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INTRODUCTION

The Human Rights Watch estimates that over 2,225 juveniles (age seventeen and younger) in the United States are serving life in prison without the possibility of parole.[1] Effectively, life in prison without parole condemns a child to die in prison. Short of the death penalty, life in prison without parole ("LWOP") is the harshest sentence that may be imposed on a criminal offender. The imposition of LWOP on a child ignores the modern behavioral and scientific understanding that children have tremendous potential for growth and maturity as they move from adolescents to adulthood. Historically, very few countries have punished juveniles by sentencing them to life in prison without the possibility of parole. Currently, the United States is now responsible for nearly 100% of all child offenders serving life in prison without parole, for both homicide and non-homicide offenses.[2] However, a Supreme Court decision, *Graham v. Florida*, in May of 2010, declared that life in prison without parole for juvenile non-homicide offenses is a cruel and unusual punishment in violation of the Eighth Amendment.[3] Life in prison without parole is *still*

[1] Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (2007), http://www.eji.org/eji/files/20071017cruelandunusual.pdf; ALISON PARKER, AMNESTY INTERNATIONAL & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1 (2005), *available at* http://hrw.org/reports/2005/us1005/.

[2] Paolo G. Annino et al., *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation*, (September 14, 2009), http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf; Human Rights Watch, *US: End Life Sentences for Youth Offenders*, (May 7, 2009), http://www.hrw.org/news/2009/05/07/us-end-life-sentences-youth-offenders.

[3] Graham v. Florida, 130 S. Ct. 2011, **2030 (2010); Adam Liptak, *Weighing Life in Prison for Youths Who Didn't Kill*, N.Y. TIMES, Nov. 8, 2009, at A24, *available at* http://www.nytimes.com/2009/11/08/us/08juveniles.html. Most of the 109 juvenile offenders serving life without parole for non-homicide crimes reside in Florida. The breakdown of juveniles serving LWOP in the United States is as follows: California, four; Nevada, one; Iowa, six; Louisiana, seventeen; Mississippi, two; Delaware,

permissible for juvenile homicide offenders.

In the 2009 term, the Supreme Court determined the constitutionality of sentencing juveniles to life in prison without the possibility of parole for non-homicide offenders. In *Sullivan v. Florida*[4] and *Graham v. Florida*,[5] both of the petitioners were sentenced to life without parole as juveniles and argued that this sentence was a cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[6] In *Sullivan*, a 13-year-old was charged and convicted of raping 72-year-old Lena Bruner in her home. After a one-day trial, and without any DNA evidence, Sullivan was found guilty and sentenced to life in prison without the possibility of parole.[7] In *Graham,* a 16 year old was charged and convicted of committing armed burglary and attempted robbery of a Jacksonville restaurant.[8] At this time, Graham was not sentenced to life without the possibility of parole, but instead was released and sentenced to a period of probation.[9] However, weeks before his eighteenth birthday, he and older accomplices committed an armed home invasion.[10] During sentencing, the judge rejected the Department of Corrections' recommendation of a four-year sentence,[11] and instead sentenced Graham to life in prison without the possibility of parole after stating "[y]ou've evidently decided this is the direction you're going to take in life."[12]

Part I of this Note examines the Eighth Amendment and its effect on juvenile sentencing. Part II discusses the abundance of scientific and behavioral evidence indicating that children are inherently less culpable than adults and argues that a different sentencing scheme should be adopted which acknowledges these differences. Part III suggests that the holding in *Graham*, which makes LWOP inapplicable to non-homicide offenders, should be expanded to include juveniles who commit homicide offenses. Specifically, part III seeks to demonstrate that both the national and international consensus, as well as recent Supreme Court jurisprudence,

one; South Carolina, one; and Florida, seventy-seven. Of the 109 incarcerated individuals, 51% were seventeen at the time of the offense, 31% were sixteen at the time of the offense, and 18% were between the ages of 13 and 15 at the time of the offenses.

4 Sullivan v. Florida, 987 So. 2d 83 (Fla. Dist. Ct. App. 1st Dist. 2008).

5 Graham v. State, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. 1st Dist. 2008).

6 U.S. CONST. amend. VIII.

7 *Sullivan*, 987 So. 2d at 83. This charge was Joe Sullivan's first felony but the judge declared that the boy was "beyond help" and sentenced him to life without parole; *see* Equal Justice Initiative, *Sullivan v. Florida/Graham v. Florida*

8 *Graham,* 982 So. 2d at 45.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 46.

would prohibit the imposition of such a sentence. Part IV showcases alternative sentencing schemes adopted by the state of Louisiana, as well as those adopted by other nations, which prohibit imposing life in prison without parole on juvenile offenders.

I. THE CURRENT REGIME: THE EIGHTH AMENDMENT AND JUVENILE SENTENCING

The Eighth Amendment to the United States Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[13] This Amendment proscribes "all excessive punishment, as well as cruel and unusual punishments that may or may not be excessive."[14] The protection against cruel or unusual punishments "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportional to the offense.'"[15] The Eighth Amendment draws its meaning from "the evolving standards of decency that mark a maturing society."[16] Although the Constitution does not define or provide any guidance on what constitutes cruel or unusual punishment, the drafters intended the provision to prohibit, at minimum, the forms of punishment banned at the time the Constitution was adopted.[17] The Supreme Court has stated that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[18] However, sentencing juveniles to life in prison starkly contradicts respect for the dignity of all persons. Effectively, a child serving LWOP is sentenced to die in prison. A LWOP sentence, and its unique effect on juveniles, raises both legal and moral questions.[19] In some states, judges who imposed "death in prison sentences" on young children were required to do so as they had to respect a state statute so requiring. As a result of being bound by such laws, the majority of children sentenced to LWOP were condemned to die in prison

13 U.S. CONST. amend. VIII.

14 Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the death penalty for child rape is unconstitutional and in violation of the 8th Amendment).

15 Weems v. United States, 217 U.S. 349, 367 (1910).

16 Roper v. Simmons, 543 U.S. 551, 561 (2005).

17 *Id.* at 609; *see* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008).

18 *Id.* at 560.

19 Equal Justice Initiative, *supra* note 1. *See* Leslie P. Wallace, *"And I Don't Know Why it is that You Threw Your Life Away": Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B. U. PUB. INT. L.J. 35, 61 (2010).

by mandatory sentencing laws that precluded the judge from considering the child's age, maturity, or capacity for change.[20] Children are uniquely vulnerable and impositions of such a sentence ignore a child's capacity for growth, change, and most importantly rehabilitation.

The first juvenile court was established in Chicago in 1899. The juvenile court was established in response to the notion that punishments designed for adults were too harsh when applied to juveniles.[21] These juvenile courts recognized the developmental differences between adults and children, which resulted in a system focused on rehabilitation rather than a purely penal model. However, since the establishment of the first juvenile courts, attitudes towards juvenile justice have changed with drastic pendulum swings.[22] Most recently, the attitude towards juvenile justice reflects a focus on retribution and harsher sentencing.[23] Those who believe in harsher sentencing for juvenile offenders believe that children who committed violent offenses need more than a "slap on the wrist" from juvenile courts.[24] Additionally, such advocates find it "naïve to continue to rely on a juvenile system designed for a simpler era, when children were getting into fistfights in the schoolyard."[25] Now, juveniles are committing heinous and violent crimes, like murder and rape, at a far greater rate than in the past.[26] Yet the juvenile court system was built upon the idea that children are different from adults, in a way that makes them less culpable for their actions.[27]

In juvenile courts judges have wide discretion to refer a juvenile to the

[20] Equal Justice Initiative, *supra* note 1. "In some states, 13 and 14 year olds are subjected to the harshest possible prison sentence, despite widespread acknowledgment by experts, parents, teachers, doctors and courts that children tend to be incapable of making mature choices, that they are vulnerable to negative influences and peer pressure, and that they are powerless to protect themselves from dysfunctional and dangerous home environments." Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2649 (2011).

[21] Sameer P. Sarkar, MD, LLM, *To Young to Kill? U.S. Supreme Court Treads a Dangerous Path in Roper v. Simmons*, J. Am. Acad. Psychiatry L. 35: 364-72 (2002); *available at,* http://www.jaapl.org/cgi/content/full/35/3/364; Emily Buss, *Review: Rethinking the Connection between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 500 (2009).

[22] Sarkar, *supra* note 21; Mark H. Moore & Stewart Wakeling, *Juvenile Justice: Shoring Up the Foundations*, 22 CRIME & JUST. 253, 263 (1997).

[23] *Id.*; Javier M. Vazquez, *Appropriate Treatment for Juvenile Offenders: Juvenile Justice System v. Jury System*, 1 BARRY L. REV. 185, 211 (2000).

[24] Macarthur Foundation Research Network on Adolescent Dev. & Juvenile Justice, Issue Brief 3, *Less Guilty by Reason of Adolescence*, http://www.adjj.org/downloads/6093issue_brief_3.pdf; Marla Slaten, *Juvenile Transfers to Criminal Court: Whose Right is it Anyway*, 55 Rutgers L. Rev. 821, 822-23 (2003).

[25] *Id.*

[26] *Id.*; Hon. John B. Leete, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: Treatment and Rehabilitation or Hard Time: Is the Focus of Juvenile Justice Changing?*, 29 AKRON L. REV. 491, 493 (1996).

[27] *Id.*; Wallace, *supra* note 19, at 61.

adult criminal court. In *Kent v. United States*,[28] the Supreme Court held that the following factors should be considered before a juvenile may be tried as an adult: "the seriousness and type of offense and the manner in which it was committed; the sophistication and maturity of the juvenile as determined by consideration of his or her home life, environmental situation, and emotional attitude; the juvenile's record and history; and the prospects for protecting the public and rehabilitating the juvenile."[29] After weighing these factors, a juvenile may be tried as an adult and subsequently sentenced to life in prison without the possibility of parole.[30] However, nineteen states currently allow automatic transfers of a child to adult court when the child is accused of certain crimes.[31] This means, in effect, that judges do not have the opportunity to weigh any factors, such as the child's age, background, involvement in the crime, or other mitigating circumstances, before sentencing the child as an adult.[32] In yet another twenty-one states a sentence of life in prison without parole is mandatory[33] for certain crimes.[34] Some states reserve discretion to the sentencing judge.[35] While forty-three states have LWOP as a statutory sentence for a juvenile, only thirty-eight states actually impose the LWOP sentence on juveniles in practice.[36] However, as noted by the Court in *Graham*, the

28 Kent v. United States, 383 U.S. 541 (1996).

29 *Id.* at 566–67.

30 *Id.* at 547; *See* Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008).

31 Human Rights Watch, *Letter from Human Rights Organization to CERD regarding Juvenile Life Without Parole in the US*, Jun. 4, 2009, http://www.hrw.org/en/news/2009/06/04/letter-human-rights-organizations-cerd-regarding-juvenile-life-without-parole-us#_ftn8 [hereinafter Letter]; *see* Christine Chamberlin, *Not Kids Anymore: A Need for Punishment and Deterrence In the Juvenile Justice System*, 42 B.C. L. REV. 391, 401 (2001).

32 Letter, *supra* note 31; *see* Brian G. Sellers & Bruce Arrigo, *Adolescent Transfer, Developmental Maturity, and Adjudicative Competence: An Ethical and Justice Policy Inquiry*, 99 J. CRIM. L. & CRIMINOLOGY 435, 440–41 (2008).

33 Letter, *supra* note 31. The term "mandatory" means judges have no option other than to sentence youth offenders to LWOP upon conviction for at least one type of offense. Most often that offense is first degree murder. The Coalition for the Fair Sentencing of Children, *Submission by the Coalition for the Fair Sentencing of Children to the ABA's Juvenile Justice Committee's Town Hall Meeting*, November 6, 2008, www.youthlaw.org/...justice/...Submission_to_ABA_Nov_6.pdf (last visited Sept. 14, 2011) [hereinafter Submission by the Coalition].

34 Graham v. Florida, 130 S. Ct. 2011, 2034–36 Appendix. The states with mandatory sentencing laws are as follows: Alabama, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia. While California does not have mandatory sentencing, they have a LOWP presumption. Submission by the Coalition, *supra* note 33.

35 *Graham*, 130 S. Ct. at 2034–36 Appendix. The states that reserve sentencing discretion for the judge are as follows: Arizona, Georgia, Maine, Maryland, Nevada, North Dakota, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Submission by the Coalition, *supra* note 33.

36 *Graham*, 130 S. Ct. at 2034–36 Appendix. These five states include: Maine, New Jersey, New

"many States that allow life without parole for juvenile non-homicide offenders[,] but do not impose the punishment[,] should not be treated as if they have expressed the view that the sentence is appropriate."[37] On the other hand, Alaska, Colorado,[38] Kansas, Kentucky, and Texas flatly ban the imposition of life in prison without parole for juveniles.[39] There are only six states that permit life in prison without parole for juvenile offenders convicted of homicide offences: Connecticut, Hawaii, Maine, Massachusetts, New Jersey, and New Mexico.[40] While the Supreme Court in *Graham* expressly stated that the Court's decision applies only to those offenders who committed non-homicide offenses,[41] the behavioral and scientific research supports the proposition that children are inherently less culpable regardless of the crime committed.

II. MODERN PSYCHOLOGICAL AND BEHAVIORAL FINDINGS

The existence of a juvenile justice system rests on two fundamental assumptions about adolescents: "(1) that they are less capable of mature judgment than adults and are therefore less culpable for any offenses that they commit; and (2) that they are more amenable to treatment than adults, and therefore are more likely to profit from rehabilitation."[42] In most states, children cannot get married or obtain a driver's license without reaching a certain age delineated by the state. State laws mandate that children attend school until reaching a certain age and they punish adults who fail to adequately provide and care for their children. Such laws treat adolescents differently because they *are* different. "Scientists have revealed that adolescents' brains are anatomically undeveloped in parts of the cerebrum associated with impulse control, regulation of emotions, risk assessment, and moral reasoning."[43] Often, very serious juvenile offenses result in demands for long and harsh periods of incarceration.[44] However, such

York, Vermont, and West Virginia. Submission by the Coalition, *supra* note 33.

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

38 *Id.* While Colorado has forty-eight juveniles serving life in prison without parole, the sentence was declared unconstitutional in 2005. Submission to the Coalition, *supra* note 33.

39 *Graham*, 130 S. Ct. at 2036 Appendix; Submission to the Coalition, *supra* note 33.

40 *Graham*, 130 S. Ct. at 2035 Appendix; Submission to the Coalition, *supra* note 33.

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

42 Elizabeth Cauffman, Ph.D & Laurence Steinberg, Ph.D, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, BEHAV. SCI. & L. 18: 741, 741–42 (2000).

43 Parker, *supra* note 1; *Sentencing Young Children to Die in Prison: Statement Before the Subcomm. On Crime, Terrorism, and Homeland Sec.*, H.R. 4300 (2008) (quoting Bryan A. Stevenson, Executive Director, Equal Justice Initiative).

44 ABA 2008 Report with Recommendations #105C (2008); *see* Equal Justice Initiative, *supra* note

demands may lead us to forget that no matter how adult-like the offense may be, the juvenile is not an adult.[45]

"The age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[46] Adolescence is defined as a radical transformation, including the physical changes associated with puberty (increases in height and weight, and sex- related changes) as well as progressive gains in capacity for reasoned, mature judgment, impulse control and autonomy.[47] Children are driven towards behavior marked by increased sensation seeking and risk taking.[48] A study conducted with over 935 participants between the ages of ten and thirty examined the age differences in sensation seeking and impulsivity.[49] In order to measure sensation seeking, researchers developed a computerized driving game, entitled Stoplight.[50] In Stoplight, the player is asked to "drive" a simulated car before time runs out to a location where a party is taking place.[51] Participants are told that most people are able to reach the destination in under two minutes.[52] From the vantage point of someone behind the wheel of a car, minor drives down a road and towards the destination.[53] A clock, set for two minutes and twenty seconds also appears on the screen.[54] The participant hears the clock ticking down and "party music," which grows increasing louder as the car approaches the destination. In order to reach the destination, the driver goes through eight intersections.[55] Each

1.

45 ABA 2008 Report with Recommendations #105C (2008); Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why it Matters*, 15 U.C. Davis J. Juv. L. & Pol'y 37 (2011).

46 Roper v. Simmons, 543 U.S. 551, 574 (2005).

47 Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacology, Biochemistry & Behavior 212, 212 (2009).

48 Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764, 1776 (2008); *see* Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities, Keynote Address*, Ann. N.Y. Acad. Aci. 1021: 1–22, 7 (2004).

49 Steinberg, *supra* note 48, at 1764 ("*Impulsivity* refers to a lack of self-control or deficiencies in response inhibition; it leads to hasty, unplanned behavior. *Sensation seeking*, in contrast, refers to the tendency to seek out novel, varied, and highly stimulating experiences, and the willingness to take risks in order to attain them").

50 *Id.* at 1767. The participants completed a two-hour assessment that consisted of a series of computerized tasks, a set of computer-administered self-report measures, a demographic questionnaire, several computerized tests of general intellectual function (e.g., digit span, working memory), and an IQ assessment. Specifically, participants engaged in a computerized version of the Tower of London task (used as a behavioral measure of impulsivity) and a computerized driving game ("Stoplight"; used as a behavioral measure of sensation seeking).

51 *Id.* at 1768.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

intersection has a traffic signal.[56] At this point, a narrator informs the participants that one of three things may happen, all depending on the choice that the participant makes:

> (a) [i]f the brakes are not applied and the car makes it through the intersection, no time is lost; (b) if the brakes are applied before the light turns red, the car will stop safely, but time will be lost waiting for the light to cycle back to green (approximately 3 s[econds]); (c) if the brakes are not applied or are applied too late, and the car crashes into the crossing vehicle (this is accompanied by squealing tires and a loud crash, as well as the image of a shattered windshield), even more time will be lost (approximately 6 s[econds]) than had the participant decided to brake.[57]

Essentially, participants must decide whether to try to drive through the intersection in order to save time and risk losing twice as much time if a crash occurs or to stop and wait, and lose a smaller amount of time.[58]

To measure impulsivity, researchers utilized the computer generated Tower of London game. The participant is presented with pictures of two sets of three colored balls distributed across three rods, one of which can hold three balls, the other two balls, and the last only one ball.[59] The first picture shows the starting position of the three balls. The second picture shows the goal position.[60] The participant's goal is to move the balls from the starting position to the goal position in as few moves as possible.[61]

The results of the study reflect that hasty performance, specifically with the first moves made in the Stoplight and Tower of London games, has been linked to "response inhibition difficulties"[62] among children, adolescents, and adults.[63] The research yielded evidence consistent with previous neurobiological evidence.[64] In the results of the study, heightened

56 *Id.* ("Before playing the game, participants see a demonstration that is accompanied by prerecorded audio instructions. Participants are informed that when they are approaching an intersection, the traffic signal may turn yellow, and that, if this happens, they must decide whether to stop the car [by using the space bar] and either wait for the light to cycle from yellow to red to green or attempt to cross through the intersection. Participants are told that they cannot control the speed of the car and that the only time the brake works is after the traffic light has turned yellow. Participants are told that if the car is driven through the intersection and the light turns red, there is a chance that it may crash into another vehicle that is driving through at the same time").

57 *Id.* at 1769.

58 *Id.*

59 *Id.* at 1768.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.* at 1774.

sensation seeking, which was measured by Stoplight, increased between the ages of twelve and fifteen.[65] The study also found that *gains* in impulse control occur in adolescence and early adulthood[66] and a linear decline in the measures of impulsivity from ages 10 through 30.[67] Specifically, the study noted that "[h]eightened vulnerability to risk taking in middle adolescence may be due to the combination of relatively higher inclinations to seek excitement and relatively immature capacities for self-control that are typical of this period of development."[68]

Adolescents' judgment is handicapped in nearly every conceivable way. Children lack life experience and do not possess the knowledge to properly inform their choices and decisions.[69] Adolescents struggle to generate options, weigh those options, and reflect upon the consequences.[70] Adolescents lack the self-confidence to make reasoned judgments and act on them.[71] Notably, modern behavioral and psychological evidence reflects that children are inherently less culpable than adults. Modern behavioral and psychological research should be incorporated into our sentencing schemes for juveniles, for this will ensure that children are not sentenced to live out the remainder of their lives in prison.

A. Adolescents' Culpabability As Compared To The Average Adult Offender

The Supreme Court has stated that, "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended

65 *Id.* at 1774–75 ("The self-report and performance measures of sensation seeking, in contrast, did not show entirely consistent results. On the self-report measure of sensation seeking, we find a curvilinear trend similar to what others have hypothesized: increasing sensation seeking during early adolescence, a peak around age 14 or 15, and a steady decline thereafter. On the driving game, however, we see heightened sensation seeking during the period from 10 to 15 [with no increase between 10 and 15], a sharp decline in middle adolescence, and no further decline after that. Whether this difference is due to differences between self-report and performance measures of sensation seeking in general or to differences between the specific measures used in this study [i.e., the driving game may be tapping into other aspects of psychological functioning in addition to sensation seeking that develop along a different timetable, or perhaps the onset of actual driving at age 16 contributes to more skillful or cautious performance on the game] is not something that can be determined").

66 *Id.* at 1774.

67 *Id.*

68 *Id.* at 1764.

69 Initial Brief: Petitioner-Appellant at 14–15, Sullivan v. State of Fla., 129 S. Ct. 2157 (2009) (No. 08-7621); Leon Mann et al., *Adolescent Decision-Making: the Development of Competence*, 12 J. ADOLESCENCE 265, 275 (1989).

70 Cauffman & Steinberg, *supra* note 42, at 758; Mann et al., *supra* note 69, at 269.

71 Cauffman & Steinberg, *supra* note 42, at 753; Mann et al., *supra* note 69, at 273.

explanation."[72] Culpability refers to the extent to which a person can be considered blameworthy or deserving of punishment for his or her behavior.[73] Evaluating one's culpability quite clearly involves a moral judgment of the offender. As stated by Elizabeth Kaufman, Ph.D "if . . . moral standards [are]to be applied to offenders of varying levels of maturity, it is important that evaluations of maturity (and subsequent determinations of culpability) be grounded in an accurate understanding of the factors that influence how adolescents make decisions."[74] According to scientific and psychological research, young adolescents have not yet developed the capacity to make mature and responsible decisions.[75] Society presumes that youths are incapable of making mature decisions and that the juvenile's ability to understand the consequences of his or her behavior is diminished as compared to adults.[76] This presumption results in the legal regulation of minors.[77]

Studies reflect that adolescents are less psychosocially mature than adults in ways that affect their decision-making in antisocial situations. These studies lend scientific credibility to the argument that juvenile offenders may warrant special treatment because of a diminished sense of responsibility.[78] Moreover, scientific research has established that adolescents score lower on measures of self-reliance and other aspects of personal responsibility, that they have more difficulty seeing things in long-term perspective, that they are less likely to look at things from the perspective of others, that they have more difficulty restraining their aggressive impulses, and that they engage in a higher degree of sensation-seeking behavior. [79] In a study of 1053 Danish youths (twelve and twenty years of age), it was discovered that sensation seeking was related to most types of risk behaviors.[80] Such behaviors included sexual intercourse

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

73 Cauffman & Steinberg, *supra* note 42, at 742; BLACK'S LAW DICTIONARY 435 (9th ed. 2009).

74 Cauffman & Steinberg, *supra* note 42, at 742.

75 *See id.* at 753; Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 APPLIED DEVELOPMENTAL PSYCHOLOGY 257, 271 (2001).

76 *See* Cauffman & Steinberg, *supra* note 42, at 753; Mann et al., *supra* note 69, at 269–70.

77 Elizabeth Scott, N. Dickon Repucci & Jennifer Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 228 (1995); *see* Adam Ortiz, *Adolescence, Brain Development and Legal Culpability* ABA JUV. JUST. CTR. (Jan. 2004).

78 Cauffman & Steinberg, *supra* note 42, at 759; *see* Elizabeth Scott & Laurence Steinberg, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AMERICAN PSYCHOLOGIST 1009, 1013 (2003).

79 Cauffman & Steinberg, *supra* note 42, at 759; *see* Scott & Steinberg, *supra* note 78, at 1013.

80 Jeffrey Arnett & Lene Balle-Jensen, *Cultural Bases of Risk Behavior: Danish Adolescents*, 64 CHILD DEV. 1842, 1851 (1993); *see* Meg Gerrard, *Prevalence Estimates and Adolescent Risk Behavior: Cross-Cultural Difference in Social Influence*, 80 JOURNAL OF APPLIED PSYCHOLOGY 107, 107 (1995).

without contraception, marijuana use, and cigarette smoking.[81] Most notably, sensation seeking is greater during adolescence than any other developmental period.[82]

Biological science also explains the differences between adult and adolescent behaviors. Neurological research using magnetic resonance imaging provides a scientific basis for explaining adolescent behavior.[83] Such studies reveal that the adult brain is dramatically different from the adolescent brain[84] and that the brain of an adolescent continues to develop well into his or her twenties.[85] Notably, the brain continues to develop into the twenties in areas relating to judgment and impulse control.[86] Researchers have found that the frontal lobe associated with regulating aggression, long-range planning, abstract thinking, and moral judgment is not sufficiently developed in adolescents to support these functions. [87] Since adolescents' frontal lobes are not completely developed they tend to make decisions under the control of the amygdala, which is a part of the brain associated with impulsive and aggressive behavior.[88] Moreover, at the age of 13 and 14 the major transformation in the brain that enables adults to exercise cognitive control over their behavior is barely underway, and certainly not yet developed.[89] Despite such scientific findings, in some states children as young as 13 are being sentenced to life in prison without the possibility of parole. This research reflects that young children do not possess adult biological functionalities, and they, therefore, cannot be as culpable for their acts as adults.

B. The Effect Of Impulse Control And Negative Influences On A Child

Children are inherently vulnerable and lack control over their surroundings.[90] Research indicates that susceptibility to peer influence

81 Arnett, *supra* note 80, at 1851; *see* Gerrard, *supra* note 80, at 107.

82 Arnett, *supra* note 80, at 1843; *see* Gerrard, *supra* note 80, at 107.

83 ABA Report, *supra* note 44, at 10; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 77 (2004).

84 ABA Report, *supra* note 44, at 10; Giedd, *supra* note 83, at 79.

85 ABA Report, *supra* note 44, at 10; Giedd, *supra* note 83, at 79.

86 ABA Report, *supra* note 44, at 10; Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 366 (1992).

87 ABA Report, *supra* note 44, at 10; *see* Bruce Bower, *Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty*, 165 SCIENCE NEWS 299, 299 (2004).

88 ABA Report, *supra* note 44, at 11; *see* Bower, *supra* note 87, at 300.

89 BEATRIZ LUNA, ATTENTION TO GOAL-DIRECTED BEHAVIOR: NEURODYNAMICAL, METHODOLOGICAL AND CLINICAL TRENDS 257 (Francisco Aboitiz & Diego Cosmelli eds. 2009); *see* Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 69 (2005).

90 Stanford v. Kentucky, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting); Thompson v.

peaks during early adolescence.[91] Research suggests that children are less sensitive to risk and more sensitive to rewards, which is indicative of gauging attitudes regarding risk.[92] Additionally, children lack an adult's ability to resist impulses and risk taking behavior.[93] The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."[94] Accordingly, the neurological development critical to making sound judgments, moral and ethical decisions, and controlling impulsive behavior is incomplete during adolescence.[95]

This can be explained partly by the notion that juveniles have less experience with control over their own environment.[96] Studies centered on adolescents' susceptibility reflect that parents are more influential in matters of religion, educational plans, occupational choice, and/or other "deep" issues, whereas peers are more influential in day-to-day affairs, such as taste in clothing.[97] Notably, studies reflect steady and gradual increases in adolescents' capacity to escape parental and peer influence throughout the adolescent years, with gains continuing through the final years of high school.[98]

Children are incredibly vulnerable to the pressures of their peers, older adolescents, and adults.[99] Peer influence can affect youths' decisions directly, as when adolescents are coerced to take risks they might otherwise

Oklahoma, 487 U.S. 815, 324 (1988) (quoting a 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy toward Young Offenders).

91 *See* Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD. DEV. 841, 846 (1986); *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 254 (1996).

92 *See* National Juvenile Justice Network, *Using Adolescent Brian Research to Inform Policy: A Guide for Juvenile Justice Advocates*, http://njjn.org/uploads/digital_library/resource_847.pdf; *see also* Neir Eshel et al., *Neural Substrates of Choice Selection in Adults & Adolescents: Development of the Ventrolateral Prefrontal & Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270 (2007).

93 *See* National Juvenile Justice Network, *supra* note 92; *see also* Eshel et al., *supra* note 92, at 1273–74.

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

95 *See* National Juvenile Justice Network, *supra* note 93; *see also* Roper v. Simmons, 543 U.S. 551, 570 (2005).

96 Steinberg & Scott, *supra* note 78, at 1013; *see also* Steinberg & Cauffman, *supra* note 91, at 263.

97 *See* Clay V. Brittain, *Adolescent Choices & Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385, 388 (1963); *see also* Clay V. Brittain, *Age and Sex of Siblings and Conformity toward Parents Versus Peers in Adolescence*, 37 CHILD. DEV. 709, 711 (1966).

98 ELLEN GREENBERGER, *Education and the Acquisition of Psychosocial Maturity*, *in* THE DEVELOPMENT OF SOCIAL MATURITY 155, 169–72 (David C. McClelland ed., 1982).

99 *See* National Juvenile Justice Network, *supra* note 93; *see also* Steinberg & Cauffman, *supra* note 91, at 253.

avoid.[100] Indirectly, youths may be lead by a desire for peer approval or fear of rejection, which may lead them to do things they might not otherwise do.[101] However, a study conducted by the Adolescent Development and Juvenile Justice Research Foundation found that vulnerability to peer pressure declined over the course of adolescence and young adulthood.[102] This decline in vulnerability to peer pressure is attributable to the maturation process,[103] which ultimately allows cognitively developed adolescents and adults to remove themselves from situations that may be dangerous or morally toxic. While it is true that not every teen succumbs to peer pressure, it cannot be disputed that many do. Furthermore, a recent study of seventy-three children serving LWOP in the United States for crimes they committed at the ages of thirteen and fourteen found that, "[these children] have been physically and sexually abused, neglected, and abandoned; their parents are prostitutes, drug addicts, alcoholics, and crack dealers; they grew up in a lethally violent and extremely poor areas where health and safety were luxuries their families could not afford."[104]

C. Reform And Rehabilitation

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[105] As aptly stated in *United States v. Johnson,*[106] "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." The Supreme Court has stated that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of [his] most basic liberties, but the State cannot extinguish his life and his

[100] Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILD. 15, 20–21 (2008); *see also* Steinberg & Cauffman, *supra* note 91, at 254.

[101] Scott & Steinberg, *supra* note 100, at 21; *see also* Steinberg & Cauffman, *supra* note 91, at 255.

[102] Scott & Steinberg, *supra* note 100, at 20; *see also* Steinberg & Cauffman, *supra* note 91, at 254.

[103] *See* L.P Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REV. 417 (2000); *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779518.

[104] Equal Justice Initiative, *supra* note 1, at 15.

[105] Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[106] Johnson v. Texas, 509 U.S. 350, 368 (1993).

potential to attain a mature understanding of his own humanity.[107] Children, by their very nature, grow and mature *into* adults. Sentencing a child to live out his or her entire life in a prison cell robs the child of any and all potential for growth, change, discovery of him or herself, and the opportunity to re-enter society as a rehabilitated person." The Court continued, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults."[108] The Supreme Court has also discussed an adolescent's ability to change based on developments in psychology and science, which indicates that brains of adults and children show fundamental differences.[109] These fundamental differences are bridged during maturation into late adolescence and early adulthood.[110]

"[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, and less fixed."[111] A psychological study conducted in 2000 examined the psychosocial maturity of adolescents and adults between the ages of 12 and 48.[112] The study focused on the developmental changes during adolescence in psychological characteristics that bear on determinations of culpability. The study hypothesized that responsibility, perspective, and temperance are part of what is considered "maturity of judgment."[113] The data was collected from self-reported questionnaires and was intended to measure responsibility, perspective, temperance, maturity, and anti-social decision-making. In these questionnaires, study participants were first presented with different decision-making scenarios.[114] One such scenario presented read "[y]ou're out shopping with some of your close friends and they decide to take some clothing without paying for it. You don't think it's a good idea, but they say you should take something too.''[115] Next, participants were presented with three possible outcome scenarios,[116] one in which, "nothing bad would happen to you (such as getting arrested) if you took the clothing. Would you shoplift or would you refuse to take the item?''[117] The next

107 *Roper*, 543 U.S. at 573–574.

108 *Id.*

109 *Id.* (citing Brief for American Medical Association et al. as *Amicus Curiae* 16–24); Brief for American Psychological Association et al. as *Amicus Curiae* 22–27.

110 *Id.*

111 *Roper*, 543 U.S. at 570; *see generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968).

112 Cauffman & Steinberg, *supra* note 42, at 741.

113 *Id.* at 752.

114 *Id.* at 749.

115 *Id.*

116 *Id.*

117 *Id.*

scenario asks the participant to imagine that something bad would happen, while the third scenario suggests that the participant doesn't know what would happen.[118] For each scenario participants are asked to indicate whether or not they would engage in the behavior, rating their response on a four-point scale ranging from "definitely shoplift" to "definitely refuse to shoplift."[119] The study revealed that individuals between 12 and 48 differed significantly in their psychosocial maturity relating to domains of responsibility, perspective, and temperance.[120] As hypothesized by the study, these domains compose the "maturity of judgment."[121] This maturity of judgment, while stabilized in adults, develops appreciably up until 19 years of age.[122]

Additionally, the study found that antisocial decision-making was strongly influenced by psychosocial maturity rather than age.[123] Individuals who are more psychosocially mature, in domains relating to responsibility, perspective, and temperance, are less likely to make anti-social decisions.[124] Notably, the study revealed that such decision-making tends to stabilize around 19 years of age.[125] However, children as young as 14 and 15 are being sentenced to life in prison without parole before their decision-making abilities and "maturity of judgment" has stabilized.[126] Of even greater relevance, the study yielded that "the steepest inflection point in the developmental curve occurs between 16 and 19 years . . . which is especially true with respect to the development of perspective and temperance, but less true with regard to the development of responsibility, which appears to develop more gradually."[127] As the study points out, these results do not categorically render adolescents irresponsible and reckless.[128] Rather, the "maturity of judgment" measured by responsibility, temperance, and perspective "are more predictive of anti-social decision making than chronological age alone."[129] Though chorological age is not the strongest predictor of anti-social decision-making, behavioral evidence indicating that the developmental period between the ages of 16 and 19 is a

118 *Id.*
119 *Id.* at 750.
120 *Id.* at 752.
121 *Id.* at 756.
122 *Id.*
123 *Id.* at 755.
124 *Id.* at 16.
125 *Id.* at 756.
126 *Id.*
127 *Id.*
128 *Id.* at 757.
129 *Id.*

crucial transition point in psychosocial development should have great implications in drawing legal boundaries, for purposes of sentencing, between adolescence and adulthood.[130] The importance of such a study is that the differences in brain functions between adults and children render suspect any conclusion that a juvenile is capable of being classified as among the worst offenders.

Nothing about a child's character is fixed. A child who gives into his or her impulses or makes unreasoned choices is not a permanently flawed human being. Rather, this child will still develop biologically, cognitively, and psychosocially. Since children's characters are not fully established until adulthood, children have the unique capability to change and to reform, if provided with that chance. Georgia's Justice Project provides children with that chance.[131] Georgia Justice Project's Approach to Juvenile Justice Works takes an innovative approach to breaking the cycle of crime among children in Atlanta.[132] The Georgia Justice Project incorporates counseling, treatment, and employment and educational programs in its legal services.[133] The Georgia Justice Project successfully minimizes recidivism rates among juveniles: the national average is 60%, but the Georgia Justice Program's recidivism rate is 18.8%.[134] This demonstrates that a unique and holistic approach to juvenile justice actually works and that children can be reformed. If science, research, and tested programs like the one in Georgia all indicate that children are less culpable by the function of biology and environmental cues, then locking children up in prison and throwing away the key is certainly a disgrace for a society whose tradition and history is built on protecting the vulnerable. By imposing LWOP sentences on child offenders, society denies these children any chance at life. In *Graham*, the Supreme Court stated that, "[l]ife without parole is an especially harsh punishment for a juvenile. Under this sentence, a juvenile offender will on average serve more years and a greater percentage of his life in prison than will an adult offender."[135] As the Court aptly stated, "[t]his reality cannot be ignored."[136] Psychological research and biological science support the proposition that

130 *Id.*

131 De La Vega & Leighton, *supra* note 30, at 1023; *see also* Georgia Justice Project, *The GJP Approach*, http://www.gjp.org (last visited Sept. 14, 2011).

132 De La Vega & Leighton, *supra* note 30, at 1022; *see* Georgia Justice Project, *supra* note 131.

133 De La Vega & Leighton, *supra* note 30, at 1022; *see* Georgia Justice Project, *supra* note 131.

134 *See* De La Vega & Leighton, *supra* note 30, at 1022; *see also* Georgia Justice Project, *supra* note 131.

135 Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

136 *Id.*

children are capable of reform and change; the research does not distinguish between children who commit homicide offenses and those who do not.

III. THE INTERNATIONAL AND NATIONAL COMMUNITY POSITION ON LWOP FOR JUVENILES

The Supreme Court has declared that the Eighth Amendment is an ever-changing reflection of the "evolving standards of decency that mark the progress of a maturing society."[137] The meaning of the Eighth Amendment "must be interpreted according to its text, by considering history, tradition and precedent, and with due regard for its purpose and function in the constitutional design."[138] In 2005, as a result of such evolving standards of decency, the Supreme Court struck down the death penalty for juveniles by a 5-4 vote in *Roper v. Simmons*.[139] *Roper* represents the idea that the "special vulnerabilities and frailties of adolescence"[140] directly reflect on the degree of personal culpability for Eighth Amendment purposes.[141] The Court applied similar rationales in both *Graham* and *Roper*.[142] "The essential feature of the death sentence or a life without parole sentence is that it imposes a terminal, unchangeable, once and for all judgment upon the whole life of a human being and declares that human being forever unfit to be part of a civil society."[143] *Roper* explained why such a sentence could not be passed on children below a certain age. Children, by their very nature, are works-in-progress. In *Graham*, the Supreme Court stated that LWOP means, "[d]enial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days."[144] As reflected by a plethora of behavioral and psychological evidence, children stand at a particularly vulnerable point in their lives. In determining that the death penalty and LWOP for non-homicide offenses for juveniles violates the Eighth Amendment, the Supreme Court relied on the *inherent* differences between children and

137 *Id.* at 2021 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

138 Roper v. Simmons, 543 U.S. 551, 560 (2005).

139 *See id.* at 554.

140 Brief for Petitioner at 28 Sullivan v. Florida, 130 S. Ct. 2059 (2010) (per curiam) (No. 08-7621).

141 Brief for Petitioner, *supra* note 140.

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

143 Brief for Petitioner, *supra* note 140, at 5.

144 Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (citing Naovarath v. State, 105 Nev. 525, 526 (1989)).

adults and the national and international consensus which were opposed to such a severe penalty.[145] The same rationales employed in *Roper* and *Graham* should extend to juveniles who commit homicide offenses. Since life in prison without parole is the functional equivalent of the death penalty, children should be given a second chance despite the crime committed.

A. The Evolving Standards Of Decency

In *Graham*, the Supreme Court explored the national consensus in determining the constitutionality of imposing such a penalty. Professional organizations, modern science, and leading members of the international community certainly have reached a consensus regarding sentencing juveniles to life in prison without parole: it should be prohibited. The United States stands alone in allowing such a sentence for juvenile homicide offenders.

In deciding *Roper* and *Graham*, the Supreme Court consulted scientific evidence relating to children's biological and psychosocial development.[146] The Court in *Roper* considered the views expressed by "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,"[147] and the Court's "own independent judgment."[148] In *Roper*, the Court observed that children are inherently different than adults, and thus must be treated accordingly. It concluded that "today our society views juveniles . . . as 'categorically less culpable than the average criminal.'"[149] *Roper* rested on the following principles: youthful offenders are categorically less culpable than the average criminal; youthful offenders

145 Roper v. Simmons, 543 U.S. 551, 598 (2005).

146 *Roper*, 543 U.S. at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)); *Graham,* 130 S. Ct. at 2015.

147 *Id.* at 561 (quoting Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (plurality opinion)).

148 *Id.* at 564.

149 *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316). "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. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under [eighteen] as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under [eighteen] as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation--that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573–74 (citations omitted).

have a tendency to conform and lack maturity; youthful offenders are more vulnerable or susceptible to negative influences and outside pressures including peer pressure; and the characters of youthful offenders are not as well formed while their personality traits are more transitory, and less fixed.[150] There is a consensus among scientists, psychologists, psychiatrists, social workers, and child advocates that children are inherently less culpable due in part to the overwhelming scientific and behavioral evidence. However, the inquiry must not stop there. The national and especially the international consensus reflect that LWOP is a cruel and unusual punishment for juvenile offenders.

In the United States, forty-one states and the federal government permit life in prison without parole as a sentence for juveniles, while nine states prohibit such a sentence.[151] The forty-one states that permit such a sentence are divided yet again on the age at which a child is eligible for LWOP. Thirteen states permit a child of any age to be sentenced to LWOP and one sets the bar at eight years or older.[152] Eighteen states apply the sentence to a child as young as ten years of age and one state permits the sentence at age twelve.[153] Thirteen states set the minimum age at fourteen years.[154]

Although the majority of the states permit LWOP for juveniles, several states that have discretionary sentencing statutes reflect the notion that children are inherently less culpable and deserve a different sentencing scheme. In such states, the legislature affords special consideration for juvenile offenders.[155] For example, in Montana a statutory mandatory minimum does not apply if the offender was under the age of eighteen at the time he or she committed the crime.[156] Similarly, in Kentucky there are no restrictions on parole for juveniles.[157] Recently, the Colorado legislature passed an amendment providing that if a person is convicted as an adult,

150 *Id.* at 569–70,

151 There are seven states which blankly prohibit the imposition of life in prison without parole of juvenile offenders. These states are: Alaska, Colorado, Kansas, Kentucky, Montana, New Mexico, and Oregon. *See* De La Vega & Leighton, *supra* note 30 at 1029; Annino et al., *supra* note 2; MONT. CODE ANN. § 46-18-222 (2010).

152 De La Vega & Leighton, *supra* note 30, at 1029. The thirteen states are as follows: Delaware, Florida, Idaho, Maine, Maryland, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. Nevada allows juveniles to be sentenced to LWOP as young as eight.

153 *Id.* at 1029.

154 *Id.* at 1029.

155 Graham v. Florida, 130 S. Ct. 2011, 2028 (2010); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. OF CRIM. L. 1, 5 (2011).

156 MONT. CODE ANN. § 46-18-222 (2010).

157 Shepherd v. Kentucky, 251 S.W.3d 309, 321 (KY 2008).

parole is possible after serving forty years.[158] The Colorado legislature reflected modern psychological and scientific evidence when stating that "because of [children's] level of physical and psychological development, juveniles who are convicted as adults may, with appropriate counseling, treatment services, and education, be rehabilitated to a greater extent than may be possible for adults whose physical and psychological development is more complete when they commit the crimes."[159]

Graham forecloses states from sentencing juveniles to LWOP for non-homicide offenses. However, even before the Supreme Court decided *Graham*, many states refused to sentence juveniles to LWOP for non-homicide offenses.[160] A recent study found that thirty-six states do not impose life without parole sentences on juveniles.[161] Even though such sentences are technically permitted by statute in many states, few states actually utilize the sentencing scheme. The exception is Florida, which has nearly seventy-seven juveniles serving LWOP for non-homicide offenses.[162] In the United States, one-hundred-nine juveniles are serving life in prison without parole for non-homicide offenses committed as an adolescent.[163] The breakdown of juveniles serving LWOP for non-homicide offenses in the United States is as follows: California, four; Nevada, one; Iowa, six; Louisiana, seventeen; Mississippi, two; Delaware, one; South Carolina, one; and Florida, seventy-seven.[164]

A 2009 study from The Sentencing Project reported that only 6,807 juveniles are currently serving life sentences and more than half of these are concentrated in five states.[165] However, the Supreme Court has recognized in *Roper* and *Graham* that children are inherently less culpable This same rationale should be applied to children who commit homicide offenses. If it's really a question of culpability, then no matter what the crime, children should be treated differently than adults. These children, lack the culpability, maturity, and the requisite brain functions responsible for moral judgments and impulse control and are human works in progress.

158 COLO. REV. STAT. § 18-1.3-401(4)(b).

159 Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. MAG. 4, 8 (2007) (quoting 2006 COLO. LEGIS. SERV. 228 (West)).

160 Annino et al., *supra* note 2, at 2; Liptak, *supra* note 3.

161 Annino et al., *supra* note 2, at 2.

162 *Id.*; Liptak, *supra* note 3.

163 Annino et al., *supra* note 2 at 2; Liptak, *supra* note 3.

164 Annino et al., *supra* note 2 at 14; Liptak, *supra* note 3.

165 ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 17 (The Sent'g Project, 2009) (noting that California, Texas, Pennsylvania, Florida, and Nevada contain over 50% of the juveniles serving life sentences); Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES, July 22, 2009, at A24.

Proponents of imposing LWOP on juveniles point to the retribution theory of punishment and feel that that the wrongdoer should suffer because he or she caused the victim to suffer.[166] As stated by the Supreme Court in *Graham*, "[s]ociety is entitled to impose severe sanctions on a juvenile . . . to express its condemnation of the crime and to see restoration of the moral balance caused by the offense."[167] However, "at the heart of the retribution rational is that a criminal sentence must be directly related to the personal culpability of the criminal offender. Whether 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 . . . ."[168] Juvenile offenders will pay their debt to society, but retribution does not justify imposing LWOP on children; children are not irreparably damaged human beings; they have the ability to grow and change. Life in prison without parole categorically dismisses rehabilitation, which is the backbone of the juvenile court and sentencing scheme. While this Note does not make light of juveniles who commit heinous homicide offenses, the overwhelming scientific and neurological research supports the proposition that children are inherently less culpable as a function of their developing brain, personality traits, and transitory character and, therefore, should not be condemned to die in prison.

The American Bar Association ("ABA") has clearly stated its opinions and desires regarding sentencing children to life in prison without parole.[169] A 2008 ABA report made three recommendations in the sentencing juveniles: "[y]outh are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system; [j]udges in the adult criminal justice system should consider the individual characteristics of the youth during sentencing; and [t]he collateral consequences normally attendant to the adult criminal justice process should not necessarily apply to all youth[s] arrested for crimes committed before the age of eighteen."[170] The American Bar Association recommendations reflect the national consensus that children are inherently less culpable, and should be

166 Graham v. Florida, 130 S. Ct. 2011, 2028 (2010); U.S. v. Cole, 622 F. Supp. 2d 632, 637 (N.D. Ohio 2008).

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

168 *Id.* (quoting Tison v. Ariz, 481 U.S. 137, 139 (1987) & Roper v. Simmons, 543 U.S. 551, 571 (2005)).

169 ABA 2008 Report with Recommendations #105C (2008); *see also* Brief of the American Bar Association as *Amicus Curiae* Supporting Petitioners at 6, Graham v. Florida, 130 S. Ct. 2011 (2009) (No. 08-7412, 08-7621).

170 ABA 2008 Report with Recommendations #105C (2008) at 5.

sentenced in a way different than adult counterparts who commit similar crimes.[171]

Despite such recommendations, the United States is now responsible for all child offenders serving LWOP sentences.[172] Most countries never allowed, expressly prohibited, or would not practice such sentencing on child offenders because it violates principles of child development and international human rights law.[173] As of 2005, then other countries besides the United States, in theory, permit a sentence of life in prison without the possibility of parole for a juvenile offender. These ten countries are as follows: Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. [174] Importantly, some of the countries that did allow for such a sentence have since either abolished it or now allow the sentences to be reviewed to determine whether they were in fact warranted.[175] Notably, in *Graham* the Supreme Court emphasized that the United States is the *only* country in practice that *imposes* this type of sentence.[176]

The international community recognizes that the special characteristics of childhood should preclude them from being sentenced to life in prison without the possibility of parole. The international consensus is replete with evidence that LWOP is a cruel and unusual punishment when imposed on children. The United Nations Convention on the Rights of the Child ("CRC"), a treaty that has been ratified by every country in the world except the United States and Somalia, codifies the international norm of human rights and forbids the imposition of life in prison without parole for juveniles.[177] Article 37(a) of the CRC provides in relevant part that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by

171 *Id.* at 6.

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

173 De la Vega & Leighton, *supra* note 30, at 990; *see also* Molly C. Quinn, *Comment: Life Without Parole for Juvenile Offenders: A Violation of Customary International Law*, 52 ST. LOUIS L.J. 283, 283 (2007).

174 De la Vega & Leighton, *supra* note 30, at 990. *See also* Quinn, *supra* note 173, at 295–296.

175 De la Vega & Leighton, *supra* note 30, at 986; *see also* Brady J. O'Malley, *Graham v. Florida and the Role of International Sources in Eighth Amendment Jurisprudence*, 38 SYRACUSE J. INT'L L. & COM. 377, 383–84 (2011).

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

177 Convention of the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. CRC/C/GC/10, at 1469–70 (Nov. 20, 1989). The Convention of the Rights of the Child can be traced to the Declaration of Geneva, which was the first international instrument recognizing that children are entitled to special care and protection. The Declaration stated that "mankind owes to the child the best that it has to give."

persons below eighteen years of age."[178] Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") prohibits cruel, unusual, and degrading treatment or punishment, and provides that LWOP sentences are cruel when applied to children.[179] Additionally, such sentences violate Article 10(3) of the ICCPR, which provides that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitations.[180] Article (14)(4) of the ICCPR requires that when sentencing juvenile persons, governments "should take into account their age and the desirability of promoting their rehabilitation."[181] Notably, the United States ratified the ICCPR in 1992.[182] The Committee on Human Rights determined that in 2006 the United States was not in compliance with the ICCPR because it allows LWOP sentence for juveniles.[183] Additionally, the United Nations General Assembly prohibits the imposition of LWOP for children. By a vote of 185 to one, where the United States was the lone vote against, the General Assembly passed a resolution on December 19, 2006 which requested that nations "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offense."[184] Again in December of 2007, a similar resolution was passed.[185] 183 countries ratified.[186]

178 *Id.* Article 37 states parties shall ensure that: (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent independent and impartial authority, and to a prompt decision on any such action.

179 Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 1717.

180 *Id.* at 104.

181 *Id.* at 107.

182 Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR, June 29, 1992, *available at* http://www.cartercenter.org/news/documents/doc1369.html.

183 Human Rights Comm., Rep. on its 87th Sess., July 10–28, 2006, U.N. Doc. CCPR/C/SR.2395 (July 27, 2006).

184 G.A. Res. 61/146, ¶31, U.N. Doc. A/RES/61/146 (Dec. 19, 2006).

185 G.A. Res. 62/141, ¶36, U.N. Doc. A/RES/62/141, (Dec. 18, 2007); Brief for Amnesty Int'l, et al., as *Amici Curiae* Supporting Petitioners at 20, Graham v. Florida, 130 S. Ct. 2011 (2009) (No. 08-7412, 80-7621).

186 Brief for Amnesty Int'l, et al. as *Amici Curiae* Supporting Petitioners at 20, Graham v. Florida, 130 S. Ct. 2011 (2009) (No. 08-7412, 80-7621); James I. Pearce, *International Materials and the Eighth Amendment: Some Thoughts on Method After* Graham v. Florida, 21 DUKE J. COMP. INT'L L. 235, 258 (2010).

Again, the United States was the lone dissenter.[187]

The international community has spoken. The numerous treaties and commissions on human rights demonstrate the overwhelming consensus that LWOP should not be imposed on children. While the Supreme Court in *Graham* eliminated LWOP for juvenile offenders who commit non-homicide crimes, the Court should extend such a decision to juveniles who commit homicide offenses based on psychological research and the overwhelming consensus among the international community.

IV. ALTERNATIVES SENTENCING SCHEMES

In recent years, correction systems nationwide have shifted their focus to alternatives for incarceration of juveniles, even for those who have committed very serious offenses. There are a number of reasons cited for the need for alternatives for the incarceration of juveniles, two of which are the overcrowding of prisons and their lack of effectiveness.[188] Studies conducted between the 1960's and 1990's revealed that community-based programs, such as group homes, were far more effective in rehabilitating juveniles than traditional forms of incarceration, such as prison or training schools.[189] In states like Massachusetts,the juvenile corrections system houses a small number of serious juvenile offenders in a small and secure facility coupled with an intensive community-based program.[190] This approach has been incredibly effective in reducing recidivism and building a strong connection between the juvenile and his or her family.[191]

Similar programs in other states have also been successful. After

187 Brief for Amnesty Int'l, et al. as *Amici Curiae* Supporting Petitioners at 20, Graham v. Florida, 130 S. Ct. 2011 (2009) (No. 08-7412, 80-7621); Pearce, *supra* note 186, at 258.

188 James Austin, Kelly Dedel Johnson & Ronald Weitzer, *Alternatives to Secure Detention and Confine of Juvenile Offenders*, U.S. DEP'T OF JUSTICE, 2–3 (Sept. 2005), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf.; Melissa Sickmund, *Juvenile Residential Facility Census,2000: Selected Findings*, U.S. DEP'T OF JUSTICE, 4 (Dec. 2002), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/196595.pdf.; Richard G. Wiebush et al., *Implementing and Outcome Evaluation of the Intensive Aftercare Program*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, (Mar. 2005), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/206177.pdf.

189 Austin et al., *supra* note 188; Office of Juvenile Justice and Delinquency Prevention, *Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders*, U.S. DEP'T OF JUSTICE, 29 (James C. Howell ed., May 1995), *available at* http://www.ncjrs.gov/pdffiles/guide.pdf.

190 Office of Juvenile Justice, *supra* note 189; Colleen Quinn, *DYS: 2005 Program Leads to Drop among Young Offenders in Custody*, STATE HOUSE NEWS SERVICE, 1 (June 6, 2011), *available at* http://66.105.150.81/cgi/as_web.exe?REV2011+D+6020912.

191 Office of Juvenile Justice, *supra* note 189; Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INSTITUTE, 16 (Nov. 28, 2006), *available at* http://www.cfjj.org/Pdf/116-JPI008-DOD_Report.pdf.

discovering problems of abuse and youth violence, the United States Department of Justice recommended immediate reform for the Bridge City Correctional Facility.[192] The death of a child prisoner spurred the reform which mandates compliance with the Juvenile Justice Reform Act. Bridge City Detection Center was shut down, [193] and when it reopened, the New Bridge City Center for Youth no longer treated juvenile inmates like adults, but rather established a home like environment.[194] The New Center was focused on therapeutic care and rehabilitation of the child offenders.

Efforts to reform juvenile offenders have also been successful outside the United States. In the 1970's Germany withdrew traditional sentencing for juveniles.[195] The Juvenile Justice Act was established and provided for alternative sentencing structures including: suspensions, probation, community service, and day fines.[196] As a result of this new sentencing scheme, "between [the years of] 1982 and 1990, incarceration of juveniles . . . decreased by more than 50%."[197] Currently, the sentencing scheme in Germany deals with juvenile (ages fourteen-seventeen) offenders by educating juveniles and providing for special sanctions.[198] Children are provided with victim offender reconciliation mediation and educational programs.[199] As can be seen, programs aimed at rehabilitation, rather than incarceration, support the psychological and biological research that children are capable of reform if given the opportunity.

A. Reforming Juvenile Sentencing Schemes And Policies

LWOP for juveniles is a sentence which "deprives children of both any hope for return to society and any opportunity for rehabilitation."[200]

192 Katy Reckdahl, *Bayou Betterment, The American Prospect*, 3 (Aug. 15, 2005), *available at* http://www.prospect.org/cs/articles?article=bayou_betterment; Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Mike Foster, Governor of Louisiana (July 15, 1996) (on file with the Department of Justice).

193 Reckdahl, *supra* note 192; Gwen Filosa, *Juvenile Justice in Louisiana Making Transition From Confinement to Treatment*, THE TIMES-PICAYUNE, (Feb. 23, 2010, 7:57 PM), http://www.nola.com/crime/index.ssf/2010/02/juvenile_justice_in_louisiana.html.

194 Reckdahl, *supra* note 192; Filosa, *supra* note 193.

195 De la Vega & Leighton, *supra* note 30; Dr. Christian Pfeiffer, *Alternative Sanctions in Germany: an Overview of Germany's Sentencing Practices*, U.S. DEPARTMENT OF JUSTICE, 1 (Feb. 1996), *available at* http://www.ncjrs.gov/pdffiles/germany.pdf.

196 De la Vega & Leighton, *supra* note 30; *see also* Jugendgerichtsgesetz [hereinafter *JGG*] [Juvenile Court/Justice Act], Dec. 11, 1974, [BGBI] 1 at 3427 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_jgg/englisch_jgg.html#p0276 (hereinafter "JGG").

197 De la Vega & Leighton, *supra* note 30 (citing Dr. Christian Pfeiffer, *supra* note 195 at 1).

198 *See id.*; *see also* JGG, *supra* note 196, at 3427, Part 1, § 1(2).

199 De la Vega & Leighton, *supra* note 30 (citations omitted).

200 Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. DAVIS L. REV. 111, 162 (2007).

Consequently, a "sentence must rest on a rational determination that the punished criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator."[201] For a juvenile, the possibility of parole serves an important rehabilitative function.[202] The Supreme Court has stated that the "ultimate purpose of parole . . . [is] the long-range objective of rehabilitation."[203] Sentencing a juvenile offender to LWOP serves absolutely no rehabilitative function.[204] Rather, this sentence is a "denial of hope."[205]

Additionally, those jurisdictions that sentence juveniles to thirty or forty years of imprisonment, in place of LWOP, still do not alleviate the issues with such excessive sentencing schemes. The scientific evidence, as discussed above, highlights that children are inherently less culpable than adults and that there brain develops well into their twenties. Children sentenced to thirty or forty years will still be incarcerated long after their brain has matured, their idea of right and wrong is stabilized, and their ability to grasp the consequences of their actions is developed. This evidence, coupled with success in Georgia, Massachusetts, California, and Louisiana highlights the need for a reform in juvenile sentencing. A holistic approach to juvenile incarceration should be adopted which takes into account modern psychological research. This new approach should recognize that children are capable of reform, are works-in progress, and with proper rehabilitation, should be permitted to renter society.

CONCLUSION

The *Graham* decision was certainly a step forward in reforming the juvenile justice system to reflect modern psychological and biological understandings. However, the decision in *Graham* does not extend to juveniles who commit homicide offenses. Therefore, it is foreseeable that the rationales underlying *Graham* will be employed to petition the Supreme Court to hold that life in prison without parole is an unconstitutional

201 Brief of Juvenile Law Center et al. as *Amici Curiae* in Support of Petitioners at 34, Graham v. Florida, 130 S. Ct. 2011 (2009) (No. 08-7412, 08-7621).

202 *See e.g.*, Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 13 (1979); *see also* Dutra v. Curry, 2008 U.S. Dist. LEXIS 35902, *18–19 (N.D. Cal. Apr. 30, 2008).

203 *Greenholtz*, 442 U.S. at 13.

204 *See* Harmelin v. Michigan, 501 U.S. 957, 1028 (1991); *see also* U.S. v. Harris, 154 F.3d 1082, 1085 (1998).

205 Graham v. Florida, 130 S. Ct. 2011, 2042 (2010) (quoting Naovarath v. State, 105 Nev. 525, 526, 779 P.2d 944 (1989)).

sentence for juvenile homicide offenders. The Supreme Court in *Graham* failed to recognize that psychological and biological science applies to *all* juveniles, not just those who commit non-homicide offenses. The international community has spoken: such a sentence is cruel and unusual, despite the offense committed.A sentence of LWOP denies the child homicide offender of any hope of reform or rehabilitation and, while "life is over for the victim of the murderer,"[206] "[i]ncapacitation cannot override all other considerations."[207]

206 *Graham*, 130 S. Ct. at 2072.
207 *Id.* at 2029.