

2012

What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential

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Recommended Citation

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WHAT STATES SHOULD DO TO PROVIDE A MEANINGFUL OPPORTUNITY FOR REVIEW AND RELEASE: RECOGNIZE HUMAN WORTH AND POTENTIAL

BY: GERARD GLYNN¹ & ILONA VILA²

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INTRODUCTION

The United States Supreme Court in *Graham v. Florida*³ recognized that children are different and should be treated differently at the sentencing phase of the criminal justice system. In *Graham*, the Court relied on a categorical analysis that, up until *Graham* was decided, had only been applied in the context of the death penalty.⁴ In deciding which analysis to use, Justice Kennedy reviewed the Court's long standing precedents in Eighth Amendment jurisprudence, stating that the Court must consider whether or not the punishment is disproportionate to the crime, not whether or not the punishment is barbaric.⁵ Justice Kennedy rejected the proportionality test related to the length of the term of the sentence,⁶ favoring instead the categorical approach to restrictions on the death penalty.⁷ Having chosen this analysis is critical because it provides the Court with the opportunity to focus on the characteristics of the juvenile defendant. By considering the characteristics of children under the age of eighteen in the context of a determinate sentence for non-homicide crimes, the Court extends the proposition that children are different.

The concept that children and adults differ was first expressed by the Court in *Roper v. Simmons*,⁸ but only applied in the context of death penalty cases. In *Roper*, the Court discusses the broad differences between children and adults, namely, that children are malleable and less culpable because they have not yet finished the brain development process.⁹ Thus, in *Graham*, the Court reiterates the following:

Roper [sic] established that because juveniles have lessened culpability they are less deserving of the most severe punishments.¹⁰ As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures including peer pressure]';

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

4. See *id.* at 2021 (using a categorical analysis involving a term of years, despite the categorical analysis in effect at the time *Graham* was decided); see also *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for children under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (abolishing the death penalty for defendants whose intellectual functioning is in a low range).

5. *Graham*, 130 S.Ct. at 2021–22.

6. *Id.* at 2022–23 (finding the gravity of the offense test does not advance the analysis needed to address the issues raised by the *Graham* case).

7. *Id.*

8. 543 U.S. 551 (2005). The *Graham* Court relies heavily on the developmental aspects of *Roper*, stating that there is nothing to suggest that the brain science used to abolish the death penalty for juveniles has not changed since *Roper* was decided. See *Graham*, 130 S.Ct. at 2026–27.

9. See *Roper*, 543 U.S. at 569–70.

10. *Id.*

and their characteristics are 'not as well formed.'¹¹

Graham mandates that states provide defendants an opportunity for release if they are serving life in prison for a non-homicide offense committed as a child.¹² The Court says the non-homicide juvenile offender should be allowed to demonstrate maturity and rehabilitation.¹³ However, the Court provides little guidance on what courts or states should consider in making that determination or what mechanism for which to provide it.

The absence of specific criteria or guidelines for lower courts, parole systems, or states to consider makes it a difficult task. The Court emphasizes that experts cannot determine whether or not a child's actions are characteristics that "reflec[t] unfortunate yet transient immaturity or rare irreparable corruption."¹⁴ Additionally, the Court notes that representing children generally is a challenge because children do not trust adults and do not understand the court process, further allowing children to make poor decisions during the criminal justice process.¹⁵ However, the fact that the Court chose to focus on the characteristics of children perhaps is in itself an extensive framework to take into consideration while sentencing or reviewing sentences. Decision makers should consider a wide range of issues concerning all developmental and individual aspects of the child. This would expand the nature of court reviews or parole hearings.

Graham creates many questions about what meaningful opportunity for release should encompass in its implementation.¹⁶ However, Justice

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

12. *See Graham*, 130 S.Ct. at 2030.

13. *Id.*

14. *Id.* at 2026 (quoting *Roper*, 543 U.S. at 572).

15. *See id.* at 2032 (citing Brief for NAACP Legal Def. & Educ. Fund, Inc. et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S.Ct. 2011 (2010), Nos. 08–7412, 08–7621, 2009 WL 2197340, at *7–12) [hereinafter Brief for NAACP Supporting Petitioners, *Graham v. Florida*]; *see also* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 272–73 (2005) (describing different cognitive and psychosocial variables in juveniles that may negatively impact decision-making and attorney-client relationships).

16. *See Graham*, 130 S.Ct. at 2030 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."); John Gibbs, *Jurisprudential Juxtaposition: Application of Graham v. Florida to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 958 (arguing that the *Graham* decision provides an analytical framework for the Court to apply when evaluating life without parole (LWOP) sentences moving forward); *see also Graham*, 130 S.Ct. at 2034 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); *Miller v. Alabama*, 63 So. 3d 676 (Ala. Crim. App. 2011); *Eighth Amendment—Juvenile Life without Parole Sentences*, 124 HARV. L. REV. 209, 215 (2010) (stating that the next step in the analysis of *Graham* is the exercise of the court's "independent judgment" and how that applies to juvenile LWOP homicide cases); SCOTUSBLOG, *Miller v. Alabama*, <http://www.scotusblog.com/miller-v->

Kennedy notes that the child has no hope of restoration through clemency, which is rare.¹⁷ Thus, there is a clear suggestion that an opportunity for release will be through parole or resentencing.

After the *Graham* decision, states with statutory parole systems addressed *Graham* by converting the life without parole sentence into life with the possibility of parole.¹⁸ The possibility of release through a parole system arguably provides a “meaningful opportunity to obtain release.”¹⁹ However, there are some states, such as Florida, where parole has been eliminated.²⁰ In those states, there is no logical way to review life or long sentences through either a parole system²¹ or procedural post-conviction process within the court system itself. Accordingly, the states have to develop a new system.

alabama/ (last visited May 1, 2012). See generally Leonardo P. Caselli, *Criminal Law—One Small Step for Juveniles, One Giant Leap for Juvenile Justice*; *Graham v. Florida*, 130 S.Ct. 2011 (2010), 11 WYO. L. REV. 269 (2011); Leslie Patrice Wallace, “*And I Don’t Know Why it is that You Threw Your Life Away:*” *Abolishing Life without Parole, the Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 59–60 (2010). There are many other questions raised by *Graham*. Caselli, *supra*, at 269. The Court clearly limited its ruling to non-homicide offenses for children under the age of 18. See *Graham*, 130 S.Ct. at 2030. However, it is clear that the logic of *Graham* should apply to children who commit murder. This may be resolved by two cases pending before the U.S. Supreme Court: *Miller v. Alabama* (where an Alabama appeals court upheld a sentence of life imprisonment without parole imposed on a fourteen-year-old convicted of intentional murder) and *Jackson v. Hobbs* (where the Arkansas Supreme Court upheld a death-in-prison sentence imposed on a fourteen-year-old who was convicted of an unintentional killing where he was not the triggerman). SCOTUSBLOG, *supra*. The United States Supreme Court heard oral argument on these cases on March 20, 2012. *Id.* Others argue that *Graham*’s mandate should apply to virtual life. See Wallace, *supra*, at 59–60. If this is true, it is not clear when a sentence to a term of years becomes virtual life. See *Miller*, 63 So. 3d. In this article, we do not address these issues, which have been discussed in other articles, as it will be resolved by the courts.

17. *Graham*, 130 S.Ct. at 2029 (citing *Solem v. Helm*, 463 U.S. 277, 300–01(1983)).

18. See *State v. Shaffer*, 77 So. 3d 939, 941 (La. 2011); *Bonilla v. State*, 791 N.W.2d 697, 701 (Iowa 2010).

19. See *infra* Part V. However, a review of parole statutes demonstrates that these processes do not take into account the characteristics of the defendant consistent with principles of adolescent development that are suggested by the Supreme Court in a meaningful opportunity for review and release.

20. See TIMOTHY A. HUGHES ET AL., DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TRENDS IN STATE PAROLE, 1990–2000, at 2 (2001), available at <http://www.prisonpolicy.org/scans/bjs/tsp00.pdf> (noting that the following states have abolished discretionary parole: Arizona, California [excluding certain offenses], Delaware, Florida, Illinois, Indiana, Kansas [excluding a few offenses], Maine, Minnesota, Mississippi, North Carolina, Ohio [excluding murder and aggravated murder], Oregon, Virginia, Washington, and Wisconsin).

21. See Wallace, *supra* note 16, at 39, 46–47; see also *infra* Part IV.a. See *infra* Part V, for a discussion on judicial review. One author argued that *Graham* mandates each state set up a parole system. See Wallace, *supra*, at 64–65. However, states have several other options, which include parole. See *infra* Part V (discussing judicial review); see also *infra* Part IV.a.

This article begins with a detailed analysis of the Court's mandate in *Graham*,²² followed by a review of the science that influenced the Court's decision²³ and an analysis of what states have done so far to comply with the mandate.²⁴ Then, the article explores existing parole rules,²⁵ followed by a discussion on the challenges minors face in proving their ability to rehabilitate despite the prison system's complicity in preventing such development.²⁶ Based on the foregoing discussion and analysis, the authors propose a model statute that states should consider adopting for purposes of implementing the mandates in the *Graham* opinion.²⁷

THE COURT CONSIDERS MEANINGFUL OPPORTUNITY

THE COURT'S DISCUSSION IN GRAHAM

The Court makes it clear in its mandate: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."²⁸ It is also made clear that this cannot be an illusory opportunity; there must be "some realistic opportunity to obtain release before the end of that term."²⁹ It is explicitly left up to the states to decide how to provide defendants seeking release with a meaningful opportunity to demonstrate their maturity and rehabilitation.³⁰

The Court acknowledges that "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society."³¹ Recognizing the demands of trial judges, the Court gives some guidance in its opinion about what should be considered.

22. See *infra* Part II.a.

23. See *infra* Parts II.b, III.

24. See *infra* Part IV.

25. See *infra* Part V.

26. See *infra* Part VI.

27. See *infra* Parts VII, VIII.

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

29. *Id.* at 2034; see *infra* Part VI.

30. See *Graham*, 130 S.Ct. at 2030 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance."); see also *id.* at 2034 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."). But see *id.* at 2057 (Thomas, J., dissenting) (criticizing that this will lead to years of litigation).

31. *Id.* at 2031.

It is the Court's opinion that solely focusing on the depravity of the crime is insufficient to deny release.³² States must provide more criteria for review than the severity of the offense when considering early release of inmates convicted when they were children.³³ In *Roper v. Simmons*, the Court rejected the notion that a jury instruction allowing the child's age to be considered as a mitigating factor was enough to comply with the Eighth Amendment.³⁴ The Court found "that an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even when the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."³⁵

The Court suggests some characteristics that demonstrate maturity based on the transition from adolescence to adulthood, which include "remorse, renewal, and rehabilitation."³⁶ The Court also found the notion that one should be able to exhibit the effect of atonement and the lessons learned from mistakes by virtue of transition into adulthood compelling.³⁷

32. *Id.* ("Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character.' This is inconsistent with the Eighth Amendment."). In Chief Justice Roberts' concurrence, he writes that Graham's sentence was indeed disproportionate to his crime compared to others similarly situated. *Id.* at 2040 (Roberts, J., concurring). Chief Justice Roberts did, however, discuss two Florida cases that, in his opinion, were crimes that exhibited depraved character:

[B]ut what about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? [sic] or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son?

Id. at 2041.

33. See generally Ed Pilkington, *Life without Hope*, GUARDIAN (Aug. 3, 2007), <http://www.guardian.co.uk/world/2007/aug/04/usa.edpilkington> (discussing the sentence lengths for juveniles tried and convicted as adults and the other factors that contributed to their commission of crime relative to the life sentences imposed upon them).

34. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate the younger years can subside." (internal quotations and citations omitted)).

35. *Graham*, 130 S.Ct. at 2032 (quoting *Roper*, 545 U.S. at 573).

36. *Id.*

37. See *id.* at 2033. The Court states:

Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law.

Unfortunately, each review mechanism – be it a court or parole system – embodies subjectivity³⁸ and potential disproportionate measurements of the relevant characteristics of the individual, especially in light of its own acknowledgement that experts do not have all the answers.³⁹ Moreover, there is significant debate about the meaning of rehabilitation and the potential lack of complicity on the part of the criminal justice system to prevent maturity. The reality that counsel representing a child in the adult system may not be able to effectively represent the client before a court, while simultaneously protecting the child client's rights and providing mitigating information to the court at the sentencing phase of the proceedings, is another issue receiving much contention.⁴⁰

THE COURT CONTINUES TO RECOGNIZE THE SCIENCE OF ADOLESCENT DEVELOPMENT

The scientific research relied upon by the Court in both *Roper* and *Graham* concludes that, for a variety of interrelated reasons, adolescents as a group cannot be expected to behave or make decisions in the same way as adults. “*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’”⁴¹

To illustrate its point, the American Academy of Child and Adolescent Psychiatry (AACAP)⁴² begins each amicus brief with the same introduction to its Summary of Argument:

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures all over the world have presumed it for decades or more. And scientific evidence now sheds light on how

Id.

38. See *id.* at 2031 (“[E]xisting state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient . . .”).

39. See *id.* at 2029 (quoting *Roper*, 545 U.S. at 573) (stating that it is difficult even for psychologists to discern a child who committed a crime due to immaturity from a child who committed a crime out due to irreparable depravity).

40. *Id.* at 2032.

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

42. Brief for Am. Med. Ass'n and the Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae Supporting Neither Party, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (Nos. 08–7412, 08–7621), 2009 WL 2247127 [hereinafter Brief for AMA and AACAP Supporting Neither Party, *Graham v. Florida*]. The AACAP, founded in 1953, “is comprised of over 7,500 child and adolescent psychiatrists and other interested physicians.” *Id.* at *1.

and why adolescent behavior differs from adult behavior.⁴³

As the AACAP points out, the Supreme Court has written several decisions prior to *Roper* and *Graham* that discuss the differences between adults and children.⁴⁴ The most notable opinions from the Court recognizing that children are different from adults are in *Haley v. Ohio* and later, in *Gallegos v. Colorado*.⁴⁵ In analyzing the voluntariness of confessions by fifteen and fourteen-year-old boys, respectively, in *Haley*, Justice Douglas wrote:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 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. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic Short of the point where he became the victim of coercion.⁴⁶

Later, in 1962, the United States Supreme Court again wrote about this issue in *Gallegos*. Justice Douglas, using *Haley* as the foundation,⁴⁷ stated:

The prosecution says that the youth and immaturity of the petitioner and the five day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the con-

43. See Brief for AMA and AACAP Supporting Neither Party, *Graham v. Florida*, *supra* note 42, at *2.

44. In *Re Gault*, 387 U.S. 1, 28 (1967) (“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”); *Id.* at 35 (“The parent and the probation officer may be relied upon to protect the infant’s interests.”); *Id.* at 46 (referring to the Arizona statute that it later found unconstitutional, in favor of a child’s right to counsel); *Id.* at 48 (“With respect to juveniles, both common observation and expert opinion emphasize that the ‘distrust of confessions made in certain situations’ . . . is imperative in the case of children from an early age through adolescence.”); *Gallegos v. Colorado*, 370 U.S. 49, 53 (1962); *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948) (showing that it is of significance that the child was convicted in adult court and not juvenile court).

45. See *Gallegos*, 370 U.S. at 49; *Haley*, 332 U.S. at 596.

46. *Haley*, 332 U.S. at 599–600.

47. *Gallegos*, 370 U.S. at 49.

sequences of his admissions. He would have no way of knowing what the consequences of his confessions of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights – from someone concerned with securing him those rights – and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14 year old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand, would, in effect, be to treat his as if he had no constitutional rights.⁴⁸

In *Roper*, the Court recognized that legislatures have enacted many laws that prohibit children and teenagers from engaging in “adult” activities, such as those establishing a minimum age to vote,⁴⁹ a minimum age for jury service,⁵⁰ and a minimum age for marriage without parental or judicial consent.⁵¹

Although the Supreme Court discusses the AACAP amici in *Roper*⁵² and *Graham*⁵³ and tells the lower courts that children are categorically different,⁵⁴ the lower courts do not necessarily understand how to use that information in sentencing proceedings. Lower courts still need to learn what the “differences” between children and adults mean and how, over time, children develop the ability for change – as part of the maturation process – based on biological information.

In *Graham*, the AACAP’s brief⁵⁵ explains the biological underpin-

48. *Gallegos*, 370 U.S. at 54–55; see *Graham*, 130 S.Ct. at 2032 (citing to Brief for NAACP Supporting Petitioners, *Graham v. Florida*, *supra* note 15, at *7–12; Henning, *supra* note 15, at 272–73). The *Graham* court elaborated by stating:

What we now know about adolescent development contradicts the proposition in *Halley* and *Gallegos* that interested adult advice would in fact assist the child in making decisions that consider the long-term consequences of that decision. Evidence suggests lawyers representing children in delinquency and criminal court proceedings have difficulty forming relationships with child clients because of an inherent distrust of adults. The nature of adolescence has an impact on the ability of counsel to adequately represent young clients.

Graham, 130 S.Ct. at 2032.

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

50. *Roper*, 543 U.S. at 579–88.

51. *Id.*

52. See *id.* at 569.

53. See *Graham*, 130 S.Ct. at 2026.

54. See *id.* at 2026 (“[T]heir characteristics are ‘not as well formed’ Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’” (quoting *Roper*, 543 U.S. at 569–70)).

55. For purposes of this article, the authors chose to extrapolate the explanation behind the

nings of why children, as a category, are different.⁵⁶ The brief, filed on neither party's behalf, focuses on what science can inform the courts about physiological, emotional, and behavioral development of adolescents from the perspective of researchers and medical professionals. Children between the ages of twelve and seventeen "as a group, are less capable than adults of accurately assessing risks and rewards; controlling their impulses; and recognizing and regulating emotional response . . ." with impulsivity declining up to the age of thirty.⁵⁷ Children are "less consistent in their ability to self-regulate behavior."⁵⁸

"Researchers have found that these limitations are especially pronounced when other factors – such as stress and emotions – enter the equation."⁵⁹ These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, cognition, and voluntary behavior in teenagers is particularly complex. Adolescents are more susceptible to stress from daily events than adults, which creates further distortion of their already skewed cost-benefit analysis.⁶⁰

Reward Sensitivity – Evaluating Risks

Risk-taking/sensation-seeking is pervasive during adolescence.⁶¹ Children can perceive a risk, just as an adult can. The difference, however, is that children take more risks because they cannot evaluate the consequences of the risky behavior as an adult would.⁶² Children are not different from adults because they cannot distinguish right from wrong per se, but they are different from adults because their psychosocial limitations make them more reward seeking, making them vulnerable to risky behav-

brain science from the *Graham* amici briefs filed by the AMA and the AACAP, which show a clearer explanation of how the developmental differences between children and adults are based on brain science findings.

56. See Brief for AMA and AACAP Supporting Neither Party, *Graham v. Florida*, *supra* note 42, at *2–3 (noting that science cannot gauge moral culpability).

57. *Id.* at *4.

58. *Id.*

59. *Id.* at *11.

60. *Id.* at 12; see Linda P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REV. 417, 421 (2000); see also Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 22 (1992).

61. See Brief for AMA and AACAP Supporting Neither Party, *Graham v. Florida*, *supra* note 42, at *6.

62. See Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 230–31 (1995).

ior.⁶³ As compared to adults, children make decisions based on the immediate benefits, not the risk, because of adolescence, and also in part due to their lack of experience in life.⁶⁴

Emotional Regulation and Peer Pressure

Controlling emotional reactions to stimuli is difficult for children. Their emotions are erratic, irrational, and influenced during puberty even though they are biologically improving cognitively.⁶⁵ As a result, emotions impact children's ability to control their behavior. Many social situations, especially those involving social interactions (particularly, peer pressure) arouse emotions of fear, rejection, or desire to impress friends, which can undermine the reliability of adolescent behavioral control systems and result in them taking actions without fully considering or appreciating the consequences.⁶⁶ Adolescents become more distant with their parents and increase the frequency and intensity of peer interaction at a time when they are most vulnerable to outside influences.⁶⁷ Children conform to social pressure and less to parental guidance.

Children who engage in unlawful activity tend to do so with peers. Adults, on the other hand, tend to commit crimes alone. In almost every case where the United States Supreme Court issued an opinion relating to children in the criminal and juvenile justice systems, the child committed the act for which he or she was convicted with peers, illustrating the salient

63. See generally Praveen Kamban & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173, 176 (2009); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764 (2008).

64. See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 163 (1997).

65. See Samantha Schad, Note, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 J. HEALTH CARE L. & POL'Y 375, 382, 400–01 (2011) ("Decisions to commit a crime almost always occur 'in situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced.'"). See generally Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1009, 1011–13 (2003) ("[J]uveniles should not be held to the same standards of criminal responsibility as adults, because adolescents' decision-making capacity is diminished, they are less able to resist coercive influence, and their character is still undergoing change.").

66. B.J. Casey et. al, *The Adolescent Brain*, 28 DEV. REV. 62, 68 (2008).

67. Steinberg & Scott, *supra* note 65, at 1012 ("Susceptibility to peer influence increases between childhood and early adolescence as adolescents begin to individuate from parental control . . .").

factors related to emotional regulation and peer pressure. Here are a few key examples:

John Harvey Haley, a fifteen-year-old, allegedly robbed a confectionary store near midnight on October 14, 1945. Haley was accompanied by a sixteen-year-old and a seventeen-year-old; he had only acted as a lookout.⁶⁸

Robert Gallegos, a fourteen-year-old, and another juvenile (his younger brother, Richard) followed an elderly man to a hotel, got into his room on a ruse, assaulted him, overpowered him, stole \$13 from his pockets, and then fled.⁶⁹

Gerald Gault, a fifteen-year-old, was with a friend, Ronald Lewis, when he was taken into custody after a neighbor, Mrs. Cook, complained about a telephone call made to her in which the caller or callers made lewd or indecent remarks. Gerald was still on probation for having been in the company of another boy who had stolen a wallet from a lady's purse.⁷⁰

Gregory Martin, a fourteen-year-old, was arrested and charged with first degree robbery, second degree assault, and criminal possession of a weapon based on an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers.⁷¹

Christopher Simmons, a seventeen-year-old, was a junior in high school when he committed murder. Simmons discussed his plan with two friends. He also assured his friends they could "get away with it" because they were minors.⁷²

Terrance Graham, a sixteen-year-old, was with three other school-age boys when they attempted to rob a barbeque restaurant.⁷³

68. *Haley v. Ohio*, 332 U.S. 596, 597 (1948) (holding that a fifteen-year-old Negro boy's due process rights were violated when he involuntarily confessed to murder after five hours of interrogation, which began at midnight, by police officers who failed to advise him of his rights, as well as his opportunity to seek advice from friends, family, or counsel).

69. *Gallegos v. Colorado*, 370 U.S. 49, 49 (1962) (holding that despite the petitioner's previous confessions, the confession petitioner made to the officers after being held for five days without being able to seek the advice from his parents or a lawyer, was procured in violation of his due process rights).

70. *In Re Gault*, 387 U.S. 1, 4 (1967).

71. *Schall v. Martin*, 467 U.S. 253, 257 (1984).

72. *Roper v. Simmons*, 543 U.S. 551, 600 (2005) (holding the Eighth and Fourteenth Amendments prohibit the execution of juveniles under age eighteen when they committed their crimes).

73. *Graham v. Florida*, 130 S.Ct. 2011, 2018 (2010) (finding life without parole sentences for non-homicide juvenile offenders violate the Eighth Amendment).

Impulse Control

Adolescents have observable limitations with their ability to control impulses.⁷⁴ “The ability to control one’s impulsive reactions to an event or problem is necessary to achieve adult levels of problem solving ability, logical reasoning, and the consistent exercise of good judgment.”⁷⁵ Self-control increases gradually throughout adolescence and into young adulthood.⁷⁶ Impulsivity declines between the ages of ten and thirty.⁷⁷

THE AACAP’S POLICIES ON JUVENILE LIFE WITHOUT PAROLE

The AACAP filed an amici brief in *Roper*,⁷⁸ *Graham*,⁷⁹ and most recently, in *Miller v. Alabama*,⁸⁰ for the purpose of providing information to

74. See Brief for Am. Med. Ass’n et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03–633), 2004 WL 1633549, at *2–3 [hereinafter Brief for AMA et al. Supporting Respondent, *Roper v. Simmons*]. Brain imaging research, using Magnetic Resonance Imaging and other techniques, has shown that adult and juvenile brains differ significantly, and these differences increase juveniles’ aggression and risk-taking behavior while diminishing their judgment and ability to control impulses. *Id.*

75. Brief for the Am. Med. Ass’n & the Am. Acad. of Child & Adolescent Psychiatry et al. as Amici Curiae in Support of Neither Party, *Miller v. State*, 132 S.Ct. 548 (2012) (Nos. 10–9646 & 10–9647), 2012 WL 174239, at *10 [hereinafter Brief for AMA et al. in Support of Neither Party, *Miller v. State*].

76. See Steinberg & Scott, *supra* note 65, at 1765.

77. *Id.* at 1766.

78. See Brief for AMA et al. Supporting Respondent, *Roper v. Simmons*, *supra* note 74. The American Academy of Child and Adolescent Psychiatrists filed as amici with the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association in support of the Respondent, Christopher Simmons. *Id.* at *1.

79. See Brief for NAACP Supporting Petitioners, *Graham v. Florida*, *supra* note 15. The American Academy of Child & Adolescent Psychiatry filed as amicus with the American Medical Association in support of neither party, simply stating that the amici hope the Court will consider the scientific evidence provided in its brief in its deliberations about whether or not the Eighth Amendment prohibits the imposition of life without parole for non-homicide juvenile offenders. *Id.* at *2–3.

80. See Brief for AMA et al. in Support of Neither Party, *Miller v. State*, *supra* note 75, at *1 (serving as amicus brief for both *Miller* and *Jackson v. Hobbs*, 368 Ark. 610 (Ark. 2007)); *Argument Audio Detail* – *Miller v. Alabama*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-9646 (last visited May 1, 2012). *Miller* featured a challenge of the constitutionality of LWOP for children who committed a homicide crime at the age of fourteen. *Miller*, 63 So. 3d, at 686. The case was argued before the United States Supreme Court on March 20, 2012. *Argument Audio Detail* – *Miller v. Alabama*, *supra*. The American Academy of Child & Adolescent Psychiatry filed as amicus with the American Medical Association in support of neither party, simply stating that the amici hope the Court will consider the scientific evidence provided in its brief in its deliberations about whether or not the Eighth Amendment prohibits the imposition of life without parole for juvenile homicide offenders at the age of thirteen and fourteen. Brief for AMA et al. in Support

the Court on the brain science of adolescent development. In addition to these briefs, the AACAP has issued policy statements through its Juvenile Justice Committee regarding juvenile death sentences. The AACAP's 2009 policy statement states:

Adolescents differ from adults in the way they behave, solve problems, and make decisions. There is a biological explanation for these differences. Recent research has demonstrated that the brain continues to mature and develop throughout adolescence and into early adulthood. Neuroimaging studies have also shown that adolescents use their brains in fundamentally different ways than adults. As a result, they are more likely to respond impulsively, utilizing a more primitive part of their brain. They are also less likely to stop, think things through, and analyze the consequences of their actions

The deterrent value of life without parole has yet to be demonstrated. It is particularly unlikely to deter adolescents from crime, as they tend to live in the present, think of themselves as invincible, and have difficulty contemplating the long-term consequences of their behavior. A primary focus of the juvenile court system has always been rehabilitation. This goal is now more attainable than ever through the use of improved assessment tools, effective community intervention programs, and treatment for underlying psychiatric disorders. Therefore, the American Academy of Child and Adolescent Psychiatry strongly opposes the imposition of life without parole for crimes committed as juveniles.⁸¹

In reaction to the debate in various states over how to respond to *Graham*,⁸² the AACAP's Juvenile Justice Reform Committee responded by issuing a proposed policy for juveniles facing life without parole. This time, the AACAP provided guidance on the how states should conduct reviews of sentences:

There are currently over 2500 people serving life without parole for crimes committed as juveniles. In 2010, the Supreme Court declared such sentences to be unconstitutional for crimes other than homicide. As a result, at least 125 of these individuals will soon have their sentences reviewed. Juvenile offenders serving life without parole should have an initial review of their sentences within five years of sentencing or by age 25, whichever comes first. As maturation and rehabilitation are ongoing processes, subsequent reviews should occur no less than every three years. Research demonstrates that brain development con-

of Neither Party, *Miller v. State*, *supra*.

81. Juv. Just. Reform Committee, *Life Without Parole for Juvenile Offenders*, AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (June 2009), available at http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders (last visited May 1, 2012).

82. See *infra* Part IV.

tinues throughout adolescence and into early adulthood. The frontal lobes, which are critical for mature reasoning and impulse control, are among the last areas of the brain to mature. They are not fully developed until the early to mid-20's.

Any sentence review must include a review of educational and court documents as well as a comprehensive mental health evaluation, conducted by a child mental health professional, such as a child and adolescent psychiatrist. The mental health evaluation must include a family interview, prenatal history, developmental history, medical history, academic history, legal history, history of mental health interventions, history of treatment for substance use, social history and a psychological evaluation.⁸³

STATES' RESPONSE SINCE THE *GRAHAM* DECISION

Thirty-seven states, the District of Columbia, and the federal government permit sentencing children to life without the possibility of parole.⁸⁴ As a result of *Graham*, states have had to develop mechanisms to eliminate life without the possibility of parole, such as merely converting sentences to life with the possibility of parole (just like how states had to convert death sentences to life without parole after *Roper*).⁸⁵ States also have had to consider legislation to revise statutes that permit life without the possibility of parole to ensure the systems have the capacity to provide a meaningful opportunity for release based on maturity and rehabilitation, which may mean parole.⁸⁶ However, there is no requirement that states have parole.⁸⁷ Sixteen states have eliminated parole.⁸⁸ In these states, there is no

83. *Id.*

84. See *Graham v. Florida*, 130 S.Ct. 2011, 2034–35 (2010) (identifying the following jurisdictions as permitting life without the possibility of parole for juvenile non-homicide offenders: Alabama, Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the Federal system).

85. See, e.g., *Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010) (holding that when a juvenile commits a non-homicide offense and is sentenced to life imprisonment without the possibility of parole, the sentence should be changed to life imprisonment with the possibility of parole); *State v. Macon*, No. 46,696–KA, 2012 WL 204496, at *7–8 (La. Ct. App. 2012) (holding that when a defendant is convicted of rape while a juvenile and sentenced to serve life in prison without parole, the sentence should be amended and the restriction on parole eligibility should be deleted).

86. See *infra* Part IV.b (finding that although some states have attempted to change statutes to comply with *Graham*, very little progress has been made statutorily).

87. *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 19 (1979) (Powell, J., concurring) (“Nothing in the Constitution requires a State to provide for probation or parole.”).

88. TIMOTHY A. HUGHES ET AL., *supra* note 20, at 1–2 (reporting that sixteen states abol-

easy solution. People serving life without parole sentences for non-homicide offenses committed while they were juveniles must be resentenced.

IMPLEMENTATION OF GRAHAM'S MANDATE BY STATE AND APPELLATE COURTS

Since *Graham*, there have been many decisions applying its concepts to sentences given to children for non-homicide offenses.⁸⁹ Several courts have found "virtual life" or "de facto life" sentences constitutional. In California, trial courts have given lengthy sentences that are tantamount to a life sentence, which must be served before becoming eligible for parole.⁹⁰ In Florida, a court has held as constitutional a 90, 70, and 50-year determinate sentence.⁹¹ In Arizona, a sentence of 139 years was found constitutional.⁹² In Virginia, its supreme court held that a geriatric parole provision that allows any inmate over sixty to be eligible for parole is sufficient to meet the *Graham* mandate for a meaningful opportunity for review.⁹³

One federal district court struggled to find a way to make the federal mandatory minimum sentencing scheme constitutional pursuant to *Graham*.⁹⁴ The defendant child in *United States v. Mathurin* faced a manda-

ished discretionary parole for all offenses while four additional states abolished it only for certain violent offenses). Arizona, California, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin have all abolished discretionary parole for all offenses. *Id.* at 2. Alaska, Louisiana, New York and Tennessee have abolished discretionary parole only for some violent offenses. *Id.*

89. *Contra* Miller v. Alabama, 63 So. 3d 676, 686–88 (Ala. Crim. App. 2010), *cert. granted*, 132 S.Ct 548 (Nov. 7, 2011) (No. 10–9646) (addressing the pending issue of whether *Graham* should be extended to homicide offenses).

90. *People v. Caballero*, 119 Cal. Rptr.3d 920, 925–27 (Cal. Ct. App. 2011), *cert. granted*, 250 P.3d 179 (Cal. 2011) (noting that the court upheld a 110-year life sentence and explicitly rejected the idea that *Graham* should apply to virtual life cases). *But see* *People v. Kidd*, Nos. C062075, C062512, 2012 WL 243250, at *20–23 (Cal. App. 3d Jan. 26, 2012) (stating it was unconstitutional for the court to have held that a fifteen-year-old must serve a sentence of 90.5 years and a seventeen-year-old must serve a sentence of 85 years before being eligible for parole).

91. *Henry v. State*, Nos. 5D08–3779, 5D10–3021, 2012 WL 162005, at *2, *5 (Fla. Dist. Ct. App. Jan. 20, 2012).

92. *State v. Kasic*, 265 P.3d 410, 415 (Ariz. App. 2011). The court relied on the fact that the total number of years was based on consecutive sentences for thirty-two felony convictions, seven incidents of which were for arson, with the longest sentence for any single count being 15.75 years. *Id.* The court distinguished this from *Graham* who was sentenced to life for a single felony. *Id.*

93. *Angel v. Commonwealth*, 704 S.E.2d 386, 401–02 (Va. 2011) (citing VA. CODE ANN. § 53.1–40.01).

94. *See* *United States v. Mathurin*, No. 09–21075–Cr., 2011 WL 2580775, at *6 (S.D. Fla. June 29, 2011).

tory minimum sentence of 307 years.⁹⁵ Congress had eliminated parole in 1984.⁹⁶ The judge sentenced the youth to forty-one years.⁹⁷ The judge concluded that the youth could demonstrate maturity and rehabilitation and earn a reduction in his sentence through good time calculations.⁹⁸

What is missing in each of these cases is any clear guidance to the lower courts on what criteria should be used in providing a meaningful opportunity for review. Some courts have described what the trial courts are considering, but little has been said definitively about what should be considered to meet the Supreme Court's mandate in *Graham*.⁹⁹

California case law, however, provides some criteria. Even before *Graham*, whenever a state constitutional claim was raised, courts conducted an analysis of the defendant and the crime.¹⁰⁰ For example, in *People v. Lugo*, the court rejected a categorical challenge to the sentence under *Graham*,¹⁰¹ but it conducted a detailed analysis of the defendant and the crime.¹⁰² The court considered the age of the youth,¹⁰³ the influence of

95. *Id.* at *1–2.

96. *Id.* at *2 (citing Pub. L. No. 98473, 98 Stat. 2019 (1987)).

97. *See id.* at *6.

98. *Id.*

99. *See Moore v. Warden*, No. 1:11-cv-155, 2012 WL 748386, at *11 (S.D. Ohio Mar. 8, 2012); *Silas v. Pennsylvania*, No. 08–0659, 2011 WL 4359973, at *2 (E.D. Pa. Sept. 19, 2011).

100. *See People v. Dillon*, 34 Cal. 3d 441, 475–76, 79 (1983). The California Supreme Court lays out a detailed analysis:

With respect to ‘the nature of the offense,’ we recognize that when it is viewed in the abstract robbery-murder presents a very high level of such danger, second only to deliberate and premeditated murder with malice aforethought. In conducting this inquiry, however, the courts are to consider not only the offense in the abstract – i.e., as defined by the Legislature – but also ‘the facts of the crime in question’ – i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.

Secondly, it is obvious that the courts must also view ‘the nature of the offender’ in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual. Our opinion in *Lynch*, for example, concludes by observing that the punishment in question not only fails to fit the crime, ‘it does not fit the criminal.’ This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.

Id. at 479 (citations omitted).

101. *People v. Lugo*, No. G044200, 2012 WL 268536, at *10–12 (Cal. Ct. App. Jan. 30, 2012) (affirming the children's trial court sentences of life in prison with the possibility of parole after fifty years of incarceration).

102. *See id.* at *13–15; *see also* Transcript of Record at 62–63, 78, *Peters v. State* (Fla. Cir. Ct. Jan. 24, 2011) (Nos. 561989CF002911B, 561989CF002910B, 561989CF003068A, 561989CF002919B, 561989CF002909B, 561989CF002908B), *aff'd* 984 So. 2d 1262 (Fla. Dist. Ct. App. 2008) [hereinafter *Peters Transcript*]. A Florida Assistant State Attorney had also previously made this argument (that the defendant had an opportunity to reduce his sentence if he was

peers,¹⁰⁴ and that each youth had prior offenses.¹⁰⁵ The court balanced these factors against the circumstances of the offense.¹⁰⁶ The crimes were gang related and premeditated.¹⁰⁷ The fourteen-year-old defendant solicited others to help him and he specified particular weapons to be used.¹⁰⁸ The fifteen-year-old defendant stayed longer than the others involved and returned to the victim to further beat him after the others left.¹⁰⁹ Based on this analysis, the court found the mandatory minimum of fifty years constitutional.¹¹⁰

In another California case, the defendant was convicted of numerous offenses against four victims, including “two counts of sodomy by force, two counts of kidnapping to commit robbery, two counts of dissuading a witness by force, two counts of second degree robbery, kidnapping to commit a sexual offense, forcible oral copulation, and attempted second degree robbery.” The defendant was sentenced to fifty years to life plus two consecutive life terms, with a minimum period of actual confinement of fifty-six and one-half years.¹¹¹ The appellate court, in reviewing the sentence using the California-mandated review of the nature of the offense and the characteristics of the offender, concluded that the offenses “were particularly heinous.” It also considered life expectancy tables and concluded that the sentence was equivalent to life.¹¹² However, in balancing the background of the offender, the court concluded his “age at the time of the offenses, his poor upbringing, and his substandard intelligence render his sentence unconstitutional under federal and California proportionality tests.”¹¹³

“perfect” based on gain time provided by the Florida Department of Corrections) in a *Graham* resentencing proceeding. See Peters Transcript, *supra*.

103. *Lugo*, 2012 WL 268536, at *9 (explaining that at the time of the offenses, the children were fourteen and fifteen years of age).

104. *Id.* at *13.

105. *Id.* at *15 (recognizing that the offenders committed the crimes alongside older fellow gang members).

106. *Id.* at *14–15. (“[W]e nonetheless must consider the circumstances and the nature of the crimes they committed.”).

107. *Id.* at *15.

108. *Id.*

109. *Lugo*, 2012 WL, at *15.

110. *See id.*

111. *People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 144 (Cal. Ct. App. 2011).

112. *Id.* at 149 (“Although J.A.’s sentence is not technically an LWOP sentence, it is a de facto LWOP sentence because he is not *eligible* for parole until about the time he is expected to die.”).

113. *Id.* at 152. The court found that J.A., who was fourteen-years-old at the time of the offense, had been a victim of sexual abuse when he was six years old. *Id.* at 152–53. “His father and his stepfather, who both had substance abuse problems, emotionally and physically abused J.A. . . .” *Id.* at 153. He began drinking and smoking marijuana at twelve or thirteen years of age

Under this analysis, the court reduced his mandatory sentence to forty-two and one-half years.¹¹⁴

In a case before the Alaska Court of Appeals, which involved a defendant who was sixteen years old at the time of the offense, the court permitted a review of two non-statutory mitigating factors: extraordinary potential for rehabilitation and developmental immaturity.¹¹⁵ However, the court rejected the second factor of developmental immaturity, which relied on adolescent brain science.¹¹⁶ The court concluded that permitting the factor of developmental immaturity would undermine the legislative intent expressed in the decision to prosecute sixteen and seventeen-year-old defendants in adult court.¹¹⁷

Without guidance, it is evident that courts will continue to render verdicts that are based on varying evidence that specifically contradict the Supreme Court's mandate that the severity of the crime itself is not enough to provide a meaningful opportunity for review.¹¹⁸

LEGISLATIVE RESPONSES TO GRAHAM

In most states, there are offenses that mandate either a death sentence or a sentence of life without the possibility of parole. If a child is charged and convicted of those offenses, courts would have no choice but to ignore the law to avoid a constitutional violation under *Roper* and *Graham*.¹¹⁹ To truly implement *Graham*, legislatures need to revise the considerations parole commissions use to mandate review to make the considerations based on maturity and rehabilitation, as mandated by the Supreme Court.¹²⁰ States that eliminated parole must enact new laws that reflect the categorical holding that children are different.¹²¹ Some states have attempted to address some of these problems but only one state has enacted a new law in response to *Graham*: Iowa.

and was in "the mentally deficient range." *Id.* The court concluded he "had no parental guidance, and he was free to behave as he wished . . ." *Id.*

114. *Id.* at 154.

115. *Smith v. State*, 258 P.3d 913, 914 (Alaska Ct. App. 2011). Although this case did not involve a life sentence, the defendant brought up the *Graham* case to seek a lower sentence. *See id.* at 919–20 (citing *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010)).

116. *Id.* at 919–20 (reasoning that the proposed factor would apply to all offenders in their teens and early twenties).

117. *See id.* at 920–23.

118. *See id.* at 920.

119. *See, e.g., Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010).

120. *See infra* Part V.

121. *See, e.g., United States v. Mathurin*, No. 09–21075–Cr., 2011 WL 2580775 (S.D. Fla. June 29, 2011).

The Iowa legislature changed its law to respond to the *Graham* mandate. Before *Graham*, Iowa had a statute that provided that anyone convicted of a “Class A” felony will be sentenced to life without parole.¹²² However, in the 2011 session, the Iowa legislature created an exception for anyone who was under the age of eighteen at the time of the offense.¹²³ Offenders who fall within this exception are eligible for parole after serving twenty-five years.¹²⁴

Four other state legislatures have considered bills related to *Graham* issues: California, Pennsylvania, Florida, and Louisiana. However, none of these bills have passed. The bill in California has been moving its way through the legislature since December 2010.¹²⁵ The proposed legislation permits any defendant sentenced to life without the possibility of parole to seek a resentencing after fifteen years.¹²⁶ The bill, which also applies to some homicide offenders, is beyond the category of youth presented to the Supreme Court in *Graham*.¹²⁷ The bill excludes relief to those who tortured their victim or committed an offense against a public safety official.¹²⁸ The bill requires a defendant to meet certain criteria before seeking relief that balance the characteristics of the defendant during childhood and adolescence.¹²⁹ The person seeking relief has the burden of proving his or her remorse and rehabilitation,¹³⁰ must have no prior history of violent juvenile offenses,¹³¹ and have no disciplinary referrals in the last five years.¹³²

122. IOWA CODE ANN. § 902.1(1) (West 2012).

123. 2011 Iowa Legis. Serv. 38 (West 2012) (“Notwithstanding subsection one, a person convicted of a class ‘A’ felony, and who was under the age of eighteen at the time the offense was committed shall be eligible for parole after serving a minimum term of confinement of twenty-five years.”).

124. IOWA CODE ANN. § 902.1(2)(a).

125. S.B. 9, 2011 Leg., Reg. Sess. (Cal. 2011). Senate Bill 9: An Act to Amend Section 1170 of the Penal Code, Relating to Sentencing was introduced by Senator Leland Lee on December 6, 2010. See Bill History, CAL. LEGIS. INFO., http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120202_history.html (last visited May 1, 2012).

126. Cal. S.B. 9 § 1(d)(2)(A)(i). If the petition is denied, the defendant can seek relief again after twenty years, twenty-four years, and once more at twenty-five years. *Id.* § 1(d)(2)(H).

127. *Id.* § 1(d)(2)(B)(i) (permitting relief for those convicted of felony murder or aiding and abetting murder). But see *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010).

128. Cal. S.B. 9 § 1(d)(2)(A)(ii). It is not clear how this provision would survive constitutional scrutiny under *Graham*. See *Graham*, 130 S.Ct. at 2030.

129. See Cal. S.B. 9 § 1(d)(2)(F)(i)–(viii).

130. See *id.* § 1(d)(2)(B). Some indicators of rehabilitation include participating in educational or vocational programs (if those programs were available), using self-study for self-improvement, or showing remorse. *Id.* § 1(d)(2)(B)(iv).

131. *Id.* § 1(d)(2)(B)(ii).

132. *Id.* § 1(d)(2)(F)(viii).

The trial court may consider other factors, such as: whether an adult codefendant participated in the offense; whether the defendant at the time lacked adult supervision and “suffered from psychological or physical trauma, or significant stress”; whether “the defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that . . . influenced the defendant’s involvement in the offense”; and whether “the defendant has maintained family ties.”¹³³ Under California’s proposed legislation, the court may resentence the person if he or she meets the statutory criteria.¹³⁴

Before the *Graham* decision, Pennsylvania legislators attempted to reform the sentencing of youthful offenders based on the age of the offender. In 2009, an age-based bill similar to the AACAP recommendation of age twenty-five was filed but did not pass.¹³⁵ The proposed legislation permitted a youthful offender who faced a life sentence to apply for parole at age thirty-one and every three years thereafter.¹³⁶ The bill prohibited a sentence of life without the possibility of parole for any person who committed an offense under the age of eighteen.¹³⁷

Legislative efforts to reform Florida’s practice of sentencing children to life without the possibility of parole also predates the mandates in the *Graham* decision. As early as the 2009 legislative session, there were efforts to provide relief to children sentenced to life or other long sentences.¹³⁸ Since *Graham*, there have been several efforts to bring Florida into compliance with the *Graham* mandate.¹³⁹ Initial efforts focused on

133. *Id.* § 1(d)(2)(F)(iii)–(v), (vii).

134. *Id.* § 1(d)(2)(G) (“The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B)”).

135. H.B. 1999, 2009 Gen. Assemb., Reg. Sess. (Pa. 2009), available at <http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?year=2009&sind=0&body=H&type=B&bn=1999>. See generally *Bill History, PA. GEN. ASSEMB.*,

http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2011&sind=0&body=H&type=B&bn=1999 (last visited May 1, 2012).

136. Pa. H.B. 1999 § 1(b).

137. *Id.* § 1(a)(1), (2).

138. See, e.g., S.B. 1430, 2009 Leg., Reg. Sess. (Fla. 2009), available at <http://archive.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s1430.pdf> (last visited May 1, 2012). Senate Bill 1430, the “Second Chance for Children in Prison Act of 2009,” allowed parole to persons who was fifteen years or younger when they committed an offense that led to a sentence of ten years or more. *Id.* §§ 1–

2(f)(1)(a).

139. In the 2012 Florida legislative session, there were two competing efforts. There was an effort to merely comply with *Graham* and give relief to non-homicide offenders facing life. See H.B. 5, 2012 Leg., Reg. Sess. (Fla. 2012), available at <http://www.flsenate.gov/Session/Bill/2012/0005/BillText/Filed/PDF>; S.B. 212, 2012 Leg., Reg.

giving offenders parole.¹⁴⁰ However, there is strong opposition to parole in Florida.¹⁴¹ The latest version of House Bill 5 allowed the person to petition for resentencing post-conviction.¹⁴² However, this effort failed in the last days of the 2012 legislative session.¹⁴³ This latest version also permitted resentencing for any juvenile offender who committed a non-homicide offense and was sentenced to life imprisonment if the offense occurred before the offender was eighteen years of age.¹⁴⁴ To get the resentencing, the offender must have served twenty-five years in prison and have had no prison disciplinary referrals in three years.¹⁴⁵

In resentencing an offender, the court must also find that the inmate demonstrates maturity and reform.¹⁴⁶ The court must also consider the following: whether the offender is at the same risk to society as he or she was at the time of the initial sentence; the wishes of the victim; the role of the offender in the crime; whether the offender has shown remorse; the offender's age, maturity and psychological development at the time of the of-

Sess. (Fla. 2012), available at <http://www.flsenate.gov/Session/Bill/2012/0212/BillText/Filed/PDF>. However, there was also an effort to revive the previous year's efforts to provide relief for a much broader group of inmates, including any inmate facing a sentence of ten years or more. See S.B. 92, 2012 Leg., Reg. Sess. (Fla. 2012), available at <http://www.flsenate.gov/Session/Bill/2012/0092/BillText/Filed/PDF>; H.B. 635, 2012 Leg., Reg. Sess. (Fla. 2012), available at <http://www.flsenate.gov/Session/Bill/2012/0635/BillText/Filed/PDF>. The analysis in the text will focus on the *Graham Compliance* bills. A version of these bills passed the House of Representatives and was on the agenda of the Senate when the session ended this year, whereas the *Second Chance* bill never reached any House committee. Compare *History of H.B. 5*, FLA. HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.com/Sections/Bills/billsdetail.aspx?BillId=47008>, with *History of S.B. 1430*, FLA. SENATE WEBSITE ARCHIVE, <http://archive.flsenate.gov> (Under "Jump to Bill" subheading on left-hand margin, select session year 2009 and enter bill number).

140. H.B. 29, 2011 Leg., Reg. Sess. (Fla. 2012), available at <http://www.flsenate.gov/Session/Bill/2011/0029/BillText/Filed/PDF>.

141. See FLA. STAT. § 921.002(1)(e) (2012) (stating that Florida's parole provisions are inapplicable to persons sentenced under Florida's Criminal Punishment Code); Jeff Kunerth, 'Graham Law' Would Replace Life Without Parole for Juveniles, ORLANDO SENTINEL (Apr. 12, 2011), http://articles.orlandosentinel.com/2011-04-12/features/os-life-without-parole-graham-20110412_1_terrance-graham-parole-juveniles ("Standing in the way of the bill . . . are powerful legislators who object to any form of parole for any group of Florida inmates.").

142. H.B. 5-c1, 2012 Leg., Reg. Sess. (Fla. 2012), available at <http://flsenate.gov/Session/Bill/2012/0005/BillText/c1/PDF>.

143. See *History of H.B. 5*, *supra* note 139 (noting that the bill died in the Criminal Justice subcommittee on March 9, 2012).

144. Fla. H.B. 5-c1 § 2(a).

145. *Id.* § 2(3).

146. *Id.* § 2(5).

fense; whether the offender has aided others while in prison; whether the offender has completed prison programs; whether the offender was a victim of abuse as a child; the results of any mental health assessments of the offender; the facts of the offense; and any other factors the court may have considered at the initial sentencing.¹⁴⁷ If the court resentenced the offender, the proposed legislation required the court to place the offender on probation for at least five years.¹⁴⁸ If the court denied the resentencing, the offender could petition the court for resentencing every seven years thereafter.¹⁴⁹

Lastly, in Louisiana, a bill to provide parole eligibility for children given life sentences was filed in 2011 but it failed to pass on the House floor.¹⁵⁰ The bill allowed persons to seek review of a life sentence after serving thirty-five years if they were sentenced for an offense committed prior to turning eighteen years old.¹⁵¹ The bill excluded those convicted of murder and required anyone convicted of rape to be considered a sex offender if released.¹⁵² To qualify for parole, the person could not have any prison disciplinary referrals for a year and must have completed a series of prison programs.¹⁵³

Although not considered by any states, one author has suggested that “[t]o comply with *Graham*, the States should create a separate classification, ‘juvenile life sentence offender,’ that mimics treatment provided for [serious or habitual juvenile offenders] and any other similar classifications of offenders.”¹⁵⁴ This may be a simple solution to the problem states face

147. *Id.* § 2(5)(a)–(k).

148. *Id.* § 2(6).

149. *Id.* § 2(7).

150. H.B. 115, 2011 Leg., Reg. Sess. (La. 2011), available at <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=11RS&billtype=HB&billno=115>. See generally *Bill History*, LA. STATE LEG., <http://www.legis.state.la.us/billdata/History.asp?sessionid=11RS&billid=HB115>.

151. La. H.B. 115 § 1(B)(2).

152. *Id.* § 1(B)(2)(g).

153. *Id.* § 1(B)(2)(a)–(f). Additionally, the offender would have to complete one hundred hours of pre-release programming, a reentry program, and, if applicable, receive substance abuse treatment and obtain a GED. *Id.* § 1(B)(2)(b)–(d), (f). Lastly, the offender must be considered low risk by the Department of Public Safety and Corrections. *Id.* § 1(B)(2)(e).

154. See Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 21–30 (2011) (analyzing Florida’s youthful offender statute and suggesting it could be modified to meet the *Graham* mandate). The author explains:

[T]he existing statutory framework [in Florida] provides a blueprint to model provisions for the ‘juvenile life sentence offender.’ It authorizes education and treatment programs outside the adult correctional system. These treatment options comply with

after *Graham*.

PAROLE – CHILDREN SHOULD BE EVALUATED DIFFERENTLY

In the majority of states, the *Graham* mandated review is conducted by parole boards. As a result, states that do not have a parole system could create some version of parole to review youthful offenders.¹⁵⁵ However, the mere existence of a parole board may not be enough to meet the mandate of *Graham*. The Court mandated that the states, at a minimum, allow youth to demonstrate maturity and rehabilitation.¹⁵⁶ Systemic reform of the sentencing and review process for children who commit non-homicide offenses must include review of existing parole boards. For parole to be an appropriate response to *Graham*, the state system of parole must include child-specific criteria, such as those suggested in some of the proposed legislation from the states pushing for reform.

The lack of information about parole systems and the reality that few people are released in the system gives the impression that they operate like a “Star Chamber.”¹⁵⁷ There are no parole systems in place that contemplate the differences between adults and children convicted before the age of eighteen. Most states give parole boards little guidance, if any, on criteria to consider when evaluating parole applications.¹⁵⁸ States rarely have any criteria addressing the youth of an offender when considering parole.¹⁵⁹ A few parole regulations may have a vague reference to considering the age

Graham’s mandate for meaningful opportunity for release. If the States fail to statutorily authorize programming options for the juvenile life sentence offender, the existing adult prison culture will counteract any rehabilitative efforts and obviate his potential release.

Id. at 25–26 (footnotes omitted).

155. See Wallace, *supra* note 16, at 67–68 (illustrating how parole provides juvenile offenders a “meaningful opportunity” to obtain release and reenter society).

156. *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010) (holding that although a state is not required to release juveniles, it must provide them a “meaningful opportunity” to seek release).

157. See *In re Gault*, 387 U.S. 1 (1967). The Court stated:

In 1937, Dean Pound wrote: ‘The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts’ The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

Id. at 18–19.

158. See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 576–77 (1994).

159. See, e.g., ARK. CODE ANN. § 16-93-614 (2012); COLO. REV. STAT. § 17-22.5-404 (2011); CONN. GEN. STAT. § 54-125a (2012); FLA. ADMIN. CODE ANN. r. 23-21.006 (2012).

of the offender at the time of the offense but not much more.¹⁶⁰

Maryland has one of the more detailed, statutorily created guidelines for its parole board.¹⁶¹ The board must consider the following factors when reviewing an application for release:

- (1) The circumstances surrounding the crime;
- (2) The physical, mental, and moral qualifications of the inmate;
- (3) The progress of the inmate during confinement, including the academic progress of the inmate in the mandatory education program . . . ;
- (4) A report on a drug or alcohol evaluation that has been conducted on the inmate, including any recommendations concerning the inmate's amenability for treatment and the availability of an appropriate treatment program;
- (5) Whether there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law;
- (6) Whether release of the inmate on parole is compatible with the welfare of society;
- (7) An updated victim impact statement or recommendation . . . ;
- (8) Any recommendation made by the sentencing judge at the time of sentencing;
- (9) Any information that is presented to a commissioner at a meeting with the victim; and
- (10) Any testimony presented to the Commission by the victim or the victim's designated representative¹⁶²

The Nevada Administrative Regulations provide a detailed list of aggravating and mitigating factors for a parole board to consider:

- (2) The aggravating factors which the Board may consider in determining whether to grant parole to a prisoner include, without limitation:
 - (a) Whether the nature of the crime committed by the prisoner was severe, extreme or abnormal;
 - (b) Whether the prisoner has previously been convicted of a crime;

160. See, e.g., 28 C.F.R. § 2.20(h) (2011).

161. See MD. CODE ANN., CORR. SERVS. § 7-305 (West 2012). Parole boards in other states also consider a litany of factors when determining whether an offender is suitable for release on parole. See, e.g., NEB. REV. ST. § 83-1,114 (2012).

162. MD. CODE ANN., CORR. SERVS. § 7-305. Michigan uses a similar set of considerations that are reflected in a detailed list of factors divided in three major categories: the nature of the offense, the prior history of the offender, and the offender's conduct during confinement. MICH. ADMIN. CODE r. 791.7716(3) (2011).

- (c) The number of occasions on which the prisoner has been incarcerated;
 - (d) Whether the prisoner has failed to complete probation or parole on three or more occasions;
 - (e) Whether the prisoner has committed a crime while incarcerated, during any period of release from confinement on bail, during any period of escape from an institution or facility or while on probation or parole;
 - (f) The extent to which the prisoner attempted to elude capture during or following the commission of a crime;
 - (g) The extent of the injury or loss suffered by the victim of the crime for which parole is being considered;
 - (h) Whether the prisoner has engaged in repetitive criminal conduct;
 - (i) Whether the prisoner has engaged in disruptive behavior while incarcerated;
 - (j) Whether the Department of Corrections has ever ordered the prisoner to be confined in disciplinary segregation;
 - (k) Whether the prisoner has committed increasingly serious crimes;
 - (l) Whether the prisoner has a history of failing to comply with the orders of a mental health professional for the treatment of a mental illness, including, without limitation, failing to comply with prescriptions for medication to treat a mental illness;
 - (m) Whether the prisoner demonstrates that he or she does not understand the nature of any diagnosed mental illness and whether that lack of understanding may contribute to future criminal behavior;
 - (n) Whether, in committing the crime for which parole is being considered, the prisoner targeted a child under the age of eighteen years or a person who is vulnerable because of his or her age or disability;
 - (o) Whether the prisoner has a history of possessing or using a weapon during the commission of a crime; and
 - (p) Any other factor which indicates an increased risk that the release of the prisoner on parole would be dangerous to society or the prisoner.
- (3) The mitigating factors which the Board may consider to determine whether to grant parole to a prisoner include, without limitation:
- (a) Whether the prisoner has participated in programs which address the behaviors of the prisoner that led to the commission of the crime for which parole is being considered;
 - (b) Whether the prisoner has no prior history, or a minimal history, of criminal convictions;

- (c) Whether the prisoner has not had any infractions of the rules of the institution or facility in which he or she has been incarcerated during the most recent two years if the lack of infractions is not a result of the confinement of the prisoner in disciplinary segregation;
- (d) Whether the prisoner has adjusted positively to a program for reentry of offenders and parolees into the community established by the Director of the Department of Corrections pursuant to NRS 209.4887 or a program of work release established by the Department of Corrections pursuant to NRS 213.300;
- (e) Whether the prisoner had less involvement in the commission of the crime for which parole is being considered than other persons who participated in the commission of the crime;
- (f) Whether the prisoner previously completed probation or parole successfully, other than probation imposed and supervised by a court;
- (g) Whether the prisoner has support available to him or her in the community or from his or her family;
- (h) Whether a stable release plan exists for the prisoner;
- (i) Whether the release of the prisoner is not a significant risk to society because the prisoner will be paroled to another jurisdiction for prosecution or deportation;
- (j) Whether the presentence investigation indicates that the crime for which parole is being considered was situational and that the prisoner did not intend to cause harm;
- (k) Whether the presentence investigation indicates that, prior to his or her arrest for the crime for which parole is being considered, the prisoner demonstrated immediate remorse for committing the crime by immediately and voluntarily turning himself or herself in to the proper authority, immediately and voluntarily seeking treatment to address the criminal behavior, immediately and voluntarily making restitution to the victims of the crime or taking any other voluntary action which demonstrates remorse;
- (l) Whether the prisoner has consistently managed a mental illness which may contribute to criminal behavior in the manner recommended by mental health professionals; and
- (m) Any other factor which indicates that the release of the prisoner on parole would benefit, or would not be dangerous to, society or the prisoner.¹⁶³

Even though this statute is one of the better ones, these criteria neither adequately address the circumstances of a child offender nor do they meet the

163. NEV. ADMIN. CODE § 213.518 (2012).

Supreme Court mandate that there be a focus on maturity and rehabilitation. Most systems focus on likelihood or risk of reoffending,¹⁶⁴ which is not something experts can determine with a high degree of accuracy.¹⁶⁵

CHILDREN ARE DIFFERENT – PRISONS ARE THE SAME

Child offenders entering prison face the same challenges as adults entering prison. However, children lack the mental or physical ability to make the adjustment to prison life.¹⁶⁶ In 1967, the Supreme Court recognized that incarceration even in the juvenile justice system, was a severe punishment. In *In re Gault*, the Court stated the following:

The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.¹⁶⁷

Prison survival depends on "emotional control, heightened guardedness, resistance to or modeling of violence and aggression, and an ability to negotiate the deceptive behaviors of others."¹⁶⁸ Given that children are limited in their ability to regulate their emotions and behavior, especially when other factors cause stress and emotion to enter the equation,¹⁶⁹ it is not surprising that they are ill-equipped to conform to prison and use violence to express anger or to protect themselves.¹⁷⁰ Studies show that fear and anger lead to violent and disruptive behavior – among all inmates –

164. See Palacios, *supra* note 158, at 573–77.

165. See JOHN HOWARD SOC'Y OF ALBERTA, OFFENDER RISK ASSESSMENT 8–9 (2000), available at <http://www.johnhoward.ab.ca/pub/pdf/C21.pdf> (discussing the unreliability of professional risk assessments of recidivism for offenders).

166. See AMNESTY INT'L HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 52 (2005) [hereinafter HUMAN RIGHTS WATCH], available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf> (explaining that children who are incarcerated may face issues such as lack of community connection, violence, exploitation, and lack of privacy).

167. *In re Gault*, 387 U.S. 1, 27 (1967) (footnotes omitted).

168. HUMAN RIGHTS WATCH, *supra* note 166, at 53 (citing Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3(4) PSYCHOL. PUB. POL'Y & L. 499, 533 (1997)).

169. See *id.* at 45–47 (discussing the psychological differences between adults and children in terms of maturity and rational decision-making).

170. *Id.* at 57.

with children becoming the more “volatile and difficult to deal with.”¹⁷¹

The testimony of a long-time employee of the Florida Department of Corrections during a 2011 Florida resentencing case illustrates the point. When asked about children in the adult system and how they struggle initially upon entry into the prison system, the witness testified:

A: You have to in effect look at a couple of things. Your life sentence inmates [. . .].

Q: Correct.

A: [O]nce they reach maturity age [. . .].

Q: Correct.

A: [T]hey’re your better inmates.

Q: Correct.

A: They know this is what they have to do. This is their life. And so they – you get other privileges based on being – behaving yourself and doing what you’re supposed to.

Q: So the older and more mature they get, the better inmates they are?

A: Right. Right.

Q: Okay. So the younger and less mature they are, they’re the ones [. . .].

A: Just like a kid.¹⁷²

Children also have a harder time adjusting to the reality of their sentence and remaining hopeful. “Negative psychological effects of imprisonment increase as incarceration continues, but begin to reverse as prisoners near the time of release.”¹⁷³

“[P]sychologists suggest that some prisoners, ‘especially those serv-

171. *Id.* (citing JAMES AUSTIN ET AL., BUREAU OF JUST. ASSISTANCE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 63 (2000)).

172. Peters Transcript, *supra* note 102, at 80. “Gain time” is time that is taken off the ultimate sentence for good behavior, program completion, and work programs; it is completely at the discretion of the Department based on the observations and personal knowledge of the Department employees who interact with the inmate. *See id.* at 40–43. Information is entered into a matrix by the security staff, work supervisor, dormitory officer, and the classification officer (caseload officer), the latter having discretion whether to add additional days to the inmate’s sentence. *Id.*

173. HUMAN RIGHTS WATCH, *supra* note 166, at 53. *See, for example,* Peter G. Garabedian, *Social Roles and Processes of Socialization in the Prison Community*, 11 SOC. PROBS. 139, 139–40 (1963–64); Stanton Wheeler, *Socialization in Correctional Communities*, 26 AM. SOC. REV. 697, 697 (1961), for documentation of increased effects. *See, for example,* John J. Gibbs, *The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting*, in THE PAINS OF IMPRISONMENT 100–01 (Robert Johnson & Hans Toch eds., 1982), for documentation of decreased effects.

ing very long sentences [use] withdrawal and self-imposed isolation . . . as a defensive reaction to the anticipated loss of . . . outside social support.”¹⁷⁴ “Using isolation as a defense takes its toll on prisoners who may experience ‘protracted depression, apathy and the development of a profound sense of hopelessness.’”¹⁷⁵

Terrance Graham’s sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.¹⁷⁶

Until children mature, they have a very short time-horizon, looking only a few days into the future.¹⁷⁷ For a fifteen-year-old, five years into the future may seem more distant than to a forty-year-old.¹⁷⁸ For children serving life without parole or long sentences, the negative psychological effects may never reverse because there is no release date or parole eligibility beyond a child’s life expectancy.¹⁷⁹

Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.¹⁸⁰

174. HUMAN RIGHTS WATCH, *supra* note 166, at 61 (quoting Haney, *supra* note 168, at 537).

175. *Id.* (quoting Haney, *supra* note 168, at 539 (citing Judith L. Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377, 377 (1992))).

176. *Graham v. Florida*, 130 S.Ct. 2011, 2033 (2010).

177. HUMAN RIGHTS WATCH, *supra* note 166, at 46 (citing Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD RTS. J. 16, 16–17 (1999); William Gardner & Janna Herman, *Adolescents’ AIDS Risk Taking: A Rational Choice Perspective*, 1990 NEW DIRECTIONS CHILD AND ADOLESCENT DEV. 17, 25–26 (1990)).

178. *See* Scott et al., *supra* note 62, at 231 (stating that it is more difficult for an adolescent than an adult to contemplate the consequences that will be realized in the future).

179. *See Graham*, 130 S.Ct. at 2027 (observing that LWOP is the denial of hope, leading to the realization that good behavior and character improvement are immaterial because the convict will stay in prison for the rest of his or her life).

180. *Id.* at 2028 (citations omitted).

THE STATE'S ROLE IN PREVENTING DEVELOPMENT

Young offenders are incarcerated during the years when education and skill development are most crucial.¹⁸¹ Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences.¹⁸² These policies can deny access to basic rehabilitative services – such as GED courses or Alcoholics Anonymous meetings – for inmates sentenced to life without parole as juveniles.¹⁸³

In *Graham*, the Court discussed the dilemma faced by juveniles serving life without parole sentences, particularly the states' lack of programming which could, in the Court's opinion, prevent children serving life without parole from demonstrating their worth and potential. The Court stated:

In some prisons, moreover, the system itself becomes complicit in the lack of development. . . . [I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.¹⁸⁴

Several States, including Florida, do not permit children serving life without parole or long sentences to participate in rehabilitative, educational, or vocational programs because there is either no release date or a release date beyond the life expectancy of the child. If programs are offered, they are available well beyond the critical formative years when those programs should be offered to children.

As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates.¹⁸⁵ For juvenile offenders, who are most in need of and receptive to rehabilitation,¹⁸⁶ the absence

181. See HUMAN RIGHTS WATCH, *supra* note 166, at 3.

182. See *id.* at 5 (explaining that juvenile inmates sentenced to life without parole have the least priority and may have difficulty accessing vocational programs).

183. Brief for Sentencing Project as Amicus Curiae in Support of Petitioners, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (Nos. 08–7412, 08–7621), 2009 WL 2219303, at *19 [hereinafter Brief for Sentencing Project] (citing HUMAN RIGHTS WATCH, WHEN I DIE, THEY'LL SEND ME HOME: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 56–57 (2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf>; ILLINOIS COALITION FOR THE FAIR SENTENCING OF CHILDREN, CATEGORICALLY LESS CULPABLE 21 (2008), available at http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf).

184. *Graham*, 130 S.Ct. at 2032–33 (citation omitted); see also HUMAN RIGHTS WATCH, *supra* note 166, at 5.

185. *Id.* at 2030 (citing Brief for Sentencing Project, *supra* note 183, at *11–13).

186. *Id.* (citing Brief for J. Lawrence Aber et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (Nos. 08–7412, 08–7621), 2009 WL 2236775, at *28–31).

of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.¹⁸⁷

In other cases, prison security classifications prevent juveniles from accessing vocational and other rehabilitative services. In California, for example, inmates are assigned security levels based in part on the severity of their sentence; state regulations mandate that inmates sentenced to life without parole receive a high security level that restricts their movement throughout the prison and their access to work programs. Unlike other inmates, they receive this high security classification regardless of their behavior – limiting the ability of juveniles to access rehabilitation services no matter how well they behave.¹⁸⁸

In Florida, it is the Department of Corrections' policy not to offer educational or vocational programs until two years of the person's release date. In one case, a person, after being incarcerated for over seven years, obtained eighteen certificates during the two years following the *Graham* decision. Unfortunately, the types of certificates he received were for participation in religious programs, certifying that he "faithfully participated in" programs on the history of Christianity and other religious topics, narcotics anonymous, and alcoholics anonymous programs run by outside clergy who were not certified clinicians, and a "good father program" (even though he has no children). He has had no educational or vocational training that may prepare him for re-entry because he is prohibited from participating in these kinds of programs because of his life sentence.¹⁸⁹

Cross-examination testimony taken in 2011 by a long-time employee of the Department of Corrections in a Florida *Graham* resentencing hearing confirmed the Department's classification policy¹⁹⁰:

Q: Now based on his life sentence, he's not eligible to even get certain – get in that – get in the class for certain incentive gain time; correct?

A: He is not – there is – there is no date to apply it to.

....

A: It does not apply to any sentence because of the nature of a life sentence.¹⁹¹

Q: Okay. A lot of the incentive gain time programs¹⁹² are based on you

187. *Id.*

188. Brief for Sentencing Project, *supra* note 183, at *12–13.

189. Peters Transcript, *supra* note 102, at 67. This is information from the testimony of the Department of Corrections expert at KP's *Graham* re-sentencing hearing. *Id.*

190. *Id.* The witness had been with the Department of Corrections for thirty-four years and received his training "on the job." *Id.* at 39–40.

191. *Id.* at 67.

192. *Id.* at 68. Incentive gain time programs include education, vocational, and substance

can – you’re not eligible for this program unless your – you have a release date within twenty-four months; correct?¹⁹³

A: We know we want to give them towards the end of their sentence so it will be more effective. Okay.

....

Q: All right. So over the past twenty years, he maybe wasn’t eligible for certain programs, but he was always given equally incentive programs that he could earn –

A: That is correct.¹⁹⁴

A: Now the other thing, the reason we give gain time, is not only for him to . . . do so they just don’t sit around all day.

Q: Do you know if he was on the wait list for [those programs?].¹⁹⁵

A: Oh. No.

Q: – because he didn’t have a release date . . . because there’s a waiting list obviously?

A: Right.

Q: Okay. You don’t know whether or not he’s on that waiting list and never got chosen because of his life sentence?

A: I don’t. I don’t know that.

....

Q: Okay. Now you – you’ve been with the Department how many years you said?

A: Almost thirty-four.¹⁹⁶

Based on the paucity of programming available to life without parole inmates, Human Rights Watch¹⁹⁷ called for the following changes to federal and state programs available:

Increase funding to states that eliminate life without parole sentences

abuse programs and are not only rehabilitative, but also result in a sixty-day sentence reduction. *Id.* at 67–75. Regular gain time is for doing a work program, and betterment programs are “just to better him, maybe help him in doing this time . . . Gavel club helps them in public speaking. Those types of programs are – or maybe your AA or NA.” *Id.* at 73.

193. *Id.* at 68.

194. *Id.* at 69.

195. Peters Transcript, *supra* note 102, at 70 (referring to educational and vocational programs).

196. *Id.* at 76–77.

197. “Human Rights Watch is one of the world’s leading independent organizations dedicated to defending and protecting human rights.” HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited May 1, 2012).

for child offenders in order to ensure state prisons can increase rehabilitative programs focused on helping such offenders to qualify for parole.

....

Child offenders serving life without parole should have access to all prison programs offered—educational, vocational, occupational, and other rehabilitative programs—regardless of the length of their sentence.

....

Provide mental health and social services to assist youth offenders in adjusting to prison conditions as well as in coping with the length of their sentences.¹⁹⁸

GUIDANCE SHOULD BE GIVEN TO DECISION MAKERS AT REVIEWS

Following the *Graham* decision, the question before the states is how to treat children who commit horrible offenses.¹⁹⁹ Ultimately, that decision will be made by many stakeholders. Legislators will continue to decide that certain offenses automatically go to adult court and others remain in juvenile court. Prosecutors will continue to have discretion over how to charge offenses and whether those charges will be brought in juvenile or adult

198. HUMAN RIGHTS WATCH, *supra* note 166, at 7–10.

199. See Gerard F. Glynn, *Arkansas' Missed Opportunity for Rehabilitation: Sending Children to Adult Courts*, 20 U. ARK. LITTLE ROCK L.J. 77, 77–78 (1997). The dialogue from and following *Graham* raises questions that may be of assistance in considering legislation to reduce sentences or provide eligibility for parole. Some questions include: 1) Is the child's crime one of unfortunate but transient immaturity?; 2) Could the child control his or her impulses at the time of the offense?; 3) Who and what influenced the child's behavior at the time of the offense?; 4) How did the child's family affect his ability to make sound judgments?; 5) Did the child have disabilities that affected his ability to make sound judgments?; 6) Is the child the rare offender whose crime reflects irreparable corruption?; 7) Has the child demonstrated maturity?; 8) Is the child rehabilitated?; 9) Are there mechanisms by which there are opportunities to engage in rehabilitative activities?; 9a) To what degree is the system itself complicit in the lack of development?; 10) Has the child had good behavior?; 10a) Is his incorrigible behavior corroborated by prison misbehavior?; 11) Has the child improved his or her character?; 12) Is the child's desire to engage in risky behavior diminished?; 13) Are the acts he committed as a child representative of his true character?; and 14) Does the child now understand the consequences of his actions? See generally *Graham v. Florida*, 130 S.Ct. 2011 (2010) (raising questions not addressed by Justice Kennedy in his opinion). These questions lead to the conclusion that states should go beyond the Supreme Court's mandate focusing on maturity and rehabilitation and review based on the following criteria: the offense; the child's role in the offense; who the child was at the time of the offense; and what kind of adult he or she has become. The Court's mandate was based on Constitutional limitations. The states should go beyond these minimal criteria because it is sound public policy to have a more comprehensive evaluation of the offenders. See *id.*

court. Then, judges will have the discretion to sentence.²⁰⁰

The *Graham* decision does not limit any of these decisions except the judges' decision to sentence life without parole. Life sentences for children are still permitted, but there has to be some meaningful opportunity for release.²⁰¹

THE OFFENSE

Most of the children given long sentences have been involved in very serious and heinous acts.²⁰² However, they rarely committed these acts alone. Many times, the children were involved with other teens. There are also many cases in which the children were led by adults.²⁰³ The evaluation of the offense should not focus merely on the horrible facts, but also, on the role of the child and the specific state of mind the child had at the time of the offense.

200. See Glynn, *supra* note 199, at 84–89.

201. *Graham*, 130 S.Ct. at 2034. The Court stated:

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Id.

202. See *State v. Green*, 348 N.C. 588, 600 (N.C. 1998); see also *Price v. State*, 683 So. 2d 44, 45 (Ala. Crim. App. 1996). In *Green*, the child was convicted of first-degree sexual offense, attempted first-degree rape, and first-degree burglary when he was thirteen-years-old. *Green*, 348 N.C. at 592–93. The Court of Appeals affirmed the trial court's ruling, finding that it was without error for the juvenile court judge to take into account the seriousness of the offense when formulating the disposition. *Id.* at 594. In *Price*, the child was convicted of murder and sentenced to twenty years of imprisonment and the Court of Criminal Appeals held that the statute requiring children charged with serious crimes to be tried as adults was constitutional. *Price*, 683 So. 2d at 45.

203. *Massachusetts Campaign for Smart, Fair Sentencing For Youth*, YOUTH ADVOC. DEP'T, <http://www.youthadvocacydepartment.org/about/about-jlwop.html> (last visited May 1, 2012). According to data from the Youth Advocacy Department in Massachusetts regarding children serving life without the possibility of parole in Massachusetts, "80% of the cases in which youth under the age of 17 acted with a co-defendant, the co-defendant was an adult. In all but one adult co-defendant case reviewed by the Children's Law Center of Massachusetts, the adult co-defendant received a lesser sentence than the juvenile." *Id.* Another report stated:

In a survey of the 146 juvenile lifers who were under seventeen at the time of the offense, nearly half report that they were either convicted on an 'aiding and abetting' theory, or that they were not the person who committed the murder. Nearly half of those who reported that they were not the principal had adult co-defendants.

ACLU OF MICH., SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 4 (2004), available at <http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf>; see also CHILD. L. CENTER OF MASS., UNTIL THEY DIE A NATURAL DEATH: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN MASSACHUSETTS 5 (2009), available at http://www.clcm.org/UntilTheyDieaNaturalDeath9_09.pdf.

Is the child's action one of unfortunate but transient immaturity? Could the child control his or her impulses at the time of the offense? Who and what influenced the child's behavior at the time of the offense?

THE CHILD OFFENDER

As the court states in *Graham*:

No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. 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. 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.' These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.²⁰⁴

To start, the meaningful review mandated by *Graham* should include a more substantial evaluation of the child at the time of the offense.²⁰⁵ As has been seen in many of the cases, children involved in serious crimes have often been abused or abandoned by their families, have disabilities, or are more immature than other adolescents. These characteristics should be considered mitigating when conducting the review. Additionally, they should also be the starting point for comparison on progress. How did the child's family affect his or her ability to make sound judgments? Did the child have disabilities that affected his or her ability to make sound judgments?

204. *Graham*, 130 S.Ct. at 206–27 (citations omitted).

205. This article focuses on legislative, court, and parole commission standards for meaningful opportunity for review. It is equally important for the initial sentencing hearing to be as comprehensive as possible in order to create a record for review at a later point in time. It is also important for full sentencing hearings to be held at the first instance in order to establish a meaningful opportunity for review at some later point. A record must be created to establish who the child is at the time. This can be done by extensive presentation of educational information, social history, previous court involvement, mental health issues, and any other issue relevant to the developmental aspects of children, which would ascertain an appropriate sentence at the outset. See *supra* Part VII. There is extensive guidance for mitigation presentation in both proceedings that account for the developmental basis for the categorical distinction iterated in *Roper* and *Graham* that, based on brain science, children are different and in order to best balance those critical components, judges must consider "the human existence of the offender and the just demands of a wronged society." *Graham*, 130 S.Ct. at 2031.

ments?

THE JUVENILE OFFENDER AS AN ADULT

As the Court indicated in *Graham*, one cannot predict who the offender will become after he or she is sentenced. Brain science tells us that a fully mature brain will not develop until mid-twenties.

Is the child the rare offender whose crime reflects irreparable corruption? Has the child demonstrated maturity?²⁰⁶ Is the child rehabilitated?²⁰⁷ Are there mechanisms by which there are opportunities to engage in rehabilitative activities?²⁰⁸ To what degree is the system itself complicit in the lack of development?²⁰⁹ Has the child demonstrated good behavior? Is his or her incorrigible behavior corroborated by prison misbehavior? Has the child improved his or her character? Is the child's desire to engage in risky behavior diminished? Are the acts he or she committed as a child representative of his or her true character?²¹⁰ Does the child now understand the consequences of his or her actions?

A MODEL STATUTE

To meet the mandate of *Graham* and provide a more comprehensive policy that meets the fiscal, penalogical, and public policy needs of the states, below is a model statute that legislatures can adopt.²¹¹

206. *Graham*, 130 S.Ct. at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

207. *See id.* at 2029–30 (emphasizing, as discussed by Justice Kennedy, that there is a substantial amount of debate regarding the effectiveness of rehabilitation and that it is for the legislatures to determine what rehabilitative techniques are appropriate and effective). *See generally supra* Part II.b (discussing how the differences between adults and adolescents – particularly, the biological underpinnings of children – make adolescents more susceptible to stress and less deserving of severe punishments).

208. *See id.* at 2030 (citing Brief for Sentencing Project, *supra* note 183, at *12). "As one *amicus* notes, defendants serving life without parole sentences are often denied access to vocational and other rehabilitative services that are available to other inmates." *Id.*

209. *Id.* at 2032–33.

210. *See id.* at 2033.

211. *See generally* PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION (2009), available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf (examining, through empirical research, the forgotten population of juvenile non-homicide offenders who have received life without parole to provide the public and legislatures with data on this type of sentencing); Sheila S. Hopkins, *It's Time to Put a Legal End to Juvenile Execution*, TALLAHASSEE DEMOCRAT (Apr. 12, 2004), <http://www.fadp.org/news/td-20040412.htm> (emphasizing that there is strong momentum behind a movement to ban the execution of juveniles). The authors of this article were influenced by the work of Paulo Annino at Florida State University

(1) Notwithstanding any other law, a juvenile offender may be eligible for a reduced or suspended sentence.

(a) A juvenile offender is a person who has been sentenced to more than ten years for an offense he or she committed before reaching the age of 18.²¹²

(b) Upon reaching 25 years of age,²¹³ a juvenile offender may request a review to reduce or suspend his or her sentence.²¹⁴

(2) In determining whether a juvenile offender's sentence should be reduced, the following factors shall be considered:

(a) The circumstances of the offense, including:

(i) The offense and the offender's role in the offense;

(ii) Whether the juvenile offender was a principal or an accomplice, was a relatively minor participant, or acted under extreme duress or domination by another person;

(iii) The wishes of the victim or the opinions of the victim's next of kin.

(b) The juvenile offender at the time of the offense, including:

(i) The offender's age, maturity, and psychological development at the time of the offense or offenses;

(ii) Any physical, sexual, or emotional abuse of the juvenile offender before the commission of the offense or offenses.

(iii) Any showing of insufficient adult support or supervision of the juvenile offender before the offense or offenses.

(d) The juvenile offender's maturity and rehabilitation since the offense, including:

(i) Whether the juvenile offender has made educational advancement;²¹⁵

School of Law and Sheila Hopkins of the Florida Catholic Conference, both of whom have been working for several years to get the Florida legislature to pass a law to reduce the time children spend imprisoned.

212. This statute would go beyond the *Graham* mandate and allow for review of any juvenile offender's sentence that is longer than ten years and includes offenders charged with murder. *See Graham*, 130 S.Ct. at 2030. The logic of reviewing a juvenile offender's sentence is convincing regardless of the offense and length of sentence. *See id.*

213. This matches the recommendations of AACAP, which is based on the science of when a brain fully matures. *See supra* Parts II.b, III.

214. This proposed legislation could apply to a system that uses a parole board or that uses judges who conduct resentencings. *See supra* Part V.

215. Although some legislative proposals have suggested that the offenders must complete a

- (ii) Whether the juvenile offender has participated in vocational training, if available;²¹⁶
- (iii) Whether the juvenile offender has participated in counseling programs, if available;
- (iv) The results of any available psychological evaluation administered by a mental health professional as ordered by the court before the sentencing hearing;
- (v) Evidence that the juvenile offender has improved his or her impulse control since the offense;²¹⁷
- (vi) Evidence that the juvenile offender has enhanced his or her ability to regulate emotions since the offense;²¹⁸
- (iv) Evidence that the juvenile offender is able to think independently and is not as easily influenced by others;²¹⁹
- (vii) Evidence that the juvenile offender is able to understand how his or her actions impact others;²²⁰
- (viii) Any showing by the juvenile offender of a post-release plan including, but not limited to, contacts made with transitional organizations, faith and character based organizations, or other reentry service programs;
- (ix) Any other factor relevant to the juvenile offender's rehabilitation while in the prison.

CONCLUSION

As indicated by one appellate court, we should not make a decision about children who commit crimes, no matter how horrific; a child should

GED program, many offenders may never complete such a program due to disabilities. *See* H.B. 115, 2011 Leg., Reg. Sess. (La. 2011), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=746536>. The more appropriate evaluation is whether they have made educational progress. *See also supra* note 153.

216. No offender should be denied early release if programs are not available. *See supra* Part VI.

217. Impulse control is a more accurate reflection of maturity than prison referral records. *See supra* Part II.b.iii. Inmates are given disciplinary referrals for many subjective reasons that are not necessarily an accurate reflection of an inmate's maturity or likelihood of reoffending in a non-institutional setting. *But see* *Wolff v. McDonnell*, 418 U.S. 539, 568 (1974) (holding that full discretion in making disciplinary decisions lies with prison officials).

218. Being able to control emotions is a critical skill of adulthood and reflects maturity. *See supra* notes 59–60 and accompanying text; *supra* Part II.b.ii.

219. Many juvenile offenders commit offenses due to peer pressure. *See supra* Part II.b.ii. A demonstrated ability to make independent decisions shows maturity. *See supra* Part II.b.ii.

220. Although remorse is often proposed as a necessary condition for release, empathy may be the more effective measure of whether an offender is likely to reoffend. *See supra* note 36 and accompanying text.

not “be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²²¹ In an ideal world, all children should be prosecuted in juvenile court. However, the reality is that children who commit certain crimes will continue to be prosecuted as adults. Until that time, children who will be given long sentences in adult court must have an opportunity to provide information to the courts or parole commission showing they have grown since childhood into productive adults, and this growth should lead to consideration of early release.

221. *People v. Kidd*, No. C062075, 2012 WL 243250, at *22 (Cal. Ct. App. Jan. 26, 2012).