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

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

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

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

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> "I would describe you, as have others, as violently savage and vicious, unnaturally sadistic, and relentlessly inhumane and totally incorrigible. I am convinced beyond all doubt that even at your age you are beyond rehabilitation. Society must be protected from the likes of you."
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> *Page v. State*, 995 A.2d 934, 937 (R.I. 2010) (sentencing hearing of eighteen-year-old)

> "Perhaps at times 'innate depravity' is more than a fiction."
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> *People v. Roper*, 181 N.E. 88, 91 (N.Y. 1932)

I. INTRODUCTION

In *Graham v. Florida*, the United States Supreme Court announced that "when compared to an adult murderer, a juvenile [nonhomicide] offender . . . has a twice diminished moral culpability."[1] This would seem to understate the matter. Exhibit A is thirty-year-old contract killer; Exhibit B is a fifteen-year-old shoplifter. "Twice" does not begin to distinguish the two in moral culpability.

Yet this is a stylized comparison. "Homicide" and "murder" are capacious legal categories. Yoked together by a result—a dead body—they contemplate causal acts that span a range of moral culpability. Likewise, "juvenile" is a staggeringly broad term. No one would regard two sixteen-year-olds as identical in maturation because they share a birth date. So let us restate the comparison. Ryan Holle: Hungover one morning, Holle, aged twenty, lent his Chevrolet Metro to a buddy who planned to burglarize a marijuana dealer; with Holle a mile away, the burglary turned violent, and one of the dealer's relatives

1. 130 S. Ct. 2011, 2027 (2010).

was killed.[2] Nathan Walker and Jakaris Taylor: Aged sixteen, Walker and Taylor invaded a home while armed, gang-raped a woman, forced her to perform oral sex on her twelve-year-old son, and doused both victims with chemicals.[3] Holle: adult murderer. Walker and Taylor: juvenile nonhomicide offenders.

Human nature is wide, vastly wider than most of us, in our day-to-day dealings, can possibly know. Embedded in the *Graham* Court's doubly categorical statement, this Article argues, is a simplifying assumption about the relative maturity of juveniles and adults and a moral claim about the culpability of homicides and nonhomicides—both this assumption and this claim are demonstrably false in a nontrivial number of cases. It is not hard to identify actual cases of juvenile nonhomicide offenders who merit, if anyone does, a life sentence without the possibility of parole.[4] When considered with close attention to horrific detail, such cases launch us deep into the uncomfortable truth, reluctantly conceded in an early twentieth-century case, that "at times 'innate depravity' is more than a fiction."[5]

Decided over a year ago, we are now in a position to evaluate not only the rationale of the *Graham* opinion, but also its reception in the lower courts. Potentially at least, the case is of great significance. For the first time since *Solem v. Helm*, the Supreme Court invalidated a sentence other than that of death.[6] The immediate beneficiary was

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2. *See* Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES, Dec. 4, 2007, at A1. Holle was convicted of felony murder and sentenced to life without parole. *Id.*

3. *See* Susan Spencer-Wendel, *Jakaris Taylor*, PALM BEACH POST, Oct. 11, 2009, at A10. Walker and Taylor were both sentenced to life without parole. *Id.*

4. One can score easy points mocking the incarceration of persons who have aged to the point that they pose little, if any, threat to society. *See* United States v. Jackson, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [habitual armed robbers] until age makes them harmless but it does not keep them in prison until they die."). Although age does not render all criminals harmless, the justification for life without parole ordinarily rests on retributive and possibly general deterrence grounds.

5. People v. Roper, 181 N.E. 88, 91 (N.Y. 1932).

6. 463 U.S. 277 (1983). Prior to *Solem v. Helm*, inmates challenging their sentences under the Eighth Amendment were well-advised to abandon all hope. *See* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008) ("Eighth Amendment challenges to excessive incarceration [are] essentially non-starters."). The prohibition against cruel or unusual punishment—except as it applied to capital cases—was almost never construed to invalidate a criminal conviction or sentence. There was a feint toward a more ambitious Eighth Amendment jurisprudence in *Solem* when the Court threw out a life sentence imposed on a recidivist who had written a bad $100 check; but the severity of the penalty in that case in comparison with the triviality of the crime made *Solem* easily distinguishable. 463 U.S. at 281-83. In any event, *Solem* as meaningful precedent was extinguished within a decade by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Court upheld a life sentence for cocaine possession.

Terrance Graham, who at the ages of sixteen and seventeen committed at least three armed robberies and home invasions, the final two at the age of seventeen years, eleven months. After several hearings, during which Graham's mother and father testified, as well as some of his victims and collaborators in crime, an experienced trial judge concluded that Graham was irredeemable and sentenced him to life in prison.[7] As Florida, like several other states, had abandoned a formal parole procedure, Graham effectively was sentenced to "life without parole," or in the infelicitous acronym, LWOP.

Graham's sentence was a severe one, but his case would not have aroused such marked interest had it not been artfully joined, when the Supreme Court granted certiorari, with that of Joe Sullivan. His case provided more compelling copy. Over the course of two years, Sullivan was charged with over a dozen felonies, including robbery and aggravated assault. The crime spree culminated in an armed home invasion during which he raped and sodomized an elderly woman. Sullivan's sentence of LWOP would seem, at least to many Americans, richly deserved had it not been for one complication: he was thirteen years old at the time he committed his final depredation on civil society. The prospect of so young a defendant sentenced to LWOP seemed to some to be an intolerable result in any civilized society, and several Justices at oral argument seemed receptive, at least in principle, to Sullivan's plea.

Although Sullivan's case was temporarily barred on procedural grounds,[8] the story of a thirteen-year-old dispatched forever to a cage, at least when told with sufficient abstraction from the facts of his case, lent a medieval aura to the issue. For those inclined to view the American criminal justice system as unnecessarily retributive, the idea that mere juveniles could be sentenced to life in prison without the possibility of parole, and not even for homicide, seemed to cry out for correction. Fortunately, in this view, the Supreme Court was willing to step in and provide guidance where thirty-seven state legislatures had

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7. Graham committed armed robbery when he was sixteen years old. As part of a plea agreement, the State withheld adjudication of guilt, and Graham was sentenced to probation. While on probation, he committed at least two more armed home invasions. The transcripts of the hearings are reprinted in the Joint Appendix. Joint Appendix, Vols. I-II, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2163259 & 2009 WL 2163260 [hereinafter Graham Joint Appendix].

8. Sullivan v. Florida, 130 S. Ct. 2059, 2059 (2010) (per curiam) (dismissing certiorari as improvidently granted).

proven morally obtuse.[9] Yet the guidance is ambiguous. Although the Court emphasized the need to articulate a "categorical rule" with respect to juvenile nonhomicide offenders,[10] the nutshell holding—what a professor might expect of a student in a class or what might, in its clarity, foster the rule of law—is not easy to recapitulate. For present purposes, the following suffices: The Eighth Amendment prohibits the imposition of a sentence of life without parole on any juvenile for any crime other than homicide, with the caveat that the State can, in fact, imprison said juvenile for his natural life if he fails to demonstrate maturity and rehabilitation in the course of an indeterminate stay in prison.

As several observers have noted, and even lamented, the Supreme Court's pronouncements can be a mix of the Delphic and Olympian.[11] At turns cryptic and lofty, the *Graham* opinion fits neatly into this mold. Trial judges throughout the country have been confronting requests for reduced sentences from inmates, and this Article tracks their success. The results lack logical coherence. On the one hand, juveniles who committed murder, but were sentenced to LWOP for a nonhomicide, have secured reductions in their sentence,[12] as have adults who committed serious crimes, but who were sentenced to LWOP in a probation revocation hearing bottomed on crimes they committed as juveniles.[13] On the other hand, juveniles who were sentenced for nonhomicides to determinate sentences that will run nearly the entirety of their natural lives have had only mixed success. Some lower courts have found such sentences foreclosed by *Graham*,[14] but others have read *Graham* narrowly, holding that it precludes only an LWOP sentence.[15] In some instances, trial judges sentencing culpable juveniles have essentially repudiated *Graham*, making clear

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9. *See Graham*, 130 S. Ct. at 2034-35. Thirty-seven states, plus the federal government and the District of Columbia, permit the imposition of LWOP on juveniles for nonhomicides and homicides alike; another seven states authorize LWOP for juveniles convicted of homicide alone. *Id.*

10. *Id.* at 2030.

11. *See, e.g.*, Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 432-33; Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1284-85 (2010).

12. *See infra* notes 236-238 and accompanying text (discussing the cases of Jason Means & William Barbee).

13. *See infra* notes 242-246 and accompanying text (discussing the cases of David Garland & Radrrick Lavrrick).

14. *See infra* notes 252-258, 260 and accompanying text (discussing cases of Antonio Nuñez & Victor Mendez).

15. *See infra* notes 205, 207 and accompanying text (discussing the cases of Jose Ramirez & Rodrigo Caballero).

that their design is to incarcerate even nonhomicide offenders for the duration of their lives.[16] Whether such sentences survive scrutiny remains to be seen.

This Article will emphasize the facts of the crimes under consideration. This is often unpleasant and is generally disfavored, at least by several Supreme Court Justices. Inflamed by righteous indignation, the argument runs, one loses sight of the narrow legal issue presented.[17] Whatever the merits of this argument in some contexts, it does not apply here. The legal question posed in many cases reviewed in this Article is the culpability of particular defendants. One cannot assess this question unless one considers carefully, without artful euphemisms or convenient elisions, what the defendant did. And what certain crimes suggest is that there are violent juvenile offenders—fortunately rare—who are as least as mature and culpable as the typical adult violent offender.

An older approach to juvenile offenders accommodated this possibility by not categorically excluding juveniles from punishment, but presuming an incapacity that could be rebutted by facts. The *Graham* opinion rejected this older view, wrapping itself in what it imprecisely refers to as "brain science,"[18] but it is, this Article argues, unscientific. It begins with a theory—the so-called "diminished culpability" of juvenile nonhomicide offenders—and then ignores contrary facts. It is as if in the *Graham* opinion the Supreme Court announced to those judges who sentenced juveniles to LWOP that the Court's theory disproved those judges' observed facts—that is, the culpability and maturity of particular defendants. This is not, to put it delicately, what has been hailed as the modern scientific method. It would not be surprising if judges on the ground responded in a manner that suggested they were unimpressed by the Court's theory, at least in those cases in which it is tested and disproved. The Court's central claim about the relative culpability of adult and juvenile offenders originates from a poverty of the imagination and an assumption that

16. Consider, for example, the sentencing of Jose Walle, discussed *infra* text accompanying note 214.

17. *See, e.g.*, Uttecht v. Brown, 551 U.S. 1, 35 n.1 (2007) (Stevens, J., dissenting) (criticizing the majority opinion's "graphic description of the underlying facts of [Brown's] crime"); Thompson v. Oklahoma, 487 U.S. 815, 819 (1988) (plurality opinion) ("Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary."); Wainwright v. Witt, 469 U.S. 412, 440 n.1 (1985) (Brennan, J., dissenting) ("However heinous [defendant's] crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us.").

18. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

human nature is sufficiently captured by the three standard deviations that surround one's own comfortable experience in the world. Joe Sullivan's sentencing judge had access to a wider data set in reaching a contrary conclusion.

The plan is as follows. Part II begins by sketching an older approach to juvenile crime, which allowed judges to focus on the attributes of particular defendants: presuming incapacity in those of tender years, evidence of malice and wickedness could overcome that presumption on an individualized basis. Over the course of the twentieth century, influenced by various intellectual developments (progressivism, "social science," "brain science"), the Supreme Court has become more inclined to categorically exclude juveniles from certain punishments, a trend that culminated in the *Graham* decision. Part III treats the central premise of the *Graham* decision as a testable hypothesis: Is it really true that juvenile nonhomicide offenders sentenced to LWOP are less culpable than adult homicide offenders sentenced to LWOP? I consider ten case studies and then propose an alternative theory of juvenile criminal responsibility. Part IV tracks *Graham*'s reception in the lower courts over the past year. Ambiguities embedded in the opinion have given rise to a cluster of confusing decisions, but in certain respects the case has been narrowly construed. Juveniles sentenced for nonhomicides to long prison terms that approximate LWOP have sometimes obtained little relief, and juveniles sentenced to LWOP or its effective equivalent for homicides have received virtually no relief. Yet, lest one dismiss *Graham* as a symbolic decision of negligible importance, the Article assesses its costs in promoting legal uncertainty and fueling a misguided ideology of adolescent immaturity. These costs may be amplified in upcoming years if the Court extends *Graham* beyond its narrow confines. The Court's decision (as this Article was in its final stages) to grant certiorari in a pair of cases involving fourteen-year-olds who were sentenced to LWOP for homicide[19] may portend that *Graham*, far from being a throwaway case of symbolic significance alone, is a watershed in Eighth Amendment jurisprudence.

II. PUNISHING JUVENILE CRIMINALS: A SHORT INTRODUCTION

This Part sketches the development of juvenile criminal law from early common law through the *Graham* decision. The common law

19. *See* Miller v. Alabama, No. 10-9646, 2011 WL 1086007 (U.S. Nov. 7, 2011); Jackson v. Hobbs, No. 10-9647, 2011 WL 1060941 (U.S. Nov. 7, 2011).

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

A. The Common Law: "Malice Supplies the Want of Years"

Anglo-American law long recognized the need to carve out rules tailored to the capacities of minors.[20] In the criminal law, these rules were applied on a case-by-case basis. Young offenders were tried in adult courts (no juvenile courts existed until the twentieth century), but the defendant's age could be an excusing consideration in guilt determinations or a mitigating factor in punishment. For these purposes, each defendant's maturity was an issue entrusted to the consideration of the judge or jury.

Viewed with modern eyes, the early common law approach to juvenile crime seems barbaric. William Blackstone refers to the hanging of an eight-year-old boy convicted of barn-burning.[21] It is doubtful this punishment would have been inflicted on a youth of that age in Blackstone's own day, either in England or America, but there are rare instances of preadolescent children executed for murder in the early years of our republic.[22] Drawing upon and simplifying Sir

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20. *See generally* A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937).

21. 4 WILLIAM BLACKSTONE, COMMENTARIES *24 (noting that this was in the "last century" and adding that it appeared the boy displayed "malice, revenge, and cunning").

22. *See, e.g.*, Henry Channing, God Admonishing His People of Their Duty, as Parents and Masters: A Sermon, Preached at New-London, Dec. 20th, 1786, Occasioned by the Execution of Hannah Ocuish, a Mulatto Girl, Aged 12 Years and 9 Months, for the Murder of Eunice Bolles, Aged 6 Years and 6 Months (New-London, T. Green 1786) app. at 29 (describing a twelve-year-old murderer as having "a maliciousness of disposition which made the children in the neighbourhood much afraid of her" and "a degree of artful cunning

Matthew Hale's elaborate division of minors into four categories, graded by capacity,[23] Blackstone proposed that in felony prosecutions of those aged seven to fourteen an infancy defense would be available to those who possessed a "defect of understanding."[24] This required an individualized assessment of the defendant, with inferences drawn from reports of his character and the nature of his crime.[25] Although a presumption of *doli incapax* existed throughout the range, particularly in the earlier years, an individualized factual determination was expected; after all, in Blackstone's words, "[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment."[26] The state could overcome the presumption of a juvenile's incapacity, but "in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction."[27]

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

> Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax;* but in this case the maxim applies, *malitia supplet ætatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,) supplies the want of mature years. Accordingly, at the age

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and sagacity beyond many of her years"); *Execution of a Negro Girl for the Murder of a White Child*, N.Y. TIMES, Feb. 14, 1868, at 6 (reporting that a thirteen-year-old girl killed another girl "deliberately and remorselessly"). These cases are discussed in Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983); Victor L. Streib & Lynn Sametz, *Executing Female Juveniles*, 22 CONN. L. REV. 3 (1989).

23. 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 16-28 (Philadelphia, Robert H. Small ed., 1847). The evolution from Hale to Blackstone is developed in Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 168-70 (2000).

24. 4 BLACKSTONE, *supra* note 21, at *21.

25. One wrinkle in this approach was the creation of an irrebuttable presumption that a juvenile was incapable of committing rape. American courts in the nineteenth century struggled with the dubious physiological grounding for this rule. *See* Commonwealth v. Green, 19 Mass. (2 Pick.) 380, 382 (1824) ("Females might be in as much danger from precocious boys as from men, if such boys are to escape with impunity from felonious assaults . . . ."), *abrogated by* Commonwealth v. Walter R., 610 N.E.2d 323 (Mass. 1993); *see also* Williams v. State, 14 Ohio 222 (1846) (upholding minor's conviction for attempted rape, the opinion acknowledged the common law approach, but then articulated a rule that made the presumption of incapacity rebuttable), *overruled by In re* Washington, 662 N.E.2d 346 (Ohio 1996).

26. 4 BLACKSTONE, *supra* note 21, at *23; *see* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-11 (1984).

27. 4 BLACKSTONE, *supra* note 21, at *24.

> above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment.[28]

The first and second sentences are not entirely consistent. "Malice" is equated in the first sentence with "its legal sense," which calls to mind the classic mens rea ("malice aforethought") required for a murder conviction. At common law, however, malice is not necessarily "malevolence to the deceased in particular";[29] gross recklessness, such as that displayed by one playing Russian roulette with a consenting friend, could be deemed sufficient "malice" to support a murder conviction.[30] The second sentence in the passage from Broom's Legal Maxims, however, suggests that something more than recklessness in that legal sense would be necessary to impute "malice" to juveniles under the age of fourteen. Thus the mens rea that would suffice for a felony conviction in an adult might be insufficient in a juvenile.

That would seem to be how many American courts of appeals construed the common law adage that malice supplies the want of years. For example, in *State v. Adams*, a twelve-year-old and a seventeen-year-old got in a verbal and physical altercation, culminating in the younger boy stabbing the older one with a penknife.[31] The aroma of self-defense or possibly provocation hovered in the air, but the evidence supported the jury's murder verdict. The Missouri Supreme Court reversed the conviction, however, holding that the jury instructions failed to clarify the need for "evidence strong and clear beyond all doubt and contradiction" to overcome the presumption that those under the age of fourteen are presumed incapable of the malice required in a finding of murder.[32] In another case, the North Carolina Supreme Court noted that while ignorance of the law might not be a defense for adults, it did apply in the context of juvenile defendants.[33] To be sure, there were cases in which courts of appeal inferred malice on the part of a juvenile and affirmed felony convictions,[34] even

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28. Angelo v. People, 96 Ill. 209, 212 (1880) (internal quotation marks omitted).
29. 4 BLACKSTONE, *supra* note 21, at *199.
30. *See, e.g.*, Commonwealth v. Malone, 47 A.2d 445 (Pa. 1946).
31. 76 Mo. 355, 355-56 (1882).
32. *Id.* at 357 (internal quotation marks omitted).
33. State v. Yeargan, 23 S.E. 153 (N.C. 1895) (reversing gambling conviction because ignorance of the law *is* an excuse for a thirteen-year-old).
34. *See, e.g.*, State v. Goin, 28 Tenn. (9 Hum.) 175, 177 (1848) ("The proof in this record shows, that the defendant had sufficient capacity to commit crime; and that the battery

involving the death penalty,[35] but it is striking how often courts of appeals reached the contrary result, rigorously demanding evidence that overcame a presumption of incapacity.[36]

In the late nineteenth and early twentieth century, progressive reformers, fueled in part by romantic notions of youth's intrinsic goodness and malleability, pushed for an overhaul of the criminal justice system for juveniles.[37] State legislatures across the country were persuaded; they soon embraced a categorical approach that abandoned an individualized infancy defense and dispatched juveniles as a class to newly created courts that promoted the penological goal of nonjudgmental rehabilitation.[38] The rapidity with which states abrogated the common law approach to juvenile crime is illustrated by

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was prompted by malice and revenge, and committed upon an infant incapable of self-defen[s]e . . . ."). One case notably unsympathetic to a juvenile's plea of incapacity is *State v. Hicks*, 34 S.E. 247 (N.C. 1899) (affirming murder conviction of an eleven-year-old, although evidence of malice in the burning death of a baby was less than overwhelming, and sentencing defendant to life without parole).

35. *See, e.g.*, Godfrey v. State, 31 Ala. 323, 327 (1858) (affirming a twelve-year-old's murder conviction and death sentence; "if, on the whole evidence, [the jurors] were satisfied beyond a reasonable doubt that [the defendant] was fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent design and malice in its execution, they would be authorized to return a verdict of guilty" (internal quotation marks omitted)); State v. Guild, 5 N.J.L. 163, 167 (1828) (affirming in a lengthy opinion a twelve-year-old's murder conviction and death sentence after introducing the legal standard that malice can supply the want of age; the opinion contained detailed findings that the defendant merited full criminal responsibility because he fully understood the wrongful nature of his act and its consequences, a conclusion supported by testimony that the defendant "is reputed a cunning smart boy" and "is accounted smarter than common black boys of his age; full of mischief; . . . ingenious to get out of a scrape" (internal quotation marks omitted)).

36. *See, e.g.*, Martin v. State, 8 So. 858 (Ala. 1891) (reversing minor's manslaughter conviction because the lower court committed reversible error by refusing jury instructions that would have created a question of infancy and responsibility), *overruled in part by* Williams v. State, 37 So. 228 (Ala. 1904); Angelo v. People, 96 Ill. 209 (1880) (reversing murder conviction of eleven-year-old when there was no strong and clear evidence of capacity); State v. Toney, 15 S.C. 409, 414 (1881) ("Out of tenderness to infants—the ease with which they may be misled—their want of foresight and their wayward disposition, no doubt, the evidence of malice, which is to supply age, should be strong and clear beyond all doubt and contradiction . . . ."); Wusnig v. State, 33 Tex. 651, 652 (1870) (reversing manslaughter conviction of a twelve-year-old when the instruction "with[drew] from the jury any consideration of the question of infancy and responsibility"). In yet other cases, courts avoided the problem by reversing the conviction on other grounds. *See, e.g.*, McCormack v. State, 15 So. 438 (Ala. 1894); State v. Aaron, 1 N.J.L. 269 (1818).

37. The Supreme Court took approving judicial notice of these "early reformers" in *In re Gault*, 387 U.S. 1, 15 (1967). The first statutory success was the Illinois Juvenile Court Act of 1899 (codified as amended at 705 ILL. COMP. STAT. ANN. 405/1-2 (West 2007)).

38. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

the New York experience.[39] In 1903, separate juvenile criminal courts were founded; two years later, the legislature provided that for juveniles (defined as those under sixteen years of age), crimes other than those punishable by death or life imprisonment were to be treated as misdemeanors; and then in 1909, the legislature decriminalized all juvenile conduct, again other than those crimes punishable by death or life imprisonment.[40]

The striking, and perhaps unintended, results of the 1909 statute are illustrated in *People v. Roper*.[41] In connection with an early-morning armed robbery of a tavern, in the course of which a customer was shot and killed, prosecutors charged a fifteen-year-old with felony murder. On appeal, his capital conviction was overturned, the court reasoning that the state, in a felony murder charge, had proved only that the defendant had committed robbery; because a robbery committed by a fifteen-year-old was not a felony (or even a crime), it could not serve as a predicate for felony murder. The opinion evinces discomfort with the result, meandering from the observation that "[s]ometimes a spirit of innocent mischief, sometimes evil associations, not of his own choice" lay behind a juvenile's crimes, to the more grim assessment that "[d]oubtless at times the causes which have led a child into 'juvenile delinquency' are too deep-seated to be removed by . . . corrective treatment. . . . Perhaps at times 'innate depravity' is more than a fiction."[42] In recognition of this latter possibility, the court allowed the state to retry the minor, and possibly face the death penalty, but only if he was charged directly with murder in the first or second degree.[43] The stark binary outcome was thus that if convicted of felony murder, the defendant was guilty of nothing more than juvenile delinquency; but if retried for murder, the death penalty loomed as a possibility. This oddity was grist for Judge Nathaniel Sobel three decades later, when the identical issue was

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39. One of the last New York cases to apply the common law approach to infancy was *People v. Squazza*, 81 N.Y.S. 254 (Ct. Gen. Sess. 1903) (setting aside an eleven-year-old's manslaughter conviction because there was no evidence that the defendant acted maliciously).

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

41. 181 N.E. 88 (N.Y. 1932).

42. *Id.* at 91.

43. *Id.* at 92.

presented. Judge Sobel astutely concluded, "[I]t is difficult to understand why a 'child' deemed incapable of committing robbery or rape should be deemed capable of committing design murder."[44]

Considerations such as those expressed by Judge Sobel became commonplace by the 1960s. The juvenile justice system's supposed lack of procedural protections aroused the concern of the Supreme Court, but the public's alarm mounted in a different direction.[45] The antiquated notion took hold that certain juveniles might possess the requisite "malice," as demonstrated by their character and the nature of their crimes, to merit not tender concern but punishment.[46] By the 1970s, most state legislators had abandoned the romantic notions of youth's goodness that had inspired their predecessors decades earlier.[47] The categorical treatment of minors as somehow incapable of full responsibility for criminal acts was abandoned, and again New York's experience is illustrative. The Juvenile Offender Act of 1978 provided that the presumptive age of criminal responsibility for a number of crimes, basically the common law *malum in se* crimes, was lowered to thirteen.[48] Defendants aged thirteen to eighteen, who were charged in ordinary criminal courts with such crimes, could seek a transfer to juvenile courts or could raise the defense of "lack of criminal responsibility."[49]

In sum, at the local level, where crimes are investigated, prosecuted, and punished, the common law approach to juvenile capacity has made something of a return. To be sure, the age ranges associated with juvenile status have shifted a few years, although this may be consistent with the increasingly delayed adolescence commonplace in the modern world.[50] But the notion of categorical incapacity has been jettisoned in favor of a more individualized approach. Oddly, while this development has been occurring at the local level, the Supreme Court, at least in the context of punishment, has been moving in a contrary direction.

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44. People v. Rooks, 243 N.Y.S.2d 301, 320 (Sup. Ct. 1963).

45. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

46. *See generally* JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

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

48. N.Y. PENAL LAW § 30.00 (McKinney 2009).

49. *Id.*

50. For a criticism of this trend, see ROBERT EPSTEIN, THE CASE AGAINST ADOLESCENCE: REDISCOVERING THE ADULT IN EVERY TEEN (2007).

B. Toward a Categorical Eighth Amendment Jurisprudence

Soon after the Second World War, this Part will show, the Supreme Court suggested that categorical rules for juveniles would be needed in judging whether confessions complied with the Fifth Amendment privilege against self-incrimination. Yet these hints, after *Miranda v. Arizona*[51] was decided, came to naught. It was only last Term, and in a quite limited decision, that the Court held age relevant in the *Miranda* context.[52] By contrast, over the past two decades several Justices have suggested that the Eighth Amendment mandates categorical rules for the punishment of juveniles. Buttressing these arguments, members of the Court have invoked scientific data in various forms, including evidence from the nascent field of neuroscience.

In a pair of pre-*Miranda* cases, the Court questioned the voluntariness of confessions made by young defendants under the Fifth Amendment. In *Haley v. Ohio*, the Court threw out the confession of a young African American, who had been interrogated for five hours without his counsel or parents present.[53] Justice Douglas mused:

> 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.[54]

These broad reflections on adolescent frailty were unaccompanied by any citations to scientific literature; they were presented as a matter of common sense, entitled to judicial notice. Fourteen years later, Justice Douglas reaffirmed the holding in *Haley* and observed: "[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."[55] Again, no scientific evidence was cited in the opinion, or even referenced in any of the briefs, about the special characteristics of juveniles.

Yet these blanket observations about juvenile vulnerability to police pressure, which seemed to point to the need for special rules

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51. *See* 384 U.S. 436 (1966).
52. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).
53. 332 U.S. 596 (1948).
54. *Id.* at 599.
55. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

protecting juveniles, did not materialize. Much to the contrary, the Court rejected a plea for such categorical rules in *Fare v. Michael C.*[56] The Court focused on the individual characteristics of the particular juvenile involved, which strongly weighed against a finding of involuntariness:

> Further, no special factors indicate that respondent was unable to understand the nature of his actions. He was a 16 1/2-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.[57]

Fare went on to note the practical difficulties that would arise were the Court to carve out special rules for juveniles, but of relevance here is the Court's emphatic rejection of the argument that juveniles, as a class, are frail creatures and thus easy prey for Machiavellian interrogators.[58] Of course, this may be true of many juveniles (and adults), but not all. Although *Fare* has attracted hostility in academic literature,[59] its approach has been adopted in a majority of jurisdictions.[60] The Supreme Court reaffirmed the principle of *Fare*, albeit obliquely, in *Yarborough v. Alvarado*,[61] but backtracked in 2011, holding in *J.D.B. v. North Carolina* that the age of a suspect could be relevant in a Fifth Amendment voluntariness inquiry.[62]

Despite the Court's reluctance to craft special rules for juveniles in the context of the Fifth Amendment, the Eighth Amendment has proven to be an outlet for the Supreme Court's apparent need to

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56. 442 U.S. 707 (1979).

57. *Id.* at 726.

58. *Id.* at 725-27.

59. *See, e.g.*, Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions,* Miranda*, and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 111-15 (Thomas Grisso & Robert G. Schwartz eds., 2000).

60. *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail To Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 452.

61. 541 U.S. 652, 667-69 (2004) (finding that when determining whether a suspect is in custody for *Miranda* purposes, no account should be taken of his juvenile status).

62. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011). At least on its face, *J.D.B.* is a narrow decision. The issue was whether a suspect, who was concededly questioned by police, was in custody. The Court held that in answering this question the suspect's age is relevant, but only if it "was known to the officer . . . or would have been objectively apparent to a reasonable officer." *Id.* at 2406. Even then, the Court added that age would not be a determinative or even significant factor in every case. *Id.*

ruminate on the vulnerability of youth and categorical need for protection. The first inklings could be seen in *Lockett v. Ohio*, which involved a twenty-one-year-old murderer.[63] The Court overturned a state capital punishment scheme that did not permit judges to make an individualized assessment of all mitigating circumstances, including the offender's relative youth. The prohibition against cruel and unusual punishment was understood to require the consideration of age as a mitigating factor, at least in capital cases.

Four years later, in *Eddings v. Oklahoma*, the Court applied *Lockett* to overturn a death sentence imposed on a defendant who was sixteen years old at the time of his crime.[64] The Court found that the trial judge did not consider the defendant's youth as a mitigating factor and cited this as the basis for reversing the sentence. The opinion did not make a single reference to any scientific literature. Justice Powell, citing *May v. Anderson*, took notice of the "specialness" of youth, invoking as authority one of his predecessors on the Court: "As Justice Frankfurter stated, 'Children have a very special place in life which law should reflect.'"[65] The citation to *May* could be generously categorized as inapposite. That case was a custody dispute involving children aged five, eight, and twelve. *Eddings* involved a sixteen-year-old young man, already guilty of several burglaries and robberies, who sawed off a shotgun, orchestrated a car theft and then, over the repeated objections of his unwilling accomplices, pulled out the weapon and murdered a state trooper. The plight of preteen-agers caught in a bitter divorce would seem to cast little light on the character and moral culpability of the sixteen-year-old Eddings.

The Court in *Eddings* did not address the issue, urged by several amici, that executing sixteen-year-olds is necessarily unconstitutional, but this lacuna was filled a decade later in *Thompson v. Oklahoma*.[66] *Thompson*, or more precisely Justice Stevens's plurality opinion in *Thompson*, is important for our purposes in two respects: (1) for the first time a plurality of Justices suggested that the Eighth Amendment carved out special rules for categories of criminals (as opposed to crimes), and (2) scientific evidence, including a glancing reference to the brain, was invoked as relevant to the issue of criminal responsibility. The latter point is buried in footnotes. In the text of the

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63. 438 U.S. 586 (1978).

64. Eddings v. Oklahoma, 455 U.S. 104 (1982).

65. *Id.* at 116 n.12 (quoting May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

66. Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion).

opinion, Justice Stevens observed: "[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."[67] Despite the author's claim that the argument is "too obvious" to justify extended argument, both of the above sentences were graced with elaborate footnotes, the second of which quotes a presentation to the American Academy of Child and Adolescent Psychiatry: "'Adolescence is well recognized as a time of great physiological and psychological stress. . . . Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, [and] severe psychopathology . . . .'"[68] The initial sentence makes a broad claim about the stress of "adolescence," but the supporting "data" consists of a study of fourteen adolescents, all of whom committed conspicuously vicious crimes. Surely this is a small and unrepresentative sample upon which to base claims about "adolescence" generally. One might, analogously, claim that humanity is predisposed to commit acts of cruelty and then cite a study of fourteen serial killers.

Justice Stevens's plurality opinion also represents a breakthrough in Eighth Amendment jurisprudence in its suggestion that the special characteristics of a criminal, or even his age-group cohort, could prevent the state from implementing the death penalty. Starting with *Weems v. United States*, the Court had framed Eighth Amendment issues as whether a prescribed punishment was proportional to a committed *crime*.[69] In *Thompson*, for the first time, a plurality of the Court exempted an entire class of *criminals*—that is, those younger than sixteen years of age—from capital punishment. As Nita Farahany has argued, exempting one heterogeneous group of persons from a punishment, while authorizing its imposition on other groups with overlapping distributions, results in Equal Protection concerns, given that two equally vicious criminals might be treated differently.[70] Indeed, under the plurality's opinion in *Thompson*, the calculating

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67. *Id.* at 835 (footnote omitted).

68. *Id.* at 835 n.42 (quoting Dorothy Otnow Lewis, Jonathan H. Pincus, Barbara Bard, Ellis Richardson, Leslie S. Prichep, Marilyn Feldman & Catherine Yeager, *Neuropsychiatric, Pyschoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 588 (1988)).

69. 217 U.S. 349 (1910).

70. Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859 (2009).

fifteen-year-old would be exempt from the death penalty, but the naïve sixteen-year-old would be eligible.

The two seeds buried in *Thompson* (the evidentiary value of brain science and categorical rules for classes of criminals) failed to break ground for some time. Neurological evidence at last returned to the United States Reports in 2002. Dissenting from the Court's summary denial of habeas corpus relief for a petitioner sentenced to the death penalty for a crime committed when he was seventeen years, four months old, Justice Stevens wrote:

> Neuroscientific evidence of the last few years has revealed that adolescent brains are not fully developed, which often leads to erratic behaviors and thought processes in that age group. Scientific advances such as the use of functional magnetic resonance imaging—MRI scans—have provided valuable data that serve to make the case even stronger that adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults."[71]

Absent is clarification as to what recent "neuroscientific evidence" is being referenced in the first sentence; alas, to this claim, where it might be illuminating, no footnote is appended. Furthermore, the second sentence undercuts the first with the suggestion that the neuroscientific evidence simply makes the case "even stronger" that adolescents are by nature vulnerable and impulsive. The case for adolescent frailty, Justice Stevens suggests, is compelling even without the annual expenditure of millions of dollars scanning, probing, and radiating their brains. And although this evidence of adolescent vulnerability and frailty is never specified, presumably Justice Stevens intends the reader to understand that it is a matter of common observation. But if so, does the "neuroscientific evidence" add much to what we already know, or think we know? Of what relevance, if any, is this evidence in a court of law?[72]

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

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71. *In re* Stanford, 537 U.S. 968, 971 (2002) (Stevens, J., dissenting) (citation omitted) (quoting Stanford v. Kentucky, 492 U.S. 361, 395 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005)).

72. Justice Stevens also alluded to neuroscience in *Gall v. United States*, 552 U.S. 38 (2007), in which he quoted approvingly from the district court's opinion: "Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five." *Id.* at 58 (internal quotation marks omitted).

overturned the death penalty for a defendant with an IQ of fifty-nine and sweepingly invalidated the death penalty for all mentally retarded defendants.[73] Justice Stevens recapitulated many of the arguments offered in his *In re Stanford* dissent that purport to weigh against the gravest of punishment for adolescents—that is, the supposed vulnerability, plasticity, and impulsivity of the mentally retarded, all of which, as with juveniles as a class, somehow mitigate their culpability and undermine deterrence and retributive rationales for punishment.[74] Yet nowhere in *Atkins* is any reference made to neurological evidence. The Court contents itself with a pair of footnotes, festooned with citations to psychologists, for the proposition that the mentally retarded tend to be impulsive and have difficulty communicating, processing information, and thinking abstractly.[75] These findings do not come as great surprises: neither a doctorate in psychology, nor a brain scan, is necessary to know that the mentally retarded are somehow cognitively and emotionally different.

Neurological evidence was also absent in *Roper v. Simmons*, in which the Court invalidated the death penalty for all those under the age of eighteen.[76] The *Roper* opinion is, however, peppered with citations to social science data to support the propositions that adolescents are immature, have an "underdeveloped sense of responsibility," are especially "vulnerable or susceptible to . . . peer pressure," and have characters that are not well formed.[77] As with the *Atkins* Court's take on the mentally retarded, it is unclear what work, if any, the social science is doing in the *Roper* opinion.

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

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that

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73. 536 U.S. 304 (2002).

74. *Id.* at 318-21; *see In re Stanford*, 537 U.S. at 968-72 (Stevens, J., dissenting).

75. *Atkins*, 536 U.S. at 318 nn.23-24.

76. 543 U.S. 551; *see* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 410 (2006).

77. 543 U.S. at 569.

> distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.[78]

After flagging an intractable difficulty embedded in the opinion, the Court added cryptically, "For the reasons we have discussed, however, a line must be drawn."[79] It is unclear what in the preceding portion of the opinion is being referenced. The preceding passages had discussed the immaturity and vulnerability of the typical juvenile, but given that this does not apply—by Justice Kennedy's own admission—to all juveniles, why is a categorical rule imperative? The public would not have to wait long for the Court's second foray into the problem.

C. Graham v. Florida

In *Graham*, the Court held that the Eighth Amendment prohibits the sentence, but not necessarily the imposition, of life without parole for juveniles convicted of crimes other than homicide.[80] The Court reasoned as follows: The Eighth Amendment reflects evolving community standards of what is cruel and unusual. In ascertaining community standards, the Court considered first "objective" criteria (the laws and practices of the states), and then subjective criteria (philosophy, psychology, moral theory, social science) to ensure proportionality between criminal, crime, and punishment. In weighing all these factors, the Court in *Graham* concluded that a categorical rule of some sort was appropriate governing juveniles convicted of crimes other than homicides. I follow this general plan below, concluding each subsection with a question or flagging an issue to which I return in the Article's more analytical Parts.

1. Community Consensus

The starting point in an Eighth Amendment inquiry is objective evidence from the states, and the natural place to look for the community's view of appropriate punishment is the authoritative pronouncements of state legislatures.[81] The Court here stumbles upon an inconvenient fact: thirty-seven states, the District of Columbia, and

78. *Id.* at 574.
79. *Id.*
80. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).
81. *Id.* at 2023.

the federal government all permit the imposition of an irrevocable life sentence on juveniles convicted of nonhomicides.[82]

After a nod in this direction, however, the Court considers "sentencing practices."[83] This is problematic for an obvious reason: homicide and other heinous crimes are low-probability events and, even among such crimes, only a fraction are deemed so appalling that legislature, judge, and jury find LWOP an appropriate sentence. So almost by definition it is the rare juvenile convicted of nonhomicides who is sentenced to life without parole.

Yet exactly how rare? The question proves insoluble. A provisional answer was provided by a report written by two professors at Florida State University.[84] The study, which was never peer-reviewed, concluded that an "estimated" 109 juveniles convicted of nonhomicides have been sentenced to life without parole, seventy-seven of whom are from Florida.[85] There were, however, gaps in the study, and the Supreme Court took it upon itself to investigate and identified fourteen more cases.[86] The Court's attempt to complete the project itself raises issues. Here are two: First, there are other uncounted juveniles convicted of nonhomicides sentenced to extraordinarily long prison terms that operate, under relevant state law, as an LWOP sentence. How are we to code, for example, the ninety-two-year sentence imposed on Jose Walle, entitling him to release at the age of ninety-one?[87] Second, there are at least three juvenile offenders convicted of both homicide *and* aggravated kidnapping who were, because of a vagary of state law, sentenced to LWOP for the kidnapping but not the homicide.[88] They were coded in the Florida State study as juvenile nonhomicide LWOP and the Supreme Court accepted this designation, but in fact these offenders were guilty of homicide.

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82. *Id.* Another seven permit the imposition of a life sentence on juveniles convicted of homicide. *Id.* at 2035.

83. *Id.* at 2023.

84. *See* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (Fla. State Univ., Public Law Research Paper No. 399, 2009).

85. *Id.* at 14.

86. *Graham*, 130 S. Ct. at 2024.

87. *See infra* text accompanying note 214.

88. This was the result under Iowa law, in which the sentence for murder in the second degree was fifty years, and the sentence for kidnapping in the first degree was LWOP. *See* E-mail from Lettie Prell, Dir. of Research, Iowa Dep't of Corr., to author (Nov. 3, 2010, 11:36 CST) (on file with author).

No one doubts that LWOP is seldom imposed on juveniles for nonhomicides (or at all), but it is also true that no one knows how rarely the sentence is imposed. Year after year, the odd cases trickle in. Oklahoma, for example, appears as a "zero" in the Florida State study, but weeks before the Court issued its decision in *Graham*, sixteen-year-old Keighton Budder was sentenced to LWOP for rape and aggravated assault.[89] As argued more fully below, the rarity of the juvenile LWOP (JLWOP) sentence does not undercut the argument that it is appropriate in precisely those cases where it is imposed.

2. The Criminal

Perhaps sensing how perilous the argument from state practice is, Justice Kennedy breathes more easily as he leaves objective criteria of community standards for the subjective ones. The Eighth Amendment, he writes, demands the "judicial exercise of independent judgment," meaning, it would seem, judicial exercise unconstrained by stubborn facts about the laws actually adopted by the state legislatures of America.[90] In this exercise, Justice Kennedy weighs three variables—criminal, crime, and punishment—which we take up in turn.

With respect to juvenile criminals, Justice Kennedy begins by restating the position previously articulated in *Roper* that juveniles "have lessened culpability" and are less deserving "of the most severe punishments" due to their immaturity, vulnerability to peer pressure, and changeability.[91] He continues, "No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."[92] The sentence suggests that Justice Kennedy surveyed the "data" since *Roper* was decided in 2003 and found that no studies indicate that juveniles are, in fact, fully mature, invulnerable to peer pressure, and in possession of characteristics etched in stone. Unlike *Roper*, which is filled with citations to social science articles on the character of youth, the Court in *Graham* treats the matter as settled.[93] It is no longer necessary to cite Erik Erikson, for example, on the nature of juveniles; it is sufficient to cite Justice Kennedy (citing Erik Erikson). And although the social science data is apparently overwhelming, emerging data about brains cements the matter: "As petitioner's *amici* point out, developments in psychology and brain

89. *Graham*, 130 S. Ct. at 2024; *id.* at 2051 (Thomas, J., dissenting).
90. *Id.* at 2026 (majority opinion).
91. *Id.*
92. *Id.*
93. Roper v. Simmons, 543 U.S. 551, 569-70, 573 (2005).

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."[94]

The latter sentence is not easily parsed. Which "parts of the brain" do Justice Kennedy have in his mind? Virtually every part of the brain is "involved in behavior control" in some way. Shorn of the citations to the AMA and APA briefs, one might guess this a reference to the amygdala, the part of the brain's limbic system that scientists claim "activates" in response to fear and anger. Checking the AMA and APA briefs suggests that it is the "prefrontal cortex" that is the particular focus of Justice Kennedy's attention.[95] According to both briefs, adolescents' frontal lobes are "undeveloped" in two principal ways: first, "pruning," by which gray matter is lost; and second, "myelination," which refers to accumulating myelin facilitating electrical transmissions between axons. The claim seems to be that these processes improve the thinking process, prior to which the adolescent brain is a chaotic jumble. The impression left by both briefs is that it is remarkable that anyone survives to adulthood: adolescence, according to the AMA, is like "starting the engines without a skilled driver behind the wheel."[96]

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

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[97]

Each of these sentences is making provocative behavioral and criminological claims, among them that criminal acts, even of a particularly heinous nature, committed in adolescence, are less predictive of future criminal acts than criminal acts committed later in life. Here is where science could provide helpful guidance, with

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94. *Graham*, 130 S. Ct. at 2026 (citing Brief for Am. Med. Ass'n et al. as Amici Curiae in Support of Neither Party at 16-24, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621) [hereinafter AMA Brief]; Brief for Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 22-27, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621) [hereinafter APA Brief]).

95. *See* AMA Brief, *supra* note 94, at 15; APA Brief, *supra* note 94, at 24.

96. *See* AMA Brief, *supra* note 94, at 31 (internal quotation marks omitted).

97. *Graham*, 130 S. Ct. at 2026-27 (citation omitted) (quoting *Roper*, 543 U.S. at 570).

empirical studies exploring this hypothesis. Alas, none is forthcoming, as discussed below. The only support for these claims Justice Kennedy offers is his own opinion in *Roper*.[98] And in *Roper*, as in *Graham*, Justice Kennedy seems to be making a crucial assumption: even if everything said about the adolescent brain and juvenile immaturity is generally true, why would one assume that juveniles who commit heinous crimes are typical juveniles?

3. The Crime

At this point, the opinion narrows its focus to the category of crimes under review—which consists of all crimes other than homicide—and the nature of the contemplated punishment—life without parole. With respect to crimes, Justice Kennedy writes: "Serious nonhomicide crimes 'may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability.'"[99]

This is a remarkable claim, for which the supporting citation is *Kennedy v. Louisiana*, written by Justice Kennedy.[100] *Kennedy* involved the brutal rape of an eight-year-old girl by a man who had raped another eight-year-old girl a few years earlier.[101] Contrast Patrick Kennedy, nonhomicide offender, in terms of "moral depravity," with Clyde Forrest, murderer. Despondent about the slow death of his terminally ill father, driven to despair by the callous indifference to his father's suffering by those charged with caring for him, Forrest resorted to crime:

> Alone at his father's bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father's temple, and fired. . . .
>
> Following the shooting, defendant, who was crying and upset, neither ran nor threatened anyone. Moreover, he never denied shooting his father and talked openly with law enforcement officials. Specifically, defendant made the following oral statements: "You can't do anything to him now. He's out of his suffering." "I killed my daddy." "He won't have to suffer anymore." "I know they can burn me

98. *Id.*

99. *Id.* at 2027 (alteration in original) (quoting Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (internal quotation marks omitted)).

100. 554 U.S. 407.

101. *Id.* at 412-13, 417.

> for it, but my dad will not have to suffer anymore." "I know the doctors couldn't do it, but I could." "I promised my dad I wouldn't let him suffer."[102]

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

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

Furthermore, the legal punishment for homicide, which includes felony murder and accomplice murder, is almost always severe, sometimes with little calibration to the culpability of the offender. It has long been argued that when a crime culminates in death, even not through design, the punishment sometimes *exceeds* the moral culpability of the act itself.[103] What this suggests is that when comparing homicides and nonhomicides that result in equally severe sentences, it is by no means clear that the moral culpability of the former categorically exceeds the moral culpability of the latter. When one guilty of rape or kidnapping is sentenced to LWOP, it may reflect a conscious decision—on the part of the legislature rating a subcategory of crimes and a judge or jury evaluating a particular defendant—that the crime is truly shocking, evidencing a level of depravity that exceeds that of the typical rapist or kidnapper. Given that the criminal justice system makes more of an effort to calibrate culpability and punishment in nonhomicides, is it possible that nonhomicides *sentenced to LWOP* involve more, not less, moral culpability than homicides?

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102. State v. Forrest, 362 S.E.2d 252, 254 (N.C. 1987).

103. This is a much-lamented, albeit persistent, feature in homicide law. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. 6, at 37 (Official Draft and Revised Comments 1980) ("Principled argument in favor of the felony-murder doctrine is hard to find."); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 120-40 (1985); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1446-48 (1994).

4. The Punishment

With respect to punishment, Justice Kennedy quotes himself yet again (this time a concurring opinion in *Harmelin v. Michigan*), observing that "life without parole is 'the second most severe penalty permitted by law.'"[104] This seems indisputable, but Justice Kennedy obscures the issue in at least two ways. First, he depicts LWOP as "irrevocable" in a way that extinguishes hope in the defendant.[105] This is not quite accurate, as Justice Kennedy concedes, for there is always the "remote possibility" of "executive clemency."[106] It is not always that remote. Juveniles serving long sentences have received the attention of governors seeking inmates worthy of a commuted sentence. Consider Maurice Clemmons, sentenced to over one hundred years in prison for several felonies committed as a juvenile, whose sentence was commuted by Governor Mike Huckabee after nine years in prison.[107]

Through much of the remainder of the opinion, the possibility of executive clemency is forgotten and LWOP is repeatedly characterized as "irrevocable." In the very final paragraph of the opinion, the careful reader detects an allusion to executive clemency when the Court rejects LWOP for juveniles because it fails to provide a "realistic opportunity to obtain release."[108]

Second, the Court finds that LWOP "is an especially harsh punishment for a juvenile," noting, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[109] This is not a meaningful comparison: persons in their seventies are rarely sentenced to LWOP. The appropriate comparison would be the severity of LWOP imposed on a sixteen-year-old and a twenty-four-year-old, given that the two age groups commit violent crimes at roughly the same rate.[110] Initially, the difference in

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104. *Graham*, 130 S. Ct. at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

105. *Id.*

106. *Id.*

107. Mike Huckabee, *Why I Commuted Maurice Clemmons's Sentence*, WASH. POST (Dec. 7, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120702333.html. After his release, Clemmons disappointed the hopes of those who sought and obtained his pardon: he committed, among other crimes, child rape, aggravated assault, and four murders. *See* Sadie Bass, *Why Was Suspected Cop Shooter NOT in Jail?*, ABC NEWS (Nov. 30, 2009), http://abcnews.go.com/blogs/headlines/2009/11/why-was-suspected-cop-shooter-not-in-jail/.

108. *Graham*, 130 S. Ct. at 2034.

109. *Id.* at 2028.

110. *See infra* note 126 and accompanying text.

punishment would seem to be eight years, but that may not be accurate: a sixteen-year-old sentenced to LWOP is more likely to receive a commutation of sentence so, from an ex ante perspective, one cannot say that JLWOP is a more severe sentence—measured by years incarcerated—than LWOP imposed on a young adult.

5. A Categorical Rule

Having sketched the criminal, crime, and proposed punishment, Justice Kennedy then proposes to weigh them all in light of "penological justifications for the sentencing practice."[111] The opinion surveys the classic justifications for punishment (retribution, deterrence, incapacitation, and rehabilitation) and finds each fails to justify the imposition of life without parole for juvenile homicide offenders. "In sum," Justice Kennedy writes, "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual."[112] This would seem to be a place to end the opinion: a categorical assessment that the diminished culpability of juveniles, the lesser depravity associated with nonhomicides, and the severity of a life sentence renders such punishment unconstitutional.

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

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

111. *Graham*, 130 S. Ct. at 2028.
112. *Id.* at 2030.

> few incorrigible juvenile offenders from the many that have the capacity for change.[113]

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

Yet this objection to juvenile LWOP, if taken seriously, extends to *every* sentencing hearing, indeed every human interaction. How can one extrapolate, with "objective" certainty, from another person's behavior—good or ill—at t_0 to his future behavior at t_1? Predictions of this sort are doubtless difficult for juveniles, but they are difficult for adults as well. The real issue is whether sorting the irretrievably criminal from those capable of rehabilitation is easier when crimes are committed at age sixteen, say, than age twenty-four.

Here, then, is the rub: criminologists have long noted, and lamented, the difficulty in distinguishing criminals of any age who are likely to commit future crimes from those who are likely to repent and conform their behavior to societal and legal norms.[114] The problem is not restricted to juveniles. In theory and perhaps eventually in practice, modern science could shed some genuine light (as opposed to buttressing hoary common sense), but at least to date, notwithstanding its statistical studies and penetrating brain scans, we operate in a fog of uncertainty. Science of the sort respected by Justice Kennedy has failed us; in the following Part, I propose a less sophisticated sort of science that might actually provide some guidance.

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113. *Id.* at 2032 (alteration in original) (citation omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

114. The literature is voluminous. *See, e.g.*, JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASESSMENT OF CLINICAL TECHNIQUES 69-93 (1981) (surveying the very modest success of various clinical models). The failure to reliably predict future dangerousness is much noted. *See, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1450 (2001); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1455 (2007). For a recent sophisticated effort to craft a better model, see Andreas Mokros et al., *Assessment of Risk for Violent Recidivism Through Multivariate Bayesian Classification*, 16 PSYCHOL. PUB. POL'Y & L. 418 (2010).

III. TRUE CRIME LESSONS

The *Graham* Court asserts that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[115] The two embedded assumptions are: (1) "in terms of moral depravity" nonhomicides cannot be compared to murder, and (2) in terms of culpability, juveniles cannot be compared to adults. This Part subjects both assumptions to scrutiny by considering actual crimes. It is only through a careful consideration of a crime that conclusions can be drawn about a particular defendant's maturity and moral culpability. This was the implicit claim of the common law approach sketched above. Nor should this approach be disparaged as somehow unscientific. Forensic pathologist W.I. Beveridge observed, "More discoveries have arisen from intense observation of very limited material than from statistics applied to large groups."[116] Following Beveridge, this Part provides a detailed account of ten crimes: five nonhomicides (including Graham and Sullivan) and five homicides. These crimes call into question the basic premises of the *Graham* decision, and the final section of this Part offers an alternative theory of juvenile culpability at least as consistent with the observed data.

A. Why Study Crimes

There are several reasons not to recount violent crimes in detail. There is, first of all, a natural repugnance, at least among those of healthy souls. The truly best among us instinctively recoil from an account of a heinous crime as the rest of us do from the sight of a gangrenous wound.[117]

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

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115. 130 S. Ct. at 2027.

116. W.I.B. BEVERIDGE, THE ART OF SCIENTIFIC INVESTIGATION 105 (rev. ed. 1957); *see also* RICHARD RHODES, WHY THEY KILL: THE DISCOVERIES OF A MAVERICK CRIMINOLOGIST 111 (1999) (quoting criminologist Lonnie Athens, who argued "it is far better to study fifty people in depth than to study 5,000 people superficially" (internal quotation marks omitted)).

117. *Cf.* JANE AUSTEN, MANSFIELD PARK 446 (Tony Tanner ed., 1966) ("Let other pens dwell on guilt and misery. I quit such odious subjects as soon as I can . . . .").

tortured, and attempted to murder a second woman in California."[118] This was deemed excessive by Justice Stevens, who objected to the "graphic description of the underlying facts of [Brown's] crime, perhaps in an attempt to startle the reader or muster moral support for its decision."[119] In Justice Stevens's view, the issue was whether the habeas petitioner was denied a right to an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments; the details of the crime had no bearing whatsoever.[120]

Whatever the merits of his objection in *Uttecht*, Justice Stevens's aversion to detailed accounts of crimes carries over to cases where the facts of the crime would seem relevant to the legal issue. At the beginning of the opinion in *Thompson*, holding the death penalty unconstitutional for those under the age of sixteen, Justice Stevens wrote, "Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary."[121] The opinion turned in large part on claims about adolescent immaturity and vulnerability.[122] Yet "adolescents" as a class were not the issue in *Thompson*; Thompson was the issue. Or more broadly, the issue concerned the moral culpability of a subclass consisting of those juveniles whose crimes were so heinous that the legislature authorized the death penalty, and the judge and jury imposed it. And it is relevant in resolving that issue to consider what exactly it was that those adolescents did. Even Justice Stevens's brief account of the crime undercuts the broad generalizations about adolescents that follow. We learn, for example, that Thompson, far from being an unwilling accomplice, "actively participated" in a torture-murder.[123] Had Justice Stevens recounted additional facts about the crime and the defendant, we would have

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118. 551 U.S. 1, 4-5 (2007).

119. *Id.* at 35 n.1. (Stevens, J., dissenting). For a criticism of Justice Stevens's approach, see Lester Jackson, *Fact Suppression and the Subversion of Capital Punishment: What Death Penalty Foes on the Supreme Court and in the Media Do Not Want the Public To Know* 19-20 (2009), *available at* http://ssrn.com/abstract=1346142.

120. Similarly, in *Wainwright v. Witt*, 469 U.S. 412 (1985), Justice Brennan criticized a relatively terse crime narrative: "However heinous [defendant's] crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us." *Id.* at 440 n.1 (Brennan, J., dissenting).

121. Thompson v. Oklahoma, 487 U.S. 815, 819 (1988) (plurality opinion).

122. *Id.*

123. *Id.*

learned that Thompson was self-possessed, a natural leader, and notable in his appetite for violence from an early age.[124]

Recounting the facts of a crime where a claim of juvenile immaturity is raised is essential in clarifying the kind of juvenile being discussed. In this respect, it is worth noting an argument, repeated often by petitioners and amici and implicitly credited by the Court in *Roper* and *Graham*, that virtually all juveniles commit crimes—indeed, to fail to do so makes one aberrational—and therefore juvenile criminals are typical of their age cohort.[125] This argument is tenable only if one abstracts from the facts of the particular cases. Given the comprehensiveness and intrusiveness of the laws and regulations governing juvenile behavior (curfews, driving restrictions, alcohol consumption and purchase prohibitions, etc.), few Americans navigate their teenage years without committing multiple crimes. And given youth's sensitivity to personal honor and proneness to physical confrontation, it is likely that many American teenagers commit acts that, construed by an ambitious prosecutor, fall under the header of assault or battery. But it is the extraordinarily rare juvenile who commits or attempts murder, rape, kidnapping, or armed robbery. Indeed, it is roughly as rare for a sixteen-year-old to commit these crimes as it is for a twenty-four-year-old.[126] One would not treat twenty-four-year-old murderers or rapists as a typical subgroup of twenty-four-year-olds generally, and it is equally bizarre to treat juveniles guilty of such heinous crimes as typical of their age cohort. Recounting the specific facts of the crime can dispel the idea that juveniles like Thompson, Simmons, Graham, and Sullivan are typical adolescents; it should alert one to the possibility that sixteen-year-old

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124. *See* Brief of the Respondent State of Oklahoma at 6-10, *Thompson*, 487 U.S. 815 (No. 86-6169) (noting more than a half dozen arrests for violent felonies and Thompson's calculation, which he shared with his friends, that because he was sixteen he was unlikely to be punished).

125. *See* Brief for Respondent at 16-17, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633) ("'[I]t is statistically aberrant to refrain from crime during adolescence.'" (quoting Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 685-86 (1993))); APA Brief, *supra* note 94, at 8; Brief for Petitioner at 20-21, Sullivan v. Florida, 130 S. Ct. 2059 (2010) (No. 08-7621).

126. Department of Justice statistics reflect that the peak age for violent crime is between eighteen and nineteen years of age. Seventeen-year-olds and twenty-two-year-olds have comparable rates, as do sixteen-year-olds and twenty-four-year-olds. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES, 1993-2001, at 5-6 (2003) [hereinafter ARREST RATES]. This point is made in Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondents at 16, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621).

murderers and rapists are atypical. So alerted, one might be inoculated from facile claims that defendants in such cases are just adolescents behaving badly.

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

With respect to diminished culpability, Justice Kennedy has focused on three factors: (1) that juveniles evidence a "'lack of maturity and an underdeveloped sense of responsibility,'" (2) that they are "'more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,'" and (3) that "their characters are 'not as well formed.'"[127] The first factor is not easily parsed: all criminals, not simply juveniles, evidence a lack of responsibility. All make bad decisions, both from the perspective of society and themselves. If immaturity and lack of responsibility simply connote bad decision making, then every criminal could claim safe harbor.

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

The third factor—a juvenile's plasticity—is the one that is ultimately most significant in shaping the actual holding of *Graham*, denying to sentencing judges the possibility of certainty in relegating juveniles indefinitely to prison. According to Justice Kennedy, a heinous crime committed at age sixteen is less appalling than the same crime committed by an adult because the juvenile's character is "not as well formed" and the criminal act therefore less indicative of the juvenile's true character.[128] Of course, our characters, like our brains, are never fully formed in the sense of reaching an end state from which there is no possibility of evolution. Justice Kennedy's implication, however, is that the serious juvenile criminal is less likely to be

127. *Graham*, 130 S. Ct. at 2026 (quoting Roper v. Simmons, 543 U.S. 551, 569-70 (2005)).

128. *Id.*

intractably depraved than the adult criminal: both may be rehabilitated, but we are more skeptical of this happy result when contemplating the hardened adult criminal than the naïve juvenile.

In a generalized sense, there is some truth to this. Consider, for example, Alan Simpson, who committed several acts of aimless violence in his teens, culminating in an assault on a police officer. He would later become a United States Senator. Yet it suffices to note that Simpson was not sentenced to LWOP; he was, in fact, sentenced to one day in jail for all his crimes, a detail he recounts in an amicus brief filed on behalf of Terrance Graham.[129] The criminal justice system did not consider Simpson's crimes even remotely as culpable and depraved as those of Graham. Who are some of the juveniles and what are some of the crimes that the American criminal justice system has deemed worthy of LWOP or its effective equivalent?

B. Case Studies

1. Nonhomicides

a. *Calvin Breakfield*

> In the early afternoon hours of Sunday, May 5, 2007, the victim, A.H., was outside her home in Shreveport, Louisiana. At the time she was 83 years old. A young black male, later identified as Calvin Breakfield, came out of A.H.'s next-door neighbor's garage and asked to use A.H.'s bathroom—she refused. Breakfield then told A.H. that her neighbor was his grandmother and asked if he could use A.H.'s phone to call his grandmother. A.H. agreed to bring her phone to Breakfield so that he could make the telephone call, but told him that he could not come into the house.
>
> After A.H. entered her house, Breakfield followed her in, knocked her down, and kicked her. When A.H. attempted to get up, Breakfield hit her. A.H. later testified that "it was just anger on his face. . . . I knew if I said another word, he would have killed me." The defendant ripped A.H.'s clothes off, including the chain around her neck. He then dragged A.H. down the hallway, through her own blood, to her bedroom.
>
> After dragging A.H. to the bedroom, Breakfield lay on top of her and attempted to rape her, but because A.H. had a prolapsed bladder, Breakfield was unable to fully penetrate her vaginally. He then turned A.H. over onto her stomach and sodomized her. A.H. then felt what she believed to be Breakfield urinating on her.

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129. Brief of Former Juvenile Offenders Charles S. Dutton et al. as Amicus Curiae in Support of Petitioners at 11-14, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621).

Breakfield demanded money from A.H. and broke a bank found on the floor, which held some change. A.H. then lost consciousness. When she awoke, Breakfield was gone, and she was able to make her way to the telephone and call for help. The officer responding to the scene found A.H. in her house, naked and covered in blood.[130]

b. *Chaz Bunch*

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

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

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

. . . .

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

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

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

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130. State v. Breakfield, 44,605, pp. 1-2 (La. App. 2 Cir. 9/23/09); 21 So. 3d 1014, 1016-17 (alteration in original).

> . . . Bunch wanted to kill M.K., [but one of his confederates demurred]. . . . Prior to her leaving, Moore and Bunch told her that they knew who she was and threatened to harm her and her family if she ever told what happened.[131]

c. *Michael Bell*

> Petitioner [Michael Bell] and his accomplice rang the doorbell at the home of E.M. and her son, a few houses down the block. Petitioner had previously lived in a house in back of Ms. M's, and she recognized him. When Ms. M answered the door, Petitioner and his accomplice asked if they could use her phone. She declined and closed the door, but it remained partly open. When she moved to shut it fully, Ms. M saw Petitioner and his accomplice inside the house, the accomplice holding an automatic handgun. She demanded to know what they were doing, and they told her to shut up, one of them saying, "I'm going to kill you." Petitioner's accomplice pointed the gun at Ms. M's eight-year-old son and told him not to scream. The accomplice demanded to know where Ms. M's money was, and she informed him and told him to take it.
>
> Petitioner then took the gun from his companion. He asked where the clip was, and the accomplice told him it was loaded. Petitioner put the gun to Ms. M's head and told her that she was going to give him "head." He forced her into the kitchen, ripped open her sweater, and ordered her to remove her pants, which she did, along with her underwear. Petitioner sat on a chair and made her unbuckle his pants and open them. Holding the gun to her head, he forced her mouth onto his penis. Ms. M saw her son pressing his head into a pillow on a couch, as Petitioner had commanded. Petitioner then made her lie on the floor, saying, "You're going to like this." He proceeded to rape her, then dismounted her and recommenced, the gun still at her head.
>
> During the acts, Petitioner's accomplice reappeared, stepped over Petitioner and Ms. M, and inquired if there were any "brewskies." Referring to Ms. M, Petitioner asked the accomplice if he wanted "some of this." The accomplice declined. [After Ms. M. tried to escape, Petitioner's accomplice raped her.]
>
> When the accomplice stopped and went to Ms. M's bedroom, she sat down with her son, who tried to cover her with a blanket. Petitioner appeared, pointed the gun at her, and ordered her to remove her gold jewelry and give it to him, which she did. . . .
>
> Petitioner's accomplice then asked to use Ms. M's car, which was in her driveway, and she gave him the keys, telling him he could take it.

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131. Bunch v. Smith (*Bunch I*), No. 1:09CV0901, 2009 WL 5947369, at *1-2 (N.D. Ohio Dec. 8, 2009) (citations omitted).

> Handing the Petitioner the gun, he went to the car. Petitioner then took Ms. M, who was still naked, back into the kitchen, and raped her again. Ms. M heard the car's horn honking, but Petitioner did not get off of her until his accomplice returned and told him, "C'mon."[132]

One might try to style these crimes as evidencing the sort of immaturity and undeveloped sense of responsibility typical of adolescents, but if one simply recounted the facts of each case, most people would probably guess the defendants were in their twenties. In fact, Breakfield and Bunch were sixteen years old at the time of their crimes; Bell was fifteen years old. In none of the accounts is there any evidence of a particular vulnerability to peer pressure. Breakfield acted alone. Bunch and Bell were the apparent leaders of their criminal gangs and had attained their "alpha male" status despite the presence of older coconspirators. Far from being immature, they were precocious, possessing a confidence and charisma that catalyzed others. Furthermore, Bunch and Bell were not only the leaders of the groups, but the most brutal; they might have propelled the episodes into fatal outcomes but for the intervention of their coconspirators.

Breakfield's crime highlights another point: an adeptness at manipulating adults and playing upon stereotypes about juvenile incapacity. His victim, who was roughly the age of most Supreme Court Justices, may well have harbored an image of youth as an age of dependence and vulnerability: she fell for his plea to use the phone to reach his grandmother. In fact, he had already firmly settled into a life of violent crime.[133] One might contrast the septuagenarians and octogenarians on the Supreme Court, whose views of youth derive from introspective memories of a very distant past or perhaps from glimpses of their granddaughter's recent Sweet Sixteen party, with the trial judge and the jury in all three cases, whose judgments were formed not by Wordsworthian reflections on childhood but hard data placed before them. Breakfield was sentenced to LWOP;[134] Bunch was sentenced to eighty-nine years in prison;[135] Bell was sentenced to fifty-four years (with eligibility for release when he is nearly seventy years old).[136]

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132. Bell v. Haws, No. CV09-3346-JFW, 2010 WL 3447218, at *3-4 (C.D. Cal. July 14, 2010) (citations omitted).

133. *See Breakfield*, 44,605, p.1; 21 So. 3d at 1016.

134. *Id.*

135. *Bunch I*, 2009 WL 5947369, at *7.

136. *Bell*, 2010 WL 3447218, at *8, *11.

2. Homicides

d. *Tim Kane*

Tim [Kane] accompanied four older young men, led by Alvin Morton and Bobby Garner, both three to five years older than Tim. There was a plan to burglarize a house, which [Kane] believed to be unoccupied. Prior to entering the house, two of the five young men withdrew from the plan and left. [Kane] entered the house with Morton and Garner.[137]

. . . Morton carried a shotgun and [Garner] possessed a "Rambo" style knife. They began looking around the living room for something to take when Bowers and Weisser entered the room from another area of the house. Morton ordered the two of them to get down on the floor, and they complied. Bowers agreed to give them whatever they wanted and pleaded for his life but Morton replied that Bowers would call the cops. When Bowers insisted that he would not, Morton retorted, "That's what they all say," and shot Bowers in the back of the neck, killing him. Morton also attempted to shoot Weisser, but the gun jammed. He then tried to stab her, but when the knife would not penetrate, Garner stepped on the knife and pushed it in. Weisser ultimately was stabbed eight times in the back of the neck and her spinal cord was severed. Before leaving the scene, either Garner or Morton cut off one of Bowers' pinky fingers.[138]

e. *Leon Miller*

Arthur Beckom and Kentrell Stoutmire observed people walking through their neighborhood that they believed belonged to a rival gang. Beckom and Stoutmire approached defendant [Leon Miller], who was standing outside on a corner in the neighborhood, and asked him to stand as a lookout. Defendant saw that both Beckom and Stoutmire had guns in their possession, and although defendant never handled or touched the guns, he agreed to stand as a lookout. One minute later, Beckom and Stoutmire fired gunshots in the direction of Jones and Alexander, who both died as a result of their injuries. Once the shooting began, defendant ran to his girlfriend's house.[139]

f. *Quantel Lotts*

[P]etitioner [Quantel Lotts], who was fourteen years old, along with his younger brother Dorell and Michael Barton, spent the night with thirteen-year-old Teddy Thomure at the Thomure home in

137. Kane v. State, 698 So. 2d 1254, 1255 (Fla. Dist. Ct. App. 1997).
138. Morton v. State, 689 So. 2d 259, 261 (Fla. 1997).
139. People v. Miller, 781 N.E.2d 300, 302-03 (Ill. 2002).

Leadington, Missouri. Petitioner, Dorell, and their father, Charlie Lotts, lived with Michael Barton and Michael's mother, Tammy Summers, and petitioner and Michael considered themselves "brothers." Petitioner and Teddy Thomure had known each other since the fifth grade and were good friends, and Michael, who was seventeen, was the best friend of Teddy's older sister Chastity.

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

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

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

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

Petitioner and Teddy were downstairs playing cards while Michael was upstairs making Teddy's younger sister Tara an omelet. Petitioner became angry again and he got a knife from Teddy's two-knife set. The set contained a twelve-inch blade and six-inch Bowie knife, and petitioner took the larger knife. Petitioner began to walk upstairs but Teddy stopped petitioner and told petitioner to give him the knife. Petitioner complied but mumbled that he was "going to get that bastard." Teddy then tossed the knife under his bed and told petitioner to calm down and that he was acting crazy. Petitioner appeared to calm

down again. As they walked upstairs, Teddy patted down petitioner's pockets to check for other weapons, and he found none.

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

Petitioner and Michael went down to the sidewalk, while Teddy stood on the porch step and Dorell stood on the porch. Petitioner held a knife but Teddy saw no weapon on Michael. Petitioner's back was to Teddy, and petitioner and Michael were "mouthing," and pushing each other. Petitioner swung the knife and stabbed Michael in the left leg. Michael bent down, and petitioner stabbed Michael in the left side of his chest. Michael stumbled backwards and fell, and petitioner turned and "took off" towards the house.[140]

g. *James Fuller*

[James Fuller] and the victim had had an intense and troubled romantic relationship for two years preceding the killing. In the last year each had dated other people, and this increased the tension between them. Fuller spoke several times of killing the victim, to her and to others. In the months before the killing, he had discussed with his friends ways for the victim to procure an abortion without her having to obtain parental consent, having someone beat Amy so as to cause a miscarriage, or having her killed. The day before the killing the victim had taken a trip to Gloucester with two girls and two boys. When the defendant learned about this he is reported to have said, "I'm getting sick of this. I swear I'm going to kill her. . . . This s[__]t's got to stop. . . . She won't be around to go out with anyone anymore. . . . I'm going to f[_____] kill her." The next morning he called her repeatedly and insisted that she come to his house to meet him. On the day of the killing, before she arrived, the defendant met Dominic Sciola and later Mark DeMeule. Sciola testified that the defendant said he was going to kill the victim and that he invited Sciola to come along. He later told

140. Lotts v. Larkins, No. 4:07 CV 610 RWS, 2010 WL 681327, at *2-3 (E.D. Mo. Jan. 26, 2010) (citations omitted).

Mark DeMeule the same thing. When DeMeule taunted him that he "didn't have the balls to do" it, the defendant replied, "You'll see."

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

There was further testimony about Fuller's conduct after the killing. At Sciola's house he washed the blood off his arms, drank red Kool-Aid because it was "right for the occasion," took Maillet to see the body, and then warned his companions that they would "be next" if they "were to say anything." Later that day Fuller led his friends in the task of disposing of the victim's body. They obtained two trash bags, two cinder blocks, and lobster line (which would not fray in the water), and he and Maillet threw the weighted body into Shoe Pond. Thereafter he denied knowing the victim's whereabouts to the police and to his friends and joined in searching for her. Finally, on August 28, five days after the killing, Maillet led the police to the victim's body, and Fuller was arrested. At the time of his arrest, he "put on a half-smile smirk and began to chuckle." During questioning Fuller was calm and accused his friends of killing her.[141]

h. *Dale Craig*

[D]efendant [Dale Craig] and three accomplices abducted the victim, Kipp Gullet, a freshman at Louisiana State University, at gunpoint from the parking lot of Kirby Smith Dormitory on the Baton Rouge campus of the university. The victim cried and begged for

141. Commonwealth v. Fuller, 657 N.E.2d 1251, 1253-54 (Mass. 1995) (alterations in original).

> mercy as defendant and his accomplices drove the victim around in his truck. Defendant expressed his decision to kill the victim, but appeared to acquiesce to the suggestions of his accomplices to beat the victim unconscious, rather than kill him. After driving to a secluded construction site, defendant and James Lavigne marched the victim at gunpoint out to a grassy area. Lavigne used the butt of his gun to strike the victim in the head, causing the victim to fall to the ground. Lavigne then walked away. While the victim lay on the ground in a fetal position, the defendant knelt at his side and fired three bullets into his head, killing him. Defendant threatened to kill his accomplices if they said "one f---ing word." He also asked them if the group should kill anyone else while they were at it, but answered his own question by responding, "No, the game warden might get pissed."[142]

These five crimes present a more complicated picture of moral culpability. One might guess from the recitation of Kane's case that he was a young man, and indeed he was only fourteen years old at the time of the double murder. There was no evidence he had ever committed a crime before. His role in this crime consisted of hiding behind the dining room table while the murders occurred.[143] He was a bright young man from a supportive family whose misfortune was to fall into companionship with the alluringly dangerous Morton and Garner, aged seventeen and nineteen. Yet the passive voice in the prior sentence needs to be qualified: Kane was the only one of the three younger men who accompanied Morton and Garner that night. The other two recognized at a minimum the wrongness of burglary and perhaps also the possibility of violence. They withdrew from the scheme; Kane, by contrast, made a very bad choice. No one can deny that Kane bears some responsibility for murder. Although he never shot or stabbed anyone, or even handled a weapon, his presence may have emboldened Morton and Garner. Would they have proceeded with their plan if all three younger accomplices had fled? Would that unanimous disapproval have forced a reconsideration on their part? Did they persist in the plan in part to impress Kane? In short, Kane bears some responsibility for the double murder, but it is of course not remotely similar to the moral culpability of Breakfield, Bunch, and Bell. Although his coconspirators were sentenced to the death penalty,

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142. State v. Craig, 2005-2323, p. 3 (La. App. 1 Cir. 10/25/06); 944 So. 2d 660, 661-62.

143. At least this is Kane's account, which seems not to have been contradicted at trial. *See* Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

Kane received a twenty-five-year sentence (eligible for parole after seventeen years).[144]

Miller's crime seems worse than Kane's. Unlike Kane, he knew his accomplices were bent on murder. Furthermore, his responsibility for the crime, as a designated lookout, is less speculative than that of Kane. When Miller, aged fifteen at the time, assented to the plan of Beckom and Stoutmire, he knowingly chose to abet murder. Perhaps more culpable than Kane, Miller's crime nonetheless evinces nothing resembling the utter depravity of our first three examples. Although Miller's accomplices were sentenced to life without parole, the trial judge recognized his lesser culpability and sentenced him to fifty years in prison (eligible for parole after seventeen years).[145]

The Lotts case starts out as a minor domestic squabble and culminates in the sort of murder to which the adjective "needless" is often appended. Quantel Lotts, aged fourteen at the time of the crime, has been widely cited as a poster child for the immorality of juvenile life without parole.[146] The circumstances of the crime lend some support for this claim, especially when they are presented as follows:

> It began as horseplay, with two teenage stepbrothers chasing each other with blow guns and darts. But it soon escalated when one of the boys grabbed a knife.
>
> The older teen, Michael Barton, 17, was dead by the time he reached the hospital, stabbed twice. The younger boy, Quantel Lotts, 14, would eventually become one of Missouri's youngest lifers.[147]

Euphemisms, the artful use of the passive voice, and the omission of certain details, render, in this account, the punishment incomprehensible.[148] Comparing the CNN account with the fuller account drawn from the appellate opinion is therefore necessary. "Horseplay" conjures up images that do not include the use of blowguns. Furthermore, it was Lotts who initiated the "horseplay,"

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144. Kane v. State, 698 So. 2d 1254, 1256 (Fla. Dist. Ct. App. 1997).

145. People v. Miller, 781 N.E.2d 300, 310 (Ill. 2002).

146. *See Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison*, EQUAL JUSTICE INITIATIVE 8 (Nov. 2007), http://www.eji.org/eji/files/20071017cruelandunusual.pdf.

147. Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, CNN (Apr. 8, 2009), http://articles.cnn.com/2009-04-08/justice/teens.life.sentence_1_parole-hearing-parole-for-first-degree-murder-life-sentences?_s=PM:CRIME.

148. For other examples of accounts of juvenile crimes that are scrubbed of material details, see Charles Stimson & Andrew Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, HERITAGE FOUND. (Aug. 17, 2009), http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens.

although one should add that the victim responded and succeeded in injuring Lotts. The use of "soon" in the next sentence in the CNN account suggests that the struggle escalated seamlessly into the fatal incident. In fact, at least one hour separated the blowgun incident and the knifing. Lotts simmered in rage, despite the repeated attempts of various third parties to calm him down. Forcibly prevented at one point from using a bow and arrow, Lotts collected a knife with a twelve-inch blade and instigated the final encounter, although it should be acknowledged that the victim seemed to some extent a willing participant. In the final struggle, Lotts was not content with inflicting a leg wound; he thrust the foot-long blade into the victim's chest.

As a legal matter, Lotts committed murder, and there is no plausible argument for allowing a provocation defense to mitigate the crime to manslaughter. Lotts was in fact convicted of murder and sentenced to LWOP.[149] Nonetheless, an acknowledgment of the emotional dynamics of the situation, the willing participation of the victim in two violent confrontations that morning, and Lotts's relative youth are all atmospherically mitigating factors. Lotts's crime was a serious one, but whether it evidences a depraved heart is open to question. One could thus make an argument that a determinate prison sentence short of Lotts's natural life would have been appropriate. Undercutting this argument are additional facts, which may have swayed the judge and jury, that were curiously omitted from the CNN account: three witnesses reported that Lotts showed no remorse or even shock after the murder; rather, he licked the bloody knife and announced, "'I finally got the bastard.'"[150] When a police officer arrived, Lotts immediately told him, before he was posed a single question, "'I did it, and I'd do it again.'"[151]

The Fuller case involves a more classic version of premeditated murder. A plan crafted over several months; the crime; steps to conceal evidence; threats to those in a position to disclose what happened; and, once charged, a lack of remorse. Of course, jealousy—an emotion familiar to anyone—propelled the crime. Without downplaying the heinousness of Fuller's acts, or suggesting jealousy is a legally mitigating factor, most of us can, with effort, imagine how a spurned lover commits murder; in a sense, then, the three nonhomicides—cases (a), (b), and (c)—seem further removed from

149. Lotts v. Larkins, No. 4:07 CV 610 RWS, 2010 WL 681327, at *1 (E.D. Mo. Jan. 26, 2010).

150. *Id.* at *3.

151. *Id.* at *4.

the moral universe most people inhabit than that of sixteen-year-old Jamie Fuller. With the final case, Dale Craig, aged seventeen, we return to the almost incomprehensible moral universe of the first three nonhomicide crimes. Both Fuller and Craig received LWOP sentences.[152]

A review of the eight cases collectively suggests that the American criminal justice system apportioned sentences reasonably calibrated to the culpability of the offenses. Another observation is that those juveniles sentenced to LWOP, or its effective equivalent, for crimes other than homicide—cases (a), (b), and (c)—display depravity equal to, or greater than, those juveniles sentenced to LWOP for their role in homicides—cases (g) and (h). Indeed, with the possible exception of Graham and Sullivan themselves, discussed below, juveniles convicted of crimes other than homicide who were sentenced to LWOP often display the shocking quality of the first three examples above. Here are some:

> Milagro Cuningham, aged seventeen, raped an eight-year-old girl, who he left to die under a pile of rocks in a remote landfill.[153]
>
> Nathan Walker and Jakaris Taylor, aged sixteen, invaded a home while armed and raped a woman, who they forced to perform oral sex on her twelve-year-old son.[154]
>
> Marcus Colston, aged seventeen, invaded a home while armed, maced victims, handcuffed them to a bed, and kicked one in the face.[155]
>
> Alden Stevenson, aged fifteen, posed as a salesman and forced his way into a home and raped a woman; then he did the same thing a few days later to a pregnant woman.[156]
>
> James Bowers, aged sixteen, invaded a home, stuffed a rag in the mouth of an elderly woman, and stabbed her sixty times.[157]

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152. State v. Craig, 2005-2323, pp. 2-3 (La. App. 1 Cir. 10/25/06); 944 So. 2d 660, 661; Commonwealth v. Fuller, 657 N.E.2d 1251, 1259 (Mass. 1995).

153. *See* Graham v. Florida, 130 S. Ct. 2011, 2041 (2010) (Roberts, C.J., concurring).

154. *Id.*

155. *See* Colston v. State, 894 So. 2d 300 (Fla. Dist. Ct. App. 2005); Press Release, Attorney General Charlie Crist, Statewide Prosecutors Win Home Invasion Robbery Conviction (Sept. 4, 2003), http://www.myfloridalegal.com/newsrel.nsf/$$swp/0753D86B2B5936AC85256D9700718FA0. Technically, Colston will be eligible for parole at the age of seventy-five, although he is included in the Florida Department of Corrections list of inmates that they categorize as JLWOP. E-mail from Lee Robinson, Fla. Assistant State Attorney, to author (Feb. 9, 2011, 16:23 EST) (on file with author).

156. *See* David Ovalle, *Ruling on Young, Violent Lifers Puts Florida Justice on the Spot*, MIAMI HERALD (Sept. 26, 2010), 2010 WLNR 19106610.

157. *Id.*

> Jackie Berger, aged sixteen, kidnapped a husband and wife at gunpoint and held them hostage for seventeen hours.[158]
>
> Daryl Tindall, aged sixteen, sexually assaulted a six-year-old girl and a seven-year-old girl.[159]
>
> Robert Louis Robertson, aged fifteen, who became known as the Riverside Rapist, raped fifteen women, some at gunpoint.[160]
>
> Kadeem Hart, aged fifteen, raped and robbed a woman while armed and later committed an armed carjacking.[161]
>
> Asa Harris, aged sixteen, committed multiple armed robberies and at least one rape.[162]

Although Justice Kennedy infers from the rarity of the sentence that it conflicts with community norms, another conclusion would be that the rarity points to the care, and even reluctance, with which this sentence has been imposed.[163] Recall that most juvenile offenders, even those guilty of relatively serious crimes, are not subject to the adult criminal justice system; those so charged typically receive leniency in charging and plea bargaining decisions; those convicted of serious crimes typically receive leniency in sentencing decisions; and so it is only the rare juvenile offender whose crimes so shock the judge and jury that the demand for punishment overwhelms a compassion towards youth. When a juvenile commits a crime other than homicide and nonetheless receives an LWOP sentence, one hypothesis is that it reflects a sober judgment as to the defendant's moral culpability.

C. Graham *and* Sullivan

This brings us to Graham and Sullivan. In affirming the need for a categorical rule disqualifying LWOP sentences for juvenile nonhomicides, Justice Kennedy criticizes the Florida statutory scheme for permitting the imposition of such a sentence "based on a *subjective* judgment that the defendant's crimes demonstrate 'irretrievably

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158. *Id.*

159. *See* Tindall v. State, 45 So. 3d 799, 800 (Fla. Dist. Ct. App. 2010).

160. *See* Paul Pinkham, *6 Duval Life Terms Could Be Revived*, FLA. TIMES-UNION, May 19, 2010, at C1.

161. *Id.*

162. *Id.*

163. Perhaps the least egregious crime I was able to find that resulted in a LWOP sentence for a nonhomicide involves Kenneth Young, who at the age of fifteen committed a series of armed robberies. His claim is that his accomplice, a twenty-five-year-old man, always held the gun and pressured him into the crimes. For a sympathetic profile of Kenneth Young, see *Juvenile Life Without Parole*, PBS (Jan. 30, 2009), http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/.

depraved character.'"[164] One can only assume that Justice Kennedy would tolerate such a sentence if it resulted from an *objective* judgment. But what is intended by this adjective here: how can a sentencing decision be anything other than "subjective?" He then pronounces that "specific cases are illustrative," and the reader readies himself for concrete examples to clarify the meaning.[165] Only two are provided: Graham and Sullivan. With respect to Graham, Justice Kennedy writes:

> In Graham's case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible: "[Y]ou decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you."[166]

This is the entirety of the discussion of the facts of Graham's case in this section of the opinion. No argument is offered to rebut the sentencing judge's conclusion; its wrongness is taken as self-evident. One is invited to read the entirety of the sentencing proceedings in *Graham*.[167] At the age of sixteen, Graham committed an armed robbery of a restaurant in the course of which a conspirator hit a victim in the head with a pipe.[168] The judge, at the recommendation of prosecutors, and citing his "sophistication and maturity,"[169] suspended punishment and sentenced him to twelve months in jail and three years of probation.[170] Graham soon violated several conditions of probation, most notably by committing multiple armed home invasions. Precisely how many is a question, but it is sufficient here to note that the final two occurred when Graham was seventeen years, eleven months old.[171]

Hearings in Graham's case included many witnesses, including the defendant, his parents, two victims, a probation officer, and a collaborator. The trial judge openly agonized over his decision, at one point even commiserating with the defendant's mother. Interesting facts, which emerged over the course of the hearings, conflict with the nebulous idea of juvenile immaturity that runs through the *Graham*

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164. Graham v. Florida, 130 S. Ct. 2011, 2031 (2010) (emphasis added) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

165. *Id.*

166. *Id.* (alterations in original).

167. Graham Joint Appendix, *supra* note 7.

168. *Id.* at 15.

169. *Id.* at 23.

170. *Id.* at 36.

171. *Id.* at 50, 57.

opinion. Although Graham, at the age of seventeen, was the youngest of a group of three armed men who invaded the victim's apartment, eyewitness testimony suggests that he was the leader of the group, and the most violent.[172] By contrast, one of his compatriots, aged twenty-one, was described as immature for his age.[173] Although it is true that, as concurring Justice Roberts notes, the prosecution proposed that Graham receive a thirty-year sentence, what seemed to provoke the trial judge is that Graham steadfastly refused to concede his role in the crimes.[174] To sum up, then, Graham committed at least three violent armed robberies in the span of eighteen months, the last two at age seventeen years, eleven months. He surely received a sentence on the high end of what one might expect, but what was offensively subjective about it?

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

> The petitioner, Joe Sullivan, was prosecuted as an adult for a sexual assault committed when he was 13 years old. Noting Sullivan's past encounters with the law, the sentencing judge concluded that, although Sullivan had been "given opportunity after opportunity to upright himself and take advantage of the second and third chances he's been given," he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life. The judge sentenced Sullivan to life without parole.[175]

This is the entirety of Justice Kennedy's discussion of Sullivan. Some additional details might be helpful. At the age of thirteen, three youths, with Sullivan acting as instigator, broke into an elderly woman's house to steal her valuables.[176] Later that day, Sullivan and one accomplice returned; and while the victim was distracted, Sullivan entered through a rear door, threw a hood over the victim's head, and threatened to kill her.[177] He then took her to a bedroom, beat her, and raped her, vaginally and orally. In the two years preceding the rape, Sullivan had committed seventeen criminal offenses (or at least seventeen known to authorities), including a burglary in which he killed a dog and an assault on a counselor unenviably tasked with

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172. *See id.* at 317-18.
173. *See id.* at 332-33.
174. *See* Graham v. Florida, 130 S. Ct. 2011, 2040 (2010) (Roberts, C.J., concurring).
175. *Id.* at 2031 (majority opinion) (citation omitted).
176. *See* Brief of Respondent at 5, Sullivan v. Florida, 130 S. Ct. 2059 (2011) (No. 08-7621).
177. *Id.*

helping him.[178] He had also spent time in a detention facility, where he had assaulted other juveniles. After being sentenced, Sullivan committed multiple crimes in prison.[179]

Although Sullivan was sentenced to LWOP in 1988, it is possible he would have received a more lenient sentence today.[180] That said, it is unclear how the trial judge erred in finding Sullivan so morally culpable as to merit LWOP, and the *Graham* opinion is opaque on this point. Is it Justice Kennedy's claim that no thirteen-year-old can ever possess the moral culpability to merit LWOP? What is the scientific basis for this claim? Justice Kennedy's claim originates from an erroneous belief that human nature is sufficiently captured by the three standard deviations that surround one's own comfortable experience in the world. Sullivan's sentencing judge had access to a wider data set in reaching a contrary conclusion.

D. An Alternative Theory of Violent Juvenile Criminals

Implicit in the *Graham* and *Roper* decisions is a picture of juvenile abilities that is usefully made explicit. But before doing so, some clarification as to what is intended by "juvenile" and "juvenile criminal" is necessary. "Juvenile," like "child," "infant," or "youth," can encompass a seven-year-old boy, several years before the onset of puberty, and a seventeen-year-old woman, several years past menarche. The maturational differences between the two can be rhetorically effaced by referring to both as "juveniles." As noted above, in *Eddings*, for example, the Court embraced a capacious concept of "youth," such that it could include a five-year-old boy, caught in a custody dispute, and a sixteen-year-old young man, capable of burglary, sawing off a shotgun, and murder.[181] Cast in this manner, "youth" has virtually no meaning, and no generalizations about it would be possible.

Furthermore, we are here considering those young people who commit the gravest crimes and are sentenced to the severest of

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178. *Id.* at 6.

179. *Id.*

180. Lionel Tate, who, at the age of twelve, body-slammed and murdered a six-year-old girl, was originally sentenced to LWOP, but the sentence aroused such an outcry that it was reduced to thirty years, which effectively became six years. Released from prison at the age of eighteen, Tate was arrested for armed robbery at the age of nineteen and sentenced to thirty years in prison. *See* Terry Aguayo, *Youth Who Killed at 12 Will Return to Prison, but Not for Life*, N.Y. TIMES (Mar. 2, 2006), http://www.nytimes.com/2006/03/02/national/02tate.html.

181. Eddings v. Oklahoma, 455 U.S. 104 (1982); *see supra* text accompanying note 65.

punishments, either the death penalty or LWOP. This is extraordinarily rare, at least over the past few decades, for thirteen- and fourteen-year-olds; the vast majority of juveniles sentenced to LWOP are sixteen to eighteen years old.[182] The *Graham* and *Roper* opinions argue that such juveniles are significantly less mature than the ordinary adult sentenced to LWOP or the death penalty, and from this fact flows significantly less moral culpability, even when juveniles commit the most heinous of crimes. Yet how old are the adults to whom these juveniles are being compared? The peak age for violent crime in the United States is eighteen to nineteen years old,[183] but the median age of criminals sentenced to the death penalty is roughly twenty-seven years old.[184] Likewise, the briefs cited by the majority in *Graham* rely on sources that suggest that full maturation and brain development is not realized until well into one's twenties.[185] Essentially, this is the view adopted by the Court in *Gall v. United States*, where youth as a mitigating condition was deemed to extend to those in college, with brain maturation not complete until the age of twenty-five.[186] So the unstated question posed by the *Graham* and *Roper* decisions is: Exactly how different, in maturation and brain development, and therefore culpability, are those aged sixteen to eighteen, or "older juveniles," from those aged twenty-five to twenty-seven, or "young adults"?

It is a difficult question to answer. First consider a comparison of these two groups with respect to one manifestation of maturation: height. (I here limit myself to males as they constitute about ninety percent of the violent criminals and an even higher percentage of those sentenced to the death penalty or LWOP.) Given the heterogeneity of any human population, the distribution of each group is governed by a bell curve, and if those two curves were laid next to one another, the result would be something very roughly like:[187]

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182. Of the seventy-seven persons under eighteen years reportedly convicted to LWOP for nonhomicides in Florida, sixty-three, or eighty-two percent, are sixteen and eighteen. *See* Annino et al., *supra* note 84, at 18.

183. *See* ARREST RATES, *supra* note 126, at 5-6.

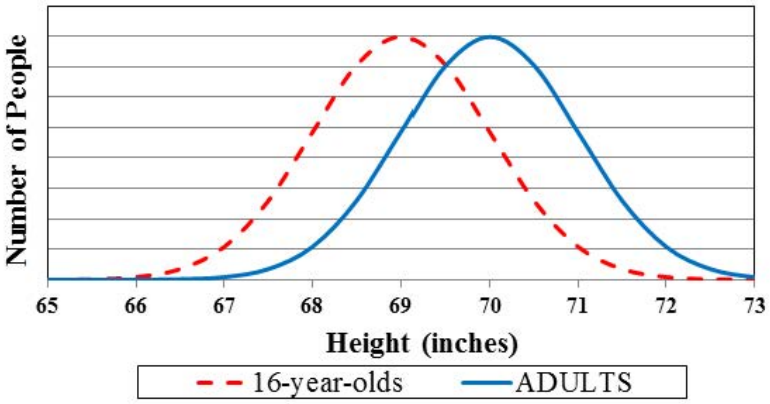
184. I considered all those sentenced to death in Florida for crimes committed after 2004. The median age of the offender at the time of the offense was twenty-seven years. *See Corrections Offender Network: Death Row Roster*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited Nov. 18, 2011).

185. *See, e.g.*, AMA Brief, *supra* note 94, at 16-24.

186. 552 U.S. 38, 58 (2007).

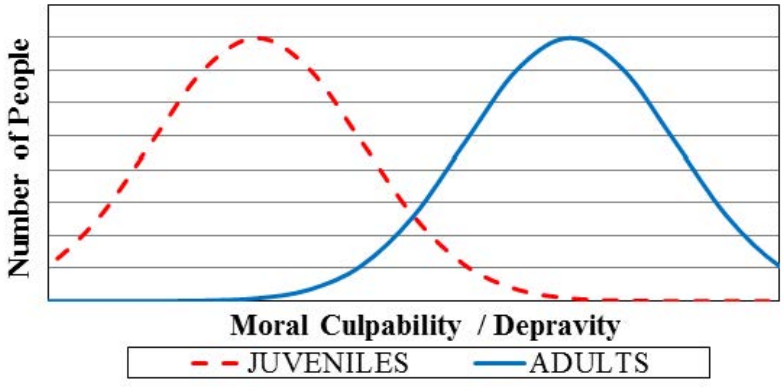
187. Figure 1 loosely tracks the data one could find at *CDC Growth Charts*, KIDSGROWTH.COM (2000), http://www.kidsgrowth.com/stages/viewgrowthcharts.cfm?id=BH318.

Figure 1



Obviously, one cannot draw any meaningful distinction between older juveniles and young adults with respect to height. If maturation or neurodevelopment tracked height, the *Graham* and *Roper* decisions would be indefensible. It would seem that these decisions are premised on a vision of older juveniles and young adults as follows:[188]

Figure 2



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

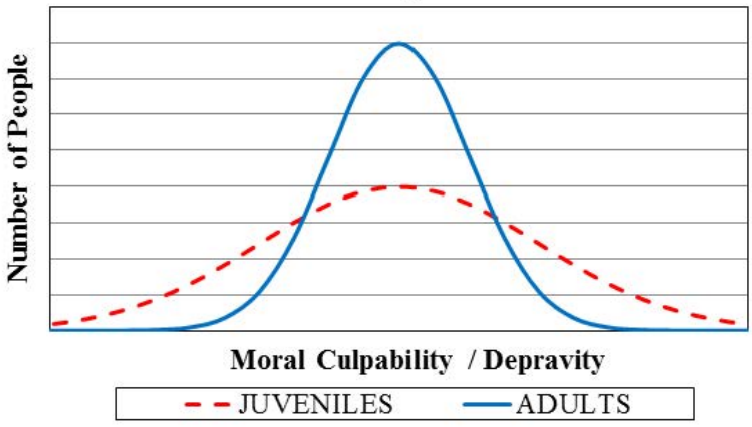
188. Figures 2 through 5 depict graphically the assumptions about juvenile responsibility that support, or undercut, the *Graham* decision. They are conceptual, not empirical.

how inchoate and even unscientific the notions of "moral culpability" and "depravity" are.

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

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

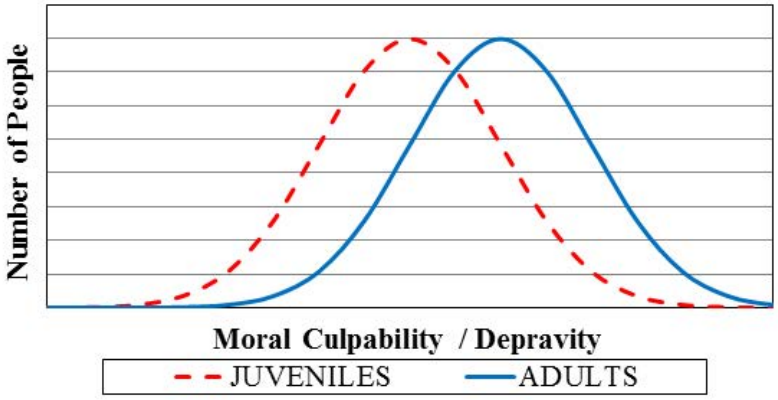
Figure 3



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

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

Figure 4



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

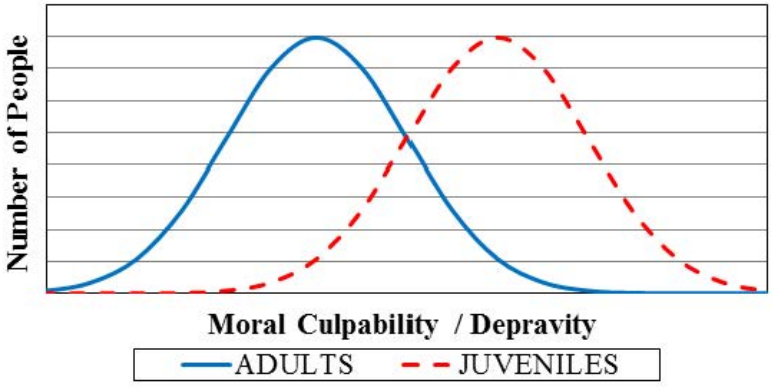
This may be discounted as merely "anecdotal evidence," but curiously there is some support from "brain science." The Court's basic argument, in this context, is that juvenile brains are undeveloped, as evidenced by incomplete myelination and not fully pruned prefrontal lobes, and there is somehow a causal relationship between this "immaturity" and a juvenile's reckless decision making. There are reasons to be skeptical,[189] but even if this were true, one would expect that those juveniles who engage in dangerous and possibly illegal behavior would have less mature brains in these respects than their age-group peers. Recent studies find the opposite. One study concluded that those aged twelve to eighteen years who act recklessly have "more mature frontal white matter tracts" than their age-group

189. *See* Robert Epstein, *The Myth of the Teen Brain*, SCIENTIFIC AM. MIND, Apr.-May 2007, at 57, *available at* http://drrobertepstein.com/pdf/Epstein-THE_MYTH_OF_THE_TEEN_BRAIN-Scientific_American_Mind-4-07.pdf. Epstein argues that "most of the brain changes that are observed during the teen years lie on a continuum of changes that take place over much of our lives." *Id.* at 60. In addition, not a single study "establishes a *causal* relation between the properties of the brain being examined and the problems we see in teens." *Id.*

peers.[190] As a consequence, "It is difficult to reconcile this increased maturity with the theory that adolescent risk-taking occurs because of immature cognitive control systems."[191] Another study undercuts the basic neurological premise of the *Graham* decision: "There is virtually no direct evidence to support a relation between natural maturation in brain structure during adolescence and impulsive behavior."[192]

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

Figure 5



This might seem implausible, but it is a hypothesis consistent with observations in other contexts. Consider the following scenario. Two people score an 800 on the math SAT exam: Angela (aged thirteen) and Bob (aged eighteen). Who is more likely to be a physics professor at Cal Tech at the age of thirty? The better guess, of course, is Angela. Her score puts her at a minimum of five or so standard deviations

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190. *See* Gregory S. Berns et al., *Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex*, PLoS ONE, Aug. 2009, at 1, 5-6.

191. *Id.* at 7.

192. Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 263, 270 (2010), http://onlinelibrary.wiley.com/doi/10.1002/dev.20442/pdf. Yet another paper, this one in the *Journal of Neuroscience*, notes: "Neuroimaging studies cannot definitively characterize the mechanism of such developmental changes (e.g., *synaptic pruning, myelination*). However, these volume and structural changes may reflect refinement and fine-tuning of reciprocal projections from these brain regions during maturation. *Thus, this interpretation is only speculative*." Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCIENCE 6885, 6885 (2006) (emphasis added).

above the mean in mathematical ability, whereas Bob's score puts him a minimum of three standard deviations above the mean. Angela's mathematical ability may decline, or her interest in exploiting that ability may diminish, but everything else being equal, spectacular performance at the age of thirteen is more, not less, suggestive of profound ability and attainment later in life.

Perhaps a taste and capacity for violence and cruelty at a young age is likewise the sort of precocity that portends notable accomplishments in later life. Although the peak age for crime in America today is seventeen, the peak age for violent crime is 1.5 years later. In that sense, a violent crime committed at the age of sixteen or seventeen, at least one so heinous as to be deemed worthy of LWOP, could be deemed more suggestive of human depravity than the same crime committed at the age of twenty-five. At a minimum, when a sixteen-year-old commits an appalling crime, such as those surveyed in the preceding Subpart, it is not clear why society should not find such a person at least as threatening, and worthy of condemnation, as a twenty-five-year-old who commits the same crime.[193]

Ironically, the case of Christopher Simmons lends support for this last possibility. In the Supreme Court opinion invalidating Simmons's death penalty and culminating in ruminations on juvenile immaturity, the introduction consists of an elaborate summary of Simmons's calculating crime. The facts of Simmons's crime call into question the premise of the decision. Simmons, aged seventeen, found conspirators younger than himself; he formed a plan to burglarize a house, tie up a victim, and murder her; he boasted to his collaborators that they would "get away with it" because they were minors. They burglarized a house at night; they used duct tape and electrical wires to cover the victim's mouth and bind her limbs; they carried her away from the

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

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

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

house; and Simmons himself dumped her, alive, from a railroad trestle into a river, where she drowned while struggling to free herself.[194] This is not a case of an "adult" resorting to murder after battling demons in his head for years, or after being debilitated by a decade of drug abuse, or after being laid off from a job, or spurned by a lover, or suffering any of the hard knocks life cruelly deals out. It is the story of a seventeen-year-old acting with cold-hearted calculation, embarking on a torture-murder, aware of its costs and benefits. Simmons would seem more mature, not less, than the typical murderer.

Simmons's case was thrust into the lap of the Supreme Court when the Missouri courts engaged in a patent misreading of the relevant precedent and overturned his death sentence.[195] Thus, his case, with inconvenient facts, became an untidy vehicle for establishing the proposition that juvenile murderers categorically lack the culpability warranting the death penalty. The *Graham* and *Sullivan* cases are more typical of how Eighth Amendment challenges to juvenile sentences are likely to wind their way to the Supreme Court: identified by organizations seeking to reduce juvenile sentences, they likely reflect among the most compelling cases nationwide in this effort. Alternatively put, Bunch, Breakfield, and Bell may be more typical of juvenile nonhomicide offenders sentenced to LWOP (or its effective equivalent).

Given the almost assuredly atypical nature of the *Graham* and *Sullivan* cases, even more caution than commonplace would have been appropriate. In other contexts in the criminal procedure field, the Court has eschewed categorical rules when petitioners failed to identify a pattern of cases that warranted dramatic judicial intervention. For example, in *Texas v. Cobb*, the Court rejected an extension to *Miranda* with the observation that there was "no evidence that such a parade of horribles" had transpired anywhere in America.[196] Justice Kennedy presented himself as sympathetic to this cautious

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194. Roper v. Simmons, 543 U.S. 551, 556-57 (2005).

195. In *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399-400 (Mo. 2003) (en banc), the Missouri Supreme Court held, implausibly, that *Atkins v. Virginia*, 536 U.S. 304 (2002), which invalidated the death penalty for mentally retarded defendants, somehow overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

196. 532 U.S. 162, 171 (2001). Analogously, in *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001), petitioners argued that police officers should not be authorized to arrest persons for all misdemeanors, however minor, for such a rule created a "grave potential for abuse." The Court rejected the argument: "Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality. In fact, as we have pointed out in text, there simply is no evidence of widespread abuse of minor-offense arrest authority." *Id.* at 353 n.25.

approach. In *Hudson v. Michigan*, rejecting the categorical application of the exclusionary rule to evidence obtained in violation of the knock-and-announce rule, he wrote, "If a widespread pattern of violations were shown . . . there would be reason for grave concern."[197] But he discerned no such pattern and concurred in the majority's judgment in that case. In *Graham*, however, Justice Kennedy insisted on the necessity of a categorical rule in the absence of any showing of a "widespread pattern" of improvident juvenile LWOP sentences. At most, he found two.

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

IV. *GRAHAM*'S RECEPTION IN THE LOWER COURTS

Graham has already been featured as part of an orchestrated effort to revamp penalties for juvenile criminals.[198] A year after the case was decided, we can now evaluate the initial success of these advocacy efforts. Having to choose between the Court's sweeping rhetoric and its narrow holding, courts have generally regarded the latter as more relevant to their work. Even as they dutifully follow the

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197. 547 U.S. 586, 604 (2006).

198. Groups lobbying state legislatures to eliminate JLWOP sentences have cited the *Graham* decision. Consider, for example, the efforts of the Juvenile Law Center to change the relevant law in Pennsylvania. *Juvenile Life Without Parole*, JUV. L. CENTER, http://www.jlc.org/jlwop/ (last visited Nov. 18, 2011). Doubtless emboldened by the *Graham* decision, a California State Senator introduced a bill in the legislature to authorize any inmate, who was sentenced as a juvenile and who had been incarcerated as few as ten years, to petition for resentencing. *See* S.B. 9, 2010 Leg. Sess. (Cal. 2010) (proposed), *available at* http://www.aroundthecapitol.com/billtrack/text.html?bvid=20110SB999INT. The bill was narrowly defeated. Marisa Lagos, *Bill To Give Juvenile Lifers Second Chance Defeated*, S.F. CHRON., Aug. 26, 2011, at C8. Somewhat more modestly, there are also litigation efforts on behalf of juveniles convicted of felony murder, arguing that because such defendants did not have the intent to kill, *Graham* precludes an LWOP sentence. *See, e.g.*, Brief of Amicus Curiae on Behalf of Devon Knox at 4-5, Commonwealth v. Knox, 11 A.3d 1046 (2010) (No. 801 WDA 2009). Finally, academics have argued that *Graham*'s ruminations on adolescence have implications for juvenile transfer decisions. *See* Neelum Arya, *Using* Graham v. Florida *To Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

precise holding of *Graham*, some judges seem to be almost gleefully trampling upon its spirit. But those who taunt the Supreme Court do so at their peril, and one likely development of the *Graham* decision will be judges becoming less forthright about their motivations at sentencing hearings, lest they be rebuked for epistemological certainty about a juvenile criminal's innate depravity. There are a few inmates whose sentences have been amended as a result of *Graham*, but they are often not among the apparently intended class of beneficiaries. Given the rarity with which JLWOP is imposed for any crime, *Graham*'s direct impact may be small; however, the concluding Part explores the decision's costs in undermining the clarity of the law and perpetuating a misguided theory of juvenile immaturity.

A. An Ambiguous and Narrowly Construed Decision

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

Let us first consider how the litigants themselves have fared. Terrance Graham's resentencing, originally scheduled for March 1, 2011, was postponed after the prosecution reinstated dropped charges on April 26, 2011, only to be rescheduled for December 19 and 20, 2011, after the prosecution again dropped those charges.[199] Joe Sullivan's resentencing occurred on January 27, 2011, twenty-one years after he was first sentenced to LWOP.[200] It was his misfortune that the judge who oversaw his trial, and sentenced him originally, was still on the bench. In 1989, Circuit Judge Nick Geeker pronounced that Sullivan "is beyond help."[201] Nothing in the intervening decades caused him to reassess this view. Judge Geeker resentenced Sullivan to the maximum term, or forty years for each of the two rape counts,

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199. Telephone Interview with Law Clerk, Creed & Gowdy (Mar. 2, 2011); Telephone Interview with John Kalinowski, Assistant State Attorney (Nov. 19, 2011).

200. The resentencing is described in *80 Years for Rape*, PENSACOLA NEWS J., Jan. 27, 2011, *available at* 2011 WLNR 1769121. Although a transcript is not yet available, I spoke with Bridgette Jensen, the State Attorney representing Florida at the hearing on February 9, 2011.

201. Kris Wernowsky, *Inmate's Sentence Affected by Court Ruling*, PENSACOLA NEWS J., May 18, 2010, *available at* 2010 WLNR 10250351.

and ran them consecutively.[202] Yet the judge's apparent design—to incarcerate Sullivan for the duration of his life—was frustrated by quirks in the law, as it existed in 1989, when coupled with case law precluding the restructuring of a concurrent sentence into a consecutive one; Sullivan, earning a windfall, can now expect to be released in 2016.[203]

The Sullivan resentencing highlights an ambiguity at the core of the opinion: What if a juvenile is sentenced for a nonhomicide to a long prison term that may operate as a life sentence? Sullivan's sentence, under current law, would have rendered him ineligible for release until the year 2057, or at the age of 82.[204] Courts are divided as to whether such a sentence would satisfy *Graham*. California, for example, has already accumulated roughly a half dozen conflicting precedents. Some courts have affirmed sentences of 110 years and 120 years imposed on juveniles for nonhomicides.[205] Other courts have reversed sentences of 175 years, 84 years, and 50 years plus two consecutive life with parole terms (entailing expected incarceration of 52 years).[206] The California Supreme Court recently granted a petition to resolve the issue.[207]

In some jurisdictions, a narrow construction of *Graham* has thus far prevailed, with courts issuing and affirming sentences for juvenile nonhomicides that are tantamount to LWOP. The case of Michael Bell, discussed above,[208] is illustrative. The trial judge sentenced Bell to the maximum term permissible under state law, fifty-four years to life, with the stated intent of ensuring his incarceration for the remainder of

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202. Kris Wernowsky, *Sullivan Sentence: 80 Years*, PENSACOLA NEWS J., Jan. 28, 2011, *available at* 2011 WLNR 1768660.

203. The Florida Department of Corrections eventually updated Sullivan's release date, which is now listed as "2/03/2016." *Corrections Offender Network: Inmate Population Information Detail*, FLA. DEP'T OF CORR. (Nov. 6, 2011), http://www.dc.state.fl.us/ActiveInmates/. For some of the complexities of Florida sentencing law, I spoke with Lee Adams of the Florida Department of Corrections on November 4, 2011.

204. *See* FLA. STAT. ANN. § 944.275(4)(b)(3) (West 2001) (stating that for sentences imposed for offenses committed after 1995, a prisoner is not entitled to release prior to serving 85% of the sentence imposed).

205. People v. Ramirez, 123 Cal. Rptr. 3d 155 (Ct. App.) (120-year sentence), *reh'g granted*, 255 P.3d 948 (Cal. 2011); People v. Caballero, 119 Cal. Rptr. 3d 920 (Ct. App.) (110-year sentence), *reh'g granted*, 250 P.3d 179 (Cal. 2011).

206. People v. Nuñez, 125 Cal. Rptr. 3d 616 (Ct. App.) (175-year sentence), *reh'g granted*, 255 P.3d 951 (Cal. 2011); People v. Mendez, 114 Cal. Rptr. 3d 870 (Ct. App. 2010) (84-year sentence); People v. J.I.A., 127 Cal. Rptr. 3d 141 (Ct. App.) (50 years, plus consecutive life terms), *reh'g granted*, 260 P.3d 283 (Cal. 2011).

207. *Caballero*, 250 P.3d 179.

208. *See supra* text accompanying notes 132-136.

his life.[209] The term will probably fall just short of accomplishing this goal, for he will eligible for release two months shy of his seventieth birthday, and his life expectancy is between seventy and seventy-one years. Rejecting his habeas petition,[210] the federal court noted that, given current life expectancies, Bell could expect to spend a few of his golden years, or perhaps just months, in freedom, assuming he is released at the first permissible date.[211] At least the court considering Bell's sentence found it to be in technical compliance with *Graham*. Chaz Bunch's eighty-nine year sentence, for a crime recounted above,[212] was given less scrutiny, the judge noting the lack of indication that he would not, at some point, be eligible for release.[213]

The sentencing of Jose Walle is perhaps most notable in its disregard for the *Graham* decision. In sentencing Walle, who was thirteen years old at the time of his crimes, to what amounts to a ninety-two-year sentence, the trial judge was honest about his motivations and his goal. Dispensing even with the fiction that Walle might someday be released, Judge Tharpe pronounced, "Walle knew the difference between right and wrong . . . . He has forfeited his right to live in a free society."[214] It is hard to imagine a lower court judge more forthrightly engaged in judicial nullification of a Supreme Court opinion. Notwithstanding Justice Kennedy's ruminations on adolescent immaturity and the impossibility of certainty about a juvenile's culpability, Judge Tharpe evinced great confidence that

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209. Bell v. Haws, No. CV09-3346-JFW, 2010 WL 3447218, at *1 (C.D. Cal. July 14, 2010).

210. The magistrate judge's opinion contained a "Facts" section of 1349 words, *id.* at *3-5 (detailing the crime and drawing upon the crime to neutralize Bell's attempts to mitigate the severity of his crime).

211. Bell's parole date would be two months shy of his seventieth birthday; according to defendant's proffered actuarial statistics, he can expect to live to sometime between his seventieth and seventy-first birthday. *See id.* at *9-11 & nn.8 & 9. The judge held: "[D]espite the trial judge's intent that Petitioner remain in prison for the duration of his life, there is a date certain upon which Petitioner will be eligible for release on parole. The trial judge's intent does not alter that date or transform his sentence into LWOP." *Id.* at *11.

212. *See supra* text accompanying note 131.

213. *See* Bunch v. Smith (*Bunch II*), No. 1:09 CV 901, 2010 WL 750116, at *2 (N.D. Ohio Mar. 2., 2010) ("[T]here is still no indication [in the record] that Bunch will not be eligible for parole prior to the completion of [his aggregate] sentence."). Bunch was decided while *Graham* was still pending before the United States Supreme Court, but the court assumed for purposes of argument that he would prevail and that a JLWOP sentence for a nonhomicide would be deemed unconstitutional.

214. Alexandra Zayas, *No Life Term? Then 65 Years*, ST. PETERSBURG TIMES, Nov. 18, 2010, at B1. The trial judge mocked the Eighth Amendment argument made by Walle's lawyer: "Is it not cruel and unusual punishment for the victims to have endured the rage, the brutality, the terror that your client exacted upon them?" *Id.*

Walle was mature and culpable. In arriving at this assessment, it was doubtless relevant that Judge Tharpe had heard evidence that Walle, *at the age of thirteen*, had committed five separate crimes in a three-week period, which collectively gave rise to over a dozen counts of armed sexual battery, aggravating kidnapping, armed robbery, grand theft auto, and armed carjacking.

Whether Judge Tharpe will be rebuked on appeal, especially given his transparent disregard for the *Graham* decision,[215] remains to be seen; and more generally the cases will percolate, as lower courts struggle to resolve whether sentences of fifty or one hundred years, imposed on juveniles for nonhomicides, violate *Graham*. At some point, the United States Supreme Court may reenter the fray, but already there are hints as to what may constitute compliance with its decision. Juveniles sentenced to life *with* the possibility of parole have thus far generally not obtained relief from Graham.[216] And the "eligibility for parole" that removes a defendant from the protection of *Graham* can apparently be quite speculative. In *Angel v. Commonwealth*, the sixteen-year-old defendant was convicted of abduction with intent to defile, malicious wounding, and object sexual penetration, and he was sentenced to consecutive life terms.[217] The Virginia Supreme Court unanimously rejected the argument that *Graham* applied, invoking a state law that provided: "Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony . . . who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release."[218] Because none of the crimes that Angel was convicted of qualified as Class 1 felonies, he "may petition the Parole Board" at age sixty, which the Virginia Supreme Court deemed a "meaningful opportunity to obtain release," as required by *Graham*.[219] It is worth noting, however, that the

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215. *See also infra* text accompanying notes 252-258 and note 260 and accompanying text (discussing sentencings of Mendez and Nuñez).

216. *See* Hall v. Thomas, 611 F.3d 1259 (11th Cir. 2010) (robbery and kidnapping conviction; life sentence affirmed); Warren v. Smith, No. 1:09 CV 1064, 2010 WL 2837002 (N.D. Ohio July 19, 2010) (rape and kidnapping conviction; life sentence affirmed).

217. 704 S.E.2d 386, 389 (Va. 2011), *cert. denied*, 80 U.S.L.W. (U.S. Oct. 3, 2011) (No. 11-5730).

218. *Id.* at 402 (quoting VA. CODE ANN. § 53.1-40.01 (2009)).

219. *Id.* A similar result was reached in *Cunningham v. State*, 54 So. 3d 1045 (Fla. Dist. Ct. App. 2011), in which the defendant was sentenced in 1983 by a Florida court to a life sentence for nonhomicide offenses. Under the law at the time, which still governs his case, he will be eligible for parole consideration in 2026, when he turns sixty. A unanimous three-judge panel held this sufficient under *Graham*. *Id.* at 1045-46.

Parole Board regularly denies parole to inmates in their sixties and even seventies, citing as a reason the "[s]erious nature and circumstances of the offense."[220] Angel petitioned the United States Supreme Court for review, arguing that he was denied a "meaningful opportunity" to demonstrate improvement and seek release, but the Court declined to review his sentence. At least for now, then, Virginia's method for dealing with juvenile nonhomicide offenders, who can be sentenced to a life term that carries with it the remote possibility of parole starting at age sixty, is acceptable to the United States Supreme Court.

Let us turn now to juveniles convicted of homicide. At least so far, not a single one has obtained relief from *Graham*.[221] For those

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220. Consider, for example, the January 2011 monthly decisions of the Virginia Parole Board. *Parole Decisions Jan. 2011 with Reasons*, VA. DEP'T OF CORR., http://www.vadoc.state.va.us/resources/vpb/decisions/2011/decisions-jan11.pdf (last visited Nov. 18, 2011). In denying the application for parole of Charles Edward Bevill, aged sixty-four, convicted of sexual assault, rape, and robbery, the board referenced the "[s]erious nature and circumstances of [the] offense." *Id.* Consider also the denials of Loren Neal Duffield (homicide), aged seventy-one, Larry Alexande Griffin (sex crimes), aged sixty-three, Bruce Edward Goodwin (sex crimes), aged sixty-one, and Bobbie Caldwell Webber (homicide), aged sixty-nine. The list of denials goes on and on and swamps the only eighteen parole grants. *Id.*

221. *See, e.g.*, Cox v. State, No. CR 00-345, 2011 WL 737307 (Ark. Mar. 3, 2011) (per curiam) (fourteen-year-old murderer sentenced to LWOP); People v. Wills, No. B223216, 2011 WL 3278689 (Cal. Ct. App. Aug. 2, 2011) (fourteen-year-old murderer's life sentence affirmed; unanimous three-judge panel); People v. Ruiz, No. B220619, 2011 WL 2120123 (Cal. Ct. App. May 31, 2011) (sixteen-year-old murderer sentence of eighty two years to life affirmed; unanimous three-judge panel); People v. Adderley, No. B217620, 2011 WL 817751 (Cal. Ct. App. Mar. 10, 2011) (sixteen-year-old murderer sentenced to LWOP; unanimous three-judge panel); People v. Hernandez, No. B223310, 2011 WL 539448 (Cal. Ct. App. Feb. 17, 2011) (seventeen-year-old accomplice to felony murder sentenced to LWOP); People v. Perez, No. F058027, 2011 WL 222120 (Cal. Ct. App. Jan. 21, 2011) (sixteen-year-old murderer sentenced to LWOP; unanimous three-judge panel); Twyman v. State (*Twyman II*), No. 747,2010, 2011 WL 3078822 (Del. July 25, 2011) (fifteen-year-old murderer sentenced to two mandatory LWOP sentences; unanimous three-judge panel); State v. Windom, 253 P.3d 310 (Idaho 2011) (sixteen-year-old murderer sentenced to LWOP; 4-1 decision); McReynolds v. State, No. 104,640, 2011 WL3795484 (Kan. Ct. App. Aug. 26, 2011) (per curiam) (seventeen-year-old murderer's life sentence affirmed); Jones v. State, No. 2009-CA-02033-COA, 2011 WL 3671890 (Miss. Ct. App. Aug. 23, 2011) (fifteen-year-old murderer's life sentence affirmed; unanimous decision of state court of appeals); Evans v. State, No. 2009-KA-00854-COA, 2011 WL 2323016 (Miss. Ct. App. June 14, 2011) (en banc) (fourteen-year-old murderer's life sentence affirmed); State v. Andrews, 329 S.W.3d 369 (Mo. 2010) (en banc) (fifteen-year-old murderer sentenced to LWOP; 4-3 decision); State v. Olivares-Coster, 259 P.3d 760 (Mont. 2011) (seventeen-year-old murderer's life sentence with parole after sixty years affirmed; 5-2 decision); State v. Golka, 796 N.W.2d 198 (Neb. 2011) (seventeen-year-old murder sentenced to LWOP; unanimous state supreme court opinion); Paolilla v. State, 342 S.W.3d 783 (Tex. App. 2011) (seventeen-year-old murderer sentenced to LWOP; unanimous three-judge panel); Meadoux v. State, 325 S.W.3d 189 (Tex. Crim. App. 2010) (sixteen-year-old murderer sentenced to LWOP; 7-2 decision); State v. Ninham, 797

guilty of premeditated murder, the result is little surprising, given the circumstances of their crimes, which several courts have painstakingly recounted.[222] In *Miller v. State*, for example, a fourteen-year-old (named Evan Miller, not to be confused with the Leon Miller of Part III.B.2) schemed with a confederate to burglarize a neighbor, then assaulted the victim with a baseball bat, leaving him badly injured on the floor.[223] As the victim pleaded for his life, the defendant set fire to the trailer home, announcing, "'I am God, I've come to take your life.'"[224] The Alabama appellate court's account of the crime, stretching over 2000 words, seems precisely the sort of overindulgent narrative criticized by Justice Stevens in *Uttecht*.[225] Yet the circumstances of the crime prove relevant when the court addressed Justice Kennedy's critique of juvenile immaturity in *Graham*. Given the horrific crime, and Miller's apparent maturity, the Alabama court held the LWOP sentence was merited.[226]

The United States Supreme Court's decision, as this Article was in its final stages of publication, to grant certiorari in *Miller* is a

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N.W. 2d 451 (Wis. 2011) (fourteen-year-old murderer's LWOP sentence affirmed; two justices dissenting). There have been dissenting judges in the above decisions, and often the *Graham* Court's discussion of juvenile immaturity is prominently argued in their opinions, but so far they have not prevailed. For still more opinions affirming LWOP sentences for juvenile murderers, see cases cited *infra* note 222. In *People v. Perez*, No. G042811, 2011 WL 521319 (Cal. Ct. App. Feb. 15, 2011), a fourteen-year-old, guilty of being an accomplice to murder, was successful in challenging his fifty-year sentence. However, the court rejected the argument that the sentence violated the Federal Constitution under *Graham* and grounded its decision on the California constitution and on a statutory analysis. The court reduced Perez's sentence to twenty-five years. *Id.* at *13.

222. In *Gonzalez v. State*, for example, the court saw fit to note that the sixteen-year-old defendant stabbed the victim, a forty-nine-year-old man in poor health, weighing 109 pounds, twelve times. 50 So. 3d 633, 635 (Fla. Dist. Ct. App. 2010), *cert. denied*, 80 U.S.L.W. 3193 (U.S. Oct. 3, 2011) (No. 11-5641). For other extravagant accounts of the crime that gave rise to a juvenile LWOP sentence, see *Espie v. Birkett*, No. 07-12506-BC, 2010 WL 2994010, at *1-2 (E.D. Mich. July 28, 2010); *Browner v. Jacquez*, No. CV 09-2912-JHN(DTB), 2010 WL 3419806, at *1 (C.D. Cal. July 7, 2010); *Miller v. State*, 63 So. 3d 676, 677 (Ala. Crim. App. 2010); and *People v. Hernandez*, No. B218507, 2010 WL 2598265, at *1 (Cal. Ct. App. June 30, 2010).

223. 63 So. 3d at 682-83.

224. *Id.* at 683.

225. *See supra* text accompanying notes 118-120.

226. In *People v. Soto*, No. C060566, 2011 WL 1303400 (Cal. Ct. App. Apr. 6, 2011), another fourteen-year-old (named Juan Torres) was sentenced to over one hundred years in prison for murder and other offenses. The court of appeals dismissed a challenge to the sentence, distinguishing another case in which the defendant was an "unusually immature youth." Torres, by contrast, "had created [the] situation" that culminated in his committing "willful, deliberate, and premeditated murder." *Id.* at *18 (internal quotation marks omitted); *see also* People v. Cabanillas, No. F058890, 2011 WL 1143230 (Cal. Ct. App. Mar. 30, 2011) (affirming sentence of determinate term of 17 years plus indeterminate term of 115 years to life imposed on 14-year-old murderer).

remarkable development. It was apparently Miller's age that piqued the Court's interest, as his petition was joined with that of another fourteen-year-old murderer sentenced to LWOP,[227] despite the fact that a month earlier the Supreme Court denied certiorari in a case involving a sixteen-year-old murderer.[228] One can only speculate as to the final resolution of the case, but one scenario is a decision that concedes the brutality of Miller's crime only to launch into generalities about the frailties of fourteen-year-olds, reversing his sentence, and remanding with opaque instructions about affording opportunities to demonstrate self-improvement.

A few homicide cases involving LWOP sentences presented more compelling material for leniency than that of Miller, albeit defendants a year or two older. Erik Jensen, often featured by advocacy groups, is an example.[229] The seventeen-year-old was convicted of conspiracy to commit murder and sentenced to LWOP.[230] The case involved the murder of Jensen's best friend's mother. According to one version of events, Jensen had no knowledge of the crime until after it was committed and was simply an accessory after the fact in the crime's concealment. Other versions, including the one credited by the judge and jury, implicated him in the plan prior to its commission. In any event, Jensen's habeas petition argued that *Graham*'s prohibition on LWOP sentences should extend to juveniles convicted merely of complicity in murder. The curtness with which a distinguished federal judge (Judge Richard Maitch) dismissed this claim must be discouraging to those who had hoped the *Graham* decision would spur a greater receptivity to constitutional claims of excessive punishment.[231]

Even more striking are cases involving immature defendants convicted of homicide, but whose crimes have the apparent character of one-off events not reflective of deep depravity. Sentenced to harsh prison terms, albeit short of LWOP, they have received no relief from the *Graham* decision. The case of Larry Lewis is illustrative.[232] Lewis,

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227. *See* Miller v. Alabama, No. 10-9646, 2011 WL 1086007 (U.S. Nov. 7, 2011); Jackson v. Hobbs, No. 10-9647, 2011 WL 1060941 (U.S. Nov. 7, 2011).

228. *See* Gonzalez v. State, 50 So.3d 633 (Fla. Dist. Ct. App. 2010), *cert. denied*, 80 U.S.L.W. 3193 (U.S. Oct. 3, 2011) (No. 11-5641).

229. A PBS Frontline segment, "When Kids Get Life," profiles, among others, Erik Jensen. *See When Kids Get Life*, PBS FRONTLINE (May 8, 2007), *available at* http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/five/nateerik.html.

230. Jensen v. Zavaras, No. 08-CV-01670-RPM, 2010 WL 2825666 (D. Colo. July 16, 2010).

231. *Id.* at *1.

232. State v. Lewis, 2009-1404, pp. 1-2 (La. 10/22/10); 48 So. 3d 1073, 1074-75.

aged sixteen years, was a bystander in a fistfight between two high school classmates. A gun fell out of one the combatant's pockets; Lewis scooped it up, and—in a manner disputed at trial—shot one of the youths in the head. After a bench trial, the judge accepted the defendant's account of the firing (that it was accidental) and threw out the murder charge, but convicted Lewis of manslaughter. At sentencing, the judge even embraced the view of juveniles adopted by the *Graham* Court, noting young defendants, although tried as adults, "still think with sixteen-year-old brains. They don't think with thirty-year-old brains."[233] Yet, bound by Louisiana law, and accepting the need for retribution, the judge sentenced Lewis to thirty years, which makes him ineligible for release for twenty-five-and-a-half years. In his appeal to the Louisiana Supreme Court, Lewis found that *Graham*, far from providing support for his claim of excessive punishment, worked against him. The Louisiana Supreme Court quoted from the *Graham* opinion that "[t]here is a line between homicide and other serious violent offenses," foreclosing review of his sentence.[234]

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

Another possibility, suggested by the Supreme Court's decision to grant certiorari in *Miller*, involving a fourteen-year-old sentenced to LWOP for homicide, is an extension of *Graham* into new terrain. Yet what? Given the Supreme Court's insistence throughout the *Graham* opinion that "homicide is different" in what it reveals about the culpability of the offender and the need for retribution, it would be a staggering development if the Court in *Miller* simply cast all that aside as mere rhetoric and sweepingly invalidated *all* juvenile LWOP sentences, even for murderers. A more modest possibility would be invalidating all LWOP sentences for those aged fourteen and fifteen. Yet what is the basis for such a rule; and where will it lead? What

233. *Id.* at p. 4; 48 So. 3d at 1076.

234. *Id.* at p. 11; 48 So. 3d at 1079 (quoting Graham v. Florida, 130 S. Ct. 2011, 2027 (2010)).

about immature sixteen-year-olds sentenced to LWOP for accomplice murder? What about seventeen-year-olds sentenced to forty years for rape? Perhaps such considerations will give the Court pause, as it rethinks the policy and doctrinal underpinnings of *Graham*; or perhaps *Graham* will serve as a launching pad for a more ambitious Eighth Amendment jurisprudence.

B. The (Unintended) Beneficiaries

Who has benefitted from *Graham*? The decision is little more than a year old, and its immediate effects are likely to be modest—that is, the psychic benefit an inmate may derive from having an LWOP sentence replaced with a life sentence *with* the possibility of parole. This category of inmates includes Calvin Breakfield, for example, although Breakfield has apparently not yet secured, or even requested, a judicial declaration amending his sentence.[235] That said, there are several inmates who have achieved an amended sentence and, as cataloged below, it is doubtful that many of them were contemplated by *Graham*.

(1) *Juvenile Murderers in Iowa*. One summer night in 1993, seventeen-year-old Jason Means, together with five other teens, planned to rob a convenience store.[236] They arrived at a party where Michelle Jensen was present and pressured her to turn over the keys to her car, intending to use it for their robbery. When she declined, Means and another man returned with a shotgun and forced her outside. Jensen was later discovered dead with a shotgun blast to the head. The astute reader may be wondering what relevance *Graham* has to this case, given that Means was guilty of murder, or at a minimum felony murder, regardless of whether he or an accomplice fired the shotgun. The answer to this question plunges us into the vagaries of Iowa criminal law. A jury convicted Means of second degree murder, as well as first degree kidnapping, first degree robbery, criminal gang participation, conspiracy to commit robbery, and (presumably for good riddance) unauthorized possession of an offensive weapon. The judge sentenced Means to fifty years for murder, the maximum sentence, and lesser terms for all of the other counts except kidnapping. Under Iowa law, however, a first degree kidnapping conviction resulted in a *mandatory* life sentence; furthermore, Iowa makes parole available as a

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235. *See supra* text accompanying note 130.

236. Iowa v. Means, No. FECR167295 (Iowa Dist. Ct. Scott Cnty. Sept. 30, 2010). For the facts of the crime, as recounted in the Article, see *id.* at 1-2.

matter of right only to those sentenced to a term of years. Accordingly, for the kidnapping charge, Means received LWOP.

An Iowa court concluded that Means's LWOP sentence *for kidnapping* was precluded by *Graham*, despite the fact that Means also committed murder.[237] This literal application of the rule announced in *Graham* (no juvenile LWOP for nonhomicides) is inconsistent with pervasive language in the opinion that "homicide is different," that is, the moral culpability of those who commit homicide, which Means did, authorizes a LWOP sentence. Although there is nothing necessarily offensive about Iowa's relative grading of first degree kidnapping and second degree murder, one can question whether the imposition of a *mandatory* LWOP sentence on a juvenile for any crime is consistent with the common law approach to juvenile crime sketched earlier, which necessitates an individualized assessment of culpability.[238] That said, given the nature of his crime, it is doubtful that Means (who was convicted of homicide) has compelling grounds under *Graham* to object to the mandatory sentence as applied to him.

Yet another case that demonstrates the perils, apparently either dismissed or ignored, of affixing a grand-sounding principle (no LWOP for juvenile nonhomicides) atop the varied details of the American criminal justice system is that of Julio Bonilla, aged sixteen, who was convicted by an Iowa court in 2005 of first degree kidnapping and sentenced to LWOP.[239] Seeking postconviction relief under *Graham*, Bonilla hit the jackpot. The Iowa Supreme Court severed the offensive language from the Iowa code authorizing LWOP for juveniles and discovered, when the statutory dust had settled, that Bonilla is eligible for parole *now*. Bonilla is fortunate that he was not convicted of second degree kidnapping, which would have required him to serve at least seventeen years of a twenty-five-year sentence.[240]

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237. *Id.* at 9-11. Another beneficiary of this oddity in Iowa law is William Barbee, who at the age of seventeen, kidnapped a woman at knifepoint and killed her. He is now eligible for parole. *See* Molly Montag, *Sioux City Man Serving Life Sentence Now Eligible for Parole*, SIOUX CITY J. COM. (Dec. 4, 2010), http://www.siouxcityjournal.com/news/local/crime-and-courts/article_dc96531f-13b7-537f-8e2d-afa7a4bc1b7e.html; *cf. Graham*, 130 S. Ct. at 2023 ("The instant case concerns only those juvenile offenders sentenced to life without parole *solely* for a nonhomicide offense." (emphasis added)).

238. *See supra* Part II.A.

239. Bonilla v. State, 791 N.W.2d 697 (Iowa 2010).

240. *Id.* at 702 n.3.

This anomaly has provoked efforts in the state legislature, still unrealized, to change the law.[241]

(2) *Adult criminals on probation for juvenile offenses*. The case of David Garland plunges us into the nuances of the law of probation in Florida.[242] Garland, at the age of fifteen, committed sexual battery on a person under the age of twelve. Allowing, one can only assume, for the immaturity of adolescents, the trial judge imposed the relatively lenient sentence of five years' imprisonment followed by ten years' probation. About a year after his release from prison, at the age of twenty-one, Garland committed armed robbery. The trial judge revoked probation and sentenced him to life without parole.

Yet again, the reader may be wondering how *Graham* is relevant: after all, we are unmistakably dealing with an adult crime. While *Graham* was pending before the Supreme Court, an intermediate state appellate court rejected Garland's constitutional challenge with the terse observation that he "was not sentenced as a juvenile. He was given a second chance, but he [committed] another violent act at the age of 21, demonstrating his inability to rehabilitate."[243] After *Graham* was decided, however, the panel had second thoughts, withdrew the opinion, and ordered him resentenced.[244] Whether *Graham* applies in such circumstances has emerged as a matter of debate. On the one hand, the trial judge who imposed LWOP was, as a technical matter, doing so as part of a probation revocation hearing bottomed on Garland's juvenile crime. This, indeed, was the holding of another intermediate appellate court, which was presented with a case raising similar facts and overturned an LWOP sentence.[245] On the other hand, the *Graham* opinion is premised on the argument that juvenile criminals must be afforded a "meaningful opportunity" to demonstrate an improvement in their character. Garland easily passes this test: he was given an *actual* opportunity and as an adult committed yet another

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

242. Garland v. State (*Garland I*), 28 So. 3d 925 (Fla. Dist. Ct. App.), *withdrawn*, 70 So. 3d 609 (Fla. Dist. Ct. App. 2010), *reh'g denied*, 60 So. 3d 388 (Fla.), *cert. denied*, 79 U.S.L.W. 3729 (U.S. Nov. 14, 2011) (No. 10-1519).

243. *Id.* at 926.

244. Garland v. State (*Garland II*), 70 So. 3d at 609.

245. Lavrrick v. State, 45 So. 3d 893 (Fla. Dist. Ct. App. 2010). Lavrrick was sentenced to five years' probation for armed robbery and carjacking at the age of sixteen. After turning eighteen, he committed another armed robbery. The trial judge revoked probation and sentenced him to LWOP. The appellate court reversed and ordered resentencing under *Graham*. *Id.*

violent crime. *Graham*'s application to his case, viewed in this light, would seem doubtful. We can only wait to see which line of reasoning will prevail.[246]

(3) *Attempted murderers*. The *Graham* opinion failed to clarify where attempted murder falls along the homicide/nonhomicide divide. Stray comments in the opinion provide fodder, presumably unintentional, for both views. On the one hand, some language points to the consequence (death) as decisive. The astute observation that "'[l]ife is over for the victim of the murderer,'" which the Court contrasts with the victim of "even a very serious nonhomicide crime," would seem to categorize "attempted murder," whose victim, of course, survives, as a nonhomicide.[247] Other language, however, focuses on the *intentions* of the offender and appears to include those who actually kill someone with those who intended to kill, grouping these offenders together as "categorically . . . deserving of the most serious forms of punishment."[248] The latter view is perhaps more strongly supported in the text, as in the blanket statement, "It follows that, when compared to an adult murderer, a juvenile offender who did not kill *or intend to kill* has a twice diminished moral culpability."[249]

One court followed this logic, holding that a juvenile attempted murderer was guilty of homicide and could be sentenced to LWOP.[250] Other courts have treated attempted murder as "nonhomicide," rendering a juvenile convicted of this offense ineligible for LWOP.[251] In these cases, the conclusion hinged in part on whether attempted murder was treated as homicide under state law. Summing up, although it would seem that attempted murderers were not

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246. Recently, the Supreme Court denied certiorari in *Garland*. *Garland*, 60 So. 3d 388, *cert. denied*, 79 U.S.L.W. 3729 (U.S. Nov. 14, 2011) (No. 10-1519).

247. *See* Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).

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

249. *Id.* (emphasis added).

250. State v. Twyman (*Twyman I*), No. 9707012195, 2010 WL 4261921, at *1 (Del. Super. Ct. Oct. 19, 2010). The Delaware Supreme Court reversed the LWOP sentence for *attempted* murder, finding it inconsistent with *Graham*, but affirmed the sentence nonetheless because Twyman was also convicted of murder. *Twyman II*, No. 747, 2010, 2011 WL 307882 (Del. July 25, 2011).

251. McCullum v. State, 60 So. 3d 502 (Fla. Dist. Ct. App. 2011); Gonzalez v. State, 50 So. 3d 633 (Fla. Dist. Ct. App. 2010), *cert. denied*, 80 U.S.L.W. 3193 (U.S. Oct. 3, 2011) (No. 11-5641).

contemplated by the *Graham* Court, at least one such defendant has benefitted from the decision, a windfall flowing in part from the happenstance of state homicide law.

(4) *Transparent Sentencing Judges*. Another beneficiary of the *Graham* decision is Victor Mendez.[252] Mendez, aged sixteen, was part of a gang of four young men who, in the course of a single night, committed an armed carjacking and three separate armed robberies. In two of the crimes, Mendez brandished a handgun at the victims; in the other two he remained in the car that served as the base of operations for the roving crime spree.[253]

The fact that no one had yet died at Mendez's hands (assuming this is the case) seems to have been a matter of luck. The jury convicted him of all counts, and the trial judge, appalled by what he saw and heard over the course of the trial, loaded up sentences to the maximum and ran them all consecutively, culminating in a sentence of eighty-four years, with parole not available to Mendez until the age of eighty-eight.[254] The trial judge was transparent in his rationale:

> "You know, when I was a young attorney, I used to appear in front of a judge who used to use the term 'sociopath.' He overused the term, because he used it for everyone who came before him who was sentenced on a serious case. I haven't used that term, either as an attorney or much as a judge. Then, I opened Mr. Mendez's probation report, and I looked at his juvenile record since age ten, and I saw that he was sent to the Youth Authority for robbery at age twelve in Los Angeles County. Then I saw the crime spree that I witnessed this defendant do [including seven armed robberies and carjackings]. I'm totally convinced that this particular defendant has no conscience, has no conscience for society or other people's lives and property. He just doesn't understand the importance of being a law-abiding member of society, not at all, and he's proven that since age ten."[255]

The California appeals court waffled as to *Graham*'s applicability to the case. After noting that Mendez's sentence was "materially indistinguishable" from LWOP, the court acknowledged his sentence was "not technically" life without parole.[256] Proceeding to note that Mendez's case is "not controlled" by *Graham*, the court returned to its starting point in this carousel, proclaiming that it was "guided" by the

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252. People v. Mendez, 114 Cal. Rptr. 3d 870 (Ct. App. 2010). For the facts of the case, as recounted in this Article, see *id.* at 873-74.

253. *Id.* at 876-77.

254. *Id.* at 881-82.

255. *Id.* at 883.

256. *Id.* at 882-83.

"principles" articulated in *Graham*.[257] And the principle that proved most illuminating, and which required reversal, is that which prohibits a sentencing judge from determining at the "outset" that a juvenile violent criminal is "irredeemable."[258]

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

> You are a young man, with many chances to reform. For several years, you have been subject to bad influences and removed from those influences your prospects will brighten. Because of the many criminal acts you have committed, I am sentencing you to a long prison term, but it is not life without parole. I'm totally convinced that you are capable of reform, and expect you will do so.

In another article, I argued that judicial pronouncements on what constitutes a permissible *Terry* stop have influenced how police officers testify at suppression hearings but may less robustly shape how they act on the streets.[259] My argument was that in many instances police officers will, notwithstanding the Court's solemn injunctions, stop people when they have a "mere hunch" that criminal activity is afoot, confident that it will be easy to reverse engineer the permissible "reasons" for the stop. Likewise, one wonders whether *Graham* will only modestly affect the actual sentences issued by trial judges; what it will affect is what the judges say at sentencing hearings. When sentencing juveniles to very long terms in jail, the effective equivalent of LWOP, the major lesson of *Graham* is to avoid certain buzzwords, such as "irredeemable." The lesson to trial judges is to emphasize that the sentence is not technically LWOP and that there are opportunities for reform. It is doubtful that the sentencing judge in *Mendez*, on

257. *Id.* at 883.

258. *Id.*

259. *See* Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006).

remand, will reconsider his judgment that the defendant is a sociopath; what he will reconsider is his transparency in arriving at his sentence.[260]

C. The Costs

In the past decade, each year roughly seven to ten persons under the age of eighteen have been sentenced to LWOP for crimes other than homicide.[261] One might argue, assuming lower courts do not extend *Graham*, that it is simply a symbolic gesture, articulating the need for measured punishment for offenders of diminished culpability.

This argument underestimates the costs of the decision. Let us begin with deterrence. Life without parole is a terrible sentence; according to the famed criminologist Cessare Beccaria, it stirs even greater terror in potential criminals than the death penalty:

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260. Another case that illustrates the perils of transparency in sentencing is *People v. Nuñez*, 125 Cal. Rptr. 3d 616 (Ct. App.), *reh'g granted*, 255 P.3d 951 (Cal. 2011). At the age of fourteen, Antonio Nuñez, along with an older defendant, kidnapped a man at gunpoint; after their ambitious ransom plans were frustrated, he fired multiple volleys from an AK-47 while being chased by police along southern California highways. Miraculously, no one was injured. Nuñez was convicted of aggravated kidnapping, attempted murder, and other charges, and the judge originally sentenced Nuñez to LWOP. In 2008, before *Graham* was decided, the court of appeals reversed on state law grounds, but the trial judge persevered in his original design. In resentencing Nuñez to 175 years in prison, the judge announced, "'[T]here is clearly a tension between the Father Flanagans of the world and the victims of gang violence[,] . . . . Mr. Nuñez is not Mickey Rooney, and I don't believe in the saying that there is no such thing as a bad boy.'" *Id.* at 620 (alterations in original). This did not sit well with the court of appeals, which reversed, again, this time relying in part on *Graham* and noting the scant possibility that Nuñez would survive to be paroled.

261. Florida, which is apparently responsible for roughly one-half to two-thirds of the nation's JLWOP nonhomicide cases, has complete records, which I reviewed. *See* Graham v. Florida, 130 S. Ct. 2011, 2024 (2010) (estimating that of 123 identified juvenile nonhomicide offenders, 77 of those are serving sentences imposed in Florida); E-mail from Lee Robinson, Fla. Assistant State Attorney, to author (Feb. 9, 2011, 16:23 EST) (on file with author). Here is an analysis of six recent years:

Year/JLWOP Nonhomicide	Number of cases
2008	4
2007	7
2006	3
2005	11
2004	0
2003	4

Any attempt to code this data is problematic. For example, when offenders committed multiple crimes as juveniles, I used the year of the most recent crime. And when offenders committed crimes as juveniles and as adults, I excluded them. The average was 4.8 JLWOP cases per year, which, extrapolating from Florida, means roughly seven to ten cases nationwide per year.

> But he who foresees, that he must pass a great number of years, even his whole life, in pain and slavery; a slave to those laws by which he was protected; in sight of his fellow citizens, with whom he lives in freedom and society; makes an useful comparison between those evils, the uncertainty of his success, and the shortness of the time in which he shall enjoy the fruits of his transgression. The example of those wretches continually before his eyes, makes a much greater impression on him than a punishment, which, instead of correcting, makes him more obdurate.[262]

The modern reader is apt to regard this argument as unsophisticated. As academic observers have not tired of pointing out, deterrence arguments assume that criminals know the law, appreciate the penalties, and adjust their actions in some rational way accordingly.[263] Hardened criminals, particularly young ones, the argument runs, do not possess the requisite knowledge, or do not care to acquire that information, or discount the chances of being caught, or doubt that they will be severely punished, or are, in short, so constituted as to be reckless of the criminal penalties, whatever they might be.[264]

Even leaving aside the personal characteristics of such criminals, given the rarity with which LWOP is imposed on juveniles, no one would assign a large number to its direct deterrent effect as a prospective penalty. Yet if JLWOP caused one criminal to pause one second every thousand years before committing a crime then one would be obliged to say that the sentence exercises a positive marginal deterrent effect.[265] Even a "madman" calculates, Jeremy Bentham reminds us,[266] and there is ample evidence that juveniles are capable of rationality, including responses to changes in law enforcement and increases in criminal penalties.[267] How deterrence operates is

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262. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 111-12 (Univ. of London 1903) (1767).

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

264. *See, e.g.*, Carla Cesaroni & Nicholas Bala, *Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges*, 34 QUEEN'S L.J. 447, 471-74 (2008).

265. The idea is borrowed, essentially verbatim, from Daniel D. Polsby, *Recontextualizing the Context of the Death Penalty*, 44 BUFF. L. REV. 527, 528 (1996).

266. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 174 (1948) ("I would not say, that even a madman does not calculate.").

267. *See* William T. Harbaugh, Kate Krause & Timothy R. Berry, *GARP for Kids: On the Development of Rational Choice Behavior*, 91 AM. ECON. REV. 1539, 1543-44 (2001);

extraordinarily complex,[268] but one would expect, and evidence confirms, that deterrence operates most effectively when the law's message is clear.[269] Life without parole is a terrible sentence, and the terror in part arises from its clarity. The sentence is not "fifty years," which might mean forty-five years or just fifteen. Apart from the death sentence, LWOP expresses a finality that is absent in the criminal justice system. If any message can penetrate the minds of the offenders described in Part III.B, this is it.

A significant harm flowing from the *Graham* decision is the way in which it complicates the law, compounding ambiguity with confusion, further diluting whatever deterrent effect the law can possibly have. As the preceding Subpart illustrated, there are now a welter of uncertainties, and it is doubtful the Supreme Court will resolve them any time soon, if ever. Is a fifty-year sentence for rape committed as a juvenile constitutional? Does it depend on the honesty of the sentencing judge? Can attempted murderers be sentenced to JLWOP? Can adults be sentenced to LWOP when probation is revoked for crimes committed as juveniles? Can juveniles be sentenced to LWOP for crimes other than homicide if they also committed a homicide? Can young adults be sentenced to LWOP with juvenile crimes serving as aggravating or enhancing bases for punishment?[270] Can young and immature adult defendants claim any support from the *Graham* decision?[271]

Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1181 (1998); Moin A. Yahya, *Deterring* Roper*'s Juveniles: Using a Law and Economics Approach To Show that the Logic of* Roper *Implies that Juveniles Require the Death Penalty More Than Adults*, 111 PENN ST. L. REV. 53, 81-84 (2006). The psychological literature tends to assume that adolescents engage in more risk taking than adults, but one notable dissent from this view is Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1 (1992).

268. *See* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 370 (1985).

269. *Id.* (citing ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975)); WILSON, *supra* note 46.

270. Courts have so far rejected arguments that *Graham* forecloses the use of juvenile convictions when sentencing adult defendants. *See, e.g.*, Cao v. Taylor, No. CV 02-2076 GAF, 2010 WL 5598518 (C.D. Cal. Nov. 2, 2010) (defendant challenged use of juvenile convictions in three-strikes sentencing); Dunn v. State, 936 N.E.2d 873 (Ind. Ct. App. 2010) (nineteen-year-old defendant challenged sentencing judge's reliance on extensive juvenile history).

271. *Compare* State v. Uzzelle, No. COA10-600, 2011 WL 705152 (N.C. Ct. App. Mar. 1, 2011) (holding *Graham* does not foreclose LWOP sentence imposed on immature eighteen-year-old with history of mental illness and poor upbringing), *with In re* Phoeun Mey, No. H035849, 2011 WL 2582522 (Cal. Ct. App. June 30, 2011) (quoting from trial court that extended *Graham* to a defendant who was eighteen years and four months old at the time of his crime and had "underdeveloped" insight).

After the Supreme Court pronounced the death penalty unconstitutional for the mentally retarded,[272] state legislatures were presented with the nettlesome problem of implementing this holding;[273] the result is a patchwork of confusing and difficult-to-apply laws, at least some of which have the apparent design of undercutting the Supreme Court holding.[274] Likewise, the implementation of *Graham* will provoke a daunting variety of responses, and one can assume that some legislatures will throw up a smokescreen of compliance to conceal a less obedient design.[275] For any state legislature interested in taunting the Supreme Court, here is a simple drafting addition to the criminal code: "For any crime other than homicide, notwithstanding any other provision to the contrary, if the defendant was less than 18 years old at the time of the offense, the maximum sentence is 60 years in prison." In a state in which release is permitted after serving eighty-five percent of a determinate sentence, this will mean that juveniles will serve roughly fifty-one years in prison. This, of course, provides a "meaningful" expectation of release prior to the expiration of the defendant's life, albeit by a year or two. An alternative statutory addition is suggested by the Virginia code: "Any person serving a sentence imposed upon a conviction for a felony offense . . . who has reached the age of sixty or older . . . may petition the Parole Board for conditional release."[276] This provides even less relief, as there is no certainty of release; however, the ability to apply for release would arguably comply with the strict dictates of *Graham*.

The American criminal justice system, certainly as it is experienced by offenders, has a lottery aspect to it, given the happenstance not simply of apprehension but the lightning-strike possibility of a successful suppression motion and the lurking chance of a favorable plea bargain. For juveniles, this uncertainty is amplified, given the seemingly random manner in which crimes are investigated and punished. Joe Sullivan's story is illustrative. It is hard to imagine a criminal justice system doing less to deter him. After committing an

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272. Atkins v. Virginia, 536 U.S. 304 (2002).

273. *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811 (2007).

274. The development is lamented in Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215 (2008).

275. It is also likely that some state legislatures will, inspired by the *Graham* decision, provide more meaningful relief to juvenile defendants than is required by the decision. *See supra* text accompanying note 198 (discussing S.B. 9 in California).

276. VA. CODE ANN. § 53.1-40.01 (2009).

armed home invasion, he received no meaningful penalty. After committing aggravated assault, he received no meaningful penalty. So on, and so forth, for more than a dozen felonies. The claim that Sullivan and those like him are somehow "beyond deterrence" gets it exactly wrong. When he embarked upon his final crime, one could argue he was acting "rationally," at least in the sense that he could have reasonably expected that no serious penalty would result.

Furthermore, in considering deterrence, it is best to think more broadly than the law's effect on a narrow class of hardened criminals. The criminal justice system reinforces social solidarity and achieves voluntary obedience when it is perceived as legitimate.[277] The Supreme Court's decision to truncate the range of punishments, flouting society's own judgments, renders the criminal law itself suspect. One might argue that given how rarely JLWOP is imposed for any crime, the impairment of legitimacy is negligible. Yet the punishment is likely to be sought in precisely the most noteworthy of crimes. A toolbox is filled with tools that, though rarely used, are on certain occasions indispensable. It is, fortunately, the rare juvenile offender whose crimes merit the forfeiture of freedom for the duration of his life. But instances arise, at least in the opinion of a majority of state legislatures, and in such instances, *Graham* constrains judges in arriving at an appropriate punishment.

Justice Kennedy dismisses such concerns with the complacent observation that "for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.'"[278] That life is not over in a nonhomicide crime is tautological; that life is "normally" not beyond repair is likely also true. But normally is not never, and we should contrast Justice Kennedy's observation with the words of a trial judge at the sentencing hearing of Chaz Bunch and his collaborators:

> "I want you to know that I've been here 27 years, first as a bailiff and then as a lawyer, doing the same thing these lawyers have done in this case, and now as a Judge. And I've seen and learned things that in criminal cases I pray my sons and my family never have to see and learn. But in all my time I've never seen a crime so vicious or so evil or so unforgivable. As I listened to this victim's testimony, I felt her fear. I felt her shame. I felt the terror that you [rained] down upon her. I've

277. *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 62-66 (George Simpson trans., 1933); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

278. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).

> never felt that in a case before. As you let her go after threatening to kill her and holding the gun to her face, I think I felt a relief, but it's not much relief because what you did will forever alter her life and the lives of all those close to her, and even the lives of every person in this community. You have imposed a life sentence of a very different sort upon this victim and upon her family."[279]

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

Retribution as a basis for punishment is generally disfavored in the modern academy.[280] The impulse to cage Bunch for the duration of his life can easily be categorized as a bloody and atavistic urge that should itself be analyzed and reformed.[281] We have only a transcript of an excerpt of Bunch's sentencing hearing, but there is nothing to suggest lust for revenge or even anger. There is an emotional cast to the judge's words, but what one mostly detects is sadness, compassion for the victim, a sense of duty, and a need to arrive at some punishment that, however lamely, settles the scales. We seem, to bring this Article conveniently full circle, to be confronted with a judge in the common law tradition trying to match up culpability and sentence *in this particular case*—that is, not evaluating data through the obfuscating fog of a theory of adolescent immaturity. There is no invocation of brain scans, nor the slightest discourse on the meaning of adolescence, but at least to this author, there is an understated wisdom in this paragraph that compares favorably with the *Graham* opinion.

V. CONCLUSION

As a general matter, juveniles are less mature than adults. As a general matter, homicide is more serious than other crimes. In *Graham*, the Supreme Court converted these general rules into a categorical exclusion: no LWOP for juvenile nonhomicides. Given the rarity with which this sentence is imposed, the case may be

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279. State v. Bundy, No. 02 CA 211, 2005 WL 1523813, at *17 (Ohio Ct. App. June 24, 2005).

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

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

dismissed as one of little direct effect. Symbolically, however, it can be celebrated for affirming the State's duty to proportion punishment and culpability, particularly for defendants of tender years.

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

Second, and further impairing the law's legitimacy, *Graham* compounds the ambiguity of, and reduces clarity in, the juvenile criminal law. This is one of the principal lessons gleaned a year after the case was decided. For example, whether a ninety-year sentence imposed on a juvenile nonhomicide offender violates the Eighth Amendment is anyone's guess.[282]

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

> Like a sentence of death, it is intended to remove a person from our midst for the rest of his natural life. It is more awesome when imposed on one as young as Fuller, who may expect to live out his young manhood, middle, and late years all in confinement. Accordingly, we fulfill the role assigned to this court with the utmost gravity.[283]

The symbolic "value" of *Graham* is not in upholding an elementary principle of criminal law but in promoting a misguided theory of adolescent immaturity. It is, curiously, an ideology that American elites profess but do not practice, piling their children under a mountain of AP courses, insisting upon achievement in school and on the athletic field.[284] Like virtually all human beings, the young respond to incentives. Told that they are mature and responsible and held

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282. Compare the cases of Jose Walle, *supra* text accompanying note 214, and Victor Mendez, *supra* text accompanying note 252.

283. Commonwealth v. Fuller, 657 N.E.2d 1251, 1259 (Mass. 1995).

284. For an extreme version of this compulsion, see AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2011).

accountable for their actions, they tend to behave accordingly. Told, as in *Graham*, that they are immature and irresponsible, and held harmless, they tend to behave accordingly.

Furthermore, whatever the validity of juvenile immaturity as a general matter, it is demonstrably false in individual cases. There may be a place in the law for age-based categorical rules, especially ones firmly rooted in history, such as those disqualifying all minors from voting and those minors below a specified age from driving. In such settings, the law *could* provide for an individualized inquiry into each minor's knowledge and maturity, but the cost of so doing is prohibitive and deemed to outweigh any benefit. Binary rules capture enough of the truth to make more fine-tuned distinctions not worthwhile. In the case of sentencing juveniles convicted of serious felonies, however, the judicial system has already incurred a substantial cost in a highly individualized inquiry: this particular defendant has been found guilty beyond a reasonable doubt of committing a certain act; and this particular defendant has been deemed to possess a particular culpability. If a sentencing judge, after hearing the evidence at trial, is convinced that a juvenile is sufficiently mature and his crime so egregious that LWOP is appropriate, Justice Kennedy's ruminations on "brain science" and "adolescence" are unlikely to alter that opinion. And how will legislatures that persist in regarding LWOP as a just punishment, at least potentially, in some cases of juvenile nonhomicides adjust to *Graham*? As suggested above, it is easy to imagine statutory schemes that technically comply with *Graham* while remaining inconsistent with its apparent intent.[285]

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

The Supreme Court's decision to grant review of an LWOP sentence imposed on a fourteen-year-old murderer may portend that

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285. *See supra* text accompanying note 276; *see also* COLO. REV. STAT. § 18-1.3-401(4)(b) (2011) (providing that the maximum sentence for a juvenile is "life imprisonment with the possibility of parole after serving a period of forty calendar years").

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