Louisiana Law Review

Volume 71 | Number 1
Fall 2010

Using Graham v. Florida to Challenge Juvenile Transfer Laws

Neelum Arya

Using *Graham v. Florida* to Challenge Juvenile Transfer Laws

Neelum Arya[*]

INTRODUCTION

Five years after the Supreme Court abolished the juvenile death penalty in *Roper v. Simmons*,[1] the Court handed down its decision in *Graham v. Florida*[2] abolishing juvenile life without parole sentences (JLWOP) in nonhomicide cases. Until this ruling, "death is different" ruled the day.[3] Now, *Graham* has solidified the rule the Court first established in *Thompson v. Oklahoma* and reiterated in *Roper*—juveniles are different too.[4]

---

* J.D., UCLA School of Law; M.P.A., Harvard University; Research & Policy Director for the Campaign for Youth Justice (CFYJ), an organization dedicated to ending the practice of prosecuting, sentencing, and incarcerating youth in the adult criminal justice system. The ideas presented here should not be viewed as a position of CFYJ. The author wishes to thank the *Louisiana Law Review*, the John D. and Catherine T. MacArthur Foundation, and the George W. and Jean H. Pugh Institute for Justice for sponsoring the symposium on juvenile justice. The author also thanks Sarah Baker, Katayoon Majd, Christine Rapillo, Addie Rolnick, Liz Ryan, and Christopher Slobogin for their comments and Brittany Brown, Kelly Latta, and Megan McQuiddy for their research assistance.

1. 543 U.S. 551 (2005).
2. 130 S. Ct. 2011 (2010).
3. *Id.* at 2046 (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a non-capital sentence using the categorical approach it previously reserved for death penalty cases alone."); *see also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (explaining the differences between capital and non-capital sentencing review); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) (critiquing the Court's death penalty and prison sentence cases).
4. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of judges found that all 15-year-old offenders lacked the culpability necessary for the death penalty because:

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

The new categorical rule established by *Graham* has the potential to profoundly impact the field of juvenile justice and youth policies as a whole.[5] While *Graham* explicitly provides only a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"[6] for all persons currently serving JLWOP sentences for nonhomicide crimes,[7] it remains to be seen what ripple effects this case will generate across the criminal justice system.[8] Dedicated lawyers across the country are working on behalf of Terrance Graham and Joe Sullivan,[9] and the other individuals serving JLWOP sentences for nonhomicide crimes, to ensure that this recent victory is not illusory. Many lawyers are contemplating how to broaden the reach of *Graham* to abolish life without parole sentences for adults. Scholars are examining the impact of this latest decision on Eighth Amendment jurisprudence overall. This Article takes a different approach and examines *Graham* from an *ex ante* perspective focusing on how it may be used to reform the juvenile and criminal justice systems by eliminating the ability to prosecute youth as adults in the first place.[10]

Just as *Roper* paved the way for *Graham,* hopefully *Graham* foreshadows significant changes in the legal landscape related to youth prosecuted as adults.[11] The result of litigation-based

---

Id. at 835. The following year, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), a majority upheld the death penalty for 16 and 17 year olds in a decision that was overturned by the *Roper* decision. *See supra* note 1 and accompanying text.

5. *See, e.g.*, Elisa Poncz, *Rethinking Child Advocacy After* Roper v. Simmons*: "Kids Are Just Different" and "Kids Are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273 (2008) (explaining and applying the tensions between special rules for youth in the criminal justice context to areas such as medical decisionmaking, emancipation, marriage, parenting, education, and the Internet).

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

7. The Court identified a total of 129 individuals in 12 jurisdictions: Florida, California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, Virginia, and in the federal system. *Id.* at 2024.

8. *See* Barkow, *supra* note 3, at 1145 ("If, as a matter of constitutional law, death were no longer different, our criminal justice system would be almost certainly for the better.").

9. The companion case, *Sullivan v. Florida*, was "dismissed as improvidently granted." 130 S. Ct. 2059, 2059 (2010). However, Joe Sullivan will benefit from the *Graham* ruling declaring a categorical ban on JLWOP sentences for nonhomicide crimes.

10. For a description of juvenile transfer laws, see *infra* notes 53–60 and accompanying text.

11. *Graham* is not likely to produce widespread reforms by itself. *See, e.g.*, Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A*

advocacy on behalf of children has been sobering.[12] Some scholars have suggested that the Supreme Court victories that established new constitutional protections in the civil rights and criminal justice contexts actually helped create the political environment responsible for the punitive criminal justice policies of the 1970s and beyond.[13] Despite this pessimistic history, this Article explains why lawyers working on behalf of children have reasons to be optimistic about the potential for *Graham* to generate significant reforms on behalf of all children accused of committing crimes.[14]

Seventeen-year-old Terrance Graham asked the Court to declare that his JLWOP sentence, imposed by a Florida trial court judge after he had violated the terms of his probation stemming from an earlier armed burglary charge, was unconstitutional under the Eighth Amendment. The Court had three potential ways to resolve his case. First, the Court could have found that the JLWOP sentence as applied to Graham did not violate the Eighth

---

Relational Analysis of Social Movement Lawyers in the United States, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998) ("Many scholars in recent years have examined the relationship between law and the politics of social reform advocacy in the United States. The bulk of this scholarship has been highly circumspect regarding the progressive potential of legal tactics, legal institutions, and cause lawyers for social reform movements.").

12. *Compare* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 43 (1985), *and* GERALD R. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991), *and* STAURT A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974), *with* SHERYL DICKER, STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN (1990), *and* BLDG. BLOCKS FOR YOUTH INITIATIVE, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR IN THE JUSTICE SYSTEM (2005), *available at* http://www.buildingblocksforyouth.org/noturningback/ntb_fullreport.pdf.

13. *See, e.g.*, Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms As Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 516–19 (2009); Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189 (2007); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 827 (2006); David Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 13, 32–33 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (discussing how the *Kent* and *In re Gault* decisions providing juveniles the same procedural rights had the unintended effect of eroding the rehabilitative idea of juvenile justice).

14. The author encourages further discussion over the potential unintended consequences of using some of the arguments presented in this article (e.g., returning youth who have committed the most serious crimes to the juvenile system may harm children charged with less serious crimes), although no attempt is made to raise them here.

Amendment's prohibition against cruel and unusual punishment.[15] The second option was to conduct a proportionality analysis and determine that the JLWOP sentence was unconstitutional because it was disproportionate as applied to the facts of Graham's case.[16] The final option, and the approach which is now law, was to create a categorical rule abolishing the JLWOP sentence for all non-homicide crimes so that the sentence can never be imposed on any youthful offender.[17] Although the Court acknowledged that some youth may have the requisite culpability to be deserving of such sentences, the Court determined there were too many risks that JLWOP sentences would be inappropriately imposed on undeserving youth and found a categorical ban on the sentence was necessary.

This Article suggests that lawyers consider using *Graham* to ensure that every child under the age of eighteen, regardless of whether the child has been given a JLWOP sentence, is entitled to a chance to "atone for his crimes and learn from his mistakes"[18] so that he may "demonstrate that the bad acts he committed as a teenager are not representative of his true character."[19] *Graham* is not merely an extension or incremental continuation of *Roper*, but provides significant fodder for a reexamination of our juvenile justice policies more broadly,[20] including the possibility of removing retribution as a valid goal of the criminal justice system as applied to youth, and firmly establishing a constitutional right to rehabilitation. *Graham* is revolutionary in that it cuts to the heart of why we have a juvenile justice system, why it is separate from the adult system, and hopefully will make us rethink why we let the two bleed together so often. Although *Graham* directly addresses the constitutionality of JLWOP sentences, the author argues that there are several collateral holdings within *Graham* relevant to challenge the transfer of youth to the adult system as well.

Part I provides a description and analysis of the *Graham* opinion. Graham was subject to the JLWOP sentence because he was transferred to the adult criminal justice system. This Part

---

15. This is the position taken by Justices Thomas, Scalia, and Alito. *See* Graham v. Florida, 130 S. Ct. 2011, 2043–59 (2010) (Thomas, J., dissenting).

16. This is the position taken by Chief Justice Roberts. *See id.* at 2036–42 (Roberts, C.J., concurring).

17. This is the position taken by Justices Kennedy, Stevens, Ginsburg, Breyer, and Sotomayor. *See id.* at 2017–35 (majority opinion).

18. *Id.* at 2033.

19. *Id.*

20. *See, e.g.*, Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483 (2009) (describing challenges and opportunities for juvenile justice reform).

contextualizes the facts of Terrance Graham's case with a brief history of juvenile transfer laws that result in more than 200,000 children being tried in adult criminal courts every year.[21] Part I then reviews the Court's Eighth Amendment jurisprudence through to its recent ruling that declares JLWOP sentences for nonhomicide crimes unconstitutional.

Part II suggests that the rationale the Court uses are collateral holdings, as opposed to merely persuasive authority, that have many implications on the future of the juvenile justice system. Based on this reading of *Graham,* youth have a right to rehabilitation found under the state's police power.[22] In addition, *Graham* discusses three types of difficulties that adult decisionmakers in the criminal justice system have with respect to youth that may be useful to challenge transfer laws. First, judges and experts have problems evaluating the culpability and maturity of youth. Second, adult perceptions of youth are biased by the severity and manner in which the crimes were conducted. Third, counsel have difficulty representing youth in the adult system. This Article suggests these factors apply to all youth prosecuted in the adult criminal system, regardless of offense charged or sentence imposed.

Part III then reviews the only Supreme Court case directly related to youth tried as adults, *Kent v. United States.*[23] After *Kent,* subsequent attempts to challenge transfer statutes have largely been unsuccessful. In light of the *Graham* decision, this Article encourages lawyers to revisit these prior challenges in both individual cases and as part of impact litigation strategies to declare all transfer statutes, or portions of them, unconstitutional.

This Article concludes by recognizing that efforts to change transfer laws will not occur in a vacuum. Several changes to the existing juvenile justice system may be necessary to ensure that youth receive the appropriate services they need without sacrificing public safety. This Article encourages scholars, lawyers, and other advocates for justice to engage in further debate about what kind of juvenile justice system we wish to see in the future. While many scholars have subscribed to the "diminished culpability" model of juvenile justice, this Article suggests that we

---

21. Campaign for Youth Justice, *Key Facts: Youth in the Justice System,* CAMPAIGN FOR YOUTH JUST. (June 2010), http://www.campaignforyouthjustice.org/documents/FS_KeyYouthCrimeFacts.pdf.

22. *See infra* notes 142–43 and accompanying text.

23. 383 U.S. 541 (1966).

may want to move toward a zero-retribution approach to juvenile justice.[24]

I. *GRAHAM* AND EIGHTH AMENDMENT JURISPRUDENCE

A. How Terrance Graham Received a Life without Parole Sentence

At the age of 16, Terrance Graham, along with three other youth, attempted to rob a restaurant in Jacksonville, Florida.[25] One of Graham's accomplices hit the restaurant manager on the head, injuring him enough to require stitches.[26] Although Graham had no prior offenses and had never received any services within the juvenile justice system, the prosecutor charged Graham directly in adult court.[27] Graham did not challenge his prosecution in the adult system, although if he had, he would have lost as Florida courts had previously ruled that youth do not have a right to juvenile court treatment.[28] Graham pled guilty to armed burglary with

---

24. The author's personal views are not captured by any of the extant scholarship even as she finds much to admire in the work done to date. For scholars who have endorsed the diminished-retribution approach, see generally ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008) (advocating a separate juvenile justice system based on a diminished culpability rationale); Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 61 (2008) (describing "a categorical 'youth discount' that provides adolescents with fractional reductions in sentence-lengths based on age as a proxy for culpability"); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that immaturity should be a mitigating factor for juvenile offenders). For scholars advocating an alternative approach, see Christopher Slobogin & Mark Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 3–8 (2009), which describes four models of juvenile justice: (1) the rehabilitative model designed to make children better citizens regardless of whether the child has committed a crime; (2) the adult-retribution model which suggests that youth should be punished similar to adults; (3) the diminished-retribution model which prescribes dispositions in proportion to a youth's immaturity/culpability; and (4) an "individual-prevention" model in which the intervention is the "most-effective, least restrictive means of curbing future crime."

25. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

26. *Id.*

27. *Id.* Graham's experience is not atypical. More than half (59%) of juveniles received JLWOP sentences for their first-ever criminal conviction. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES 19 n.30 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

28. *See* Tate v. State, 864 So. 2d 44, 52 (Fla. Dist. Ct. App. 2003) ("Florida courts have long recognized that there is no absolute right requiring children to

assault or battery, an offense that carried a maximum penalty of life imprisonment without possibility of parole, and attempted armed robbery, carrying a maximum of 15 years imprisonment.[29] The court sentenced him to a total of three years of probation and one year in the county jail, for which Graham was given time served.[30]

Less than six months later, Graham was arrested in connection with a home invasion at gunpoint.[31] Although Graham initially denied his involvement, he later acknowledged that he violated the terms of his probation.[32] The trial court judge evaluating the violation of probation had the discretion to impose a sentence ranging from less than five years (with a downward departure) to a term of life imprisonment, and chose the latter.[33] As Florida abolished its parole system, Graham had no possibility of release outside of a grant of clemency by the governor of Florida.[34]

Graham challenged his sentence under the Eighth Amendment, but the Florida trial and appellate courts affirmed his sentence.[35] After the Florida Supreme Court denied review, Graham petitioned for a *writ of certiorari* from the United States Supreme Court.[36] On May 17, 2010, the Supreme Court rendered its decision and Graham won a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[37] Graham's ultimate release, if ever, is still uncertain.

Graham was subject to the JLWOP sentence because he was tried as an adult. Graham had no prior contacts with the system, so why did the prosecutor believe that Graham would not benefit from juvenile court treatment? If the prosecutor believed Graham was a significant threat to public safety necessitating adult court treatment, then why did the prosecutor agree to his sentence of probation? Another way to ask the question is: if Graham is not the type of child who is intended to be served by the juvenile justice

---

be treated in a special system for juvenile offenders."); *cf.* Brief of Respondent at 19, *Graham*, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2954163 ("Given that Graham does not challenge his adjudication as an adult via the transfer system, his attempt to inject age at the sentencing phase is unwarranted and, if allowed, would undermine transfer systems nationwide.").

29. *Graham*, 130 S. Ct. at 2018.
30. *Id.*
31. *Id.*
32. *Id.* at 2019.
33. *Id.*
34. *Id.* at 2020.
35. *Id.*
36. *Id.*
37. *Id.* at 2030.

system, who is the system designed to help? In a well-functioning juvenile justice system,[38] Graham would not have been incarcerated in an adult jail for a year, but he would have received appropriate interventions in the community to minimize the likelihood that he would commit additional crimes.

Florida has been a national leader in the trend to try more youth as adults, particularly with respect to the use of prosecutorial discretion laws. Significant empirical evidence from Florida shows that children tried as adults are more likely than children tried as juveniles to re-offend, re-offend more quickly, and they commit more serious offenses.[39] Nonetheless, prosecutors across America continue to exercise their discretion to charge youth in the adult system.

The American juvenile justice system has fluctuated between a *parens patriae* model (theoretically based on the child's best interests) and a punitive crime-control model.[40] One of the primary reasons juvenile courts were initially formed, and the reason justifying the courts' existence today, is that the normal adolescent experience is characterized by experimentation and risky behavior[41] and the fact that youth are generally thought to be more amenable to rehabilitation as compared to adults.[42] From childhood to adulthood, the majority of youth in America will engage in delinquent conduct but will "age out" of these activities.[43] Our

38. There is no specific definition for a well-functioning juvenile justice system, but the MacArthur Foundation provides six clear principles: (1) all system participants deserve fair treatment; (2) systems must acknowledge that youth are fundamentally and developmentally different from adults; (3) systems must acknowledge and appropriately respond to youths' individual differences in terms of development, culture, gender, needs, and strengths; (4) systems should recognize youths' strengths and capacity for positive growth; (5) communities and individuals deserve to be safe, and to feel safe; and (6) youth must be encouraged to accept responsibility for the consequences of their actions, communities have an obligation to support youth and help them grow into adults, and the system should be part of society's collective exercise to safeguard the welfare of children and youth. *See Principles*, MODELS FOR CHANGE, http://www.modelsforchange.net/about/Background-and-principles/Principles.html (last visited Oct. 13, 2010).

39. Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 13, at 227.

40. Dia N. Brannen, *A National Study of How Juvenile Court Judges Weigh Pertinent* Kent *Criteria*, 12 PSYCHOL. PUB. POL'Y & L. 332, 345–47 (2006).

41. SCOTT & STEINBERG, *supra* note 24, at 52–55.

42. ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968).

43. *See, e.g.*, ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (1993) (developing an age-graded theory of crime and deviance over the life course and finding that continuation of adolescent delinquent behavior could be modified by key institutions of social control in the transition to adulthood (e.g., employment,

society does not want to unnecessarily saddle a youth with the lifelong stigma of a criminal conviction if the delinquency is only temporary. Youth who are prosecuted in the adult system are denied this benefit. Youth tried as adults are not entitled to any special treatment[44] and can be incarcerated with adults, be subject to mandatory minimum sentencing laws, and face lifelong obstacles to employment.[45]

Although youth have been prosecuted as adults since the beginning of the juvenile court system, many of the juvenile transfer laws were significantly expanded during the 1990s as part of a "moral panic" that seemed to take over the country.[46] Exploiting the public's fears about juvenile "superpredators"[47] and

---

military service, and marriage)); Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993) (finding that adolescent boys involved in criminal activity is a "normal part of teenage life" and only about 5% are "life course persistent offenders").

44. *See* Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1434–35 (2001) ("[A] young offender impaired in a similar way by immaturity has no defense or mitigation, because adult courts traditionally have not recognized an immaturity excuse. Courts have had no need to make such an excuse available in the past for the obvious reason that juvenile courts dealt with the cases involving youthful offenders. The recent trend toward trying youths in adult courts has created the need for such an excuse defense, but none has been developed, perhaps because the defense would interfere with the goal of gaining control over dangerous offenders without regard to their blamelessness.").

45. CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM (2007), *available at* http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf. Youth with adult criminal convictions are often barred from receiving student financial aid and other educational opportunities, may be barred from voting or obtaining public benefits, and most certainly will face lifelong obstacles to finding employment. *See also* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION (Marc Mauer & Meda Chesney-Lind eds., 2003).

46. SCOTT & STEINBERG, *supra* note 24, at 10 ("Although supporters saw the punitive law reforms as a coherent policy response to a new generation of dangerous young criminals, closer inspection reveals that these policy changes, even when driven by legitimate concerns, have often been adopted in a climate of fear and, sometimes, near hysteria.").

47. John DiIulio coined the term "super-predator" as he described remorseless adolescents involved in murder, rape, and drugs. John DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23. He later denounced his assertions. Elizabeth Becker, *As Ex-Theorist on Youth "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

rising juvenile homicide rates,[48] conservative politicians[49] passed legislation in nearly every state between 1992 and 1999, making it easier for youth to be prosecuted in the adult criminal system.[50] As a result, every year an estimated 200,000[51] youth are prosecuted, sentenced, or incarcerated as adults across the United States instead of being adjudicated in the juvenile justice system.[52]

Juvenile courts are statutorily created, and there is a surprising lack of uniformity in how juvenile court systems are organized and administered across the states and how states choose to enable prosecution in the adult system.[53] There are three main types of laws that allow youth to be prosecuted in the adult system, collectively referred to as juvenile transfer laws throughout this Article.[54] First, judicial waiver laws have historically been the

---

48. *See, e.g.*, PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIMES 3–9 (1996); FRANKLING E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998); Feld, *supra* note 24, at 12–13; Feld, *supra* note 13, at 192–95, 212–13.

49. Feld, *supra* note 13, at 213.

50. NAT'L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM (2008), *available at* http://www.modelsforchange.net/publications/181; *see also* NAT'L CRIMINAL JUSTICE ASS'N, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994–1996, at 79 (1997) ("Whether States enact single juvenile justice initiatives or undertake comprehensive revisions of their juvenile codes, policymakers are often treading in uncharted waters. Many of the system reforms being undertaken, whether traditional or innovative, are based on little evidence to support their efficacy.").

51. COAL. FOR JUVENILE JUSTICE, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING AND SENTENCING YOUTH IN ADULT CRIMINAL COURT (2005), *available at* http://www.juvjustice.org/media/resources/public/resource_115.pdf; Jennifer L. Woolard et al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 4 (2005).

52. This article will frequently refer to a "juvenile justice system." There are actually more than 51 juvenile justice systems operating across the nation. MELANIE KING, NAT'L CTR. FOR JUVENILE JUSTICE, GUIDE TO THE STATE JUVENILE JUSTICE PROFILES (2006), *available at* http://www.ncjjservehttp.org/NCJJWebsite/pdf/taspecialbulletinstateprofiles.pdf.

53. *State Juvenile Justice Profiles: National Overview*, NAT'L CENTER FOR JUV. JUST., http://70.89.227.250:8080/stateprofiles/overviews/overviewlist.asp?overview=%2Fstateprofiles%2Foverviews%2Foverviewlist.asp (last visited Oct. 13, 2010).

54. Additional mechanisms not discussed in the text include: (1) "once an adult, always an adult" laws which require that youth who have been tried in the adult system for any offense be automatically sent to the adult system for all subsequent offenses, regardless of severity; (2) "reverse waiver" laws which allow youth being tried in the adult criminal system to petition to have the case transferred back to the juvenile court; and (3) "blended sentencing" options which allow juvenile or adult court judges to choose between juvenile and adult

primary vehicle to transfer youth from the juvenile court to criminal court.[55] Under judicial waiver laws, the juvenile court judge has the authority to waive jurisdiction and transfer the case to criminal court after weighing certain criteria to determine whether the child is amenable to treatment within the juvenile justice system.[56] Second, statutory exclusion laws require children charged with certain crimes to be filed in adult criminal court. Judges are not given the discretion to examine the individual circumstances of any case or make personalized decisions about what treatment would best suit any particular youth.[57] A particular kind of statutory exclusion law, an *age of jurisdiction* law, determines the age of adulthood for criminal justice purposes. Thirteen states define the upper age of original juvenile court jurisdiction as below the age of 18.[58] In other words, in certain states, 16 and 17 year olds are automatically in the adult criminal system regardless of the severity of the offense. The final type of transfer laws are known as *prosecutorial discretion* laws.[59] These

---

correctional sanctions in sentencing certain youth. *See, e.g.*, CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45; NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 50.

55. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45.

56. Even within the category of judicial waiver, there are three different types of these laws. The most common, available in 45 states, is the discretionary waiver. Most use some form of the *Kent* waiver criteria. *See infra* notes 239–43 and accompanying text. A juvenile court judge weighs the criteria before deciding whether to waive the case to the adult court. Generally, the prosecutor has the burden to show why the cases should be moved to the adult system. In contrast, presumptive waiver laws shift the burden from the prosecutor to the defendant. In these cases, the youth must "rebut" the presumption that the case should be heard in adult court. The final type of judicial waiver law is a mandatory judicial waiver. This law is functionally the same as a statutory exclusion law. The judge merely checks to ensure that probable cause exists to believe the youth meets the statutory criteria to be waived to the adult system. NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 50, at 2–3. Statutory exclusion laws are also known as legislative exclusion or automatic waiver laws. These laws can also be based on state constitutional provisions. For example, in Florida many of these laws are required by the state constitution. *See* Rostyslav Shiller, *Fundamental Unfairness of the Discretionary Direct File Process in Florida*, 6 WHITTIER J. CHILD & FAM. ADVOC. 13, 17–18 (2006).

57. An exception exists if the state has a reverse waiver law. *See supra* note 54.

58. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45. Many advocates and practitioners consider "age of jurisdiction" laws to be distinct from other types of transfer laws. This article ignores this technical distinction.

59. These laws are also known as "concurrent jurisdiction," "prosecutorial waiver," or "direct file" laws.

laws allow the prosecutor to file cases in either court because the juvenile and criminal courts share jurisdiction.[60]

The next section will explain how the Court determined Terrance Graham's JLWOP sentence was unconstitutional.

B. The Changing Nature of Eighth Amendment Jurisprudence

The Supreme Court's Eighth Amendment jurisprudence is a complicated web of opinions that has divided Justices for years.[61] The Eighth Amendment, applicable to the federal government and binding on the states through the Due Process Clause of the Fourteenth Amendment,[62] states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[63] The Court has interpreted the Eighth Amendment to protect people in the criminal justice system in cases that fall into several types of categories.[64] First, the Court has declared some types of punishments (e.g., torture) unconstitutional altogether.[65] Second, the Court has declared certain punishments unconstitutional because of how they are administered (e.g., prison conditions that are inhumane).[66] And third, the Court has found certain punishments to be unconstitutional, (e.g., the death penalty or sentences of incarceration) if the punishment imposed is

---

60. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 45. Functionally, all states with statutory exclusion laws have prosecutorial discretion laws as well. If prosecutors want to try the case in the adult court, all they have to do is charge the youth with a crime mandating adult court prosecution. If the prosecutors prefer the juvenile court, the prosecutor can charge the youth with a crime allowing juvenile court adjudication.

61. *See, e.g.*, Barkow, *supra* note 3, at 1145; Youngjea Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 692–93 (2005) ("The key cases . . . sit uneasily with each other, and there is still much uncertainty about how the case law will eventually settle, especially given the rarity of majority opinions in this area.").

62. Robinson v. California, 370 U.S. 660 (1962).

63. U.S. CONST. amend. VIII; *see also* Roper v. Simmons, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

64. Lee, *supra* note 61, at 678–79.

65. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) ("'[P]unishments of torture,' for example, 'are forbidden.'" (alteration in original) (quoting Wilkerson v. Utah, 99 U.S. 130, 136 (1879))); *see also* Baze v. Rees, 553 U.S. 35, 99 (2008) (Thomas, J., concurring) ("Consistent with the original understanding of the Cruel and Unusual Punishments Clause, this Court's cases have repeatedly taken the view that the Framers intended to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment.").

66. Lee, *supra* note 61, at 678–79.

disproportionate to the crime or the type of offender.[67] Within this last category of cases, the previously clear line between capital and non-capital cases has now been eroded by *Graham*.[68]

The Court has long believed that "death is different" and has interpreted the Eighth Amendment to protect against death sentences that are imposed in an arbitrary and capricious manner.[69] In contrast, the Court has done virtually nothing to ensure that sentences imposed in noncapital cases are appropriate.[70] So long as

67. *Graham*, 130 S. Ct. at 2021 ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime."); *see also* Weems v. United States, 217 U.S. 349, 367 (1910) (holding that the Eighth Amendment's Cruel and Unusual Clause requires that punishment for a crime be proportioned to its severity).

68. *Graham*, 130 S. Ct. at 2021–22 ("The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences [and] considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. . . . The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty.").

69. Barkow, *supra* note 3, at 1146; *see also* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (holding the death penalty unconstitutional for the rape of a child); Roper v. Simmons, 543 U.S. 551, 571 (2005) (holding the death penalty unconstitutional as applied to persons who committed the crime before the age of 18); Atkins v. Virginia, 536 U.S. 304, 311 (2002) (holding the death penalty unconstitutional as applied to offenders with mental retardation); Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) ("The Court has . . . imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality."); Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty unconstitutional for aiding and abetting a felony in the course of which a murder is committed by others); Godfrey v. Georgia, 446 U.S. 420 (1980) (holding that states must give a narrow and precise definition to the aggravating factors that can result in a capital sentence); Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty unconstitutional for the rape of an adult, overruling Furman v. Georgia, 408 U.S. 238 (1972)).

70. *Graham*, 130 S. Ct. at 2021 ("[I]t has been difficult for the challenger to establish a lack of proportionality."); *see also* Barkow, *supra* note 3, at 1146. *Compare* California v. Robinson, 370 U.S. 660 (1962) (reversing a 90-day prison sentence for the use of narcotics), *and* Solem v. Helm, 463 U.S. 277 (1983) (holding that life without parole was disproportionate as applied to a recidivist for writing a bad check worth $100), *with* Rummel v. Estelle, 445 U.S. 263 (1980) (affirming a mandatory life sentence with the possibility of parole for the non-violent theft of less than $230), *and* Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding a 50-years-to-life sentence with possibility for parole for shoplifting $150 worth of videotapes under California's three-strikes law), *and* Ewing v. California, 538 U.S. 11 (2003) (affirming a sentence of 25 years to life under California's three-strikes law for theft of three golf clubs worth $399 each), *and* Harmelin v Michigan, 501 U.S. 957 (1991) (affirming a sentence of life without parole for possession of 672 grams of cocaine).

state legislators have "a reasonable basis for believing"[71] that the punishment advances any one of "a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation,"[72] the sentence will be found constitutional.[73] With *Graham,* much of this prior case law is now questionable even though none of the prior case law was explicitly overruled.[74]

In *Graham,* the Court made a radical departure from prior cases by applying a categorical rule developed in the context of death sentences to a life without parole sentence for a non-homicide case.[75] The majority believed that the "case implicated a particular type of sentence as it applies to an entire class of offenders" and therefore determined that a "comparison between the severity of the penalty and the gravity of the crime" was not the appropriate analysis. Instead, the Court applied the test "used in cases that involved the categorical approach, specifically *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana*."[76] It is only much later in the opinion that Justice Kennedy, writing for the majority, explained why the JLWOP sentence is unconstitutional for all children charged with nonhomicide crimes, not just Terrance Graham.[77]

---

71. *Ewing*, 538 U.S. at 28.

72. *Id.*

73. *See* Lee, *supra* note 61 (referring to this standard as "disjunctive theory," which is incompatible with the Eighth Amendment); *see also Graham*, 130 S. Ct. at 2047 (Thomas, J., dissenting) ("In the 28 years since *Solem*, the Court has considered just three such challenges and has rejected them all.").

74. At least a few Justices, however, appeared willing to do so. *See Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring).

75. *Id.* at 2022 (majority opinion) (claiming the case involved a novel issue: a categorical challenge to a term-of-years sentence). Chief Justice Roberts, in concurrence, however, declined to to apply a new categorical rule: "I see no need to invent a new constitutional rule of dubious provenance . . . ." *Id.* at 2036 (Roberts, C.J., concurring). Justice Thomas, in dissent, also declined to apply such a rule:

> The Court asserts that categorical proportionality review is necessary here merely because *Graham* asks for a categorical rule . . . . [T]he Court fails to acknowledge that a petitioner seeking to exempt an entire category of offenders from a sentencing practice carries a much heavier burden than one seeking case-specific relief under *Solem.*

Id. at 2047–48 (Thomas, J., dissenting).

76. *Id.* at 2023 (majority opinion). This is a major departure from the Court's prior rulings. *E.g.*, Rummel v. Estelle, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.").

77. *See Graham*, 130 S. Ct. at 2030–33.

To determine whether a life without parole sentence was unconstitutional, the Court applied the "evolving standards of decency" test used in categorical cases.[78] There are two prongs to this test: (1) evidence of a national consensus against the sentencing practice at issue; and (2) the Court's independent judgment. The Court has not clarified whether one or both prongs must be met before finding the sentence unconstitutional.[79]

1. The First Prong: Evidence of a National Consensus

In the first prong of the test, the Justices consider "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus.[80] Despite alluding to objectivity, the Court has not used a consistent methodological approach to determine whether national consensus approves or condemns a certain practice.[81] In *Atkins* and *Roper,* the Court focused on state trends noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[82] Since

78. *See id.* at 2021.

79. National consensus in favor of or against a particular sentencing practice alone should not necessarily implicate Eighth Amendment protections; compare *Atkins*, *Roper*, *Kennedy*, and *Graham*. *See also* Richard M. Ré, *Can Congress Overturn* Kennedy v. Louisiana*?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1060 (2010).

80. *Graham*, 130 S. Ct. at 2022–23 ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (alteration in original) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)) (internal quotation marks omitted)); *see also* Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008) ("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'" (quoting Roper v. Simmons, 543 U.S. 551, 552 (2005))); *Roper*, 543 U.S. at 564 (referring to "objective indicia of consensus"); *Atkins*, 536 U.S. at 312 (referring to "objective evidence of contemporary values").

81. *See Kennedy*, 128 S. Ct. at 2656 (striking down the death penalty for child rape even though six states had recently changed the law in favor of the penalty); *Roper*, 543 U.S. at 565 (noting that within 15 years, five states abolished the juvenile death penalty); *Atkins*, 536 U.S at 314–15 (noting that within 13 years, 16 states banned the execution of persons with mental retardation); Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (reinstating the death penalty because 35 state legislatures enacted new death penalty statutes after the Court's *Furman* ruling); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 588 n.115 (2010) (arguing that the Court "has failed to clarify what number of states or what rate of change of state legislation is necessary").

82. *Atkins*, 536 U.S. at 315.

the evidence of legislative trends cut both ways in *Graham*,[83] the Court could not rely on this method to determine there was a national consensus against it.[84]

A specific hurdle the Court had to resolve was how to declare the JLWOP sentence unconstitutional in light of overwhelming evidence that youth are statutorily eligible for the penalty. Since *Thompson*, the 1988 case declaring that 15 year olds lacked culpability for the juvenile death penalty, there have been two conflicting sides to this debate.[85] Some Justices view the decision to try a youth as an adult as determinative of the state's legislative decisions regarding sentencing.[86] Others view the transfer decision as separate and distinct from determinations about appropriate sentencing options.[87] Justice Kennedy followed the latter view in *Graham* and declared that "the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole

---

83. *See Graham*, 130 S. Ct. at 2050 (Thomas, J., dissenting) ("First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. . . . Second, legislatures have moved away from parole over the same period."). The majority opinion did not address the fact that state legislatures may have relied on the Court's interpretation in *Stanford*; statutory authorization for transfer to adult court was sufficient consideration to believe states had contemplated decisions about sentencing. The Court should have determined that even state legislatures that made deliberate decisions to impose a JLWOP sentence have violated the Eighth Amendment.

84. *Graham*, 130 S. Ct. at 2023. Thirty-seven states, the District of Columbia, and the federal government permit sentences of life without parole for a juvenile nonhomicide offender. Six states do not allow JLWOP sentences for any offense, and seven States allow JLWOP sentences for homicide crimes.

85. *Compare* Thompson v. Oklahoma, 487 U.S. 815 (1988) (finding, by a plurality, that all 15-year-old offenders lacked the culpability necessary for the death penalty), *with* Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding the death penalty for 16 and 17 year olds).

86. *See Stanford*, 492 U.S. at 375 ("[T]he determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of 16- and 17-year-old offenders before they are even held to stand trial as adults."); *see also* Brief of Respondent, *supra* note 28, at 19 ("[Graham's] attempt to inject age at the sentencing phase is unwarranted and, if allowed, would undermine transfer systems nationwide.").

87. *See, e.g.*, *Thompson*, 487 U.S. at 829 (saying that although every state allows youth to be tried as adults, state transfer laws tell us "nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders"); *see also id.* at 852 (O'Connor, J., concurring) ("[T]here is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense. . . . That fact is a real obstacle in the way of concluding that a national consensus forbids this practice.").

sentences."[88] The Court reaffirmed this belief that statutory eligibility should not be linked to sentencing considerations in part because they acknowledged the fact that transfer policies are overbroad:

> The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.[89]

The hypothetical proposed by the Court is not as unrealistic as one might imagine.[90] In Mississippi, a 4-year-old girl was accused of using a brick to kill her brother in 2002.[91] In 2008, an 8-year-old boy in Arizona faced double-murder charges.[92] In a case receiving significant media coverage prior to the *Graham* decision, Jordan Brown, an 11-year-old Pennsylvania boy, was charged as an adult for allegedly killing his pregnant soon-to-be stepmother.[93] If convicted, Brown could become the youngest person known to receive a JLWOP sentence.[94]

Unable to rely on legislative trends or enactments to determine there was a national consensus, the Court relied on state practice in

---

88. *Compare Graham*, 130 S. Ct. at 2026 (majority opinion) ("[S]tatutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration."), *with id.* at 2050 (Thomas, J., dissenting) ("First, States over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders. . . . Second, legislatures have moved away from parole over the same period."). An interesting side note is that Justice Kennedy followed the *Thompson* approach (a decision he had chosen not to participate in) over the *Stanford* approach (a decision in which he signed Scalia's majority opinion).

89. *Graham*, 130 S. Ct. at 2025–26 (citation omitted).

90. In fact, 703 children aged 12 or younger were judicially transferred to adult court between 1985 and 2004, and that does not include the number of youth whose cases may have been filed directly in adult court. MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM (2009).

91. Dennis Wagner, *St. John's Boy, 8, Suspected of Double Murder*, ARIZ. REPUBLIC, Nov. 8, 2008, *available at* http://www.azcentral.com/arizonarepublic/news/articles/2008/11/08/20081108kidmurder1108.html.

92. *Id.*

93. *District Attorney: No Choice But to Try Boy Murder Suspect as an Adult*, FOX NEWS.COM (Feb. 24, 2009), http://www.foxnews.com/story/0,2933,498384,00.html.

94. Andrea Cannin & Maggie Burbank, *Jordan Brown Murder Case Takes Emotional Toll*, ABC NEWS (Apr. 28, 2010), http://Abcnews.Go.Com/Nightline/Jordan-Brown-Murder-Case-12-Year-Adult/Story?Id=10288704.

a new way.[95] The Court was persuaded by the fact that only 12 jurisdictions nationwide have imposed JLWOP sentences for nonhomicide crimes, compared to 26 States and the District of Columbia which do not impose the sentence despite statutory authorization.[96] Concerned that the sentencing practice was not unusual,[97] the Court compared the 129 individuals currently serving JLWOP sentences for nonhomicide crimes to juvenile arrests to find that "in proportion to the opportunities for its imposition"[98] these sentences are "exceedingly rare" such that "'a national consensus had developed against it.'"[99]

2. The Second Prong: The Independent Obligation of Judges to Interpret the Eighth Amendment

Finding a national consensus to satisfy the first prong of the test, the Court began its independent obligation to interpret the Eighth Amendment as required by the second prong.[100] The independent analysis requires considering the culpability of the offender, the severity of the punishment, and whether the sentence serves legitimate penological goals.[101]

---

95. In prior Eighth Amendment cases, the Court used practice "to show punishments had fallen into disuse" and used legislation to show elimination of the punishment. Ré, *supra* note 79, at 1060. Also compare the majority opinion in Graham v. Florida, 130 S. Ct. 2011, 2023 (2010) ("[A]ctual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."), with Thomas's dissent, *id.* at 2053 ("Not long ago, this Court, joined by the author of today's opinion, upheld the application of the death penalty against a 16-year-old, despite the fact that no such punishment had been carried out on a person of that age in nearly 30 years.").

96. *Id.* at 2024 (majority opinion).

97. *Id.* at 2024–25 ("It must be acknowledged that in terms of absolute numbers juvenile life without parole sentences for nonhomicides are more common than the sentencing practices at issue in some of this Court's other Eighth Amendment cases."). *Compare id.* (129 persons serving JLWOP sentences for nonhomicide crimes), *with* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (two persons for death penalty of child rape), *and* Roper v. Simmons, 543 U.S. 551 (2005) (more than 70 youth affected), *and* Enmund v. Florida, 458 U.S. 782 (1982) (six executions of nontriggerman felony murderers in a span of 28 years), *and* Atkins v. Virginia, 536 U.S. 304 (2002) (five executions of persons with mental retardation in a span of 13 years).

98. *Graham*, 130 S. Ct. at 2025.

99. *Id.* at 2026 (citing *Atkins*, 536 U.S. 304).

100. *Id.* ("[T]he task of interpreting the Eighth Amendment remains our responsibility." (quoting *Roper*, 543 U.S. at 575) (internal quotation marks omitted)).

101. *Id.*; *see also* Barkow, *supra* note 3, at 1202 (noting that the Court's independent judgment is vulnerable to attack because "[t]here is no natural limit to what the Court can strike down on this basis").

Justice Kennedy briefly revisited the culpability of juveniles and found that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."[102] *Roper* highlighted three general differences between juveniles younger than 18 and adults, demonstrating that juvenile offenders are categorically less deserving of the most severe punishments.[103] First, juveniles have a "lack of maturity and underdeveloped sense of responsibility."[104] Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[105] Third, juvenile characters are "not as well formed."[106]

As for the severity of the penalty, the Court declared that life without parole sentences are the second most severe and "share some characteristics with death sentences that are shared by no other sentences."[107] The Court found the JLWOP sentence to be comparable to a death sentence in that "the sentence alters the offender's life by a forfeiture that is irrevocable."[108] Further, the Court noted that despite their diminished culpability, lengthy sentences of incarceration are more severe when applied to youth because "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[109]

---

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

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

104. *Id.* The *Roper* Court observed that "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent" and provided an exhaustive list of statutory limitations on youth. *Roper*, 543 U.S. at 569.

105. *Graham*, 130 S. Ct. at 2026. The *Roper* Court based this analysis on Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

106. *Graham*, 130 S. Ct. at 2026. The *Roper* Court based this analysis on ERIKSON, *supra* note 42.

107. *Graham*, 130 S. Ct. at 2027. At least one scholar has suggested that the sentence of life without parole is qualitatively different from other term-of-years sentences and thus warrants special review by the Court. William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. (forthcoming 2010), *available at* http://ssrn.com/abstract=1615148. The author sees no effective difference between a life without parole sentence and a determinate term-of-years sentence that exceeds the actuarial life expectancy of the defendant. *See also* Robert S. Hogg et al., *Years of Life Lost to Prison*, HARM REDUCTION J. (Jan. 25, 2008), http://www.harmreductionjournal.com/content/5/1/4 (noting that imprisonment reduced life expectancy with differential impact based on race and gender).

108. *Graham*, 130 S. Ct. at 2027.

109. *Id.* at 2028 ("Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.").

Finally, the Court compared JLWOP sentences against the four penological principles, discussed in greater detail in the next Part of this Article, and declared "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders"[110] and so determined that JLWOP was not a legitimate sentence. The Court's own independent judgment of the dictates of the Eighth Amendment confirmed its finding of national consensus, and the Court ruled that JLWOP sentences for nonhomicide crimes are unconstitutional. *Graham* is now the law of the land, yet it remains to be seen how it will be implemented. What length of sentences short of JLWOP remain constitutional?[111] Each state must determine the means and mechanisms for compliance with the decision.[112]

*3. The "Evolving Standards of Decency" Test(s) Post-*Graham

Where the Court goes next is not clear, particularly in light of the changing membership of the Court.[113] It appears that there are three options the Court can choose from with respect to the requirements for the "evolving-standards-of-decency" test moving forward: (1) evidence of a national consensus will be necessary to find an Eighth Amendment violation; (2) national consensus is only sometimes required, and the evidence of national consensus and the Court's independent judgment are fungible factors; or (3) national consensus is never required, and the Court's independent judgment will be sufficient to find an Eighth Amendment violation.[114]

---

110. *Id.* at 2030.

111. At oral argument, counsel for Graham conceded that a sentence as long as forty years would likely be constitutional. Transcript of Oral Argument at 6–7, *Graham*, 130 S. Ct. 2011 (No. 08-7412); *see also Graham*, 130 S. Ct. at 2052 n.11 (Thomas, J., dissenting) (commenting that the majority's analysis involved "only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)").

112. *Graham*, 130 S. Ct. at 2030 ("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.").

113. Justice Kennedy's majority opinion seems to indicate that the test established in *Harmelin* is still the appropriate test to use. *Id.* at 2022. But see the concurrence by Justices Stevens, Ginsburg, and Sotomayor, who indicate that the dissenting opinions in prior opinions more accurately describe the law today. *Id.* at 2036 (Stevens, J., concurring).

114. *See* Ré, *supra* note 79, at 1060.

Significant questions remain as to whether children sentenced to extreme term-of-years sentences will benefit from the decision[115] or whether the categorical ban will be extended to youth convicted under felony-murder statutes[116] and to all homicide offenders.[117] A cynical view of the Court is that it will pick and choose factors or tests from previous cases in accordance with the outcome the Court desires in the future.[118] While this may unsettle those yearning for a consistent theoretical explanation for the Court's Eighth Amendment jurisprudence,[119] assuming the

---

115. *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991) ("In some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment—for example . . . a lengthy term sentence without eligibility for parole, given to a 65-year-old man."); *see also infra* note 197.

116. *Compare Graham*, 130 S. Ct. at 2027 ("[A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."), *with* Enmund v. Florida, 458 U.S. 782, 798 (1982) ("[Enmund] did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike . . . . This was impermissible under the Eighth Amendment."). *But see* Tison v. Arizona, 481 U.S. 137, 158 (1987) (allowing the death penalty for felony murder where the defendant showed a "reckless indifference to human life"); *see also* Jensen v. Zavares, No. 08-cv-01670-RPM, 2010 WL 2825666 (D. Colo. July 16, 2010) (failing to apply the Court's established categorical exclusions of the death penalty in felony murder cases as an appropriate extrapolation of the holding in *Graham*).

117. The author predicts that in time JLWOP sentences for homicide offenses will be ruled unconstitutional as well. *See, e.g.*, *Graham*, 130 S. Ct. at 2055 (Thomas, J., dissenting) ("The Court is quite willing to accept that a 17-year-old who pulls the trigger on a firearm can demonstrate sufficient depravity and irredeemability to be denied reentry into society, but insists that a 17-year-old who rapes an 8-year-old and leaves her for dead does not."); *id.* at 2042 (Roberts, C.J., concurring) ("The Court is of course correct that judges will never have perfect foresight—or perfect wisdom—in making sentencing decisions. But this is true when they sentence adults no less than when they sentence juveniles. It is also true when they sentence juveniles who commit murder no less than when they sentence juveniles who commit other crimes.").

118. Corinna Lain, *Lessons Learned from the Evolution of "Evolving Standards,"* 4 CHARLESTON L. REV. 661, 674 (2010) ("The cases that paved the road to 'evolving standards' as a substantive doctrine show the Justices time and again rejecting the result that a cold reading of the law would provide in favor of what they thought was right."); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 999 (2005) ("[J]udges not only make law, but . . . they seek to advance their views of legal policy in doing so. Indeed, the prevalence of this view is so striking that those who embrace a contrary vision of judicial lawmaking—one that anticipates that judges will be motivated by a neutral desire to resolve cases within the framework of existing rules and without regard to any policy preferences that they might hold—are depicted as naïve.").

119. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008) ("[C]ase law . . . is still in search of a unifying principle . . . .").

Court's concern about the diminished culpability of youth remains intact, lawyers for children have reason to be optimistic.

Now that *Graham* has determined that states are prohibited from "making the judgment at the outset that those offenders never will be fit to reenter society"[120] by abolishing JLWOP sentences for nonhomicide offenses, the remainder of this Article will discuss what this may mean for children currently subjected to juvenile and criminal court proceedings.

II. THE COLLATERAL HOLDINGS OF *GRAHAM*

The *Roper* Court abolished the juvenile death penalty because youth have a "lack of maturity and underdeveloped sense of responsibility"; are "vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."[121] After *Roper,* many youth attempted to use this reasoning to challenge their transfers to adult court or to limit their *mens rea* or other mental capacities.[122] Most were not successful because of the disconnect between these scientific findings and the questions asked by legal doctrine.[123]

First, the "death is different" legal framework of the Eighth Amendment made courts reluctant to apply rules specially created to regulate the death penalty to non-capital contexts.[124] Second, courts have been unwilling to make the leap from youth are *generally* less culpable to *every* youth is less culpable. *Graham* broke this barrier.[125] For youth charged with nonhomicide crimes, the "juveniles are different" argument now has legal relevance. This appears to be one of Chief Justice Roberts' main concerns; he believed the majority was using Graham's case "as a vehicle for unsettling our established jurisprudence and fashioning a categorical rule applicable to far different cases."[126]

This Part argues that there are several collateral holdings within *Graham* useful to challenge juvenile transfer laws. Section

---

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

121. *Id.* at 2026 (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

122. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 118 (2009).

123. *Id.* at 116–17 ("The range of neuroscientific arguments before the courts—state and federal, juvenile and criminal—is both wide and deep. Their impact, however, has been shallow.").

124. *See supra* note 3.

125. Youth charged with homicide offenses are also likely to articulate why their behavior is no worse than that of other offenders who benefit from the *Graham* ruling. *See supra* note 117.

126. *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring).

A reviews the distinctions between holdings and dicta and the doctrine of stare decisis. Section B examines the Court's independent analysis of the penological goals of sentencing. The Court suggests that youth charged with nonhomicide crimes have a right to rehabilitation (although not necessarily juvenile court treatment). Section C examines the three reasons the Court determined a categorical rule was needed to abolish JLWOP sentences for all nonhomicide offenders, in contrast to applying a proportionality review to evaluate Graham's case alone, and argues these three reasons are also collateral holdings of *Graham* that bear directly on the transfer decision.

A. Stare Decisis and Holdings

All States and the federal government, with the exception of Louisiana's civil law system, have a form of the doctrine of stare decisis.[127] The Supreme Court considers stare decisis—the obligation to adhere to past opinions—to be "indispensable" to the "rule of law."[128] In describing the doctrine, the Court has explained that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."[129] The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"[130] and protects the principles underlying Supreme Court decisions from constant reevaluation.[131]

In the horizontal form, the Supreme Court is bound by its prior rulings; and in vertical form, "no matter how misguided the judges of those courts may think it to be,"[132] lower courts must follow

---

127. "Stare decisis et non quieta movere" means "[t]o stand by things decided, and not to disturb settled points." BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

128. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

129. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996); *see also* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 22 n.78 (1979).

130. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

131. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001) (explaining the effect of stare decisis is to liberate the Justices from having to reconsider every potentially disputable issue as if it were raised for the first time).

132. Hutto v. Davis, 454 U.S. 370, 375 (1982); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818–25 (1994) (noting that "longstanding doctrine dictates that a court is always bound to follow a precedent established by a court 'superior' to it" where

superior courts.[133] However, not every part of a majority opinion necessarily states the law.[134] The legal rationale—also known as the holding—represents the line of reasoning necessary to support the judgment of the case; everything else is dicta.[135] Unfortunately the distinctions between holding and dicta are subject to debate.[136]

According to the traditional model of precedent, each statement of law must receive endorsement by a majority of Justices and form a necessary connection with the judgment of a majority of Justices before it becomes binding precedent.[137] Many of the cases interpreting the Eighth Amendment are plurality opinions that makes identifying the holding of cases confusing, but in *Graham* the Court was not fragmented and embraced a single governing rationale, and so much of the majority opinion is holding.

---

the superior court is the Supreme Court and subordinate courts are not only lower federal courts but also state courts).

133. Abramowicz & Stearns, *supra* note 118, at 956; *see* Caminker, *supra* note 132, at 818–25. Judges find ways to avoid the holding, however, by distinguishing the facts or circumstances and thereby limiting the reach of precedents. *Compare* Solem v. Helm, 463 U.S. 277 (1983), *with* Rummel v. Estelle, 445 U.S. 263 (1980). *See also Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) ("[A]lthough today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*.").

134. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 13–14 (1994); *see also* Abramowicz & Stearns, *supra* note 118, at 957 ("[B]efore a court can decide whether to apply the doctrine of stare decisis to a given case, it must first determine just what that case purports to establish. Because holdings in prior cases are at least presumptively binding—while dicta is not—this task requires an understanding of these terms."). Dictum is any part of an opinion that is "unnecessary" to the outcome of the case. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572–73 (1993) (Souter, J., concurring) (applying the concept of dictum to distinguish a prior holding); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2005 (1994).

135. Michael L. Eber, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 221 (2008).

136. Abramowicz & Stearns, *supra* note 118, at 958 (finding no universal agreement on definitions or determinations of holding and dicta); *id.* at 1056 (finding the most influential definition comes from BLACK'S LAW DICTIONARY 519 (9th ed. 2009), which identifies "dictum" as a statement in a judicial opinion that is "unnecessary" to resolving the case).

137. *See* Caminker, *supra* note 134, at 15; *cf.* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the 'holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

However, regardless of the number of judges in agreement, there is no need to give any authoritative weight to dicta.[138]

This Article uses the term "main holding" to refer to the actual judgment and the term "collateral holding" to define those propositions necessary to the judgment such that "there is no way to reach the same judgment with respect to the relevant facts without including the claimed proposition."[139] The Court's rationale to prohibit the JLWOP sentence for nonhomicide crimes is essential to the judgment, and therefore should be interpreted by lower courts as binding and relevant to transfer decisions.

Ordinarily, judges can easily limit the application of stare decisis by distinguishing the case on the basis of particular facts. Since the Court used a categorical rule, constricting the application of *Graham* based on facts may be more difficult. Although courts may limit *Graham* to cases involving life without parole sentences, this Article suggests that the collateral holdings of the opinion have much broader applications. Most constitutional rights apply to all classes of criminal defendants (e.g., Miranda rules, right to counsel).[140] Lawyers should look to apply the collateral holdings discussed below in a more expansive way. It would be an anomaly that youth convicted of the most serious charges and are subjected to JLWOP sentences would somehow have a right to rehabilitation whereas other children convicted of less serious crimes would not.

B. The Court's Perspective on Rehabilitation

While children adjudicated delinquent in the juvenile justice system have had a statutory and constitutional "right to treatment" since the 1970s,[141] children prosecuted in the adult system do not.

---

138. *See supra* note 137; *see also* Abramowicz & Stearns, *supra* note 118, at 1063 ("Careful consideration, standing alone, cannot suffice to elevate a judicial assertion into a holding. Otherwise courts could resolve any issue for which they hold strong views by presenting a well-reasoned opinion concerning its resolution.").

139. Abramowicz & Stearns, *supra* note 118, at 1060.

140. *See generally* Barkow, *supra* note 3.

141. Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment? The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1793–801 (1995). Between 1972 and 1982, advocates for children brought lawsuits against juveniles in state training schools on the basis that youth had both a statutory and constitutional right to treatment under "four theories—(1) state legislative purpose; (2) procedural due process; (3) substantive due process; and (4) the prohibition against cruel and unusual punishment." *Id.*; *see also* Tanenhaus, *supra* note 13, at 18 (noting that the juvenile court was concerned with the social welfare of children, not assignment of criminal

Youth are in the custody of juvenile justice system under the doctrine of *parens patriae* and if the state "takes custody of a child for a rehabilitative purpose, it must provide treatment to effectuate that rehabilitation."[142] In contrast, youth in the criminal justice system are in custody under the state's police power. In many instances, the state has made a deliberate choice not to provide rehabilitation to a child by prosecuting that child in the adult system. For example, the State of Florida argued in *Graham* that it "reserves adult criminal court [for] those who demonstrate that they are ill-suited for progressive juvenile programs"[143] by taking into account "the offender's age, the seriousness of the offense, and the *likelihood of future rehabilitation.*"[144] This Section explores why Florida and other states are barred from imposing a JLWOP sentence for a non-homicide crime and argues that *Graham* establishes a right to rehabilitation, although not necessarily juvenile court treatment.

There are two ways that *Graham* establishes that youth have a constitutional right to rehabilitation: (1) the main holding of the opinion explicitly references rehabilitation; and (2) the Court refused to accept incapacitation as a legitimate goal for the JLWOP sentence.

The clearest holding of the opinion is: "This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[145] Shortly thereafter, the Court presents a clear corollary to effectuate what is required in lieu of a JLWOP sentence—states must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and *rehabilitation.*"[146] These two statements are the main holdings of *Graham.* The logic of the decision also implies that youth have a constitutional right to rehabilitation, a collateral holding of *Graham.*[147]

---

responsibility, and "used the doctrine of *parens patriae* to argue that benevolent state treatment of children was in their best interest").

142. Holland, *supra* note 141, at 1792; *see also* Kent v. United States, 383 U.S. 541, 555 (1966) (stating that the state's juvenile court is "rooted in social welfare philosophy rather than in corpus juris").

143. Brief of Respondent, *supra* note 28, at 50–51.

144. *Id.* at 54 (emphasis added).

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

146. *Id.* at 2030 (emphasis added).

147. *Id.* at 2029–30. The Court noted:

> A sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that

In the death penalty cases, the Court did not have an opportunity to comment on rehabilitation because the only justifications are retribution and deterrence.[148] In *Graham,* the Court evaluates all four penological principles related to youth. However, the Court does not reconcile the competing tensions between these principles and thus it is unknown whether the Court believes lifetime incarceration for Graham was an excessive retributive response to Graham's crimes, whether lifetime incarceration for Graham was unwarranted based on Graham's perceived dangerousness, or some combination of both.

Retribution: Children are less deserving of retribution. Justice Stevens declared in *Thompson* that "[t]he basis for this conclusion is too obvious to require extended explanation."[149] In *Roper* and *Graham,* the Court similarly found that "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as an adult."[150] The Court says little more.

While the Court continued the logic used in *Kennedy*—that cases not resulting in death do not warrant the most severe sentences—the majority opinion did not engage in a discussion about the different types of nonhomicide cases that would benefit from a categorical rule or directly address how retribution may be appropriate to justify the JLWOP sentence for some of the other youth who benefit from the opinion (e.g., Milagro Cunningham,

---

> person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes, defendants are often denied access to vocational training and other rehabilitative services that are available for other inmates. For 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.

Id. (citations omitted).

148. Roper v. Simmons, 543 U.S. 551, 553 (2005) ("Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders—provides adequate justification for imposing that penalty on juveniles." (citation omitted)). *But see* Spaziano v. Florida, 468 U.S. 447, 461–62 (1984) ("Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding.").

149. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

150. *Graham,* 130 S. Ct. at 2028; *Roper,* 543 U.S. at 571.

Nathan Walker, Jakaris Taylor, and Keighton Budder).[151] In other words, the majority opinion made no attempt to explain why retribution was not an appropriate justification for life without parole sentences imposed on youth convicted of far more serious crimes than Terrance Graham. Professor Markel suggests this may indicate that the Court will interpret the Eighth Amendment to forbid "state-imposed retributive punishment against minors."[152] The author believes retribution should not be an accepted penological goal as applied to youth.[153]

Deterrence: The Court finds the rationale of deterrence unpersuasive. In the death penalty context, the Court found that deterrence has less applicability to children because "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[154] In *Graham,* the Court also found that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."[155]

Incapacitation: The *Graham* decision is the first opportunity to understand how the Court views the goal of incapacitation relative to other goals of retribution, deterrence, and rehabilitation related to youth. Here the life without parole sentence is not being evaluated on the basis of whether the child deserves the punishment of life without parole, but rather whether the sentence is appropriate with respect to crime prevention.[156]

Although the Court acknowledges that incapacitation is a legitimate reason for imprisonment and an important goal,[157] the

---

151. *See* discussion *infra* Part II.C.2.

152. Dan Markel, *May Minors Be Retributively Punished After* Panetti *(and* Graham*)?*, 23 FED. SENT'G REP. 62, 64 (2010), *available at* http://ssrn.com/abstract=1646000 (analogizing the Court's rationale in *Panetti* prohibiting the execution of a presently incompetent individual, and suggesting "retributive punishment can be visited only on individuals who are fully competent to be objects of retributive blaming practices").

153. *See id.* at 62 ("Depriving the state of its authority to punish minors in the name of retribution does not entail that crime by youth must be left unheeded, but rather that the approach must be one combining rehabilitation with other methods of social self-defense against the specific threat posed by that juvenile offender.").

154. *Thompson*, 487 U.S. at 837.

155. *Graham*, 130 S. Ct. at 2028 (citing *Roper*, 543 U.S. 551).

156. *See* Robinson, *supra* note 44, at 1441 ("[T]he traditional principles of incapacitation and desert conflict; they inevitably distribute liability and punishment differently. . . . Incapacitation concerns itself with the future—avoiding future crimes. Desert concerns itself with the past—allocating punishment for past offenses.").

157. *Graham*, 130 S. Ct. at 2029.

Court was ultimately not persuaded by Florida's argument that "States must have ongoing flexibility to decide what mix of incapacitation, deterrence, and rehabilitation their criminal justice systems will pursue."[158] By doing this, *Graham* significantly undermines prior Court precedents.[159]

A state can rationalize any sentence length under the theory of incapacitation. Outside of the death penalty, incapacitation is the sure-fire way to ensure the offender does not commit another crime in the community. Nonetheless, the Court determined that "incapacitation cannot override all other considerations."[160] The Court used the facts of Graham's case to explain that while "one cannot dispute that this defendant posed an immediate risk . . . it does not follow that he would be a risk to society for the rest of his life."[161] The Court's decision is particularly interesting if considered in light of the other children who will benefit from the decision. The Court suggests, particularly in light of the discussion on judges and experts *infra*, that even children who have committed the most serious crimes cannot automatically be presumed to be serious offenders for the rest of their lives.

After determining that retribution, deterrence, and incapacitation are not sufficient justifications for JLWOP, what is left?

Rehabilitation: A collateral holding of *Graham* is that youth are constitutionally entitled to rehabilitation. Since incapacitation could have justified the JLWOP sentence, the Court did not need to evaluate the JLWOP sentence against the goal of rehabilitation. Justice Thomas' dissent chastising the majority opinion makes this clear: legislatures "may not 'forswea[r] . . . the rehabilitative ideal.' In other words, the Eighth Amendment does not mandate 'any one penological theory,' just the one the Court approves."[162]

While it seems clear that the Court believes youth are entitled to rehabilitation, the Court provides mixed messages about what rehabilitation means.[163] The Court immediately acknowledges there is a debate about what rehabilitative efforts are

158. Brief of Respondent, *supra* note 28, at 21.

159. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 274 (1980) (noting that, in contrast to sentences of death, "the length of the sentence actually imposed is purely a matter of legislative prerogative"); Ewing v. California, 538 U.S. 11, 29 (2003) (remarking that declaring the sentence to be unconstitutional "would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions" even though his punishment exceeded what was necessary under retribution).

160. *Graham*, 130 S. Ct. at 2029.

161. *Id.*

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

163. *Id.* at 2029 (majority opinion) ("The concept of rehabilitation is imprecise.").

appropriate.[164] On the one hand, the Court may believe rehabilitation can happen spontaneously by suggesting that maturity is rehabilitative.[165] On the other hand, the Court alludes to the belief that rehabilitation is the provision of services or treatment to youth, stating "the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident"[166] and "[i]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[167]

In the end, the Court does not specifically explain what type of rehabilitation is required for youth, rather Justice Kennedy declares that "[i]t is for legislatures to determine what rehabilitative techniques are appropriate and effective."[168] This Article contends that most state legislatures have considered what rehabilitation techniques are appropriate and effective for youth—these are the services they provide to youth in the juvenile justice system.[169]

While the quality of these services available in the juvenile justice system leave much to be desired, the fact remains that all states have made the decision about what works for children by choosing to operate a separate juvenile justice system.[170] A common argument in support of juvenile transfer laws is that the current juvenile justice system does not really know how to handle youth who commit serious offenses. While that may have been true in the 1970s, that is no longer the case.[171] However, juvenile

---

164. *Id.* ("[Rehabilitation's] utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue.").

165. *Id.* at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

166. *Id.* at 2030.

167. *Id.* at 2033. Although some prisons specifically preclude youth sentenced to JLWOP from participating in rehabilitation programs, youth held in adult facilities are generally deprived of quality programming. *See, e.g.*, CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA (2007), *available at* http://www.campaignforyouthjustice.org/key-research/national-reports.html#jailingjuveniles.

168. *Graham*, 130 S. Ct. at 2029.

169. One of the unfortunate consequences of adult court prosecution is that youth are more likely to re-offend than youth retained in the juvenile court system. *See infra* note 228 and accompanying text.

170. *See, e.g.*, United States v. Bland, 472 F.2d 1329, 1349–50 (D.C. Cir. 1972) ("I harbor no illusions as to the efficacy of our juvenile court system. . . . I am certain of a few propositions, however. I am confident that a child is unlikely to succeed in the long, difficult process of rehabilitation when his teachers during his confinement are adult criminals.").

171. *See infra* note 279.

justice systems may need to make modifications to meet the needs of these youth.[172]

In light of the collateral holding of *Graham* that youth prosecuted as adults have a right to rehabilitation, now is the time to revisit the "right to treatment" cases from the past[173] to ensure that the juvenile justice systems of the future can provide support to youth without sacrificing public safety.

C. The Court's Perspective on Adult Decisionmakers in the Justice System

In addition to determining that the JLWOP sentence was unconstitutional as applied to Terrance Graham, the Court determined the sentence was also unconstitutional for all children convicted of nonhomicide offenses.[174] The Court believed "a clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment"[175] In *Roper,* the Court used a categorical rule to abolish the death penalty because of the qualities of youth that make them less culpable than adults. In contrast, the *Graham* Court provided three reasons focused on adult decisionmakers in the criminal justice system, specifically judges, experts, juries, and defense counsel, necessitating the elimination of the JLWOP sentence for nonhomicide offenses. Just as the Court is concerned about

---

172. *See* discussion *infra* Conclusion.

173. *See generally* Holland, *supra* note 141, at 1796; *see also* Alexander S. v. Boyd, 876 F. Supp. 773, 790 (D.S.C. 1995) ("The court finds that, under the Constitution, a minimally adequate level of programming is required in order to provide juveniles with a reasonable opportunity to accomplish the purpose of their confinement, to protect the safety of the juveniles and the staff, and to ensure the safety of the community once the juveniles are ultimately released. Minimally adequate program services should be designed to teach juveniles the basic principles that are essential to correcting their conduct. These generally recognized principles include: (1) taking responsibility for the consequences of their actions; (2) learning appropriate ways of responding to others (coping skills); (3) learning to manage their anger; and (4) developing a positive sense of accomplishment.").

174. To clarify, the Court never performed a calculus specifically for Terrance Graham. The majority opinion does not provide any explanation for how it made the decision to use the categorical approach, only why it was necessary. The author presumes the Court made an internal decision about Graham before proceeding to extend the rule to all youth convicted of nonhomicide crimes.

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

arbitrary decisions imposing capital punishment,[176] the Court shows similar concern about arbitrary decisions involving youth. First, judges and experts have problems evaluating the culpability and maturity of youth. Second, adult perceptions of youth are biased by the severity and manner in which the crimes were conducted. Third, counsel have difficulty representing youth in the adult system. This Article suggests these factors apply to all youth prosecuted in the adult criminal system, regardless of offense charged or sentence imposed.

1. Judges and Experts Cannot Determine Incorrigibility

Although there has been "broad agreement on the proposition that adolescents as a class are less mature and responsible than adults,"[177] the Justices have continued to disagree as to whether *any* individual youth might be sufficiently mature and responsible to warrant the most severe sentences of death[178] or life without parole.[179] The idea that experts are unable to determine the "worst of the worst" juvenile offenders first appears in *Roper*.[180] In *Graham*, this concept is extended to judges and juries as well.[181] *Graham* found that judges and experts are unable to detect the irretrievably depraved youth from those who are not. The Court acknowledged that there may be a youth who warrants a JLWOP

176. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 182 (1976) (noting that discretion in the capital sentencing context "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

177. Thompson v. Oklahoma, 487 U.S. 815, 834 (1987).

178. Roper v. Simmons, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting) ("Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case.").

179. *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring) ("[J]uvenile offenders are *generally*—though not necessarily in every case—less morally culpable than adults who commit the same crimes."); *id.* at 2050 (Thomas, J., dissenting) ("[J]uveniles can sometimes act with the same culpability as adults and that the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases.").

180. *Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.").

181. *Graham*, 130 S. Ct. at 2031 ("[E]xisting state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.").

sentence for a nonhomicide crime,[182] but the Court chose to ban the penalty altogether because "it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[183]

Social scientists and legal scholars have critiqued transfer laws for decades on this same rationale because "there is little reason to believe that the juvenile system can accurately predict which juveniles are, indeed, beyond rehabilitative efforts and should therefore be remanded [to the adult system] in the name of public safety."[184] This is another collateral holding in *Graham* that can be used to challenge transfer laws. Unlike the arguments using *Roper* to try to convince a judge that a particular youth has less culpability, post-*Graham,* the argument is that adults are unable to accurately detect the fully-culpable youth from youth with diminished culpability.

2. Heinous Nature of Crimes Sways Public Opinion

The second reason the Court decided that a categorical rule was needed was because an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."[185] This rationale is interesting because while Graham's actions were serious (accomplice to a robbery and participation in a home invasion), they were not heinous, particularly as compared to some of the other nonhomicide offenders who will benefit from the decision such as Milagro Cunningham ("a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill"), Nathan Walker and Jakaris Taylor ("juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-

182. *Graham*, 130 S. Ct. at 2032 ("[S]ome juvenile nonhomicide offenders might have sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity." (second alteration in original) (quoting *Roper*, 543 U.S. at 572) (internal quotation marks omitted)); *Roper*, 543 U.S. at 572.

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

184. M.A. Bortner, *Traditional Rhetoric, Organizational Realities: Remand of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 59 (1986) ("It cannot be demonstrated that those juveniles who are remanded are singularly dangerous or that they are intractable. Neither can it be demonstrated that the remand of these particular juveniles enhances public safety through incarceration or deterrence. The lack of compelling evidence in support of the traditional rationale for remand necessitates alternative explanations of its increased use." (footnote omitted)).

185. *Roper*, 543 U.S. at 573; *see also Graham*, 130 S. Ct. at 2032.

old son"),[186] or Keighton Budder (a 16 year old who "viciously attacked a 17-year-old girl who gave him a ride home from a party").[187]

One gets the sense that Justice Kennedy includes this rationale specifically to address the criticisms of Chief Justice Roberts and Justice Thomas who argue that youth who commit such heinous crimes deserve a JLWOP sentence. These are precisely the types of cases that baffle stakeholders in the juvenile justice system, outrage the public, and prompted state legislators to change transfer laws making it easier to try youth as adults. However, notice that the Justices only identified four youth serving JLWOP sentences for nonhomicide crimes to use as examples of cases they thought truly warranted the sentence. These cases are only 3% of the total, confirming the *Roper* Court's assessment that rules that may "under-punis[h] the rare, fully-culpable adolescent still will produce less aggregate injustice than a discretionary system that improperly, harshly sentences many more undeserving youths."[188]

This rationale is a collateral holding that the heinous nature of the crimes should not be used to make a judgment about the youth's culpability or potential for rehabilitation. This is perhaps the most radical of *Graham's* holdings, and one wonders on what basis decisions about youths culpability or treatment needs can be made. Nonetheless, the Court did include this reason to justify creating a categorical rule, and it is therefore a holding of *Graham.*

3. Counsel Have Difficulty Representing Youth

The final factor justifying the categorical rule relates to the "difficulties encountered by counsel in juvenile representation."[189] This issue first emerges in *Graham* and has the potential to alter the interpretation of how the constitutional right to counsel applies to youth in both juvenile and adult court proceedings.[190] The Court finds that youth have "limited understandings of the criminal justice system and the roles of the institutional actors within it"[191] and that youth "are less likely than adults to work effectively with

186. *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring).
187. *Id.* at 2051 (Thomas, J., dissenting).
188. *Roper*, 543 U.S. at 573.
189. *Graham*, 130 S. Ct. at 2032.
190. *Roper* did not address this issue, however, the risk of false confession and the inability to provide adequate counsel was one of the factors the Court considered in *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel . . . .").
191. *Graham*, 130 S. Ct. at 2032.

their lawyers to aid in their defense."[192] The Court also finds that youth have "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel [which] all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant's representation."[193]

The final collateral holding of *Graham* is that children are "at a significant disadvantage in criminal proceedings."[194] The fact that the Court has determined that children are ill-equipped to assist their attorneys could be the basis for a new Sixth or Fourteenth Amendment challenge to transfer laws.

In review, the three factors the Court uses to justify the categorical ban on JLWOP sentences for nonhomicide crimes are essential to the judgment because otherwise the Court would not have used the categorical approach. If it were not for these principles, the Court would have opted for a fact-specific approach using the "gross proportionality" test established in *Harmelin v. Michigan*. Therefore, these factors are collateral holdings of *Graham*. As these three factors relate to concerns about the ability of adult participants in the justice system (i.e., judges, juries, experts, and defense counsel) to make accurate assessments or predictions about the culpability of youth and the potential for rehabilitation, these holdings could form the basis of new challenges to juvenile transfer laws. The next Part provides an initial sketch of possible ways to use the collateral holdings of *Graham* to challenge transfer laws.

III. USING *GRAHAM* TO CHALLENGE TRANSFER LAWS

Lawyers should consider using *Graham* to challenge transfer in individual cases, as well as explore potential impact litigation opportunities. The author is a public interest lawyer and believes there are several practical reasons to use the logic of *Graham* to challenge juvenile transfer laws.[195]

---

192. *Id.*
193. *Id.*
194. *Id.*
195. There are a number of different models for how to think about impact litigation and cause lawyering which may generate contradictory strategies for lawyers hoping to effect social change using *Graham*. *See, e.g.*, Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1, 8 (1994). Sturm identifies four kinds of public interest legal strategies: individual service, impact litigation, institutional change, and political empowerment models, and suggests that which type of strategy is chosen depends on: (1) What are the legal needs of the clients? (2)

First, lawyers should be interested in developing multiple case pathways to build upon the favorable *Graham* decision.[196] Courts may interpret *Graham* in narrow ways to limit the relief to the 129 persons identified by the Court.[197] While conflicting interpretations of *Graham* at the appellate level may help generate another Supreme Court opinion on these issues, the next opinion may not be as favorable. If lawyers start using *Graham* to challenge transfer laws, there is the potential to begin a new line of cases using *Graham* with the possibility of expanding upon the favorable ruling in entirely different ways.[198]

What is the political environment in which clients are operating, and what is the political environment of those who will decide matters pertaining to the client's interests (i.e., courts, workplaces, legislatures, hospitals, prisons, government agencies, corporations)? (3) What remedies are possible through informal or informal resolution of proceedings? (4) What advocacy method is most likely to be effective in the context specific environment for the remedies sought? *Id.* The Campaign for Youth Justice strives to achieve the broadest possible reforms affecting the most numbers of children, without negatively impacting future reform strategies for the remaining children.

196. *See* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 312–14 (2008) ("The general idea of path dependency is that prior decisions constrain (or expand) the subsequent range of possible or feasible choices. . . . [I]f we imagine a network of paths through time, from past to future, decisions to branch at an earlier point on the chosen path may affect the destinations that one can reach from a later point on the path."); *see also* 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, 165 (2008) (describing how death penalty jurisprudence has had unintended negative consequences for challenging noncapital sentences).

197. A major drawback of litigation-based reform efforts is that reliance on principle and precedent tends to reinforce certain elements of the legal system. McCann & Silverstein, *supra* note 11. There is a real danger in future courts taking the approach that JLWOP sentences are unconstitutional, whereas lengthy term-of-years sentences, which also result in youth sentenced to die in prison, remain out of constitutional reach. *See, e.g.*, People v. Demirdjian, 50 Cal. Rptr. 3d 184, 188–89 (Ct. App. 2006) (resentencing a youth to two consecutive life sentences, even though California law prohibits sentencing juveniles under 16 years of age to JLWOP); California v. Mendez, No. B217683, slip op. at 17 (Cal. Ct. App. Sept 1, 2010), *available at* http://www.courtinfo.ca.gov/opinions/documents/B217683.PDF (declaring an 84-year sentence unconstitutional as applied to a 16 year old convicted of carjacking, but noting that "Mendez's sentence is not technically an LWOP sentence, and therefore not controlled by *Graham*"); *see also Graham*, 130 S. Ct. at 2052 n.11 (Thomas, J., dissenting) (arguing that the majority's analysis involved "only those juveniles sentenced to life without parole and exclude[d] from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)").

198. A danger of not pursuing these arguments quickly is that courts will be reluctant to apply *Graham* innovatively if all of the courts have used *Graham* in

Second, lawyers bringing these claims may be better equipped to develop more favorable legal arguments during the trial process than attacking a sentence already imposed.[199] The majority of cases using *Graham* to challenge sentencing practices will be brought by *pro se* litigants[200] operating under strict procedural rules and timelines.[201] In the meantime, youth currently being prosecuted in the adult system are represented by legal counsel who may be able to use these arguments to prevent adult court prosecution entirely, or to avoid the mandatory minimum penalty scheme of the adult system.[202]

---

narrow ways. Of course, there is always the danger of courts not accepting these arguments and developing unfavorable case law.

199. The author is not suggesting that using *Graham* to prevent prosecution in the adult system will be easier than expanding its use in habeas proceedings, quite the contrary. However, representation by counsel versus proceeding *pro se* has advantages and makes it more likely that these arguments will be successful.

200. *See, e.g.*, Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010) ("[P]ro se prisoners are at an inherent disadvantage. They lack many of the resources enjoyed by non-prisoner litigants. They have limited finances and restricted access to libraries, legal materials, computers, the Internet . . . . [They] struggle to navigate the complex legal system, often losing their cases on procedural grounds before ever reaching a decision on the merits.").

201. The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a statute of limitations for filing a habeas petition in federal court, which generally requires inmates to file a petition within one year of receiving a final judgment in state court. 28 U.S.C. § 2244(d) (2006); *see also* Dodd v. United States, 545 U.S. 353 (2005) (applying 28 U.S.C. § 2244(d)(1)(C), which states that a habeas petition may be filed up to one year after a new rule is announced by the Supreme Court, if the rule has been made retroactively applicable to cases on collateral review). The problems with the federal habeas corpus system are significant and have been discussed at length by others. *See, e.g.*, Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1 (2010). In addition, the quality of appellate level review for life without parole cases does not match those in the death penalty. *See* Barkow, *supra* note 3, at 1145.

202. Although youth frequently waive counsel, access to counsel does not guarantee effective or quality counsel. *See, e.g.*, AM. BAR ASS'N, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993) (noting lack of competent representation in juvenile courts throughout the country); AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 45, 52 (1995), *available at* http://www.njdc.info/pdf/cfjfull.pdf (finding rural county youth waived their right to counsel at higher rates, and that attorneys faced intense pressure in the courtroom to "get along" with the judge and prosecutor, which tempered the zeal to advocate); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010) (analyzing substandard juvenile representation); Kristin Henning, *What's Wrong with Victim's Right in Juvenile Court? Retributive Versus Rehabilitative Systems*

Third, the vast majority of youth prosecuted in the adult system do not receive JLWOP sentences.[203] Fewer than 5% of youth admitted to adult prisons before the age of 18 remain incarcerated past their 25th birthday.[204] If *Graham* is going to have widespread impact on the criminal justice system, it must have relevance to the majority of youth currently being prosecuted as adults who are not serving JLWOP sentences.

Fourth, using the courts to declare transfer statutes unconstitutional would be a major way of creating the most impact on laws that, by and large, are difficult to change in our current political environment.[205] Reforming the juvenile and criminal justice system through the political process is extraordinarily difficult, and using *Graham* in court may offer an attractive

---

of Justice, 97 CAL. L. REV. 1107 (2009) (noting that lawyers appointed to represent accused and adjudicated youth are ineffective due to: lax preparation, strong adherence to the child's "best interests" standard, lack of resources and ability to investigate, lack of discovery, and lack of knowledge regarding juvenile psychology); Wallace J. Mlyniec, *In re* Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 381–82 (2008) (discussing findings of 16 state-wide assessments conducted by the National Juvenile Defender Center and noting that "competent lawyering was the exception rather than the norm in juvenile court of those states"); Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466 (2007) (detailing systematic barriers hindering quality representation for youth including: outrageous caseloads; delay in representation; cultural barriers; lack of specialized knowledge; lack of funding; inexperience; and lack of advocacy).

203. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Wash., D.C.), June 2010, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf. Because 78% of children convicted as adults were released from prison before their 21st birthday, and 95% are released before their 25th birthday, the vast majority of youth who are prosecuted as adults are unlikely to see any direct benefit from *Graham*. *Id.*

204. *Id.* at 2.

205. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (arguing that impact litigation is most effective when constitutional rights are being violated and the majoritarian political control is unresponsive to the needs of the minority community); *see also* Brandon K. Applegate et al., *Reconsidering Child Saving: The Extent and Correlates of Public Support for Excluding Youths from the Juvenile Court*, 55 CRIME & DELINQ. 51, 54–56 (2009) (reviewing studies that have examined the public perceptions of juvenile transfer laws); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1747 (2006) ("Polls consistently indicate that U.S. public opinion on criminal justice is fickle and highly malleable in the face of specific events and political manipulation.").

alternative for advocates.[206] Describing the difficulty of reforms in North Carolina, Professor Birckhead has noted, "it is not surprising that public outrage over a brutal killing by a teenager has triggered the passage of punitive reforms, it is much less likely that the public will be similarly inspired to mobilize on behalf of sixteen- and seventeen-year-olds charged with criminal offenses."[207]

Section A examines whether juvenile transfer laws can be directly challenged using the Eighth Amendment. The success of challenges brought under this theory seems unlikely unless a court is willing to rely on its independent judgment. Section B briefly revisits prior legal challenges to transfer laws and suggests that lawyers consider using *Graham* to challenge judicial waiver laws and use claims under the due process and equal protection clauses of the federal and state constitutions to challenge statutory exclusion and prosecutorial waiver laws.

A. Eighth Amendment Challenges to Transfer Laws

Although the *Graham* Court passively accepts the constitutionality of youth being tried as adults,[208] the issue has never been properly brought before the Court, and lawyers should not disregard potential claims using the Eighth Amendment. While courts may be reluctant to extend *Graham's* reasoning outside of

206. *See generally* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 753 (2005) (discussing development of sentencing law in connection with "interest group dynamics and the lack of public information" and "the mobilization of public fears by entrepreneurial politicians"); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1276 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005) ("Legislators are concerned (and rightly so) that the public may conflate their support of decriminalization with support for the conduct in question."); Melissa J. Mitchell, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1679 (2005) (asserting that it is easier to get the legislature to add a new law rather than repeal one); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'"); Stuntz, *supra* note 13, at 784–85.

207. Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1497–98 (2008).

208. Graham v. Florida, 130 S. Ct. 2011, 2025 (2010) ("Many States have chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances."); *see also infra* text accompanying notes 239–43 (discussion of *Kent*).

the life without parole context, there is no principled basis to justify restricting *Graham* to life without parole sentences.[209] Just as *Roper* relied on the possibility of life without parole sentences for juveniles before deciding *Graham*, another court may be willing to accept the argument that transfer laws are unconstitutional as well.[210]

The first hurdle to overcome will involve articulating the reasons why the decision to prosecute a youth in the adult system is a punishment and not merely a jurisdictional question.[211] There are several reasons why the choice to transfer a youth to the adult system should be considered a punishment, most notably the lifelong impact of a criminal court conviction.

The second decision will involve choosing between an as-applied challenge using proportionality review for an individual client or pursuing a categorical approach. Since "it has been difficult for the challenger to establish a lack of proportionality,"[212] a categorical approach is likely more favorable.[213]

---

209. At least one scholar has suggested life without parole sentences deserve a special category of review. Berry, *supra* note 107. The author believes a new special category would unnecessarily reinforce and create new conflicts of interest between classes of criminal justice defendants. *See* Steiker & Steiker, *supra* note 196.

210. *Graham*, 130 S. Ct. at 2039 (Roberts, C.J., concurring) ("Indeed, *Roper* explicitly relied on the possible imposition of life without parole on some juvenile offenders."). But see Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009), which found that lower courts were reluctant to extend *Roper*: "The most commonly articulated justification for rejection of such claims is *Roper* itself, in which the Court appeared in dicta to endorse the Missouri Supreme Court's resentencing of Simmons to 'life imprisonment without eligibility for probation, parole, or release except by act of the Governor.'" *Id.* at 121.

211. *See* State v. Pittman, 647 S.E.2d 144, 163 (S.C. 2007) (declaring the scope of the Eighth Amendment is limited to punishment and not jurisdiction); *see also infra* note 252.

212. *Graham*, 130 S. Ct. at 2021; *see also* Pascarella v. State, 669 S.E.2d 216, 219 (2008) ("A presumption arises when a defendant is sentenced within the statutory limits set by the legislature that such sentence does not violate the Eighth Amendment's guarantee against cruel and unusual punishment. Such presumption remains until a defendant sets forth a factual predicate showing that such legislatively authorized punishment was so overly severe or excessive in proportion to the offense as to shock the conscience. Pascarella's ten-year sentence fell within the statutory limits set by the legislature for conspiracy to commit armed robbery, and we find no facts in the record demonstrating that this punishment was overly severe or excessive in proportion to the offense." (footnotes omitted)).

213. There may be some benefit to using a proportionality review in that in some tests intra- and inter-jurisdictional analyses come into play which could be useful given that transfer laws are inconsistently applied within states. *Compare* Solem v. Helm, 463 U.S. 277, 290–91 (1983) (employing a three-part test

Recall from Part I that there are two prongs to the "evolving standards of decency" test used in categorical cases: (1) evidence of a national consensus against the sentencing practice at issue; and (2) the Court's independent judgment.[214] Lawyers trying to challenge all transfer laws in the aggregate will have difficulties meeting the first prong of the test. It is unclear how a court would evaluate either the rate of legislative change or state practice regarding juvenile transfer laws.[215] In recent years nearly a dozen states have changed portions of their juvenile transfer laws, however the changes are not directly comparable across the 50 states complicating the legislative trend analysis. With respect to state practice, the widespread use of trying youth as adults makes satisfying the consensus prong unlikely. Lawyers may be able to meet the first prong, however, if able to provide evidence of a national consensus against transferring youth charged with specific offenses.[216]

Even if lawyers cannot meet the first prong of the test, it is still possible for a court to determine that juvenile transfer laws violate the Eighth Amendment using the second prong. *Atkins*, *Roper*, *Kennedy*, and *Graham* all discovered ways to find the requisite evidence of national consensus in support of their position, but the question of whether the Court could exercise its independent judgment to find an Eighth Amendment violation when a national consensus is lacking is still an open question.

The independent analysis requires considering the culpability of the offender, the severity of the punishment, and whether the sentence serves legitimate penological goals.[217] The diminished

---

including: (1) comparing the gravity of the offense and the harshness of the penalty; (2) comparing sentences imposed on other criminals in the same jurisdiction; and (3) comparing sentences for the same crime imposed in other jurisdictions), *with* Harmelin v. Michigan, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring) (noting that before getting to the intra- and interstate comparisons contemplated by *Solem*, the court must find the sentence is "grossly disproportionate" to the crime).

214. *See supra* text accompanying notes 78–79.

215. In *Atkins* and *Roper*, the Court focused on state trends, noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Atkins v. Virginia, 536 U.S. 304, 315 (2002). However, in *Kennedy* and *Graham*, the Court focused more on the availability of the punishment and the degree to which the punishment is actually used. *See supra* notes 85–99 and accompanying text.

216. In this situation, lawyers would presumably rely on the Court's analysis in *Kennedy*, applying a categorical rule used for offenses, in combination with *Graham*.

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

culpability of youth has been solidified by *Roper* and *Graham,* however, the severity of punishment could pose some barriers to relief. As the *Graham* Court recognized, the JLWOP sentence "alters the offender's life by a forfeiture that is irrevocable."[218] There is no disputing that a sentence of JLWOP is considerably more severe than a 40-year sentence or much lesser sentences imposed in adult court such as adult probation.[219] However, in other ways the severity of the adult court penalty is similar. Youth receive the lifelong stigma of an adult court conviction, which may be accompanied by lifelong restrictions in voting or access to other governmental privileges.[220] In addition, even short-term sentences to adult prison will forever alter the trajectory of a young person's life because of the way in which the child's adolescent development is compromised.

Finally, the Court will examine the penological principles as they relate to juvenile transfer laws.

Retribution: How a court will translate the status of diminished culpability of youth to transfer decisions and sentences less than JLWOP is unknown. Justice Kennedy implied there is something special about a JLWOP sentence by noting that it is the "second most severe penalty,"[221] however, Justice Thomas recognized that if juveniles are categorically less culpable, "no reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth, or fiftieth most severe penalties as well."[222]

Deterrence: Both *Roper* and *Graham* dismissed the rationale that the death penalty and JLWOP sentences for nonhomicide offenders could be justified by the goal of deterrence.[223] The "deterrence theory" suggests that by allowing children to be subjected to the harsh punishments available in the adult criminal justice system, youth will be deterred from committing crimes in the first place. Deterrence assumes a rational-actor model, but the latest adolescent brain research suggests that youth are not rational

---

218. *Id.* at 2027.

219. As a practical matter, youth who receive these short sentences in the adult criminal justice system (i.e., less than five years of incarceration or adult probation) are likely to have pleaded guilty to these sentences and will not be disputing these sentences.

220. *See supra* note 45.

221. *Graham*, 130 S. Ct. at 2028.

222. *Id.* at 2046 (Thomas, J., dissenting).

223. *Id.* at 2028 (majority opinion) (citing Roper v. Simmons, 543 U.S. 551, 571 (2005)); *Roper*, 543 U.S. at 571.

actors.[224] Available research demonstrates that deterrence is not a valid justification for trying youth as adults either.

In 2007, the Centers for Disease Control and Prevention (CDC) Task Force on Community Preventive Services examined every available study on transfer policies in published journals or produced by a government agency.[225] The task force compared recidivism rates of youth charged with comparable offenses and prior histories, recognizing that youth who are transferred to adult courts may be charged with more serious offenses or may have more serious backgrounds that make them different from youth in the juvenile system. The CDC review found insufficient evidence to support the deterrence theory.[226] With respect to general deterrence, most studies examining whether the presence of transfer laws deters youth in the overall population from committing crimes have failed to uncover any reductions in juvenile crime rates that can be linked to the presence of transfer laws. With respect to specific deterrence, available studies have shown higher recidivism rates for youth prosecuted as adults compared to their similarly situated peers retained in the juvenile system.[227] In fact, the task force found that juveniles transferred from the juvenile court system to the criminal system are, on average, approximately 34% more likely than youth retained in the juvenile court system to be rearrested for violent or other crimes.[228] Based on the weight of the evidence, the task force thus concluded

---

224. Economic models are based on the rational-model and have yielded conflicting results when examining factors contributing to juvenile crime rates. *See, e.g.*, Steven Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1158 (1998) (finding that crime rates decline when youth move from a lenient juvenile system to the adult system); Anthony Doob & Cheryl Webster, *Sentencing Severity and Crime*, 30 CRIME & JUST. 143, 164–67 (2003) (critiquing Levitt's analysis). A forthcoming economic analysis of the effects of transfer laws on juvenile crime will also show that transfer laws do not decrease total juvenile crime, juvenile property crime, or juvenile violent crime. In fact, transfer laws actually have a net effect of increasing juvenile property crime. Jacob Cohn & Hugo M. Mialon, *The Impact of Juvenile Transfer Laws on Juvenile Crime* (Emory Pub. Law Research Paper No. 10-103, 2010), *available at* http://ssrn.com/abstract=1606002.

225. *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, MORBIDITY & MORTALITY WKLY. REP. (Ctrs. for Disease Control & Prevention, Atlanta, Ga.), Nov. 30, 2007 [hereinafter *Effects on Violence*], *available at* http://www.campaignforyouthjustice.org/documents/CDCNR_ViolenceofLaws.pdf.

226. *Id.*

227. Juveniles incarcerated with adults "learn social rules and norms that legitimate[] domination, exploitation, and retaliation" from the surrounding adult criminals. Bishop & Frazier, *supra* note 39, at 263.

228. *Effects on Violence*, *supra* note 225.

that the "available evidence indicates that [transfer laws] do more harm than good," and are "counterproductive to reducing juvenile violence and enhancing public safety."[229]

Similarly, the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) released a research bulletin in 2008 with findings that mirror those in the CDC report.[230] Therefore, trying youth as adults is not a rational state legislative policy on the basis of deterrence.

Incapacitation: As stated earlier, the *Graham* decision does not provide much guidance on how to weigh the goal of incapacitation relative to the other penological goals. Applying the goal of incapacitation to transfer laws is also particularly difficult. As demonstrated during oral argument, the Justices assumed that the reason that Graham was being prosecuted as an adult was because he needed to be incarcerated for a term longer than available in the juvenile system.[231] But the facts from the Graham case actually contradict the goal of incapacitation as a justification for trying youth as adults. After his first arrest, Graham spent a year awaiting trial in jail, but when he ultimately accepted a plea he was not given a lengthy incarceration sentence but three years of probation.[232] Even after he violated his probation, the Florida Department of Corrections only recommended a period of four years of incarceration, which Graham could have served within the time available under juvenile court jurisdiction.[233] On the basis of these facts, incapacitation is not a sufficient justification for adult court treatment.

The belief that children need to be incarcerated past the upper age of juvenile court jurisdiction may be the most frequent justification for prosecuting youth as adults, but it is contradicted by the evidence of what happens in practice. The overwhelming majority of youth sentenced to adult prisons are released in early adulthood.[234] Furthermore, while incapacitation may temporarily forestall criminal activity, the evidence indicates that imprisonment

229. *Id.*
230. Redding, *supra* note 203.
231. *See* Transcript of Oral Argument, *supra* note 111, at 20 (colloquy between Justice Stevens and the attorney for Graham).
232. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010). The length of sentence imposed should not be an absolute bar to obtaining relief under the Eighth Amendment. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (overturning a 90-day jail sentence because it had been imposed for the wrong reasons).
233. *Graham*, 130 S. Ct. at 2019.
234. Redding, *supra* note 203.

is less effective at reducing recidivism over the long term.[235] As a result, incapacitation, particularly when the term of incarceration can be completely carried out before termination of juvenile court jurisdiction, is not a valid penological goal for trying youth as adults.

Rehabilitation: Finally, in many states, relinquishing juvenile court jurisdiction reflects a determination that a child is beyond rehabilitation by choosing between a nominally rehabilitative juvenile court system and an overtly punitive adult court system.[236] While juvenile courts were perhaps initially formed to meet the rehabilitative needs of juveniles, the same wave of legislation that increased transfer to adult court also accompanied a change in the purpose of juvenile court jurisdiction. Many states changed their purpose statutes such that the overriding focus was no longer on rehabilitation.[237] As a result, there are now juvenile courts and criminal courts with overlapping rationales.[238] Therefore, trying

---

235. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 302–06 (2008); *see also* BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4–6 (2006), *available at* http://www.cfjj.org/Pdf/116-JPI008-DOD_Report.pdf (reporting studies finding that incarceration increases the chances of recidivism, promotes "peer deviancy training," and impedes the aging-out process that normally diminishes criminal behavior); Donna Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996) (finding "transfer actually aggravated short-term recidivism").

236. Linda F. Giardino, *Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America*, 5 J.L. & POL'Y 223, 258–60 (1996).

237. Henning, *supra* note 202, at 1113–14 ("The shifting juvenile court agenda is also evident in recent amendments to the purpose clauses that often accompany state juvenile court codes. While most purpose clauses still manifest a commitment to the rehabilitation of children, those clauses now also reflect a growing concern for the interests of victims, the accountability of the offending youth, the safety of the community, and sometimes even the punishment of the child."); *see also State Juvenile Justice Profiles: National Overviews*, NAT'L CENTER FOR JUV. JUST., http://70.89.227.250:8080/stateprofiles/overviews/faq9.asp (last visited Oct. 15, 2010) (noting that only "6 states can be loosely characterized as 'tough,' in that they stress community protection, offender accountability, crime reduction through deterrence, or outright punishment, either predominantly or exclusively").

238. Henning, *supra* note 202, at 1119 ("[A]lthough many states have incorporated accountability and public safety into juvenile justice legislation, none have abandoned rehabilitation as an equally if not more important goal for the juvenile justice system. State statutes manifest an ongoing commitment to the rehabilitation and treatment of children by requiring that judges act in the best interests of the minor, provide care and guidance conducive to the child's welfare, and identify a continuum of services that will make the child a productive citizen." (footnote omitted)).

youth as adults cannot be justified as meeting a rehabilitative goal absent some indication that youth are more likely, rather than less, to receive treatment and services within the adult criminal justice system.

After examining the four penological principles as they relate to juvenile transfer laws, it is possible that a court would determine that juvenile transfer laws violate the Eighth Amendment.

B. Revisiting Kent *and Previous Challenges to Transfer Laws*

In addition to challenges under the Eighth Amendment, lawyers should see if *Graham* may be used to overrule prior unfavorable case law validating transfer laws. There has been only one Supreme Court case directly addressing juvenile transfer laws, the 1966 U.S. Supreme Court case of *Kent v. United States*.[239] In *Kent*, a 16 year old was transferred from the District of Columbia juvenile court to the criminal court after only a cursory review of his case.[240] Kent appealed, and the Court held that a juvenile is "entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision."[241] An appendix to the opinion of the Court contained a 1959 policy memorandum listing eight factors to consider when making a decision to transfer a child to the adult system.[242] The eight factors that comprise the *Kent* criteria are:

1. seriousness of the offense charged,
2. whether the offense was committed in an aggressive, violent, premeditated, or willful manner,
3. whether it was against person or property,
4. the prospective merits of the case,
5. whether the offense was committed with adult cofactors [and the desirability of disposing of cases together],
6. the sophistication and maturity of the juvenile,
7. the juvenile's prior record, and
8. the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the

239. 383 U.S. 541 (1966).
240. *Id.*
241. *Id.* at 557.
242. Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 13, at 181, 183–84.

> use of procedures, services, and facilities currently available to the juvenile court.[243]

Although the *Kent* decision paved the way for the better-known *In re Gault* case the following year which established the right to counsel for juveniles,[244] *Kent* otherwise has had a fairly limited impact. In subsequent cases courts declined to follow *Kent* by finding that the protections were limited to judicial waiver laws and did not apply to statutory exclusion or prosecutorial discretion statutes.[245] This interpretation created a perverse incentive for state legislatures to rewrite their statutes to avoid judicial waiver laws altogether by instituting more statutory exclusion and prosecutorial discretion laws.[246]

In the decades following *Kent*, transfer laws have largely been outside the reach of the courts. Most courts have taken a deferential stance toward legislatures and have allowed legislatures to punish youth without any constraints,[247] though there have been a few protectionist courts.[248] Lawyers have challenged transfer laws using many theories including due process,[249] equal protection,[250] separation of powers,[251] *Apprendi* challenges,[252] and

---

243. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 533 n.83 (1987).

244. *In re* Gault, 387 U.S. 1 (1967).

245. In response to *Kent*, Congress changed the D.C. law to circumvent the judicial waiver process entirely by allowing prosecutors to file the case directly in adult court. The subsequent case, *Bland*, had persuasive impact on jurisdictions across the country. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972); *see also* Frost Clausel & Bonnie, *supra* note 242, at 188–89.

246. Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Court and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 177 (2007) ("While many states reexamined their waiver statutes to abide by the criteria laid out in *Kent*, a large number of states took steps to overcome this procedural boundary and created 'automatic transfer' or 'legislative waiver' statutes. In fact, in some jurisdictions, district attorneys were given the power to make transfer decisions without providing juveniles any of the procedural safeguards specified in *Kent*. Others wrote statutes that defined 'juvenile' in such a way as to 'exclude persons of a certain age when they were charged with certain crimes.'" (footnotes omitted) (quoting Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1172 (2005))).

247. Robert E. Shepard, Jr., *Challenging Change: Legal Attacks on Juvenile Transfer Reform*, 12 CRIM. JUST. 55 (1997).

248. *See, e.g.*, State v. Fernandes, 971 A.2d 846 (Conn. App. Ct. 2009), *cert. granted*, 979 A.2d 491 (Conn. 2009); *In re* William M., 196 P.3d 456, 458 (Nev. 2008); State v. Rudy B., 216 P.3d 810 (N.M. Ct. App. 2009).

249. *See infra* notes 273–77 and accompanying text.

250. *See infra* notes 264–67 and accompanying text.

Fifth Amendment challenges.[253] The author suggests that lawyers revisit these claims, specifically three types of challenges that

---

251. Prosecutorial discretion statutes are purported to violate the separation of powers doctrine because granting prosecutors the discretion to determine whether a juvenile is tried in adult or juvenile court is giving a member of the executive branch power that is exclusively judicial in nature. Courts have repeatedly rejected this argument by finding that the decision of whether or not to transfer a youth to adult court is a charging decision firmly within the traditional powers of a prosecutor. *See, e.g.*, State v. Angel C., 715 A.2d 652, 672–73 (Conn. 1998) ("[C]ontrol of the criminal docket is not an exclusive judicial function. By this we mean only that the prosecution, by exercising its core function of determining which cases to prosecute, obviously exercises some 'control' over the criminal docket. That, however, does not infringe on the separation of powers principle; it flows from that principle. . . . The legislature, by enacting laws that define criminal conduct, in large part already affects which cases will appear on the criminal docket. A prosecutor's decision whether to charge or whether to take a plea bargain also affects the docket. Although these actions affect the docket, they do not control the time and manner of scheduling. Similarly, the decision whether to request that an individual be transferred . . . might affect, but does not control, the docket.").

252. Juvenile defendants have challenged their transfer to adult court by arguing that transfer increased the penalty they faced upon conviction, and therefore, the decision to transfer must be made by a jury. Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings:* Apprendi, *Adult Punishment, and Adult Process*, 61 HASTINGS L.J. 175 (2009). In *Apprendi v. New Jersey*, the Supreme Court held that facts that increase "the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). The Court clarified this ruling in *Blakely v. Washington*, stating that "[t]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. 296, 303–04 (2004). Most courts have found that *Apprendi* does not apply because transfer hearings determine jurisdiction and do not adjudicate guilt or that the fundamental differences between the juvenile and adult systems mandate different constitutional requirements, but at least two courts have been persuaded by this logic. Carroll, *supra*; *see, e.g.*, Commonwealth v. Quincy Q., 753 N.E.2d 781, 789–90 (Mass. 2001) (noting that a jury must find beyond a reasonable doubt all pending factual elements required under the prosecutorial waiver statute before a juvenile may be tried as a youthful offender in criminal court), *overruled on other grounds by* Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005); *Rudy B.*, 216 P.3d 810 (holding that *Apprendi* requires amenability decisions for juveniles to be tried as adults must be made by juries).

253. The Fifth Amendment privilege against self-incrimination has also been used to challenge the transfer law in Nevada. Until 2008, Nevada had a presumptive transfer statute which required that juveniles 14 years of age or older who had been charged with certain offenses were to be presumptively certified as adults unless they could rebut the presumption by proving that when they committed the crime it was the result of substance abuse or emotional or behavioral problems. *See In re William M.*, 196 P.3d at 458. In order to qualify

appear most promising after *Graham*: (1) challenges to judicial waiver; (2) equal protection; and (3) due process.

1. Challenges to Judicial Waiver

Approximately 75% of the States use some form of the *Kent* criteria.[254] These criteria roughly fall into three categories: (1) relating to the type of offense the youth has been charged with; (2) the prior record and likelihood of rehabilitation which relate to qualities of the child; and (3) the ability of the system to protect the public and dispose of cases together, which relate to characteristics of the system.[255] While *Kent* requires that several factors be considered in judicial decisionmaking, "no guidelines exist as to how these factors should be weighed."[256]

A survey of juvenile court judges who were members of the National Council of Juvenile and Family Court Judges was conducted to determine how judges weigh the *Kent* criteria. Researchers found that although judges claimed a youth's amenability to treatment was most important, they did not rely on this factor. Instead, "[d]angerousness appeared to be the factor weighed most heavily in transfer cases, followed by sophistication—maturity"[257] Another study analyzed court

---

for this exception, the minors had to admit that they had committed the crime with which they were charged and those admissions could be used against the minors in subsequent proceedings. *Id.* at 457–58. In *In re William M.*, the Supreme Court of Nevada ruled that the presumptive transfer statute was unconstitutional under the Fifth Amendment to the extent that it required the juveniles to incriminate themselves in order to rebut the certification presumption, *id.* at 464–65, overruling a prior case holding that the Fifth Amendment privilege did not apply to certification hearings because they were "not designed to determine guilt." *Id.* at 462–63 (quoting Anthony Lee R. v. State, 952 P.2d 1, 4 n.1 (Nev. 1997)) (overruling Marvin v. State, 603 P.2d 1056 (Nev. 1979), while finding that although a transfer hearing is not a final adjudication of guilt, it is a "much more momentous and life-changing event for a juvenile than is an adjudication of delinquency" and therefore the Fifth Amendment applies).

254. Feld, *supra* note 243, at 533 n.83.

255. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 13, at 56.

256. Brannen, *supra* note 40, at 345.

257. *Id.* at 346–48; *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 300 (1999) (conducting an analysis of judicial waiver cases and finding that "[r]ather than focusing on treatability, the courts appear to be driven by a mix of incapacitative, retributive and rehabilitative

opinions involving judicial waiver cases to find that "[r]ather than focusing on treatability, the courts appear to be driven by a mix of incapacitative, retributive and rehabilitative concerns, with the latter focus routinely taking a back seat to the first two objectives."[258] As Professor Slobogin has noted, "the court's application of the factors that are considered relevant to the amenability determination is often pretextual. Rather than representing a genuine attempt to assess a child's treatability, courts' evaluation of amenability focuses more on culpability and dangerousness."[259] In light of the *Graham* decision, the validity of judicial waiver statutes is called into question.

As discussed *supra,* a collateral holding of *Graham* is that judges and experts cannot distinguish between offenders who do or do not have the capacity to change,[260] and the heinous nature of crimes should not influence the assessment of a youth's culpability or potential for rehabilitation.[261] Post-*Graham* it is unclear on what basis judicial waiver statutes could remain valid.

2. Equal Protection

The *Graham* Court was not persuaded by Florida's argument that "States must have ongoing flexibility to decide what mix of incapacitation, deterrence, and rehabilitation their criminal justice systems will pursue."[262] Perhaps *Graham* can also be used to overrule a longstanding Florida case, *State v. Cain,* allowing juvenile transfers as well.[263]

Transfer laws have been challenged using the equal protection clauses of federal and state constitutions arguing that similarly situated minors are being charged differently.[264] Statutory

---

concerns, with the latter focus routinely taking a back seat to the first two objectives").

258. Slobogin, *supra* note 257, at 300.

259. *Id.* at 330 (footnote omitted).

260. *See supra* note 183 and accompanying text.

261. *See supra* note 185 and accompanying text.

262. Brief of Respondent, *supra* note 28, at 21.

263. State v. Cain, 381 So. 2d 1361, 1364 (Fla. 1980) ("It cannot be said that the legislature acted arbitrarily in providing for these statutory exceptions to juvenile treatment. The legislature could reasonably conclude based on circumstances such as age, seriousness of the offense and past record that certain juvenile offenders were not suitable candidates for the juvenile act's rehabilitative goals; consequently, the legislature could reasonably classify these offenders as persons against whom adult sanctions would be an alternative.").

264. *See, e.g.*, People v. Thorpe, 641 P.2d 935, 938 (Colo. 1982) ("[The defendant reasons that] since the prosecutor may choose to prosecute one 14-

exclusion laws, in particular, have frequently been challenged on the ground that "the age limitations are arbitrary, capricious and unreasonable and are not rationally related to any legitimate state interest."[265] With the exception of a few cases,[266] courts have found that these classifications are not arbitrary because it is reasonable for legislatures to decide that factors such as age, seriousness of offense, and past record are related to whether a person is more or less likely to be rehabilitated.[267] Perhaps the collateral holdings of *Graham* can be used to revisit the equal protection argument.

---

year-old violent offender as an adult and another 14-year-old violent offender as a juvenile, and since there are no statutory criteria to guide him in making that decision, the statute denies one in the defendant's position equal protection of law."); *see also* People v. Conat, 605 N.W.2d 49, 60 (Mich. Ct. App. 1999) ("[Defendant argues] that the prosecutors' charging decisions will result in some juveniles being charged and sentenced differently from others.").

265. State v. Leach, 425 So. 2d 1232, 1236 (La. 1983).

266. See, for example, *Hughes v. State*, 653 A.2d 241, 242 (Del. 1994), where the Supreme Court of Delaware invalidated a revision of the juvenile transfer statute that eliminated a "reverse amenability process" in the adult court because the amendment eliminated judicial review for some juveniles prosecuted as adults, while it did not do so for other classes of juveniles. The court found this distinction was "patently arbitrary and [bore] no rational relationship to a legitimate government interest." See also *State v. Mohi*, 901 P.2d 991, 1003 (Utah 1995), where the Supreme Court of Utah held that a statute that gave prosecutors unguided discretion over the decision of whether to try children as adults or juveniles violated the state constitution's "uniform operation of laws" provision, which is similar to, but broader than, the Equal Protection Clause. The court noted, "Choosing which court to file charges in has significant consequences for the offender, and the statute does not indicate what characteristics of the offender mandate that choice. The scope for prosecutor stereotypes, prejudices, and biases of all kinds is simply too great."

267. *See, e.g.*, *Thorpe*, 641 P.2d at 940 ("It is clear that the General Assembly intended to exclude certain offenders from the juvenile court system by defining certain serious offenses as per se criminal and properly within the constitutional jurisdiction of the district court even if committed by a juvenile over the age of 14. This is not unreasonable in light of the apparent legislative decision that certain repeat offenders, or those who have committed serious offenses, should be separated from those juveniles who perpetrate relatively less serious or less violent crimes and who, in the view of the legislature, are more likely candidates for rehabilitation."); *see also Leach*, 425 So. 2d at 1237 ("The state's interest here, the protection of its citizens, is legitimate. The age classifications it has drawn bear a rational relationship to that interest by the use of age and severity of offense. It would be unreasonable to expect the state to assess the mental age of each of its citizens in determining its laws. The designation of chronological age to set the parameters of the classifications in the instant offense affords the most reasonable, fair and even-handed method available to the state.").

First, *Graham* holds that youth have a right to rehabilitation (at least for youth charged with nonhomicide crimes), which may also be violated by proceeding in adult court. If youth are entitled to rehabilitation, perhaps there are arguments to keep youth in juvenile court because that is the system that is designed to meet the rehabilitative needs of youth.

Second, statutory exclusion and prosecutorial waiver statutes may be arbitrary after *Graham.* The severity of the offense should not automatically render a child subject to adult court prosecution because *Graham* holds that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."[268] Age distinctions within transfer statues could also be arbitrary. Although the Court has found that age classifications are not sufficient to create a suspect class, one of the most important ramifications of *Graham* is the fact that the Court has solidified age 18 as the defining line between childhood and adulthood.[269] In 2000, Professors Franklin Zimring and Jeffrey Fagan explained, "since there is no single cognitive, social, or behavioral boundary in the developmental findings on criminal responsibility of adolescent offenders, the incremental differences between ascending age groups do not translate into binary distinctions like juvenile or adult, or full versus partial culpability."[270] Yet, these binary distinctions between youth and adults now exist with *Roper* and *Graham.*[271] If judges, juries, and experts cannot differentiate

---

268. Graham v. Florida, 130 S. Ct. 2011, 2032 (2010); Roper v. Simmons, 543 U.S. 551, 573 (2005).

269. *Graham*, 130 S. Ct. at 2030 ("Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." (alteration in original) (quoting *Roper*, 543 U.S. at 574)).

270. Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 13, at 407, 419.

271. See the colloquy between Chief Justice Roberts and Bryan Stevenson in the case of *Sullivan v. Florida*, heard on the same day as Graham:

> So your line is 13, and for obvious reasons. Another line is going to be 16 for obvious reasons. . . . [W]hy [are you] drawing the line on the basis of the Eighth Amendment—there is certainly nothing in the Eighth Amendment that suggests there is a difference between 16 and 17.

Stevenson responds that hundreds of laws draw lines. Roberts then responds: "Well, but that's because that's a policy judgment by the legislature. Here we are talking about the dictates of the Eighth Amendment. And the idea that the Eighth Amendment draws those kinds of arbitrary distinctions is one that I don't understand." Transcript of Oral Argument at 22–23, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621), 2009 WL 3750775. See also the colloquy between Justice Ginsburg and Mr. Makar in *Graham*:

between the culpability of children below the age of 18, there is no reason to believe that distinctions between younger age groups would serve a legitimate purpose.

Third, *Graham* clearly holds that States are prohibited from "making the judgment at the outset that those offenders never will be fit to reenter society."[272] What justifies allowing the legislature or prosecutors to render judgments about similarly situated youth such that they are treated differently by the juvenile and criminal justice systems?

3. Due Process

Youth have argued that transfer statutes violate the due process clauses of federal and state constitutions. Youth are entitled to more procedural safeguards before transfer[273] because the consequences resulting from prosecution in a criminal case vary so significantly from those resulting from a juvenile proceeding.[274] Others have challenged the statutes on the basis of the implied presumption that the juveniles charged as adults are unfit for

---

> But Florida does—and every State—recognize the difference between an adult and a minor. And you have to make the line. We have it at 18. But think of the teenager [who] can't drink, can't drive, can't marry. There are so many limitations on children just because they are children.

Mr. Makar:

> [W]e ask that the same respect for our juvenile justice system be given to those laws enacted in Florida that protect the—the juveniles. It is the legislature on the ground there seeing what is going on in our state that makes these decisions about who can drive, who gets the right to have a tattoo . . . .

Justice Ginsburg: "But they don't make it on a case-by-case basis. They say no juvenile can drink—no juvenile." Transcript of Oral Argument, *supra* note 111, at 42–43.

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

273. *See, e.g.*, People v. Thorpe, 641 P.2d 935, 938 (Colo. 1982) ("[T]he decision of the prosecutor to charge a juvenile as an adult when there are no statutory guidelines and without a prior hearing cannot be constitutionally justified as a valid exercise of prosecutorial discretion. Since there is no hearing prior to the charging process at which the juvenile may be present and heard, and be represented by counsel, the argument goes, he is denied due process."); State v. Cain, 381 So. 2d 1361, 1362 (Fla. 1980) ("Cain also maintained that the statute violates due process of law by permitting transfer of the juvenile to adult court jurisdiction without a hearing.").

274. See, for example, *Thorpe*, 641 P.2d at 939, where the defendant argued that "since the consequences to the child from his prosecution in a criminal case vary so significantly from those flowing from a juvenile proceeding, the child should be afforded the same protections as he would have were the case filed in the juvenile court and transfer to the criminal division sought."

rehabilitation.[275] Unfortunately, these claims have been almost universally unsuccessful.[276] Courts have consistently found that since juvenile courts are statutorily created, youth have no inherent right to juvenile treatment.[277]

These prior cases need to be reconsidered after *Graham's* collateral holding that youth charged with nonhomicide offenses have a constitutional right to rehabilitation. Lawyers may have an opportunity to create successful arguments that juveniles have a substantive right to juvenile treatment if they are able to pair arguments based on the right to rehabilitation with empirical data showing that treatment available within the juvenile system is the only realistic way for the youth to achieve that rehabilitation.

CONCLUSION

Graham represents a significant shift in Supreme Court jurisprudence because it focuses on juveniles' unique amenability to rehabilitation—rather than on the nature of the punishment—as a reason to categorically bar life sentences for youth convicted of nonhomicide crimes. This element of *Graham* found in the Court's collateral holdings that youth have a right to rehabilitation and that dispositions which prospectively remove this option are therefore unconstitutional, also applies to juvenile transfer decisions.

This article has identified the collateral holdings of *Graham* that are applicable to transfer cases and has provided an initial sketch of

---

275. *See, e.g.*, *Cain*, 381 So. 2d at 1366 ("Cain and Duncan also contend that subsection 39.04(2)(e)4 violates due process because of an implied conclusive statutory presumption that the juveniles charged as adults are unfit for rehabilitation." (footnote omitted)).

276. Shepard, *supra* note 247.

277. *See, e.g.*, *Cain*, 381 So. 2d at 1363 ("There was no common law right to be specially treated as a juvenile delinquent instead of a criminal offender."); *Angel C.*, 715 A.2d at 660 ("Any [special treatment] accorded to a juvenile because of his [or her] age with respect to proceedings relative to a criminal offense *results from statutory authority, rather than from any inherent or constitutional right*. . . . Because the right to [special treatment] emanates from the legislature and does not involve any fundamental right, *that right can be withdrawn or limited to certain classes of juvenile offenders by the legislature provided the classifications are founded upon a rational basis*. . . . In exercising [the state's] police power the legislature has a broad discretion, both in determining what the public welfare requires, and in fashioning legislation to meet that need." (alterations in original) (quoting State v. Matos, 694 A.2d 775, 783 (Conn. 1997))); *id.* at 667 ("The fact that the juvenile in question, his or her advocate, or even the court, might believe that he or she is better suited to juvenile adjudication than to criminal prosecution is of little significance. If the defendants disagree with the legislative conclusion of which class of juveniles presumptively should be tried as adults, their remedy lies with the legislature, not this court.").

what arguments based on *Graham* might look like in transfer cases. The author encourages advocates to use *Graham* to challenge transfer laws to effectuate the underlying motivation of the Court's ruling—that juveniles are different and deserve to be treated differently by the justice system.

For many youth subject to adult court prosecution, returning to the juvenile justice system will be an immediate possibility (i.e., the services the child needs are available in the current juvenile justice system). For others, the juvenile justice system may need significant modifications, particularly for those children convicted of committing the most serious crimes. Rather than assume that *Graham* is inapplicable in the latter cases, the author suggests using *Graham* as a transformative tool to generate four types of changes to the juvenile justice system which may make such a vision reality.

First, juvenile justice systems across the nation will need to assess and realign the types of programs and services they offer to make sure they reflect the best evidence of what we know works to rehabilitate children.[278] Too many juvenile justice systems are relying on outdated practices that are not effective, including incarceration, when many other programs have demonstrated superior results often with a net cost–savings.[279] However, there may be children for whom no treatment has yet been developed to meet their needs. Instead of giving up on these children, researchers should be encouraged to develop new programs to meet their needs.

Second, some treatment programs may require a length of participation that goes beyond the states' maximum age of juvenile court jurisdiction. For these individual youth, there may need to be a modification in the age limits of juvenile court involvement to complete the treatment.[280] The author does not, however, advocate for more blended sentencing schemes, which have been found to widen the net of youth subject to criminal sanctions.

Third, the juvenile justice system will need to determine a fair and just way to handle youth whose treatment needs only require a short period of treatment, but for whom the public is seeking

278. *See* Soler, Shoenberg & Schindler, *supra* note 20.

279. *Compare* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, *in* PUBLIC INTEREST 22, 28 (Robert Martinson ed., 1975) (declaring that "nothing works" to reduce crime with young offenders), *with* PETER GREENWOOD, CHANGING LIVES (2006) (surveying the literature on delinquency prevention and intervention programs to identify programs with demonstrated results at reducing recidivism).

280. See, for example, *In re G.B.K.*, 376 N.W.2d 385 (Wis. Ct. App. 1985), where a youth was transferred to the adult system because an expert found that the juvenile needed a minimum of two years of treatment and only 26 months remained under juvenile court jurisdiction.

punishment to fulfill retributive goals. Consider the case of Norman Bryant, a youth serving a JLWOP sentence for felony murder.[281] As a 16 year old, Bryant, along with three friends, broke into the home of an 82-year-old woman who had a heart attack "brought on by the emotional and physical stress of the entry into her home" and died.[282] A system designed to address Bryant's actions may only require a short intervention program without incarceration. Some will argue that Bryant should remain in the custody of a juvenile system only long enough to be "rehabilitated" and no longer a risk to public safety.[283] Others will argue that the death of an individual, even if committed by a child, deserves some level of punishment. While youth have diminished culpability and are less deserving of retribution, it does not necessarily mean that no level of punishment is appropriate—finding the appropriate balance will be the challenge.[284]

Advocates for youth, particularly youth charged with the most serious crimes, will likely be more successful in their efforts to reform transfer laws if they can articulate what that balance should look like in the future. While the retributive impulse to punish children is very strong, the public may be willing to forgo punishment if the juvenile justice system can demonstrate effectiveness with respect to public safety.[285] The author believes lawyers should be moving toward a retribution-free model for criminal justice policies as applied to youth, in contrast to the current articulation of the diminished-responsibility approach favored by most scholars.[286]

---

281. Commonwealth v. Bryant, No. 8506-2431–2445 (Pa. Ct. Com. Pl. Dec. 15, 2006).

282. *Id.*

283. This is presumably the approach advocated by Professors Slobogin and Fondacaro as part of their individual-prevention approach to juvenile justice. *See* Slobogin & Fondacaro, *supra* note 24.

284. Professor Barry Feld has argued for a categorical "youth discount" whereby a youth's age would serve as a proxy for culpability and youth would receive correspondingly shorter sentences. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 192–95 (1999).

285. *See, e.g.*, SCOTT & STEINBERG, *supra* note 24, at 19–23 ("Our survey suggests that Americans are concerned about youth crime and want to reduce its incidence but are ready to support effective rehabilitative programs as a means of accomplishing that end—and indeed favor this response over imposing more punishment through longer sentences."); Barry Krisberg & Susan Marchionna, *Attitudes of US Voters Toward Youth Crime and the Justice System,* FOCUS (Nat'l Council on Crime & Delinquency, Oakland, Ca.), Feb. 2007, at 5, *available at* http://www.nccd-crc.org/nccd/index.html (go to "Publications," then click on "Focus") (reporting poll findings showing the public believes in rehabilitation and treatment services).

286. *See supra* note 24.

Finally, the juvenile justice system will need to determine how to manage youth who continue to be a threat to public safety despite the best efforts to provide appropriate services to youth. While all youth, even those charged with the most heinous of offenses, are amenable to rehabilitation, the fact remains that there may always be a very small, discrete number of youth who remain a danger to the public. The criminal justice system will need to have a mechanism that acts to protect the public in these worst-case scenarios. In other words, we will need a safety net for the public that operates *after* the juvenile justice system has failed, rather than *before* youth are given an opportunity to change.