duty, and a need to arrive at some punishment that, however lamely, settles the scales. We seem, to bring this Article conveniently full circle, to be confronted, with a judge in the common law tradition trying to match up culpability and sentence

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<sup>261</sup> *State v. Bundy*, 2005 WL 1523813, 17 (Ohio App. 7 Dist.).

<sup>262</sup> See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1636-42 (1992). But see, e.g., JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

<sup>263</sup> See, e.g., John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 407 (“Moreover, in the conditions of contemporary societies, as opposed to the conditions of our biological inheritance, retribution is now a danger to our survival and flourishing.”).

*in this particular case*—that is, not evaluating data through the obfuscating fog of a theory of adolescent immaturity. There is no invocation of brain scans, nor the slightest discourse on the meaning of adolescence, but at least to this author, there is an understated wisdom in this paragraph that compares favorably with the *Graham* opinion.

## V. Conclusion

As a general matter, juveniles are less mature than adults. As a general matter, homicide is more serious than other crimes. In *Graham v. Florida*, the Supreme Court converted these general rules into a categorical exclusion: no LWOP for juvenile nonhomicides. Given the rarity with which LWOP is imposed on juvenile offenders for nonhomicides, the case may be dismissed as one of little direct effect. Symbolically, however, it can be celebrated for affirming the state's duty to proportion punishment and culpability, particularly for defendants of tender years.

This Article has challenged these claims and criticized the decision for three central reasons. *First*, although only few cases will be directly implicated by *Graham*, these are almost certainly the cases that will attract the most notoriety and involve some of the most desperately aggrieved of victims. *Graham* will frustrate the ability of the trial judge and legislature to arrive at a sentence that, in their assessment of the particulars of the case, is a merited sentence. And this in turn undermines the legitimacy of the criminal law.

*Second*, and further impairing the law's legitimacy, as applied *Graham* compounds the ambiguity of, and reduces clarity in, the juvenile criminal law. This is one of the principal lessons gleaned nearly a year after the case was decided. For example, whether a 90-year sentence imposed on a juvenile nonhomicide offender violates the Eighth Amendment is

anyone's guess,<sup>264</sup> and it is unlikely the Supreme Court will condescend to enter this morass anytime soon.

*Third, Graham* will have symbolic effects, but in this regard its costs are paramount. The principle that punishment and culpability should be proportional is not a recent discovery of the United States Supreme Court; it is a principle enshrined in the law and well appreciated by the lower courts, especially those having the onerous duty of imposing LWOP on juveniles. Consider the solemnity with which the Massachusetts Judicial Court affirmed James Fuller's sentence:

Like a sentence of death, it is intended to remove a person from our midst for the rest of his natural life. It is more awesome when imposed on one as young as Fuller, who may expect to live out his young manhood, middle, and late years all in confinement.  
Accordingly, we fulfill the role assigned to this court with the utmost gravity.<sup>265</sup>

The symbolic value of *Graham* is not in upholding an elementary principle of criminal law, but in promoting a misguided theory of adolescent immaturity. It is, curiously, an ideology that American elites profess, but do not practice, piling their children under a mountain of AP courses, insisting upon achievement in school and on the athletic field.<sup>266</sup> Like virtually all human beings, the young respond to incentives. Told that they are mature and responsible, and held accountable, they tend to behave accordingly. Told, as in *Graham*, that they are immature and irresponsible, and held harmless, they tend to behave accordingly.

Furthermore, whatever the validity of juvenile immaturity as a general matter, it is demonstrably false in individual cases. Sentencing judges have long grappled with this problem.

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<sup>264</sup> Compare the cases of Jose Walle, discussed *supra* note 206, and Victor Mendez, discussed *supra* note 234.

<sup>265</sup> *Commonwealth v. Fuller*, 421 Mass. 400, 414 (1995).

<sup>266</sup> For an extreme version of this compulsion, see AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2010).

As we have seen, if a sentencing judge, after hearing the evidence at trial, is convinced that a juvenile is sufficiently mature and his crime so egregious that LWOP is appropriate, Justice Kennedy's ruminations on "brain science" and "adolescence" are unlikely to alter that opinion. And how will legislatures that persist in regarding LWOP as a just punishment, at least potentially, in some cases of juvenile nonhomicides adjust to *Graham*? As suggested above, it is easy to imagine statutory schemes that technically comply with Graham while remaining inconsistent with its apparent intent.<sup>267</sup>

Is this preferable to the current approach? It removes clarity in sentencing, reducing deterrence. It deprives victims of the satisfaction of knowing, to a legal certainty, that the criminal will never be set free. On some margin, it makes executive clemency less likely in truly merited cases, as governors will focus attention on those sentences that seem irrevocable, either a death sentence or LWOP. And again on some margin, it might result, diabolically, in *more* such sentences than under the current scheme, as even a long determinate sentence, seeming less severe than LWOP, will be arrived at by sentencing judges with less trepidation.

Juvenile criminal responsibility is an extraordinarily difficult area of the law, but it is a subset of the larger, even more insoluble topic: how can any of us be justly punished for our crimes? We each carry our genetic and environmental baggage; we each are constrained by chemicals and hormones. Juveniles may be, as a general matter, more trammelled by forces beyond their control than adults, but—to the extent it can fairly be said of any human being—they make choices. An older approach captured this all in holding that, in determining moral culpability, malice could supply the want of years. Modern science, despite its wonders, has yet to meaningfully update the wisdom captured in this principle.

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<sup>267</sup> See supra at text accompanying note 258.