

2011

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Recommended Citation

Leanne Palmer (2011) "Juvenile Sentencing in the Wake of Graham v. Florida: A Look into Uncharted Territory," *Barry Law Review*: Vol. 17 : Iss. 1 , Article 7.

Available at: <https://lawpublications.barry.edu/barryrev/vol17/iss1/7>

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JUVENILE SENTENCING IN THE WAKE OF *GRAHAM V. FLORIDA*: A LOOK INTO UNCHARTED TERRITORY

Leanne Palmer*

INTRODUCTION

Thirty-four days shy of turning eighteen, Terrance Graham committed a home invasion robbery and an attempted robbery.¹ This was a little less than a year after pleading guilty to attempted robbery and being sentenced to three years probation.² For his second arrest and violation of probation, Terrance could have been sentenced from anywhere between five years and life in prison.³ Although the State only asked for thirty years on the armed burglary and fifteen years on the attempted armed robbery, Judge Lance M. Day determined there was nothing that could be done for Terrance and sentenced him to the maximum sentence authorized by law: life imprisonment.⁴ Since Florida abolished a parole system, a life sentence meant Terrance would die behind bars, unless granted executive clemency.⁵

Terrance appealed his sentence all the way up to the Supreme Court, and in a 5-4 decision, Justice Kennedy, writing for the majority, held “that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.”⁶ The Court established a categorical rule making it unconstitutional to sentence any juvenile to life in prison without the possibility of parole for a nonhomicide offense.⁷ The Court reasoned, first, there is a national consensus against sentencing juvenile nonhomicide offenders to life in prison without the possibility of parole, and second, the sentence is grossly disproportionate in light of a juvenile’s diminished moral responsibility and the limited deterrent effect the sentence has.⁸ The Court, however, made clear that the Eighth Amendment does not prohibit a juvenile from spending the rest of his life in jail.⁹ A state does not have to guarantee eventual freedom, but rather, the state must

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1. *Graham v. Florida*, 130 S. Ct. 2011, 2018–19 (2010). Graham was not charged with the home invasion robbery and attempted robbery, but rather a violation of probation.

2. *Id.* at 2018.

3. *Id.* at 2019.

4. *Id.* at 2019–20.

5. *Id.* at 2020.

6. *Id.* at 2019, 2030. Chief Justice Roberts wrote a special concurrence finding a sentence of life without the possibility of parole unconstitutional *as-applied* to Graham, but that “there is nothing inherently unconstitutional about imposing sentences of life without parole on juvenile offenders” *Id.* at 2041 (Roberts, C.J., concurring).

7. *Id.* at 2030.

8. *Id.* at 2026, 2029.

9. *Graham*, 130 S. Ct. at 2030.

provide a “meaningful opportunity” for release.¹⁰ Essentially, what this means is that a juvenile can be sentenced to life in prison for a nonhomicide offense but he must have the possibility of parole.

Although the Court’s holding seems clear on the surface, states and courts alike have been grappling with what the Court did not do. First, the Court did not impose any limitation on the number of years a juvenile nonhomicide offender might serve or specifically address term-of-years sentences.¹¹ Second, the Court never articulated what constituted a meaningful opportunity for release; its only guidance was that this opportunity be based on “demonstrated maturity and rehabilitation.”¹² However, the Court never specified any sort of guideline that states and courts could follow. What this means is a lack of uniformity, not only from state to state, but also from court to court. With those who were sentenced as juveniles to life without parole lining up at the courthouse doors for resentencing, no one is sure what to expect.¹³

These questions and more have come to light in courts and capitols across the country, each interpreting the meaning of *Graham*, arousing criticism and debate on both sides of the issue. Ultimately, the uncertainty and lack of uniformity of the interpretation of *Graham* will likely lead to numerous lengthy appeals until some clarification of meaningful opportunity is made clear.

I. *GRAHAM V. FLORIDA*

A. Background

In 2005, the Supreme Court held sentencing a juvenile to death violated the Eighth Amendment’s ban on cruel and unusual punishment.¹⁴ Five years later, the Supreme Court held sentencing a juvenile nonhomicide offender to life in prison without the possibility of parole also violated the Eighth Amendment’s ban on cruel and unusual punishment.¹⁵ The expansion of juvenile rights started with Terrance Graham, the petitioner in *Graham v. Florida*.

Terrance’s life story is all too familiar for children in trouble with the law. Born in 1987 to parents addicted to crack cocaine, Terrance was diagnosed with attention deficit hyper activity disorder at a young age.¹⁶ He began drinking alcohol and smoking cigarettes at the mere age of nine, and abusing marijuana at just

10. *Id.*

11. See Tracey L. Meares, *What the Court Didn’t Do*, N.Y. TIMES ROOM FOR DEBATE BLOG (May 17, 2010, 6:27 PM), <http://roomfordebate.blogs.nytimes.com/2010/05/17/redefining-cruel-punishment-for-juveniles/#tracey>.

12. *Id.* at 2030.

13. Justine Griffin, *Supreme Court Ruling Gives Life-Sentence Prisoner Hope*, ST. AUGUSTINE RECORD (Oct. 6, 2010, 12:02 AM), available at <http://staugustine.com/news/local-news/2010-10-06/supreme-court-ruling-gives-life-sentence-prisoner-hope>.

14. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). Justice Kennedy writing for the majority was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

15. *Graham*, 130 S. Ct. at 2030, 2034. Justice Kennedy writing for the majority was joined by Justices Stevens, Ginsburg, Breyer, and Sotomayor, with Chief Justice Roberts concurring in the judgment only.

16. *Graham*, 130 S. Ct. at 2018.

thirteen.¹⁷ Terrance's first run-in with the law came in July 2003 when he was arrested for attempted robbery; he was sixteen years old.¹⁸ Terrance and three other juveniles attempted to rob a restaurant where one of the children worked.¹⁹ One of the accomplices struck the manager in the back of the head with a metal bar but did not take any money.²⁰ Terrance was charged as an adult with armed burglary with assault or battery and attempted armed robbery.²¹ He pled guilty to both counts.²²

In a letter written to the trial court, Terrance stated, "this is my first and last time getting in trouble, . . . I've decided to turn my life around."²³ The trial court withheld adjudication of guilt and sentenced Terrance to three years of probation for both counts to be served concurrently.²⁴

Less than a year after pleading guilty to those crimes, Terrance was once again arrested.²⁵ On December 2, 2004, thirty-four days before his eighteenth birthday, Terrance participated in a home invasion robbery where he and two adults forced their way into a home, held the residents hostage at gunpoint, and scoured the house for valuables.²⁶ That same evening, Terrance and his two accomplices attempted a second robbery in which one of the accomplices was shot.²⁷ After dropping his accomplice off at a hospital, Terrance was signaled to stop by a police sergeant, but he fled at a high speed until he crashed into a telephone pole.²⁸ When Terrance was finally apprehended, three handguns were found in his car.²⁹

The trial court found Terrance guilty of violating his probation for attempting to avoid arrest, committing a home invasion robbery, possessing a firearm, and for "associating with persons engaged in criminal activity."³⁰ The minimum sentence was five years imprisonment, while the maximum was life imprisonment.³¹ The defense was seeking five years, the prosecution recommended thirty years on the armed burglary count and fifteen years on the attempted armed robbery, while the Florida Department of Corrections recommended only four years imprisonment.³² The trial judge, Judge Lance M. Day, determined that Terrance "threw [his] life away," and that there was nothing that could be done for him because he had chosen to live the life of a criminal, so the only option he had was to protect the community.³³ Therefore, he sentenced Terrance to life in prison.³⁴ In reality, this

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

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

26. *Id.* at 2018–19.

27. *Id.* at 2019.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Graham*, 130 S. Ct. at 2019.

34. *Id.* at 2020.

was a sentence of life in prison without the possibility of parole because Florida does not utilize a parole system.³⁵ This meant Terrance was sentenced to die behind bars at the age of seventeen.

Terrance appealed the sentence, claiming his Eighth Amendment rights were violated.³⁶ The First District Court of Appeal of Florida affirmed his sentence, finding it was not grossly disproportionate to his crime, and noting that Terrance was “incapable of rehabilitation.”³⁷ The Florida Supreme Court denied review, while the United States Supreme Court granted certiorari.³⁸

B. Majority Opinion

The majority, with Justice Anthony Stevens authoring the opinion, adopted a categorical rule holding “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”³⁹ At the outset, the Court focused on the meaning of cruel and unusual punishment under the Eighth Amendment and stated, “[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society.’”⁴⁰ The Court narrowed in on the concept of proportionality between the crime and the sentence, finding “[e]mbodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”⁴¹ The Court has held that the Eighth Amendment only requires a “narrow proportionality principle,” meaning that “only extreme sentences that are ‘grossly disproportionate’ to the crime” are unconstitutional.⁴²

Another way the Court determines whether a sentence is cruel and unusual is by using categorical rules, considering the nature of the offense and other characteristics of the offender.⁴³ When the Court uses this approach, it first considers “‘objective indicia of society’s standards . . .’ to determine whether there is a national consensus against the sentencing practice at issue.”⁴⁴ The Court must then use its own independent judgment to determine “whether the punishment in question violates the Constitution.”⁴⁵

The Court begins with the objective indicia of society. It found that thirty-seven jurisdictions, as well as the District of Columbia and federal law permit life without the possibility of parole (“LWOP”) sentences for juvenile nonhomicide

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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

40. *Id.* at 2021 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

41. *Id.* (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

42. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

43. *Id.* at 2022.

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

45. *Graham*, 130 S. Ct. at 2022 (quoting *Roper*, 543 U.S. at 572).

offenders.⁴⁶ Unconvinced that this represented a clear national consensus, the Court looked to actual sentencing practices, relying on a national study.⁴⁷ Based on this study and supplemental data, the Court found that there were 123 juveniles serving life sentences without parole for nonhomicide offenses nationwide.⁴⁸ Seventy-seven of those juveniles were serving in Florida, while the remaining forty-six were scattered amongst just ten other states.⁴⁹ The Court found convincing that a national consensus exists *against* sentencing juveniles to life without parole since only eleven jurisdictions actually impose this sentence.⁵⁰ Furthermore, the Court was persuaded by the fact that “in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.”⁵¹

The Court found that a national consensus had developed against sentencing juvenile nonhomicide offenders to life in prison without the possibility of parole.⁵² The fact that many jurisdictions permitted the sentence did not persuade the Court otherwise. Rather, the Court correctly looked at the rarity of its imposition to justify its determination.⁵³ Hundreds of thousands of juveniles are sentenced each year, yet only 123 juveniles were actually serving life sentences without parole for nonhomicide crimes.⁵⁴ Even more convincing, of those 123 juveniles, 77 or 63% of them, were serving their sentences in one state, Florida.⁵⁵ The other 37% were spread out amongst ten other states.⁵⁶ When one state harbors 63% of anything, it is clear that a *national* consensus cannot exist, and thus, the Court was not persuaded.

Next, the Court focused on the independent judgment of the judiciary, which requires “consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.”⁵⁷ The Court first examined the characteristics of juveniles reiterating its holding in *Roper*, finding that “because juveniles have lessened culpability they are less deserving of the most severe punishments.”⁵⁸ Furthermore, the Court emphasized that juveniles are immature and have an “underdeveloped sense of responsibility,” and are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁵⁹

The Court next examined the nature of the offenses. It found that nonhomicide crimes are “categorically less deserving of the most serious forms of punishment”

46. *Id.* at 2023.

47. *Id.*; see PAOLO G. ANNINO, DAVID W. RASMUSSEN & CHELSEA BOEHME RICE, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION (Sept. 14, 2009) [hereinafter Annino], available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf.

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

49. *Id.*

50. *Id.*

51. *Id.* at 2025.

52. *Id.* at 2026.

53. *Id.*

54. *Graham*, 130 S. Ct. at 2024–25.

55. *Id.* at 2024.

56. *Id.*

57. *Id.* at 2026 (citations omitted).

58. *Id.* (citing *Roper*, 543 U.S. at 569).

59. *Id.* (quoting *Roper*, 543 U.S. at 569–70) (internal quotation marks omitted).

and cannot be compared to murder in terms of “moral depravity and of the injury to the person and the public”⁶⁰ It further emphasized, “life without parole is ‘the second most severe penalty permitted by law.’”⁶¹ The Court recognized the severity of the sentence when it stated:

[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. . . . As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”⁶²

This sentence is especially harsh for a juvenile who would serve more of his life behind bars than would an adult given the same sentence.⁶³

Lastly, the Court determined that sentencing juvenile nonhomicide offenders to life without parole serves no legitimate penological justifications, and is therefore “by its nature disproportionate to the offense.”⁶⁴ First, the Court held that “retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.”⁶⁵ Second, deterrence does not suffice for the same reasons that make juveniles less culpable, because of their lack of maturity they are less likely to be deterred by harsh punishments that are rarely imposed.⁶⁶ Third, incapacitation does not justify LWOP because it requires a judge at the outset to determine the juvenile will be a danger to society for the rest of his life, without taking into consideration the characteristics of juveniles, and the possibility of maturing.⁶⁷ The Court agreed Terrance should have been removed from society because he *currently* was a risk to society, but it did not follow that he would be a danger to society for the rest of his life.⁶⁸ The Court rightfully found

60. *Graham*, 130 S. Ct. at 2027 (quoting *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659–60 (2008)) (internal quotation marks omitted).

61. *Id.* (quoting *Harmelin*, 501 U.S. at 1001).

62. *Id.* (alteration in original) (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).

63. *Id.* at 2028.

64. *Id.*

65. *Id.*

66. *Graham*, 130 S. Ct. at 2028–29.

67. *Id.* at 2029.

68. *Id.*

that a life without parole sentence “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”⁶⁹

Finally, the goal of rehabilitation is practically destroyed by a LWOP sentence because it forbids the juvenile sentenced from ever having the opportunity to reenter society.⁷⁰ This is one of the most important aspects of the Court’s reasoning, because this kind of sentence effectively rejects a juvenile’s “capacity for change and limited moral culpability.”⁷¹ But more importantly, “[f]or juvenile offenders, who are most in need of and receptive to rehabilitation, . . . the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.”⁷² Otherwise put, the Court asked what incentive is there to rehabilitate when the juvenile knows he will die in prison.⁷³

The Court also found it important to note that the United States is one of only two countries that actually sentenced nonhomicide juvenile offenders to life in prison without the possibility of parole, and that this practice is “rejected the world over.”⁷⁴ However, it stated this did not control its decision.⁷⁵

In deciding on a categorical rule, the Court found it was the only way to be sure that all juvenile nonhomicide offenders were given a chance to demonstrate maturity and rehabilitation.⁷⁶ A categorical rule avoids the risk that a jury or judge will “erroneously conclude that a particular juvenile is sufficiently culpable,” and it also avoids “the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.”⁷⁷ However, the Court went on to hold:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. . . . [The Eighth Amendment] does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.⁷⁸

69. *Id.*

70. *Id.* at 2029–30.

71. *Id.* at 2030.

72. *Id.*

73. *Graham*, 130 S. Ct. at 2032.

74. *Id.* at 2033.

75. *Id.*

76. *Id.* at 2032.

77. *Id.*

78. *Graham*, 130 S. Ct. at 2030.

The Court ultimately reversed the First District Court of Appeal of Florida affirming Graham's sentence and remanded the case for resentencing.⁷⁹

C. Chief Justice Roberts' Concurring Opinion

Chief Justice John Roberts agreed with the majority that Terrance Graham's sentence of life in prison without the possibility of parole was cruel and unusual punishment.⁸⁰ However, the Chief Justice did not support the majority's adoption of a new categorical rule finding LWOP sentences for nonhomicide juvenile offenders unconstitutional in every case.⁸¹ Instead, he proposed a case-by-case analysis using the Court's precedent requiring "narrow proportionality" review and the holding in *Roper v. Simmons* that juveniles are generally less culpable.⁸² Applying this analysis, Chief Justice Roberts found that "Graham's juvenile status—together with the nature of his criminal conduct and the extraordinarily severe punishment imposed—[led him] to conclude that his sentence of life without parole was unconstitutional."⁸³

Beginning with the gravity of Terrance's crimes committed, the Chief Justice found that although his crimes were serious, they were less serious than crimes such as murder or rape.⁸⁴ Then turning to Terrance's culpability, Chief Justice Roberts held that Terrance's youth made him less culpable and more likely to be reckless and dangerous.⁸⁵ Like the majority, Chief Justice Roberts agreed that Terrance deserved to be punished and incarcerated; however, he did not deserve to face the same sentence typically reserved for murderers and rapists.⁸⁶ In fact, the average sentence for those convicted of murder or manslaughter is less than twenty-five years in prison.⁸⁷ Therefore, it did not follow that seventeen-year-old Terrance should serve an even harsher sentence for a less serious crime, in which he was less culpable.

While Chief Justice Roberts agreed that a sentence of life without parole as applied to Terrance Graham was unconstitutional, he did not agree that it is unconstitutional in every situation.⁸⁸ He thought there are certain crimes that are so heinous and some juveniles that are more culpable who deserve LWOP sentences.⁸⁹ For instance, he pointed out that the majority agreed that a sentence of life without parole for a juvenile who commits murder is not cruel and unusual punishment.⁹⁰ Thus, he concluded, "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the

79. *Id.* at 2034.

80. *Id.* at 2036 (Roberts, C.J., concurring).

81. *Id.* (Roberts, C.J., concurring).

82. *Id.* (Roberts, C.J., concurring).

83. *Id.* (Roberts, C.J., concurring).

84. *Graham*, 130 S. Ct. at 2039–40 (Roberts, C.J., concurring).

85. *Id.* at 2040 (Roberts, C.J., concurring).

86. *Id.* (Roberts, C.J., concurring).

87. *Id.* at 2041 (Roberts, C.J., concurring).

88. *Id.* (Roberts, C.J., concurring).

89. *Id.* (Roberts, C.J., concurring).

90. *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring).

constitutionality of such sentences depends on the particular crimes for which they are imposed.”⁹¹ Thus, he concurred in the judgment but not with the creation of a new categorical rule.

D. The Dissent

Written by Justice Clarence Thomas and joined by Justices Antonin Scalia and Samuel Alito,⁹² the dissent found the sentence of life in prison without the possibility of parole for juvenile nonhomicide offenders to be completely constitutional.⁹³ The opinion focused primarily on the standards of decency at the founding of our country and found that since the sentence of life without parole would not have offended the standards of decency during the eighteenth century, it must be constitutional today.⁹⁴ Moreover, the dissent did not think it was for the judiciary to make moral judgments because nothing in Article III gives it that authority.⁹⁵

First, the dissent took issue with the proportionality test the Court’s precedent has established.⁹⁶ Justice Thomas wrote, “[T]here is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.”⁹⁷ His reasoning was that proportionality in sentencing is not specifically stated in the Constitution, and the penal statute adopted by the First Congress did not consider it necessary.⁹⁸

Regardless if the dissent thought the Constitution is a fixed document, the Court’s precedent is that the Constitution requires proportionality. For some reason the dissent found it persuasive that, at the time of the founding, it was permitted to sentence a person as young as seven to death; therefore, it certainly would not be unconstitutional to sentence a juvenile to life without parole.⁹⁹ However, this should go to show that what is cruel and unusual should not be determined at the time of our founding, but rather it is an evolving standard of decency, because most, if not all, people today would be rather appalled if our courts sentenced a seven-year-old child to death, even though it was once permitted in our country.

The dissent further disagreed with the majority and found there is a national consensus in favor of LWOP sentences for juvenile nonhomicide offenders.¹⁰⁰ It relied on the fact that thirty-seven states, as well as the federal government, permit the sentencing practice.¹⁰¹ Justice Thomas dismissed the majority’s reasoning that it was rarely used and so a national consensus has been formed against it, instead,

91. *Id.* (Roberts, C.J., concurring) (emphasis in original).

92. *Id.* at 2043 (Thomas, J., dissenting) (Justice Alito joins as to Parts I and III).

93. *Id.* (Thomas, J., dissenting).

94. *Id.* (Thomas, J., dissenting).

95. *Id.* (Thomas, J., dissenting).

96. *Graham*, 130 S. Ct. at 2044 (Thomas, J., dissenting).

97. *Id.* (Thomas, J., dissenting) (citation omitted).

98. *Id.* (Thomas, J., dissenting) (citation omitted).

99. *Id.* at 2048 n.3 (Thomas, J., dissenting).

100. *Id.* at 2049 (Thomas, J., dissenting).

101. *Id.* (Thomas, J., dissenting).

he found that the general consensus was that it should be used rarely.¹⁰² Although Justice Thomas did little to support his reasoning, he is correct in holding that “[i]t is not the burden of [a state] to establish a national consensus *approving* what their citizens have voted to do; rather, it is the heavy burden of petitioners to establish a national consensus *against* it.”¹⁰³

The dissent then went on to criticize the majority’s opinion that a life without parole sentence serves no penological purpose, and stated “the Eighth Amendment does not mandate any one penological theory, . . . just one the Court approves.”¹⁰⁴ Justice Thomas questioned the majority’s reasoning that it must be taken into consideration that a juvenile is less culpable.¹⁰⁵ He thinks that the Court is not dealing with just any juvenile, and courts should not be prohibited from ever concluding that a juvenile has “demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.”¹⁰⁶

However, the dissent missed the mark once again. The majority’s reasoning is not that certain juveniles are less culpable than adults, it is that *every* juvenile is less culpable, less mature, and less deserving of permanent incarceration. Juveniles are not fully developed and fully matured, and they should be permitted the opportunity to grow, and to show development and maturity. If sentenced to life in prison without parole as a juvenile, that child will never have that opportunity and the dissent seems to ignore that factor.

Ultimately, the dissent held it is for the legislature to determine whether to impose LWOP sentences on juveniles for nonhomicide offenses and not the Court.¹⁰⁷ Although the dissent’s arguments might be lacking in several places, it did draw attention to valid holes that were omitted from the majority opinion which are presently causing numerous concerns. Primarily, the dissent noted that the majority only prohibited life without parole sentences and omitted from its analysis lengthy term-of-years sentences.¹⁰⁸ Justice Thomas correctly stated that imposing long term-of-years sentences “effectively denies the offender any material opportunity for parole”¹⁰⁹ As Justice Thomas predicted, this is what courts and legislatures alike are grappling with, what is a material opportunity for parole, since the Court only prohibited life without the possibility of parole for juvenile nonhomicide offenders.

II. THE AFTERMATH

Graham can be summed up in one short sentence: The Eighth Amendment prohibits sentencing a juvenile who did not commit a homicide offense to life in

102. *Graham*, 130 S. Ct. at 2050–51 (Thomas, J., dissenting).

103. *Id.* at 2051 (Thomas, J., dissenting) (alteration in original) (emphasis in original) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)) (internal quotation marks omitted).

104. *Id.* at 2054 (Thomas, J., dissenting).

105. *Id.* (Thomas, J., dissenting).

106. *Id.* (Thomas, J., dissenting).

107. *Id.* at 2058 (Thomas, J., dissenting).

108. *Graham*, 130 S. Ct. at 2052 n.11 (Thomas, J., dissenting).

109. *Id.* (Thomas, J., dissenting).

prison without the possibility of parole. If only it were that simple. The problem does not arise with what *Graham* actually did; the problem arises with what *Graham* did *not* do. First, *Graham* requires that a juvenile have a meaningful opportunity for release based on demonstrated maturity and rehabilitation.¹¹⁰ However, the Court fails to define what constitutes a meaningful opportunity for release and aptly leaves it for the states to determine what is mature enough.¹¹¹ Second, as Justice Thomas noted writing for the dissent, the Court did not address term-of-years sentences, and did not impose any kind of limitation on the number of years a juvenile might serve.¹¹² Both of these questions tend to overlap when courts are attempting to sentence juveniles and legislatures are attempting to rewrite laws. What results is confusion, inconsistency, and plenty of debate.

A. Deciphering *Graham*

It is no surprise that juveniles currently serving life without parole sentences for nonhomicide offenses are eager to be resentenced. However, lawyers are more cautious of rushing to court because they just do not know what to expect.¹¹³ *Graham* was only decided in May 2010, and therefore the jurisprudence is relatively limited on *Graham*-type cases. There have been, however, several notable cases that begin to decipher the meaning of *Graham*.¹¹⁴

Although *Graham* was clear that the holding only applied to nonhomicide offenses, there have been several challenges to sentences of life without parole for homicide offenses. The Missouri Supreme Court refused to extend *Graham* to homicide offenses in *Missouri v. Andrews*.¹¹⁵ Andrews was fifteen-years-old when he shot and killed a police officer.¹¹⁶ He was found guilty of first-degree murder and the only sentence available under Missouri law was life in prison without the possibility of parole.¹¹⁷ The court rejected Andrews' argument that his sentence is cruel and unusual punishment, and stated "*Roper* expressly and *Graham* implicitly recognize that life without parole is not cruel and unusual punishment for a minor who is convicted of homicide."¹¹⁸

Similarly, the Court of Criminal Appeals in Alabama refused to extend *Graham* to fourteen-year-olds convicted of capital murder and sentenced to life

110. *Id.* at 2030–32.

111. *See* Meares, *supra* note 11.

112. *Id.*

113. *See* Griffin, *supra* note 13.

114. *See* *Missouri v. Andrews*, 329 S.W.3d 369 (Mo. 2010); *Miller v. State*, 63 So. 3d 676 (Ala. Crim. App. 2010); *Jensen v. Zavaras*, No. 08-cv-01670-RPM, 2010 WL 2825666 (D. Colo. July 16, 2010); *United States v. Graham*, 622 F.3d 445, 447 (6th Cir. 2010); *Bell v. Haws*, No. CV09-3346-JFW (MLG), 2010 WL 3447218 (C.D. Cal. July 14, 2010); *People v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Ct. App. 2011); *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Ct. App. 2010); *Manual v. State*, 48 So. 3d 94 (Fla. Dist. Ct. App. 2010); *People v. De Jesus Nunez*, 125 Cal. Rptr. 3d 616 (Ct. App. 2011); *Wisconsin v. Ninham*, 797 N.W.2d 451 (Wis. 2011); *United States v. Mathurin*, No. 09-21075-Cr, 2011 WL 2580775 (S.D. Fla. June 29, 2011).

115. 329 S.W.3d at 377–78.

116. *Id.* at 370–71.

117. *Id.* at 371.

118. *Id.* at 376–77.

without parole.¹¹⁹ First, the court held petitioner failed to prove a national consensus against sentencing fourteen-year-olds convicted of capital murder to life in prison without the possibility of parole.¹²⁰ Second, the court reasoned this case was unlike *Graham* because petitioner committed the worst offense possible but received the second harshest penalty, and thus, affirmed his sentence.¹²¹

The Supreme Court of Wisconsin also held that *Graham* did not extend to fourteen-year-olds who commit intentional homicide.¹²² The court held that sentencing juvenile homicide offenders to LWOP served “legitimate penological goals.”¹²³ The court was not convinced that juveniles who kill, even juveniles as young as fourteen, “have the same diminished moral culpability as those juvenile offenders who do not commit homicide.”¹²⁴ The court also had no problem with the sentencing court finding a fourteen-year-old juvenile convicted of murder “forever dangerous” and held that contemporary society supports this finding.¹²⁵

In a slightly different context, the United States District Court for the District of Colorado held that *Graham* did not apply to a juvenile defendant convicted of first-degree murder, even though his criminal conduct was limited to a complicitor who did not cause the death of the victim.¹²⁶ The court’s reasoning was that the petitioner was convicted of first-degree murder, regardless of his role, the conviction is still the same; thus *Graham* did not apply to him.¹²⁷

The courts are fairly unanimous in holding *Graham* does not extend to homicide offenses, which is not all that surprising. It is outside the realm of murder and death that *Graham* really begins to unfold. This is where the courts are no longer unanimous and have taken to fill the holes left behind by the Supreme Court.

Starting off easy, this first case is not all that controversial, but it is nonetheless a piece of the puzzle that is *Graham*. The Sixth Circuit held that *Graham* did not apply to an adult who was sentenced to life in prison after committing his third qualifying felony while on probation for a crime committed as a juvenile.¹²⁸ The Sixth Circuit reasoned that the petitioner was sentenced as an adult and not a juvenile, and therefore, *Graham* was not applicable.¹²⁹ The court relied on similar decisions by the Eighth and Fifth Circuits to support its conclusion.¹³⁰

Most ambiguous and controversial, however, is the term-of-years sentence. One of the first courts to address the issue was the United States District Court for

119. *Miller*, 63 So. 3d at 686.

120. *Id.* at 687.

121. *Id.* at 690–91.

122. *Ninham*, 797 N.W.2d at 474.

123. *Id.* at 473 (citation omitted).

124. *Id.*

125. *Id.* at 474.

126. *Jensen*, 2010 WL 2825666, at *1.

127. *Id.*

128. *Graham*, 622 F.3d at 462–63.

129. *Id.* at 462.

130. *Id.* at 462–63 (citing *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010); *United States v. Mays*, 466 F.3d 335 (5th Cir. 2006)).

the Central District of California in the case *Bell v. Haws*.¹³¹ Sixteen-year-old Michael Bell was convicted of three counts of first-degree robbery, three counts of forcible rape, two counts of forcible oral copulation, one count of kidnapping to commit forcible rape, and one count of assault with a firearm.¹³² He was ultimately sentenced to fifty-four years to life.¹³³ Bell appealed his sentence, claiming he will effectively be imprisoned for the rest of his life based on life expectancy data, a sentence of what he calls “virtual life without parole.”¹³⁴ The court rejected this argument and held that since Bell has some possibility of release and was not technically sentenced to life without the possibility of parole he was not entitled to relief under *Graham*.¹³⁵

Bell next argued that “the possibility of parole at age 69 does not provide a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ as required by *Graham*.”¹³⁶ The court also rejected this argument, noting that the Supreme Court never defined what a meaningful opportunity for release is, but rather left it up to the states to decide.¹³⁷ The court reiterated that there is a concrete date for when Bell will be eligible for release, and even though it is only one year before the life expectancy data says he will die, that was enough for the court.¹³⁸ The court used a very strict and limited interpretation of *Graham* when deciding this case.

To go one step further, the California Second District Court of Appeal, Division 4, upheld a minimum 120-year sentence of a juvenile convicted of attempted murder in *People v. Ramirez*.¹³⁹ The court, interpreting the language of *Graham* very literally, held that, “*Graham* did not apply to a juvenile offender who receives a term-of-years sentence that results in the functional equivalent of a life sentence without the possibility of parole,” but rather, *Graham* solely applied to a sentence of life without parole.¹⁴⁰ The court did not seem to be concerned with the fact that this juvenile has no possibility of ever seeing that parole date, let alone having a realistic opportunity for release.

However, in Division 2 of that same court, the court reversed a juvenile’s sentence of eighty-four years as cruel and unusual punishment.¹⁴¹ In *People v. Mendez*, sixteen-year-old Victor Mendez committed carjacking, assault with a firearm, and second-degree robbery, of which he was subsequently found guilty.¹⁴² He was sentenced to eighty-four years to life.¹⁴³ The appeals court found that “Mendez’s lengthy sentence—which was imposed on a juvenile who did not

131. *Bell*, 2010 WL 3447218.

132. *Id.* at *1.

133. *Id.*

134. *Id.* at *9.

135. *Id.* at *10–11.

136. *Id.* at *11.

137. *Bell*, 2010 WL 3447218, at *11.

138. *Id.*

139. *Ramirez*, 123 Cal. Rptr. 3d at 165.

140. *Id.* (citing *People v. Caballero*, 119 Cal. Rptr. 3d 920 (Ct. App. 2011)).

141. *Mendez*, 114 Cal. Rptr. 3d at 873.

142. *Id.*

143. *Id.*

commit a homicide . . . and which makes him ineligible for parole until well beyond his life expectancy—constitutes cruel and unusual punishment and is therefore unconstitutional under the federal and state Constitution.”¹⁴⁴ The court found persuasive Mendez’s contention that based on life expectancy data, which had him dying at age seventy-six, his sentence was a de facto LWOP sentence.¹⁴⁵ However, this court did *not* rely on *Graham* in reaching its conclusion; in fact, it specifically stated *Graham* did not apply because it “is expressly limited . . . to juveniles actually sentenced to LWOP” for nonhomicide crimes, and Mendez’s sentence was technically not life without parole.¹⁴⁶ But, the court was persuaded by and did rely on the principles established in *Graham*.¹⁴⁷

Based on *Graham*, the court reasoned that “common sense dictates that a juvenile who is sentenced at the age of 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the Court also put it, ‘realistic,’ opportunity of release.”¹⁴⁸ The court reasoned that sentencing Mendez to essentially die in prison should not be made at the outset.¹⁴⁹ The court held that even without *Graham* it would have made the same decision because the sentence was grossly disproportionate to the crime.¹⁵⁰

And to go one step further than the court in *Mendez*, the California Fourth District Court of Appeal struck down a juvenile’s sentence of 175 years because it violated *Graham* by not providing the juvenile with a meaningful opportunity of release.¹⁵¹ In this case, the court specifically addressed the holding in *Ramirez*, finding such a narrow interpretation of *Graham* frustrates the rationale behind the decision.¹⁵² The court also noted that *Graham* technically was not sentenced to life without parole, rather, *Graham* was merely sentenced to life.¹⁵³ It just so happened that Florida does not allow for parole, and therefore *Graham*’s sentence amounted to life without parole.¹⁵⁴ The court analogized Nunez’s sentence of a 175 years to *Graham*’s sentence of life; both amount to a life sentence without the possibility of parole, though both sentences expressly lacked the designation of LWOP.¹⁵⁵

It is important to highlight the court’s rationale here, because this court is one of the first courts to truly extend and apply the rationale supporting *Graham*’s holding. It held:

144. *Id.*

145. *Id.* at 882.

146. *Id.* at 882–83.

147. *Mendez*, 114 Cal. Rptr. 3d at 883.

148. *Id.*

149. *Id.*

150. *Id.*

151. *De Jesus Nunez*, 125 Cal. Rptr. 3d at 627. The California Supreme Court granted review of *Nunez* and *Ramirez* pending review of *Caballero* in the summer of 2011. See *People v. Nunez*, 255 P.3d 951 (Cal. 2011); *People v. Ramirez*, 255 P.3d 948 (Cal. 2011).

152. *De Jesus Nunez*, 125 Cal. Rptr. 3d at 626.

153. *Id.* at 622.

154. *Id.*

155. *Id.*

A term of years effectively denying any possibility of parole is no less severe than an LWOP term. Removing the “LWOP” designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile’s culpability. Finding a determinate sentence exceeding a juvenile’s life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label . . . is arbitrary and baseless.¹⁵⁶

The problem is blatant. Here are two very similar cases from the same court, albeit separate divisions, that come to completely opposite decisions. One court found that if the three magic words, life without parole, are not present in the sentence, *Graham* does not apply. The other court found the label to be irrelevant, and states it is what the sentence amounts to that matters. So which is it? Although *Graham* does technically refer to life without parole sentences for nonhomicide juvenile offenders as unconstitutional, the *Nunez/Mendez* courts have the right understanding. The Supreme Court made sure to stipulate that these juveniles deserve the chance to be rehabilitated, which means a realistic chance of being reentered into society.

The states and courts trying to circumvent the Supreme Court’s holding by sentencing juveniles to lengthy term-of-years sentences are degrading the intention of the Court. What difference is there really between 120 years and life besides semantics, because the reality is the same either way. All sentencing courts would have to do is stop issuing LWOP and instead start sentencing those same juveniles to 100 years, and the problem is solved. Gone would be the idea that juveniles are different, less culpable, and more deserving of a meaningful opportunity for release. Gone would be the incentive to rehabilitate. Gone would be *Graham*.

B. Back to the Beginning: What Florida Now Has to Say About *Graham*

With over seventy-seven juveniles serving life sentences without the possibility of parole for nonhomicide crimes, Florida has a fair share of opportunities to apply *Graham* as each one of these juveniles has a right to be resentenced.¹⁵⁷ Although Terrance Graham has yet to be resentenced,¹⁵⁸ others wasted little time taking their cause to court. Less than two months after *Graham* was decided, David Garland had his LWOP sentence for nonhomicide crimes he committed as a juvenile quashed and his case was remanded for resentencing by the First District Court of

156. *Id.* at 624.

157. *See* ANNINO, *supra* note 47.

158. According to the Florida Department of Corrections, Graham is out of department custody due to court order. *See* Florida Department of Corrections, Inmate Population Information Detail, <http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=3&From=list&SessionID=393968156>, (last accessed Aug. 30, 2011). On August 24, 2011, Judge Day, the original sentencing judge, was reassigned to handle Graham’s case and resentencing. *See* Duval County Clerk of the Circuit Court, Case Details Terrance Jamar Graham 16-2003-CF-011912-AXXX-MA, accessed at <https://showcase.duvalclerk.com/ViewCaseDetails.aspx?id=5025521>.

Appeal of Florida.¹⁵⁹ The issue, however, is not whether these juveniles can have their sentences quashed, rather it is a matter of what their new sentences should and will be. This is not just a matter for the courts to decide but a job for the legislature as well, because many laws, such as Florida's law abolishing parole, can be contradictory to *Graham*'s holding. The legislature must determine the definition of meaningful opportunity for release and how it should be implemented, just as the Court intended. However, with no binding precedent nor legislative mandate thus far, lower courts are left to figure it out for themselves.

Jason Klapp was convicted of rape when he was sixteen and sentenced to five consecutive life terms.¹⁶⁰ He is eager to have his case resentenced but his lawyer thinks it would be a gamble to have the case heard now, and that it is better to be cautious and have the hearing pushed back.¹⁶¹ However, some juveniles were not so patient, and so far it does not seem to have paid off. While courts are adhering to *Graham* and reducing the life without parole sentences, they are not reducing by much and are more concerned with technicality than rationality.¹⁶² Many of these juveniles who had hopes of maybe one day being free in light of *Graham* are facing the devastating reality that they will still spend every day for the rest of their lives locked up in a prison cell.¹⁶³

Take for example, Jose Walle who was sentenced to life without parole for a series of robberies and rapes he committed when he was thirteen, was resentenced to sixty-five years to be served after another twenty-seven year sentence he received for a separate crime.¹⁶⁴ He will be ninety-one-years-old when he is eligible for parole.¹⁶⁵ Another juvenile was resentenced to fifty years for his part in an armed robbery in Jacksonville.¹⁶⁶ One juvenile, who represented himself, was originally sentenced to life for robbing and raping a woman in Orlando when he was seventeen, was resentenced to ninety years.¹⁶⁷ These Florida courts are following the same path as the courts in *Bell* and *Ramirez* in constricting *Graham* to the semantics of technicality. Yes, technically, it seems that these sentences are consistent with *Graham* because they are not life sentences; however, this limited interpretation cannot possibly survive. None of these juveniles who were resentenced have any more of a chance at a meaningful opportunity for release than when they were serving life sentences.

One court, however, seems to be taking a more refreshing approach. In *Manuel v. Florida*, the Second District Court of Appeal of Florida held that attempted

159. Garland v. Florida, 35 Fla. L. Weekly D1526 (Fla. Dist. Ct. App. 2010).

160. See Griffin, *supra* note 13.

161. *Id.*

162. Lloyd Dunkelberger, *Juvenile Offenders Still Get Near-Life Terms*, SARASOTA HERALD-TRIBUNE (Nov. 21, 2010, 7:16 AM), <http://www.heraldtribune.com/article/20101121/ARTICLE/11211086/2055/NEWS?p=all&tc=pgall&tc=ar>.

163. *Id.*

164. Alexandra Zayas, *Teenage Rapist Jose Walle Resentence to 65 Years in Prison*, ST. PETERSBURG TIMES (Nov. 18, 2010, 12:03 AM), <http://www.tampabay.com/news/courts/criminal/teenage-rapist-jose-walle-resentenced-to-65-years-in-prison/1134862>.

165. *Id.*

166. Dunkelberger, *supra* note 162.

167. *Id.*

murder is a nonhomicide offense.¹⁶⁸ In 1990, Ian Manuel was thirteen years old when he committed robbery with a firearm, attempted robbery with a firearm, and two counts of attempted first-degree murder with a firearm.¹⁶⁹ He pled guilty and was sentenced to “natural life” in prison.¹⁷⁰ Now, twenty years later, the court vacated his sentence in light of *Graham*.¹⁷¹ The court reasoned that the Supreme Court established a “bright-line rule” prohibiting life without parole for nonhomicide crimes and the Florida Supreme Court has held, “under the definition of homicide, ‘[i]t is necessary for the act to result in the death of a human being.’”¹⁷² The court, therefore, held, “simple logic dictates that attempted murder is a nonhomicide offense because death, by definition, has not occurred.”¹⁷³ Thus, Manuel’s conviction of attempted murder is a nonhomicide offense, and he cannot be sentenced to life without parole under *Graham*.¹⁷⁴ The court, however, did not recommend how trial courts should proceed with resentencing, and instead, left it entirely up to them to decide.¹⁷⁵ Based on this ruling, legal experts now put the number of juveniles serving life sentences without the possibility of parole in Florida at 116.¹⁷⁶

The United States District Court for the Southern District of Florida has also addressed a lengthy term-of-years sentence in accordance with the intent of *Graham*.¹⁷⁷ In *United States v. Mathurin*, a juvenile faced a mandatory minimum sentence of 307 years as a result of a statutory requirement that required each violation to run consecutively.¹⁷⁸ The court held the statutory requirement was unconstitutional as applied to the juvenile under *Graham*.¹⁷⁹ The court, therefore, severed the unconstitutional portion of the statute, and held that the juvenile should be sentenced to forty-one years in prison, possibly being eligible for release at the age of fifty-three with demonstrated maturity and rehabilitation.¹⁸⁰

The issue becomes much more precarious when a juvenile is found guilty of a crime for which the only sentence permitted by law is life without parole. That is the exact issue sixteen-year-old Henry Baker could face.¹⁸¹ Baker is being charged as an adult with attempted murder for the shooting of Sanford police Officer Brandon Worrall.¹⁸² This crime carries a mandatory sentence of LWOP if

168. 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010).

169. *Id.* at 95–96.

170. *Id.* at 96.

171. *Id.* at 97.

172. *Id.* (alteration in original) (quoting *Tipton v. Florida*, 97 So. 2d 277, 281 (Fla. 1957)).

173. *Manuel*, 48 So. 3d at 97.

174. *Id.*

175. *Id.* at 98 n.4.

176. See Dunkelberger, *supra* note 162.

177. *United States v. Mathurin*, No. 09-21075-Cr, 2011 WL 2580775 (S.D. Fla. June 29, 2011).

178. *Id.* at *2.

179. *Id.* at *3.

180. *Id.* at *6.

181. Rene Stutzman, *Teen Faces Adult Charge, Contrary to High-Court Ruling*, ORLANDO SENTINEL (June 15, 2010, 6:48 PM), <http://www.orlandosentinel.com/news/local/breakingnews/os-teen-faces-life-sanford-cop-shooti20100615,0,346998.story>.

182. *Id.*

convicted, which *Graham* held is unconstitutional.¹⁸³ Because the mandatory sentence is unconstitutional as applied, and because judges have no other recourse, the law must be rewritten.¹⁸⁴

There have been several propositions in Florida on how to address *Graham* and juvenile sentencing. First was a bill introduced by Representative Mike Weinstein, R-Jacksonville, entitled the “Graham Compliance Act,” which dealt with how to sentence future nonhomicide juvenile offenders.¹⁸⁵ The bill, endorsed by the Florida Prosecuting Attorneys Association, still permits life sentences but provides an opportunity for parole after twenty-five years.¹⁸⁶ Parole was conditioned on a number of criteria, for example, a juvenile “could not have any serious disciplinary infractions within the previous three years; must have completed his high-school education and any vocational programs available; and passed a mental and psychological evaluation that proved he was not . . . mentally deranged or incapable of rehabilitation.”¹⁸⁷ The bill also provided for a parole hearing every seven years after the initial twenty-five years has been served.¹⁸⁸ Representative Weinstein believed this was a better solution than sentencing juveniles to lengthy term-of-years sentences, only to have them exposed to appeals and the possibility of being overturned.¹⁸⁹ However, the bill died in the Criminal Justice Subcommittee in May 2011.¹⁹⁰ Representative Weinstein filed essentially this same bill again at the end of May 2011, now titled House Bill 5.¹⁹¹

Even still, Representative Weinstein’s bill only applied to future juveniles and not those already sentenced to life without parole.¹⁹² A different bill, however, led by Florida State University Law Professor Paolo Annino, who notably was one of the authors of the national study relied upon by the Supreme Court in *Graham*, would apply retroactively to those currently serving time.¹⁹³ Annino’s bill, titled the Second Chance for Children in Prison Act, provides the possibility of parole for juveniles fifteen years old or younger who are sentenced to more than ten years in prison.¹⁹⁴ This bill also conditioned parole on a number of criteria, including

183. *Id.*

184. *Id.*

185. See Dunkelberger, *supra* note 162; see also Jeff Kunerth, ‘Graham Law’ Would Replace Life Without Parole for Juveniles, ORLANDO SENTINEL (April 12, 2011), http://articles.orlandosentinel.com/2011-04-12/features/os-life-without-parole-graham-20110412_1_terrance-graham-parole-juveniles.

186. Dunkelberger, *supra* note 162.

187. Kunerth, *supra* note 185.

188. David Ovalle, *Ruling on Young, Violent Lifers Puts Florida Justice on the Spot*, THE MIAMI HERALD (Sep. 26, 2010), http://www.miamiherald.com/2010/09/25/1842695_p3/ruling-on-young-violent-lifers.html.

189. Dunkelberger, *supra* note 162.

190. Florida House of Representatives, HB 29 – Parole for Juvenile Offenders, accessed at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44803>.

191. Florida House of Representatives, HB 5 – Parole for Juvenile Offenders, accessed at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47008&SessionIndex=-1&SessionId=70&BillText=&BillNumber=&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=B&BillSearchIndex=-1>.

192. Dunkelberger, *supra* note 162.

193. John A. Torres, *Sentences Stick for Young Killers*, FLORIDA TODAY (Jan. 2, 2011), <http://www.floridatoday.com/article/20110102/NEWS01/101020315/1006/news01/Sentences+stick+for+young+killers>.

194. *Id.*

having served at least eight years, not having any disciplinary reports for the previous two years, and being considered rehabilitated.¹⁹⁵

Both of these bills adhered to the meaning of *Graham* by providing juveniles a meaningful opportunity for release. Neither of these bills guaranteed a juvenile would ever be released, which the Supreme Court does not demand. But if either one of these bills were enacted, it certainly would be a step in the right direction for Florida and would be a much better option than de facto life sentences as a result of lengthy term-of-years.

CONCLUSION

Children are different. As a society, we have put conditions and restrictions on children and treated them differently for the very fact that they are different. As the Supreme Court held in *Graham v. Florida*, juveniles lack maturity, lack a sense of responsibility, are more susceptible to negative influences, and are therefore less culpable.¹⁹⁶ Society already treats juveniles different than adults, and that should be true in the courtroom as well.

Based on this reasoning that juveniles are less culpable for their actions, the Supreme Court held a sentence of LWOP for a juvenile nonhomicide offender was cruel and unusual punishment and violated the Eighth Amendment.¹⁹⁷ It requires juveniles must be provided with a meaningful opportunity for release.¹⁹⁸ While the Court can be congratulated for making progress in the rights of juvenile offenders, it is what the Court did not do that is frustrating in this field. By refusing to define meaningful opportunity and refusing to comment on term-of-years sentences, many courts are undermining the holding in *Graham*. Juveniles are being sentenced to terms as high as 175 years.¹⁹⁹ While technically in accordance with *Graham*, in reality it is not. Though a juvenile might never be released, it is the *possibility* of release that is significant, giving him something to strive for, an achievable goal, and a reason to rehabilitate. Sentencing a juvenile to ninety years does none of that. Therefore, these long term-of-years sentences, which are technically not life without parole, are not in accordance with the meaning of *Graham*. Ultimately, higher courts will have to rule on these term-of-years sentences, and will hopefully declare them unconstitutional as the Supreme Court has with life without parole sentences. It is hard to grasp how the two are really that different when the outcome is practically the same. So it seems to follow that if one is unconstitutional because it does not provide a juvenile a realistic opportunity for release, then the other one would also be unconstitutional for not providing a juvenile a realistic opportunity for release.

With courts inconsistently applying *Graham*, states need to pass laws that will effectively administer the intention of *Graham*; otherwise, the result will be

195. *Id.*

196. *Graham*, 130 S. Ct. at 2026.

197. *Id.* at 2034.

198. *Id.* at 2030.

199. *De Jesus Nunez*, 125 Cal. Rptr. 3d at 617.

lengthy appeals, which could ultimately end up with these sentences being overturned. Florida is headed in the right direction with attempting to pass two bills that would require the possibility of parole after a certain number of years. Each bill provides juveniles with hope, with a reason to grow, mature, and change, which is what the Supreme Court intended all along. Children deserve this opportunity. They deserve the chance to show they are no longer the immature and irresponsible juvenile that was sentenced to prison. States and courts must still do more to make up for the holes the Supreme Court left open to ensure these children are given the real opportunity they deserve; otherwise, *Graham* itself will be forgotten in the wake.