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THE CONSTITUTIONALITY OF LENGTHY TERM-OF-YEARS SENTENCES FOR JUVENILE NON-HOMICIDE OFFENDERS

REBECCA LOWRY†

INTRODUCTION

Terrance Jamar Graham was sixteen years old when he and three other boys attempted to rob a barbecue restaurant in Jacksonville, Florida.1 On December 18, 2003, he pled guilty to armed burglary with assault or battery and attempted armed robbery.2 The court withheld adjudication and sentenced him to concurrent three-year terms of probation with the first year spent in county jail.3 When he was just shy of his eighteenth birthday, less than six months after he was released from jail, he violated parole by participating in a violent home invasion robbery with two twenty-year-old men.4 Although Graham denied being involved in the incident, he admitted to violating the terms of his parole by fleeing when the police approached him that night.5 The court found him guilty of the earlier charges, and at his sentencing the hearing judge stated, "We can’t do anything to deter you... [T]he only thing I can do now is to try and protect the community from your actions."6 The court then sentenced him to life without parole for armed burglary.7 The Supreme Court reversed the sentence and held that life

† Senior Staff, St. John’s Law Review; J.D., 2014, St. John’s University School of Law. I would like to thank Dean Michael A. Simons for his guidance in writing this Note.
2 Id. at 53–54.
3 Id. at 54.
4 Id.
5 Id. at 55.
6 Id. at 57 (quoting Graham v. State, 982 So. 2d 43, 45–46 (Fla. Dist. Ct. App. 2008)) (internal quotation mark omitted).
7 Id. He was also sentenced to fifteen years for attempted armed robbery. Id.
sentences without the possibility of parole for juvenile non-
homicide offenders violated the Eighth Amendment’s ban against
cruel and unusual punishment.\(^8\)

Like Graham, James Goins was sixteen years old when he
committed armed robbery.\(^9\) On January 29, 2001, Goins and
another sixteen-year-old boy participated in two violent home
invasion robberies in Youngstown, Ohio.\(^10\) Goins was convicted
on eleven counts related to that event.\(^11\) When doling out the
maximum sentence for each count of the conviction, the judge
stated, “It is the intention of this Court that you should not be
released from the penitentiary and the State of Ohio during your
natural li[fe].”\(^12\) Goins was then sentenced to eighty-five-and-a-
half years in prison.\(^13\) Unlike the Court in Graham, the district
court upheld Goins’s sentence.\(^14\)

In both Graham and Goins, the offenders were sixteen years
of age.\(^15\) Both boys committed crimes with others, and both
received sentences that would keep them in prison for the rest of
their lives. In each case, the sentencing judge clearly stated that
the court’s goal was to make sure that these juvenile offenders
never saw the light of day. And yet, Graham’s sentence was
deemed unconstitutional, while Goins’s sentence was not.

This Note posits that sentences that exceed a juvenile’s life
expectancy, like Goins’s, are de facto life sentences and fall
within the ambit of Graham and are, therefore, unconstitutional.

\(^8\) Id. at 81–82.
21, 2005).
\(^10\) Goins v. Smith, No. 4:09-CV-1551, 2012 WL 3023306, at *1 (N.D. Ohio July
24, 2012).
\(^11\) Id. Goins was convicted of one count of attempted aggravated murder, two
counts of aggravated burglary, three counts of aggravated robbery, three counts of
kidnapping, one count of receiving stolen property, and one count of felonious
assault. Id.
\(^12\) Id. at *2 (alteration in original) (internal quotation marks omitted) (citing
Transcript to Respondent’s Answer/Return of Writ at 47, Goins v. Smith, No. 4:09-
CV-1551 (N.D. Ohio Aug. 2, 2006) (No. 16-2)).
\(^13\) Id. Goins’s initial sentence was reduced to seventy-four years because the
court misapplied the Ohio merger doctrine. Upon resentencing, the term was
increased to eighty-four years. Id.
\(^14\) Id. at 86 (noting that because Goins’s sentence was not technically life
without parole, Graham was inapposite).
\(^15\) Even though Graham was just shy of his eighteenth birthday when he
violated his parole by participating in a home invasion, he was sentenced to life
without parole for the armed robbery he committed when he was sixteen years old.
Graham's holding—that life without parole for a juvenile non-homicide offender is unconstitutional—was based on the principle that juveniles are different than adults. Because juveniles are less mature, they are less responsible, less able to take into consideration the consequences of their actions, and more susceptible to peer pressure; therefore, they are less culpable. These differences do not disappear merely because a sentence is not technically life without parole. The Graham rationale that juveniles are different than adults applies equally to both lengthy fixed-term sentences and life-without-parole sentences.

This Note further proposes that states must provide juvenile non-homicide offenders a “meaningful opportunity for release” within thirty years, as mandated in Graham. In Graham, the Court discussed that juveniles are more malleable than adults; consequently, they are more capable of reform. This capacity to change was a prominent factor that led the Court to foreswear life-without-parole sentences for juvenile non-homicide offenders. The Court determined that states must provide juvenile non-homicide offenders with a “meaningful opportunity to obtain release,” but left the method for providing this opportunity to the states, which has led to a lack of consensus in court decisions and divergent holdings. This Note suggests that a constitutional boundary needs to be set in order to give states guidance in complying with Graham and proposes that the boundary be set at thirty years.

Part I discusses the development of the Court's “kids are different” decisions. Part II argues that the rationale behind Graham applies not only to life-without-parole sentences but also to lengthy term-of-years sentences for juvenile non-homicide offenders. Part III suggests a constitutional mandate as to when states must provide a meaningful opportunity for release and explores other legislative action states can employ to comply with Graham.

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16 See id. at 68–74.
17 See id.
18 See id. at 68, 74.
19 See id. at 74.
20 Id. at 75.
I. KIDS ARE DIFFERENT

Juveniles and adults differ in many important ways that are reflected in our law. Every state has laws that mandate a minimum age for drinking alcohol, driving a vehicle, voting, getting married, having sex, serving jury duty, and alienating property. These limitations on juveniles recognize their relative immaturity and underdeveloped sense of responsibility. For over sixty years, the Supreme Court has also recognized this difference. This Part reviews some of those decisions beginning with confession cases, followed by death penalty cases, and concluding with non-death penalty sentencing cases, such as Graham. These cases reflect the Court’s continued recognition that juveniles “cannot be viewed simply as miniature adults.”

A. Confession Cases

The first time the Supreme Court recognized that juveniles were different than adults and required additional protections because of their youth was in 1948 in *Haley v. Ohio*, in which the Court held that the methods of extracting a confession out of “a lad of tender years” violated the Fourteenth Amendment.

Young Haley was fifteen years old when he helped two other boys rob a candy store; Haley was the lookout. During the robbery, the storeowner was shot. Five days later, Haley was arrested in his home at midnight, taken to the police station, and interrogated without an attorney present. At five o’clock in the morning, he signed a confession after continual interrogation by rotating police officers. He was detained for an additional three days and was denied access to his family and an attorney. The Supreme Court held that it was a violation of due process and against the standards of decency to wring a confession out of a fifteen-year-old child, to deny him access to counsel and family,

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22 J.D.B., 131 S. Ct. at 2404.
23 332 U.S. 596 (1948) (plurality opinion).
24 Id. at 599–601.
25 Id. at 597.
26 Id.
27 Id. at 598.
28 Id.
29 Id.
and to keep him incommunicado for three days. The Court reasoned that a boy is no “match for the police” and “[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.”
The Court further explained that “[a]ge 15 is a tender and difficult age for a boy” and that “[h]e cannot be judged by the more exacting standards of maturity.” Moreover, there is a “great instability” during the teenage years, “which the crisis of adolescence produces.”
The Court recognized that juveniles need someone to lean on to protect them from “the overpowering presence of the law” and to keep them from becoming “victim[s] first of fear, then of panic.” Therefore, because children lack the same maturity and fortitude that adults have, the Court threw out the confession and held that it was obtained in violation of the Fourteenth Amendment.

The Court, recognizing that a boy “cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions,” threw out another juvenile confession in the 1962 case Gallegos v. Colorado. Fourteen-year-old Robert Gallegos and another boy robbed and assaulted a man who later died. Gallegos, like Haley, was convicted based on a confession that the Court determined violated due process. The Court determined, based on the totality of the circumstances—the boy’s age, the length of the detention, and the failure to send for his parents or provide an attorney to advise the boy—that the confession was obtained in violation of due process. It also noted that to permit the “conviction to stand would, in effect, be to treat him as if he had no constitutional rights.”

Recently, in J.D.B. v. North Carolina, the Court acknowledged, yet again, that juveniles were different than adults and held that a child’s age is relevant in determining

30 Id. at 599–601.
31 Id. at 599, 600.
32 Id. at 599.
33 Id.
34 Id. at 600.
35 Id. at 601.
37 Id. at 49–50.
38 Id. at 55.
39 Id.
40 Id.
whether a suspect is in custody for the purposes of the *Miranda* analysis. J.D.B. was thirteen years old when he was removed from his seventh grade social studies class by a uniformed police officer and questioned behind closed doors by a detective in the presence of the police officer, the school's assistant principal, and an administrative intern. He was not advised of his *Miranda* rights prior to questioning and confessed to stealing a digital camera. He was adjudicated delinquent. The North Carolina Court of Appeals held that J.D.B. was not in police custody when he confessed; therefore, the *Miranda* warnings were not required and the confession was deemed voluntary. The Supreme Court granted certiorari to determine whether a juvenile's age is a factor taken into account when determining whether the juvenile is in custody or not. Speaking for the majority, Justice Sotomayor saw "no reason for police officers or courts to blind themselves to that commonsense reality" that children might succumb to police where an adult would not. She further stated that common sense was all that was necessary to determine "that a 7-year-old is not a 13-year-old and neither is an adult." Accordingly, the Court held that a child's age is a relevant factor in the *Miranda* custody analysis.

B. Death Penalty Cases

The first time the Court extended its recognition that juveniles are not just "miniature adults" into the realm of death penalty cases was in 1982, in *Eddings v. Oklahoma*, when it held that a juvenile's youth and individual circumstances should be taken into consideration for sentencing purposes in capital

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42 Id. at 2399.
43 Id.
44 Id. at 2399–2400. Police had previously questioned J.D.B. in connection with two home invasions that had occurred. Id. at 2399. A digital camera stolen in one of these robberies was found at J.D.B.'s school, which led to the questioning in this case. Id.
45 Id. at 2400.
46 See id.
47 Id. at 2401.
48 Id. at 2398–99.
49 Id. at 2407.
50 Id. at 2399.
51 Id. at 2404.
52 455 U.S. 104 (1982).
cases. Sixteen-year-old Monty Lee Eddings took his brother’s
car and ran away from home with some friends. He was pulled
over by an Oklahoma Highway Patrol Officer when he lost
control of the car. Eddings shot and killed the officer with his
father’s shotgun. The trial court refused to consider Eddings’
troubled youth and violent father as mitigating circumstances.
Justice Powell, speaking for the Court, noted that even a “normal
16-year-old customarily lacks the maturity of an adult.”
Moreover, “youth is more than a chronological fact. It is a time
and condition of life when a person may be most susceptible to
influence.” Juveniles “are more vulnerable, more impulsive,
and less self-disciplined than adults.” In addition, the Court
mentioned that while crimes committed by adolescents may
cause the same amount of harm as crimes committed by adults,
young people “deserve less punishment because [they] may have
less capacity to control their conduct and to think in long-range
terms than adults.” Therefore, not only is a minor’s age a
relevant mitigating factor in capital cases, so is the minor’s
“mental and emotional development.”

In the 1988 case Thompson v. Oklahoma, the Court, for the
very first time, proscribed a specific punishment due to a
juvenile’s age and lesser culpability and held that “the Eighth
and Fourteenth Amendments prohibit the execution of a person

See id. at 116.
Id. at 105–06.
Id. at 106.
Id.
Id. at 109. Evidence was presented at trial that Eddings was severely
emotionally disturbed and was mentally and emotionally under-developed for his
age. Id. at 107. His father was violent, and his mother was an alcoholic and possibly
a prostitute. Id.
Id. at 116.
Id. at 115.
Id. at 116 n.11 (quoting TWENTIETH CENTURY FUND TASK FORCE ON
SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7
(1978)).
Id. (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY
TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).
Id. at 116.
Id. at 116–17.
who was under 16 years of age at the time of his or her offense. In determining that the death penalty was unconstitutional when applied to those under the age of sixteen, the Court reasoned that the inexperience of juveniles makes them "less able to evaluate the consequences of [their] conduct" and more likely to succumb to peer pressure. These differences "explain why [a juvenile's] irresponsible conduct is not as morally reprehensible as that of an adult." In addition, the Court concluded that the purposes of the death penalty—retribution and deterrence—were not satisfied when applied to a fifteen-year-old boy.

Almost two decades later, the Court once again contemplated whether juveniles deserved lesser punishment because of their developmental immaturity, and in 2005, in Roper v. Simmons, categorically banned the death penalty for all juvenile homicide offenders. Christopher Simmons was seventeen years old, came from a troubled home, abused drugs and alcohol, and displayed dramatic behavioral changes. He, along with another juvenile, robbed, kidnapped, and murdered Shirley Cook by throwing her bound body off a bridge. The trial court sentenced him to death and the Missouri Supreme Court set aside the sentence. In affirming the Missouri Supreme Court's decision, the Supreme Court held that the death penalty for juvenile homicide offenders violated the Eighth Amendment's ban of cruel and unusual punishment.

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65 Id. at 838.
66 Id. at 819.
67 Id. at 835, 838.
68 Id. at 835.
69 Id. at 836–38 (noting that juveniles are less culpable and that juveniles likely would not consider the death penalty when conducting a cost-benefit analysis of the crime).
70 543 U.S. 551 (2005).
71 Id. at 578.
72 Id. at 556, 559.
73 Id. at 556–57.
74 Id. at 558, 560. Originally the Missouri Supreme Court affirmed the trial court's ruling. Id. at 559. After the Supreme Court decided Atkins v. Virginia, 536 U.S. 304 (2002), which banned the death penalty for mentally retarded people, Simmons filed a new petition. Roper, 543 U.S. at 559. It was at this point that the Missouri Supreme Court overturned his death sentence and sentenced him to life without parole. Id. at 560.
75 Roper, 543 U.S. at 578–79.
The Court drew on previous opinions, sociological studies, and knowledge that "any parent knows" to enumerate three reasons why "juvenile offenders cannot with reliability be classified among the worst offenders." First, they have a "lack of maturity and an underdeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions." Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Third, their character "is not as well formed as that of an adult" and their "personality traits . . . are more transitory, less fixed." Because of these differences, the Court concluded that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

As in Thompson v. Oklahoma, the Roper Court found that the two penological and societal goals of the death penalty, retribution and deterrence, were inapplicable in juvenile cases in light of the differences between juveniles and adults. Justice Kennedy stated, "Retribution is not proportional if . . . imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." The efficacy of deterrence, likewise, was deemed insufficient justification given that a juvenile is not likely to have "made the kind of cost-benefit analysis that attaches any weight to the possibility of execution." Moreover, whatever minimal deterrent effect the death penalty might provide could instead be provided by life without parole.

While banning the death penalty for those eighteen years of age and under required the Court to draw a precise line which "is subject . . . to the objections always raised against categorical

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76 Id. at 569.
77 Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).
78 Id. (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
79 Id. at 570.
80 Id.
82 Roper, 543 U.S. at 571.
83 Id.
84 Id. at 572 (quoting Thompson, 487 U.S. at 837).
85 Id.
rules," the Court determined that the risks of permitting a "youthful person to receive the death penalty despite insufficient culpability" were too great.\textsuperscript{86} The Court reasoned that since trained psychiatrists were unable to differentiate between juvenile crimes that represented "transient immaturity" and those that displayed "irreparable corruption," then neither could a jury or a court; therefore, a categorical ban was necessary.\textsuperscript{87}

\section*{C. Non-Death Penalty Sentencing Cases}

The first time the Court proscribed a specific punishment based on its "kids are different" jurisprudence in a non-death penalty case came a scant five years after \textit{Roper}, in \textit{Graham v. Florida},\textsuperscript{88} which held, in a six-to-three decision, that life without parole for a juvenile non-homicide offender was unconstitutional.\textsuperscript{89} Graham was sixteen years old when he

\textsuperscript{86} Id. at 572–74.

\textsuperscript{87} Id. at 573. The Court explained that this difficulty was the reason psychiatrists were forbidden from diagnosing patients under eighteen with antisocial personality disorder. \textit{Id.} Justice O'Connor disagreed and noted that there was no evidence that a sentencing jury was "incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth." \textit{Id.} at 588 (O'Connor, J., dissenting). Justice Scalia questioned the reliability of the psychological studies relied upon by the majority. \textit{Id.} at 617–18 (Scalia, J., dissenting) (citing a previous American Psychological Association ("APA") study stating that juveniles were mature enough to make a well-reasoned and rational decision regarding abortion without parental consent). The APA later clarified that the skills necessary to make decisions in a controlled environment were different than those necessary to make a split-second decision in a high-pressure situation. The skills involved different portions of the brain that develop on a different schedule. The part of the brain that allows a person to make a well-reasoned decision in a controlled situation develops much earlier, while the skills necessary to make a high-pressure decision continue to develop well into early adulthood. \textit{See} Brief for American Psychology Association et al. as Amici Curiae Supporting Petitioners, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08–7412, 08–7621), WL 2236778, at *13 n.23; Kristin Henning, \textit{Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance}, 38 WASH. U. J.L. & Pol'y 17, 45 (2012).

\textsuperscript{88} 560 U.S. 48 (2010).

\textsuperscript{89} Id. at 74, 82. Justice Kennedy delivered the opinion joined by Justices Stevens, Ginsberg, Breyer, and Sotomayor. \textit{Id.} at 51. Justice Stevens filed a concurring opinion, joined by Justices Ginsburg and Sotomayor, to support the Court's conclusion that "evolving standards of decency," a concept central to its Eighth Amendment jurisprudence, may lead to the conclusion that a punishment once acceptable is no longer considered acceptable. \textit{Id.} at 85 (Stevens, J., concurring) (internal quotation marks omitted). Chief Justice Roberts concurred only in the judgment and based his analysis on precedent set in non-capital sentencing cases that required a "narrow proportionality" review and on the rationale in \textit{Roper} that
participated in an attempted armed burglary of a restaurant.\textsuperscript{90} The court withheld adjudication and sentenced him to three years probation.\textsuperscript{91} He violated parole and was sentenced to life without parole for the original crimes.\textsuperscript{92} The Court concluded that juvenile non-homicide offenders have “a twice diminished moral culpability,”\textsuperscript{93} none of the four penological goals of punishment can justify life without parole for such offenders, and life without parole was exceedingly severe punishment because it did not offer offenders a realistic opportunity of release.\textsuperscript{94} Therefore, a sentence of life without parole was cruel and unusual punishment for a juvenile non-homicide offender.\textsuperscript{95}

Like in \textit{Roper}, the \textit{Graham} Court concluded that juveniles are less culpable than adults.\textsuperscript{96} Seeing no “reason to reconsider” its previous examination of “the nature of juveniles,” the Court adopted much of the same language and rationale used in \textit{Roper}, including the three reasons that juveniles are less deserving of the most severe punishment: (1) they lack maturity; (2) they are more susceptible to negative influences; and (3) they are not fully formed and have a great capacity to change.\textsuperscript{97} Because of these

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“juvenile[s]... are generally less culpable than adults.” \textit{Id.} at 86 (Roberts, C.J., concurring) (internal quotation marks omitted). He found no reason “to invent a new constitutional rule” that was needlessly broad and possibly applicable “well beyond the particular facts of Graham's case.” \textit{Id.} at 86, 94. Justice Scalia joined the dissent penned by Justice Thomas that criticized the Court for imposing its own “independent judgment” regarding “evolving standards of decency,” imposing a proportionality requirement into the Eighth Amendment where none existed, and eviscerating its previous distinction that “[d]eath is different.” \textit{Id.} at 97–124 (Thomas, J., dissenting) (internal quotation marks omitted). Justice Thomas concluded that a life-without-parole sentence is not cruel and unusual punishment “under any standard.” \textit{Id.} at 124. Justice Alito joined in Justice Thomas's dissent but wrote separately to point out that the Court’s opinion does not affect term-of-years sentences and that he would not have gone into a proportionality analysis since the petitioner only argued for a categorical ban. \textit{Id.} (Alito, J., dissenting).
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\textsuperscript{90} \textit{Id.} at 53.
\textsuperscript{91} \textit{Id.} at 54.
\textsuperscript{92} \textit{Id.} at 57.
\textsuperscript{93} Juvenile non-homicide offenders' culpability is “twice diminished” because juvenile offenders are less culpable than adults and non-homicide crimes are less morally depraved than murder. \textit{Id.} at 69.
\textsuperscript{94} \textit{Id.} at 69–70, 74. See \textit{infra} text accompanying notes 105–118 for a discussion of the four penological goals of punishment: retribution, deterrence, incapacitation, and rehabilitation.
\textsuperscript{95} \textit{Graham}, 560 U.S. at 74.
\textsuperscript{96} \textit{See id.} at 68–69.
\textsuperscript{97} \textit{Id.}
differences, juveniles are less blameworthy.98 The Court noted, “A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’ ”99

The Court noted that not only are juveniles less culpable than adults, but that those who do not murder are also “categorically less deserving of the most serious forms of punishment.”100 The Court explained that for the victim of a murder, life is over.101 However, even in very serious non-homicide offenses, the victim’s life “is not over and normally is not beyond repair.”102 Therefore, since juvenile offenders are less culpable than adults and non-homicide crimes are less morally depraved than murder, a juvenile non-homicide offender has a “twice diminished” culpability.103

To highlight the severity of life without parole, the Court drew a parallel between life without parole and the death penalty: Both are irrevocable.104 The death penalty permanently ends a life, while life without parole permanently “alters the offender’s life by” an irreversible forfeiture.105 Life without parole curtails the offender’s life by depriving the offender “of the most basic liberties without giving hope of restoration.”106 A life sentence without the benefit of parole “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.”107 The Court concluded that since the culpability of a juvenile non-homicide offender is diminished by reason of age and the nature of the offense, they are not deserving of “the second most severe penalty permitted by law.”108

98 Id. at 68.
99 Id. (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).
100 Id. at 69.
101 Id.
102 Id. (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion)) (internal quotation mark omitted).
103 Id.
104 Id. at 69–70.
105 Id.
106 Id. at 70.
107 Id. (alteration in original) (quoting Naovarath v. State, 799 P.2d 944, 944 (1989)) (internal quotation mark omitted).
108 Id. at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).
Graham examined the four justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—and determined that they all failed to adequately justify sentencing a juvenile non-homicide offender to life without parole. Retribution restores moral balance; therefore, the “sentence must be directly related to the personal culpability of the criminal offender.” Roper determined that retribution was not proportional when doling out the death penalty, the harshest punishment, to juvenile homicide offenders because of their lessened culpability. Since the justification for retribution “becomes even weaker with respect to a juvenile who did not commit homicide,” the Graham Court decided that retribution was also disproportionate when handing out the second harshest punishment, life without parole, to a juvenile non-homicide offender.

Deterrence will likely have little effect on juvenile offenders because they lack the maturity to weigh the long-term consequences of their actions. Consequently, juveniles are not likely to take the severity of punishment into consideration. Therefore, deterrence fails to justify life without parole for a juvenile non-homicide offender.

According to Graham, incapacitation also fails when applied to juvenile non-homicide offenders. Incapacitation is geared towards reducing recidivism, but juvenile behavior tends to be transient. Incapacitating a juvenile for life requires that a court “make a judgment that the juvenile is incorrigible,” but “incorrigibility is inconsistent with youth” because of a young person’s capacity to change. Additionally, a life-without-parole sentence “improperly denies the juvenile offender a chance to demonstrate growth and maturity.”

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109 Id. at 71-74.
110 Id. at 71 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)) (internal quotation mark omitted).
111 See id. at 71-72.
112 See id.
113 See id. at 72.
114 Id. at 72, 78.
115 Id. at 72.
116 See id. at 68.
117 Id. at 72.
118 Id. at 73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).
119 Id.
Finally, rehabilitation is also inapplicable because a life-without-parole sentence "forswears altogether the rehabilitative ideal." Sentencing a person to life without parole "makes an irrevocable judgment about that person's value and place in society." Making that kind of judgment about juveniles, given their capacity to change, mature, and develop, is incongruous.

Finding that none of the penological goals justified sentencing a juvenile non-homicide offender to the second harshest punishment available, the Court concluded that a categorical ban was necessary to ensure that such juvenile offenders would have "a chance to demonstrate maturity and reform." The Court noted that, like the death penalty, life without parole offered the offender no hope of ever reconciling or reentering society and that without hope there was little incentive to develop into a responsible person. The Court stated that juveniles should have a chance to achieve "maturity... and self-recognition of human worth and potential." Therefore, the Court stated that juvenile non-homicide offenders should be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The Court did not foreclose the possibility that a juvenile could spend life behind bars, but the Court determined that the decision could not be made at the outset.

Expanding on the Roper and Graham decisions that "establish[ed] that children are constitutionally different from adults for purposes of sentencing," the Court's most recent foray into its "kids are different" jurisprudence, Miller v. Alabama, held that mandatory juvenile-life-without-parole sentences were unconstitutional because they failed to take into account those differences. Miller was a consolidation of two cases, both involving fourteen-year-olds convicted of murder and

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120 Id. at 74.
121 Id.
122 Id.
123 Id. at 74, 78–79.
124 Id. at 79.
125 Id.
126 Id. at 75 (emphasis added).
127 Id.
129 132 S. Ct. 2455.
130 Id. at 2466.
sentenced to statutorily mandated life without parole. These schemes contravene the principle espoused in *Roper* and *Graham* "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Furthermore, "mandatory punishment disregards the possibility of rehabilitation." The Court reiterated the differences between children and adults set forth in *Roper* and *Graham*, and added that scientific evidence continued to build and support those differences. The Court reversed the sentences because they violated the proportionality principles of the Eighth Amendment by failing to take into consideration the juveniles' "age and age-related characteristics."

II. COURT CASES INTERPRETING *GRAHAM*

The dissenting opinions of Justices Thomas and Alito in *Graham* noted that the decision left two important questions unresolved: First, does *Graham* apply to lengthy term-of-years sentences; and second, what constitutes a "meaningful opportunity to obtain release." State and federal courts have struggled to come to a consensus regarding the application of *Graham*; even courts within the same state cannot agree.

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131 *Id.* at 2460.
132 *Id.* at 2466.
133 *Id.* at 2468.
134 *Id.* at 2464–65.
135 *Id.* at 2464 n.5. Chief Justice Roberts did not seem to have a need for the scientific evidence stating, "[T]eenagers are less mature, less responsible, and less fixed in their ways than adults—not that a Supreme Court case was needed to establish that." *Id.* at 2480 (Roberts, C.J., dissenting).
136 *Id.* at 2475 (majority opinion).
137 Justice Thomas remarked that categorical bans had, up until that point, been reserved for capital punishment, and found the new constitutional ban unwarranted. *Graham v. Florida*, 560 U.S. 48, 105 (2010) (Thomas, J., dissenting). He also criticized the Court for not more precisely defining "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 123 (internal quotation marks omitted). Justice Alito noted that the decision failed to address a sentence of a term-of-years without parole. *Id.* at 124 (Alito, J., dissenting).
Some courts have followed the spirit of Graham and found that its reasoning applies to lengthy term-of-years sentences.\textsuperscript{139} Others have followed the strict and narrow language of the decision and concluded that Graham is limited to life-without-parole sentences.\textsuperscript{140}

This Part answers the first question, whether Graham applies to lengthy term-of-years sentences, in the affirmative. Section A highlights the “kids are different” rationale in cases that do extend Graham to term-of-years sentences, Section B points out the flaws in the reasoning of courts that do not apply Graham to lengthy term-of-years sentences, and Section C concludes that Graham does indeed apply to lengthy fixed-term sentences. The second question, what constitutes a meaningful opportunity for release, is addressed in Part III.

The driving force of Graham’s holding that life without parole is unconstitutional when meted out to a juvenile non-homicide offender is that “kids are different.”\textsuperscript{141} While the language of the Graham holding\textsuperscript{142} and its objective indicia of consensus analysis\textsuperscript{143} focused on a life-without-parole sentence, all of the factors that led the Court to its decision are applicable to any lengthy juvenile non-homicide sentence. Kids are different, less mature, less responsible, less able to consider the consequences of their actions, and more capable of reform whether they are sentenced to life without parole or one or more lengthy term-of-years sentences. By reading Graham in its entirety, it is fair to conclude that it does indeed apply to lengthy fixed-term sentences that do not provide a juvenile non-homicide offender “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”\textsuperscript{144}

\textsuperscript{139} See infra Part II.A.
\textsuperscript{140} See infra Part II.B.
\textsuperscript{141} See Graham, 560 U.S. at 68–74.
\textsuperscript{142} The Court held that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” Id. at 82 (emphasis added).
\textsuperscript{143} See id. at 62–67 (discussing the national consensus); id. at 81 (noting that “the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders”).
\textsuperscript{144} Id. at 75.
A. Cases That Extend Graham to Lengthy Fixed-Term Sentences

Courts that have applied *Graham* to lengthy term-of-years sentences follow the spirit of *Graham* and recognize that juveniles are different, less culpable, more capable of reform, and therefore, should be afforded a meaningful opportunity to mature and develop. These courts see lengthy fixed-term sentences, even if they are separate sentences running consecutively, as de facto life-without-parole sentences. As such, these lengthy term-of-years sentences violate *Graham* because they do not offer non-homicide juvenile offenders the chance to reconcile with society, to demonstrate maturity and rehabilitation, or to lead fulfilling lives outside of prison walls.¹⁴⁵

In *People v. Caballero*,¹⁴⁶ the California Supreme Court determined that a 110-year-to-life sentence for a juvenile non-homicide offender violated the Eighth Amendment and contravened *Graham* because it offered him no hope of release.¹⁴⁷ In doing so, the court settled the issue for the state, which thus far had reached inconsistent holdings.¹⁴⁸ Rodrigo Caballero, a diagnosed schizophrenic, was sixteen years old when he opened fire on three boys from a rival gang.¹⁴⁹ He was sentenced to fifteen years to life for each of the three attempted murder

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¹⁴⁵ *Id. at 79.*


¹⁴⁷ *Id.* at 293, 295. The California, Louisiana, and Virginia Supreme Courts are the only state high courts to have ruled on whether de facto life sentences implicate *Graham*. Louisiana's high court held that *Graham* does not apply to sentences that exceed a juvenile's life expectancy. State v. Brown, No. 12–KP–0872, 2013 WL 1878911, at *1 (La. May 7, 2013). The Virginia Supreme Court has concluded that even true life-without-parole sentences for juvenile non-homicide offenders in Virginia do not violate *Graham* because the state's geriatric provision permits conditional release for those over sixty-five years of age. *See Angel v. Commonwealth*, 704 S.E.2d 386, 401 (Va. 2011). The Sixth Circuit is the only federal appellate court to have addressed the issue and has concluded that de facto life sentences do not implicate *Graham*. *See infra* text accompanying notes 168–180.

¹⁴⁸ *Compare People v. Nunez*, 125 Cal. Rptr. 3d 616, 618 (Ct. App. 2011) (holding that a 175-year sentence for a fourteen-year-old boy violated the Eighth Amendment), *People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 154 (Ct. App. 2011) (holding that a sentence of fifty years to life plus two consecutive life with parole sentences for a fourteen-year-old boy violated the Eighth amendment), *and People v. Mendez*, 114 Cal. Rptr. 3d 870, 873 (Ct. App. 2010) (holding that an eighty-four year sentence for a sixteen-year-old offender violated the Eighth Amendment), *with People v. Ramirez*, 123 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2011) (holding that a 120-year sentence for a juvenile non-homicide offender did not violate the Eighth Amendment).

¹⁴⁹ *Caballero*, 282 P.3d at 293.
charges, twenty-five years for one of the firearm enhancements, and twenty years for each of the other two firearm enhancements, all to run consecutively.\textsuperscript{150} Under California law, he would be required to serve 110 years in prison before being eligible for parole.\textsuperscript{151}

In declaring the sentence unconstitutional, the Supreme Court of California concluded that a term-of-years sentence that exceeded a juvenile’s life expectancy was a de facto life-without-parole sentence and therefore Graham applied.\textsuperscript{152} The court noted that Caballero would not be eligible for parole for over 100 years, which afforded him no opportunity for release based on growth and maturity.\textsuperscript{153} This was “in contravention of Graham’s dictate.”\textsuperscript{154} The analysis in Graham focused not on the “precise sentence meted out” but the realistic opportunity for release.\textsuperscript{155} Therefore, under Graham, any term-of-years sentence for a juvenile non-homicide offender that provided for parole outside of the juvenile’s life expectancy constituted cruel and unusual punishment and violated the Eighth Amendment.\textsuperscript{156}

The concurring opinion conceded that the court was “extending the high court’s jurisprudence to a situation that court has not had occasion to address,” but supported the court’s decision.\textsuperscript{157} Graham stated that life sentences for juveniles are cruel because of developmental and fundamental differences between children and adults; children are more capable of reform and change.\textsuperscript{158} In addition, none of the legitimate goals of punishment “provide[] . . . adequate justification” for life without parole for juvenile non-homicide offenders.\textsuperscript{159} “These concerns remain true whether the sentence is life without parole or a term of years exceeding the offender’s life expectancy.”\textsuperscript{160} Accordingly,

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 295.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 296 (Werdegar, J., concurring).
\textsuperscript{158} Id. at 297–98 (citing Graham v. Florida, 560 U.S. 48, 68–69 (2010)).
\textsuperscript{159} Id. at 298 (quoting Graham, 560 U.S. at 71). See supra text accompanying notes 104–17 for a discussion of the legitimate goals of punishment: retribution, deterrence, incapacitation, and rehabilitation.
\textsuperscript{160} Caballero, 282 P.3d at 298.
since Caballero’s sentence was the functional equivalent of life without parole, he was entitled to the constitutional protection set forth in *Graham*.\(^{161}\)

Similarly, in *Floyd v. State*,\(^{162}\) the court reversed two consecutive forty-year sentences because the sentence did not provide the juvenile a meaningful opportunity for release.\(^{163}\) Antonio Demetrius Floyd was seventeen years old when he committed grand theft auto and two counts of armed robbery with a “realistic looking” pellet gun.\(^{164}\) The crime was committed in 1998 and he was sentenced to life without parole.\(^{165}\) Ten years later, after *Graham* was decided, he was resentenced to two consecutive forty-year terms.\(^{166}\) Floyd would be at least eighty-five-years old before he would be eligible for release, which, according to statistics, exceeded his life expectancy.\(^{167}\)

The District Court of Appeal of Florida concluded that the trial court violated *Graham* on three different fronts when it resentenced Floyd to a total of eighty years in prison. First, the appellate court determined that *Graham* applied because common sense dictates that a sentence that exceeds a juvenile’s life expectancy is equivalent to life without parole.\(^{168}\) Second, the two consecutive forty-year terms did not afford Floyd any meaningful opportunity for release.\(^{169}\) Third, the trial court impermissibly determined “at the outset that [the] offender[] will never be fit to reenter society.”\(^{170}\) Accordingly, the appellate court reversed the sentences and remanded.\(^{171}\)

**B. The Flawed Reasoning in Cases That Fail To Apply *Graham* to Lengthy Term-of-Years Sentences**

Courts that do not apply *Graham* to anything but a juvenile life-without-parole sentence focus on the language of the holding,

\(^{161}\) *Id.* at 299.
\(^{162}\) 87 So. 3d 45 (Fla. Dist. Ct. App. 2012).
\(^{163}\) *Id.* at 47.
\(^{164}\) *Id.* at 45 (internal quotation marks omitted).
\(^{165}\) *Id.*
\(^{166}\) *Id.* at 45–46.
\(^{167}\) *Id.* at 46. This includes the maximum gain time Floyd could receive. If he served his entire sentence, he would not be released until he was ninety-seven years old. *Id.* at 46–47.
\(^{168}\) *Id.* at 47.
\(^{169}\) *Id.*
\(^{170}\) *Id.* at 46.
\(^{171}\) *Id.* at 47.
often to the exclusion of its rationale. However, the rationale is what justifies a court’s decision, gives it weight and merit, and illustrates that the court fully examined the issues at hand. Members of the judiciary spend a great deal of time and effort crafting their opinions in order to set forth the law and explain the court’s ruling. Furthermore, since the court can only address the specific issue presented to it, the opinions can offer guidance in how the law might be applicable in similar but factually different situations. Courts that staunchly adhere to the strict wording of Graham’s holding often ignore the Court’s rationale and violate the underpinnings of the decision.

For example, in Bunch v. Smith, the Sixth Circuit Court of Appeals concluded that Graham did not apply to an eighty-nine-year sentence of a juvenile convicted of armed robbery, kidnapping, and rape because Graham “made... clear that [it] ... concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.” Chaz Bunch, along with another armed person, robbed the victim, drove her to a gravel lot, and raped her multiple times. There were no fingerprints found, and the only DNA evidence was determined to belong to the other person. None of Bunch’s DNA was recovered from the scene or the victim. Despite the lack of physical evidence and Bunch’s constant proclamations of innocence, the Ohio trial court sentenced him to the maximum

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172 Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19–20 (1959) (“The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . .”).

173 Charles W. Collier, Precedent and Legal Authority: A Critical History, 1988 Wis. L. Rev. 771, 822 (1988) (“The whole point of written judicial opinions, after all, is to explain legal decisions, not merely to announce them.” (emphasis omitted)).

174 RUPERT CROSS & J. W. HARRIS, PRECEDENT IN ENGLISH LAW 94 (4th ed. 1991) (“One of the functions of the courts . . . is to discuss and enunciate general principles as pointers to the future development of the law.”).

175 685 F.3d 546 (6th Cir. 2012).

176 Id. at 551 (quoting Graham v. Florida, 560 U.S. 48, 63 (2010)) (internal quotation mark omitted).

177 Id. at 548. Two other males were involved in the crime. One stole some of the victim’s belongings while she was being raped, and another individual watched from the car. Corrected Merit Brief of Appellant Chaz Bunch, A Minor Child, Bunch, 685 F.3d 546 (No. 10–3426), 2011 WL 1977398, at *5–6.

178 Corrected Merit Brief of Appellant Chaz Bunch, A Minor Child, supra note 177, at *7.

179 Id.
for each of his offenses. By basing their decisions strictly on the holding of Graham, both the trial court and the circuit court trampled on the spirit of Graham.

Graham established that the Eighth Amendment “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society,” yet that is exactly what the sentencing judge did in Bunch. Before imposing the maximum sentence for each of Bunch’s offenses, the sentencing judge explained, “I’ve got to do everything I can to keep you there, because it would be a mistake to have you back in society.” By sentencing him to a total of eighty-nine years in prison, the sentencing judge made sure that Bunch would never reenter society, which is in direct contravention of Graham’s mandate that the incorrigibility of a juvenile cannot be determined at the outset.

Furthermore, a sentence of eighty-nine years imposed on a sixteen-year-old offender does not offer the juvenile a “meaningful opportunity to obtain release” as dictated by Graham. The Sixth Circuit Court of Appeals conceded that Bunch’s sentence “may end up being the functional equivalent of life without parole” but still concluded that Bunch was not entitled to Graham’s opportunity for release, because he was not the recipient of a life-without-parole sentence. That, however, ignores the principles set forth in Graham that “[j]uveniles are more capable of change than are adults,” that their characters are not yet fully formed, and that “a greater possibility exists that a minor’s character deficiencies will be reformed.” In addition, Graham stated that a “juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential” and that “a

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180 See id. at *7–9; Bunch, 685 F.3d at 548. Bunch was sentenced to 180 days for misdemeanor menacing, nine years for firearms specifications, and ten years for each of the following offenses: three counts of rape, three counts of complicity to commit rape, aggravated robbery, and kidnapping. Bunch, 685 F.3d at 548.
181 Graham, 560 U.S. at 75.
182 Bunch, 685 F.3d at 548 (internal quotation mark omitted).
183 Id.
184 Graham, 560 U.S. at 79. “A State need not guarantee the offender eventual release, but . . . it must provide him or her with some realistic opportunity to obtain release before the end of that term.” Id. at 82.
185 Bunch, 685 F.3d at 551.
categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." By determining that *Graham* did not apply merely because the sentence meted out was not an actual life-without-parole sentence, the *Bunch* court completely ignored the rationale espoused in *Graham* that juveniles are different and should be afforded the opportunity to mature and atone for their wrongdoings.

Similarly, in *State v. Kasic*, the court upheld a juvenile’s 139-year sentence because none of his individual sentences resulted in a life-without-parole sentence, regardless of the fact that he would have no opportunity for release. Mark Kasic was convicted of numerous arson offenses he committed over the course of a year, when he was seventeen and eighteen years old. Even though his sentence exceeded his life expectancy, the Arizona Appellate Court found *Graham* inapplicable because the *Graham* holding was limited to life-without-parole sentences based on a single felony. Kasic was sentenced to separate term-of-years sentences based on thirty-seven felonies. The fact that Kasic’s sentence would keep him in prison for the rest of his life was not a factor in the court’s decision, because none of Kasic’s individual convictions, the longest of which was fifteen and three-quarter years, were excessive given the gravity of each offense, nor were any of them a life-without-parole sentence. By limiting its decision to the literal wording of the holding, the court found that *Graham* did not apply, even though Kasic would never have the “chance to demonstrate maturity and reform” decreed in *Graham*.  

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187 *Id.* at 79 (emphasis added).
188 The court analyzed the case under *Graham* and determined that it did not apply and that it did not “clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole.” *Bunch*, 685 F.3d. at 547. The court did not base its holding on *Graham*. It held that *Bunch* was not entitled to habeas relief because the lower court did not violate clearly established federal law. *Id.* at 550.
190 *Id.* at 411, 415. Kasic’s actual sentence was 139 years and nine months. *Id.* at 411.
191 *Id.* Eighty-five-and-a-half years of the sentence reflected crimes committed when he was seventeen years old. *Id.* at 411 n.1.
192 *Id.* at 413–15.
193 See *id.* at 413.
194 See *id.* at 415.
The court determined that Kasic’s 139-year sentence furthered the penological goals of Arizona, which defies Graham’s findings that “penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.” The Arizona Court of Appeals explained that arson is a very serious offense and that there was ample support that Kasic intentionally set fire to the occupied structures when its inhabitants were asleep. But, Graham made a distinction between other serious crimes and murder, finding that nonhomicide crimes “differ from homicide crimes in a moral sense.” Graham recognized that some juveniles “who commit truly horrifying crimes ... may turn out to be irredeemable,” and that “[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime.” However, a state is forbidden from determining that the offender will never “be fit to reenter society” at the outset. By sentencing Kasic to 139 years, even though his crimes were horrific and may have furthered Arizona’s penological goals, the Arizona Court of Appeals made the determination that Kasic was incapable of reform at the outset, which flouts the spirit of Graham.

C. Graham Applies to Lengthy Term-of-Years Sentences

The cases above illustrate that sentencing juveniles to prison for the better part of their lives violates the spirit of Graham, an opinion shared by many courts, even those that have not extended Graham to term-of-years sentences. After all, at the

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196 Kasic, 265 P.3d at 416.
197 Graham, 560 U.S. at 74.
198 Kasic, 265 P.3d at 415.
199 Graham, 560 U.S. at 69.
200 Id. at 75.
201 Id.
202 See, e.g., Smith v. State, 93 So. 3d 371, 378 (Fla. Dist. Ct. App. 2012) (Padovano, J., concurring) (upholding the eighty-year sentence for a seventeen-year-old, but concluding that sentencing juveniles to lengthy fixed-term sentences violates the spirit of Graham); Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (upholding a ninety-year sentence for a seventeen-year-old, while admitting that Graham contained language to suggest that “a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is ‘life’ or 107 years”); Gridine v. State, 89 So. 3d 909, 911 (Fla. Dist. Ct. App. 2011) (Wolf, J., dissenting) (disagreeing with the affirmation of a seventy-year sentence of a fourteen-year-old boy because it “violate[s] the spirit, if not the letter, of the Graham decision”).
heart of *Graham* is the recognition that because juveniles are less mature and are not fully developed, they lack the same culpability of an adult, they have behavior that is transient, and they are more capable of rehabilitation than adults. Those differences do not disappear merely because the sentence is a lengthy term-of-years sentence instead of life without parole. So while the holding may specify a life-without-parole sentence, when the opinion is taken as a whole, it applies to any lengthy term-of-years sentence that fails to offer a juvenile offender the opportunity to mature, to make amends for wrongdoings, to develop into a contributing member of society, and to lead a meaningful life outside of the confines of prison walls.

III. MEANINGFUL OPPORTUNITY FOR RELEASE

As noted in Justice Thomas’s dissent in *Graham*, although the Court held that juvenile non-homicide offenders must have a reasonable opportunity to obtain release based on maturity and rehabilitation, it did not define that meaningful opportunity for release. Instead, the Court left it for the states “to explore the means and mechanisms for compliance.” Unfortunately, without guidance from the Court as to when states must offer this opportunity for release, states have no way of knowing if their “means and mechanisms” comply with *Graham*. Therefore, this Part submits that the Court set a constitutional boundary defining when states must provide a meaningful opportunity for release. Section A suggests that the boundary be set at thirty years. Section B proposes some statutory models that states can implement to comply with *Graham*. Section C briefly discusses state responses to *Graham*’s mandate.

A. The Constitutional Limit

Constitutional boundaries, just like categorical rules, “tend to be imperfect, but...necessary.” Creating constitutional boundaries and categorical rules both involve balancing interests and drawing lines in areas that lack precision. In concluding that eighteen was “the age at which the line for death eligibility ought to rest,” the *Roper* Court remarked, “[O]bjections [are]
always raised against categorical rules.\textsuperscript{206} In drawing the line at eighteen years of age, the Court noted that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."\textsuperscript{207} The Court drew the line at eighteen years of age, as that is "where society draws the line for many purposes between childhood and adulthood."\textsuperscript{208} The same difficult balancing act arises in specifying a time within which states must provide a juvenile non-homicide offender a meaningful opportunity for release. The time period must take into account the individual rights of juvenile non-homicide offenders, who are less culpable and more able to reform, as well as states' rights to set their own penal policies and society's need to punish those who do wrong. Setting that boundary at thirty years honors both the spirit of Graham and the states' rights to legislate criminal and social policies as they see fit. Anything less than thirty years would impermissibly restrain states, while anything more would frustrate the purposes of Graham.

The proposal of a thirty-year constitutional boundary is not derived from empirical, scientific, psychological, or developmental data. In fact, psychological data, which suggests that cognitive development continues well into young adulthood, would call for a much earlier line of demarcation.\textsuperscript{209} Even the Model Penal Code ("MPC") and the Federal Sentencing Guidelines would suggest an earlier boundary.\textsuperscript{210} However, the Constitution only sets forth the minimum level of protection afforded to a citizen, not the ideal level of protection. A constitutional mandate much less than thirty years runs the risk of not satisfying a society's need to punish wrongdoers. Therefore, the thirty-year boundary is based on a logical middle

\begin{itemize}
\item \textsuperscript{206} Roper v. Simmons, 543 U.S. 551, 574 (2005).
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id.
\item \textsuperscript{210} See infra Part III.B.2–3.
\end{itemize}
ground between these opposing forces and the middle ground of current state legislative solutions, which call for prison sentences between ten and forty years.\textsuperscript{211}

While concededly somewhat arbitrary, this Note settles on a thirty-year constitutional mandate as a fair compromise that adequately balances competing interests. Thirty years is still a lengthy punishment that would allow for a "meaningful opportunity for release." An eighteen-year-old offender would have up to twelve years to reach full maturity and to reform, would serve another eighteen years in prison to atone for his or her crime, and would be eligible for release at the age of forty-eight. In addition, thirty years is broad enough to permit states to legislate according to their own penological goals, and narrow enough to provide states adequate guidance and to give juvenile non-homicide offenders the opportunity for release mandated in \textit{Graham}.

A constitutional boundary of thirty years will provide states with the guidance they need to legislate accordingly to comply with \textit{Graham}. Thirty years allows states that are more lenient room to develop greater protections for juvenile non-homicide offenders and states with harsher penal laws a limit within which to work. A shorter period would be too restrictive for states with more stringent criminal policies, while a longer period would run the risk of becoming irrelevant.

As a constitutional boundary, thirty years is consistent with the underpinnings of \textit{Graham}. The possibility of release provides juveniles with the "hope of restoration" and the hope of returning to society.\textsuperscript{212} If there is hope of release, then there is an "incentive to become a responsible individual,"\textsuperscript{213} which can lead to reform. Because juveniles are less future-focused than adults, juveniles tend to live in the present,\textsuperscript{214} which leads to "[d]ifficulty in weighing long-term consequences."\textsuperscript{215} Therefore, requiring them to serve any longer than thirty years in prison before there is any possibility of release could very well cause them to lose hope, which would thwart the principles delineated in \textit{Graham}.

\textsuperscript{211} See infra Part III.C for a discussion of current state legislative solutions.
\textsuperscript{213} Id. at 79.
\textsuperscript{215} Graham, 560 U.S. at 78.
Thirty years would also allow for sufficient time to evaluate whether the juvenile is incorrigible or not. Juveniles lack maturity, which affects their ability to make decisions and to take the consequences of their actions into consideration. They are not yet fully formed, and they are “more vulnerable or susceptible to negative influences and outside pressures.” According to Graham, “[t]hese salient characteristics mean that ‘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.’” Imprisoning a juvenile non-homicide offender for up to thirty years before the possibility of release allows ample time to determine if the juvenile’s criminal behavior reflects “transient immaturity” or “irreparable corruption.”

Setting the outer boundary for when states must provide juvenile non-homicide offenders a chance at release at thirty years balances the spirit of Graham without improperly restraining a state’s ability to set its own policy in how best to punish wrongdoers. It is a short enough time period to offer a juvenile non-homicide offender the hope and opportunity to obtain release based on maturity and reform yet long enough to meet society’s need for retribution and give states leeway to legislate as they see fit.

B. Guidelines for Implementing Legislation To Comply with Graham

This Section presents several guidelines that states can use to respond to and comply with Graham and the suggested thirty-year constitutional boundary. The policies underlying these guidelines reflect Graham’s focus on the lesser culpability of juvenile offenders and their great capacity for change. Professor

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216 Id. at 68.
217 Id. (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).
218 Id. (quoting Roper, 543 U.S. at 573).
Barry Feld's juvenile discount, which is discussed first, is the most flexible. The three models that follow are addressed in order from the most stringent to the most lenient.

1. Barry Feld's Juvenile Discount

For states looking to append their current sentencing statutes and retain flexibility, Barry Feld's juvenile discount may be a viable option. Professor Feld suggests a sliding scale that would adjust any adult sentence meted out to a juvenile offender commensurate with the juvenile's age. For example, a twelve-year-old would receive a larger discount than would a seventeen-year-old due to the twelve-year-old's greater lack of maturity. The discount would use "age-as-a-proxy-for culpability" in determining the fractional reduction in a sentence: the younger the offender, the greater the sentence reduction. This kind of sliding scale "recognizes that same-length sentences exact a greater 'penal bite' from younger offenders than older ones." It would also enable juvenile "offenders to survive serious mistakes with their life chances intact." This kind of structure would permit states to meet their penal goals by sentencing juveniles to no more than thirty years, the outer limit of the suggested constitutional boundary, while still giving juveniles the ability to rehabilitate and return to society. Barry Feld's discount would be a good model for states that already have or are looking to implement highly individualized social policies regarding juveniles.

219 Barry C. Feld is a Professor of Law at the University of Minnesota and a leading scholar in juvenile justice. Barry C. Feld, Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences, 10 J.L. & FAM. STUD. 11, 11 (2007).
220 See id. at 75–76; see also Mary Berkheiser, Death Is Not so Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence, 36 VT. L. REV. 1, 60 (2011).
221 See Feld, supra note 219, at 75; Berkheiser, supra note 220.
222 See Feld, supra note 219, at 76.
223 Id. at 75 (quoting Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 65, 121–23 (1997)) (internal quotation mark omitted).
224 Id.
225 Id.
226 Id. at 76.
2. A Model Based on the Model Penal Code

The rehabilitation-centered MPC is a natural source for setting a sentencing policy for states wanting to provide juvenile non-homicide offenders with an earlier opportunity for release than the thirty-year proposed constitutional boundary. The construct of the MPC would provide juveniles with that possibility after serving twenty years in prison.

Sentencing under the MPC is a “human process” that takes into account each defendant’s “unique bundle of attributes and experiences.” Human beings are viewed as “malleable and redeemable” and the Code allows offenders the “opportunit[y] for self-improvement and advancement.” The MPC focuses on rehabilitation instead of punishment, and, in fact, avoids using the word “punishment” and instead opts for “sentenc[ing],” “treatment,” or “disposition.” Under the MPC, prison sentences are only issued if “necessary for protection of the public.”

The first draft of the MPC set out three categories of felonies and corresponding sentencing ranges. First-degree felonies were punishable by a minimum term of one to twenty years, and a maximum of life in prison. Second-degree felony offenders were sentenced to a minimum of one to three years and a

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227 The MPC was developed by the American Law Institute (“ALI”) in the 1950s and first promulgated in the 1960s. Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 24 (1998). The MPC rationalizes the entire range of criminal behavior. Id. The sentencing and corrections sections of the MPC however, are largely discretionary and favor accommodating the individual offender’s treatment to the individual offender’s specific needs over the need for a strict guideline of punishment. Id.; Michael Tonry, Reconsidering Indeterminate and Structured Sentencing, Sentencing & Corrections: Issues for the 21st Century, Sept. 1999, at 2-4.

228 Tonry, supra note 227, at 3, 5; Stith & Cabranes, supra note 227, at 24-25.

229 Tonry, supra note 227, at 5.

230 Stith & Cabranes, supra note 227, at 25 (internal quotation marks omitted) (citing Model Penal Code § 1.02(2)).

231 Id. at 32. All three editions of the American Bar Association’s Sentencing Standards and the National Commission on Reform of Federal Criminal Laws echoed this principle. Michael Tonry, Sentencing Matters 195 (1996). “The sentence imposed should be no more severe than necessary to achieve the social purpose or purposes for which it is authorized.” Id. (quoting American Bar Association Criminal Justice Section, Sentencing Standard § 18-6.1(a), available at http://www.americanbar.org/groups/criminal_justice/pages/Sentencing.html (last visited Apr. 1, 2015)) (internal quotation marks omitted).

232 Tonry, supra note 227, at 4.

233 Id.
maximum of ten years. Third-degree offenses were subject to a minimum of one to two years and a maximum of five years. Prisoners were eligible for release after serving the minimum of their sentence, and there was a presumption that parole would be granted.

Creating the statutory line of demarcation for when juvenile non-homicide offenders are eligible for parole at twenty years, the highest of the minimum sentences under the MPC, would be sufficient to reflect the serious nature of the juvenile’s crime while providing an earlier possible release date. This option would meet the needs of states with relatively stringent penal policies focused on rehabilitation that wanted an option for earlier release than the proposed thirty-year constitutional boundary.


Legislation based on the policies set forth in the Federal Parole Guidelines would also focus on rehabilitation, since the goal of parole is to release prisoners who are no longer likely to reoffend, and to reintegrate them into society as functioning members of the community. This would be a good option for

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234 Id.
235 Id.
236 Id. The final draft of the Model Penal Code noted that public opinion, which often overrode the presumption of parole, might play a significant role in setting sentencing and probation guidelines. Id.
237 The sentencing provisions of the MPC are currently being revised. The March 25, 2011 Tentative Draft No. 2 includes an entire section regarding punishment of juvenile offenders that stipulates that juvenile sentences cannot exceed twenty-five years and that sentences will be reviewed after ten years. MODEL PENAL CODE § 6.11A (Tentative Draft No. 2 2011), available at http://www.ali.org/00021333/ModelPenalCodeTD20No%2020-%20online%20version.pdf.
238 The first set of federal parole guidelines were created by the Board of Parole in 1972. PETER B. HOFFMAN, U.S. DEP’T OF JUSTICE, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003), available at http://www.justice.gov/uspc/history.pdf. The Board of Parole became an independent agency within the judicial branch of the government as part of the 1976 Parole Commission and Reorganization Act. Id. The Act maintained the Board of Parole’s requirements of written parole decisions and explicit parole guidelines, but renamed it the United States Parole Commission. Id. The Parole Commission was abolished as part of the Comprehensive Crime Control Act of 1984, but continued to exist until 2002. Id. at 1–2.
states that focus more on rehabilitating juvenile non-homicide offenders than on punishing them. It provides for possible release after the juvenile has served ten years in prison, well before the thirty-year proposed constitutional boundary.

Before the Sentencing Reform Act of 1984\(^\text{240}\) put an end to federal parole, the parole guidelines gave inmates serving lengthy sentences the possibility of parole after serving ten years.\(^\text{241}\) Using ten years as a statutory guideline would be consistent with social science research that concludes that the goals of retribution, deterrence, and incapacitation can all be met within the first ten years of a juvenile’s imprisonment.\(^\text{242}\) The research also notes that sentences of much greater length have a negative impact on the possibility of rehabilitation.\(^\text{243}\) Basing legislation on this model would be good for states with fairly lenient penal sanctions and social policies more focused on rehabilitation than punishment.

4. The American Association of Child & Adolescent Psychiatry Model

The American Association of Child & Adolescent Psychiatry (“AACAP”), which submitted amicus briefs in both *Roper* and *Graham*, has the most lenient view of the sentencing parameters. It suggests that juveniles should have their sentences reviewed either when they reach twenty-five or within five years of their incarceration, whichever comes first.\(^\text{244}\) These guidelines were based on scientific research of juvenile mental, emotional, and physiological development and reflect that juveniles continue to

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\(^{241}\) See HOFFMAN, supra note 238, at 22.


\(^{243}\) Id.

develop and mature into their early and mid-twenties.\textsuperscript{245} This research established that the parts of the brain that are responsible for impulse control and well-reasoned decision-making continue to develop from adolescence through early adulthood.\textsuperscript{246} AACAP also recommends subsequent sentence reviews approximately every three years.\textsuperscript{247} The AACAP offers juveniles the earliest possible chance at release and offers guaranteed sentence review should the juvenile's bid for release fail.\textsuperscript{248} Of all the proposals, this is the one that is most tailored to juveniles development and maturity. However, it does not seem to address society's need for punishment. Furthermore, it leaves states little room to enforce social policies or enact legislation, and would possibly be administratively infeasible.

\section*{C. State Responses to Graham}

Without any guidance from the Supreme Court, state responses to Graham's mandate have spanned from Michigan's provision, which provides for release after a minimal ten years,\textsuperscript{249} to Colorado's statute, which requires a minimum of forty years to be served.\textsuperscript{250} Some states have made adjustments to their current statutes in order to comply with Graham.\textsuperscript{251} Virginia has relied on its Supreme Court's ruling that applying their geriatric

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\footnote{246}{Id.; see also Graham v. Florida, 560 U.S. 48, 68 (2010).}
\footnote{247}{Juvenile Justice Reform Comm., supra note 245.}
\footnote{248}{Id.}
\footnote{249}{See Feld, supra note 219, at 78.}
\footnote{250}{See id. at 77. Colorado's statute pre-dates Graham and is prospective only. Id. Pennsylvania's proposed statute also pre-dates Graham and provides for parole at the age of thirty-one with the option to reapply every three years if parole was denied. Glynn & Vila, supra note 244, at 330. Pennsylvania successfully passed legislation that set a cap of forty years for juveniles convicted of certain felony sex offenses. See Feld, supra note 219, at 78.}
\footnote{251}{Iowa amended their mandatory life-without-parole for class A felonies statute to provide any offender under the age of eighteen the possibility of parole after twenty-five years in prison. Glynn & Vila, supra note 244, at 329. Ohio's amended statute provides inmates the opportunity to petition for judicial release after they have served at least half of their sentence or within five years of the mandatory term, whichever is longer. Goins v. Smith, No. 4:09-CV-1551, 2012 WL 3023306, at *7 (N.D. Ohio July 24, 2012). For a juvenile serving an eighty-year sentence, release would not be possible until after serving forty years in prison.}
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provision, which provides inmates over the age of sixty-five the opportunity for release, is sufficient to comply with *Graham.*\(^{252}\)

Other states have proposed specific statutes. California's Senate Bill 9 is still working its way through the legislative process and would permit any inmate, not just juveniles, sentenced to life without parole, to seek resentencing after serving a minimum of fifteen years.\(^{253}\) Louisiana's and Florida's proposals, which provide for release after thirty-five years\(^{254}\) and twenty-five years\(^{255}\) respectively, have both failed.

It is clear from the divergent state approaches that some kind of guidance from the Supreme Court is necessary. While the Court properly left the "means and mechanisms for compliance" to the states, it failed to provide the states a constitutional boundary within which to craft their method of compliance.\(^{256}\) If the Court provides a constitutional boundary, as this Note suggests, then states would be better able to develop legislation that is consistent with their social, criminal, and penal policies. Setting that boundary at thirty years addresses not only the states' needs, but also the juveniles' by affording them a meaningful opportunity to obtain release.

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252 See Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011) (noting that Code § 53.1-40.01 provides for conditional release of prisoners when they reach the age of sixty-five, which complies with *Graham*); Glynn & Vila, supra note 244, at 325. For juveniles convicted before their eighteenth birthday, that equates to spending a minimum of forty-three years behind bars.

253 See Glynn & Vila, supra note 244, at 329–30.

254 Louisiana's legislature proposed that children serving a life-without-parole sentence be eligible for parole after serving thirty-five years of their sentence. *Id.* at 332 (noting that this did not apply to juveniles convicted of murder and required those convicted of rape to be categorized as sex offenders upon release). For the time being, Louisiana courts have just excised the no-parole clause from the relevant statutes. See, e.g., State v. Shaffer, 77 So. 3d 939, 942 (La. 2011) (holding that the state may not enforce La. R.S. §§ 15:574.4(A)(2), (B) against any juvenile non-homicide offenders); State v. Walder, 104 So. 3d 137, 142 (La. Ct. App. 2012) (holding that excising the parole ineligibility for aggravated rape committed when defendant was seventeen years old was in compliance with *Graham*).

255 The last version of House Bill 5, the Graham Compliance Act, permits juvenile non-homicide offenders sentenced to life without parole to be resentenced after serving twenty-five years, provided they have had a clean disciplinary record for three years. See Glynn & Vila, supra note 244, at 330–31; Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release,* 16 BERKELEY J. CRIM. L. 1, 38–39 (2011). A previous incarnation, Senate Bill 616, predated *Graham* and proposed that juveniles under age fifteen sentenced to life in prison be eligible for release after eight years. Feld, supra note 219, at 78.

CONCLUSION

The Court’s history is replete with rulings that recognize that juveniles lack the same maturity as adults. Four times over the past seven years, the Court has recognized these differences and granted additional rights and protections to juveniles that are unavailable to adult offenders. *Roper* was decided in 2005, followed by *Graham* in 2010. *J.D.B. v. North Carolina* and *Miller v. Alabama* followed in close succession in 2011 and 2012, respectively. The amount of attention the Court has paid to juveniles and their rights in recent years points to its intention to expand those rights. Even Justice Alito, in his dissent in *Miller*, noted this tendency of the Court and wondered what further action the Court might take.²⁵⁷

The Court in *Graham* was not faced with a lengthy term-of-years sentence, or consecutive fixed-term sentences that exceed a juvenile’s life expectancy; however, it can be inferred from the Court’s reasoning that if it had been presented with these other long-term sentences, it would have reached the same conclusion. To find otherwise would be incongruous. Clearly, the same adolescent developmental and maturity issues enunciated in both *Roper* and *Graham* do not merely vanish because a sentence is a lengthy term-of-years sentence instead of life without parole. Juveniles are less mature, less culpable, more susceptible to peer pressure, and more apt to be led down the wrong path regardless of their sentence. They have the capacity to outgrow this immaturity if they are given the chance. *Graham* gives juvenile non-homicide offenders that chance, and any extended sentence that takes away that chance violates *Graham*.

*Graham* was a landmark decision that recognized that “juveniles have a substantive right to be treated differently [than adults] when states seek to punish them” because they are less culpable, more susceptible, and more likely to mature and

²⁵⁷ *Miller v. Alabama*, 132 S. Ct. 2455, 2489–90 (2012) (Alito, J., dissenting). It is true that, at least for now, the Court apparently permits a trial judge to make an individualized decision that a particular minor convicted of murder should be sentenced to life without parole, but do not expect this possibility to last very long. . . . Having held in *Graham* that a trial judge with discretionary sentencing authority may not impose a sentence of life without parole on a minor who has committed a nonhomicide offense, the Justices in the majority may soon extend that holding to minors who commit murder. We will see.

*Id.*
grow out of their criminal behavior than adults.\textsuperscript{258} Unfortunately, in leaving the method of providing a meaningful opportunity to the states, \textit{Graham} failed to set forth any guidelines to aid states in the application of its ruling. This has led to confusion among the courts and inconsistent rulings. In order for the spirit behind the \textit{Graham} decision to reach its full potential, the Court will have to step in, clarify its holding, and set a constitutional boundary as to when states must offer a juvenile non-homicide offender an opportunity for release. This Note suggests that thirty years would be the appropriate boundary. In the meantime, it would behoove states to draft legislation that honors the rehabilitative spirit that \textit{Graham} evinces.

\textsuperscript{258} Martin Guggenheim, Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing, 47 HARV. C.R.-C.L. L. REV. 457, 457, 462 (2012).