

# Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release

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## INTRODUCTION

“The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”<sup>1</sup>

Childhood bespeaks opportunity, especially as it relates to the passage of time—that is children have more years left ahead than left behind. Yet, opportunity varies from one child to the next depending on their circumstances (psychological, sociological, or otherwise). In *Graham v. Florida*, the United States Supreme Court held that the Eighth Amendment prohibits the sentence of life without parole for juveniles convicted of non-homicide offenses.<sup>2</sup> The *Graham* Court further provided that the States must provide juveniles sentenced to life with a “meaningful opportunity for release.”<sup>3</sup> The legal and practical question remains—what amounts to a “meaningful opportunity for release”?

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<sup>1</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

<sup>2</sup> *See id.*

<sup>3</sup> *Id.* at 2030.

Although *Graham* articulated a clear standard, the Court left it open to the States to implement the policies and procedures for compliance.<sup>4</sup> This article asserts that the States' policies and sentencing procedures must return to the rehabilitative model under which juvenile offenders have historically been treated in order to comply with *Graham*'s constitutional restraints. Sentencing a child to spend his natural life in prison might seem more reasonable for commission of violent crimes such as sexual battery, robbery, or burglary with a weapon; however, the range of non-homicide crimes covered extends to less violent crimes including car-jacking. Florida is clearly the most zealous state for sentencing juveniles to life without parole for these less violent crimes<sup>5</sup> and thus the implications of the *Graham* decision are most illustrative for this state. Accordingly, this article will examine Florida's statutory scheme and recommend how the State can restructure its legislation to comply with the *Graham* requirement.

Part I provides a brief overview of the opinion. Part II argues that the Supreme Court indirectly presses the States, through its imposition of a categorical rule, to return to rehabilitative models for the incarceration of juveniles sentenced to life. States that continue to impose life sentences on juveniles for non-homicide crimes must therefore assume the laudable task of constructing a legal structure that will comply with the Court's constitutionally imposed boundary of "meaningful opportunity."

Part II also examines Florida as a model for identifying how existing States' statutory schemes must be refashioned to comply with *Graham*. More specifically, it points to obstacles in Florida's current statutory framework (charging/jurisdictional and sentencing

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<sup>4</sup> *Id.*

<sup>5</sup> See generally Lauren Fine, *Death Behind Bars: Examining Juvenile Life Without Parole in Sullivan v. Florida and Graham v. Florida*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 24, 38 (2009). Additionally, a study conducted by researchers from Florida State University shows that of the sixty-four juvenile offenders who have been sentenced to life without parole nationwide for robbery, burglary, battery, and carjacking, sixty-one of these juvenile offenders were sentenced in Florida. Their data also shows that Florida, in comparison to all other states, most remarkably confines more juveniles to a life behind bars than other states without opportunity for release. Paolo Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 6 (Florida State Univ. College of Law, Public Law Research Paper No. 399, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1490079](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490079).

provisions) that must be deconstructed if rehabilitative goals are to replace punitive ones. After deconstruction, the States' legislative intent found in existing Criminal Punishment and Juvenile Justice Codes can help spearhead the reconstruction of useful models such as "serious or habitual juvenile offender" and "youthful offender" classifications to identify a new class of "juvenile life sentence offenders." The new classification will then prescribe a provision of services to be provided during incarceration that amount substantively to a meaningful opportunity for release. While the statutes provide the basis for complying with *Graham*, the process for determining release must also follow the spirit of the Court's opinion.

Accordingly, Part III considers a separately created prison release model for juvenile life sentence offenders that recovers the foundational reform principle historically present in U.S. parole systems. This section expounds a recommended release model that is rooted in the psychology of human conduct and that strives to attain balance between punishment and crime prevention. Part IV discusses the aftermath of *Graham* in Florida where proposed legislation provides parole for juvenile offenders.

## I. CASE SUMMARY

In *Graham*, the United States Supreme Court held that the Eighth Amendment prohibits the sentence of life without parole for juvenile offenders under the age of eighteen convicted of a non-homicide crime.<sup>6</sup> In that case, petitioner Graham was arrested for home invasion robbery with possession of a firearm.<sup>7</sup> The trial court found that Graham violated his probation for earlier charges including attempted armed robbery and armed burglary by committing the home invasion robbery and associating with persons engaged in criminal activity.<sup>8</sup> He was sentenced to the maximum life imprisonment on the armed burglary and fifteen years on the attempted robbery.<sup>9</sup>

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<sup>6</sup> See *Graham v. Florida*, 130 S. Ct. at 2033.

<sup>7</sup> FLA. STAT. § 775.087(1), (2)(a)(1)(o) (2010). Graham was charged with a "home invasion robbery" as a first degree felony that was reclassified as a "life felony" because he "carrie[d], display[ed], use[d]" a weapon during the commission of the felony. *Graham v. Florida*, 130 S. Ct. at 2018–19.

<sup>8</sup> *Graham v. Florida*, 130 S. Ct. at 2014. The probation violations included possessing a firearm, committing crimes, and associating with persons engaged in criminal activity. Graham had been previously arrested when he was sixteen for attempted robbery, but was charged as an adult for armed burglary with assault or battery and attempted armed robbery. When Graham pled guilty, the trial judge

During sentencing, the trial court judge stated his reasons for imposing a life sentence and emphasized that Graham had chosen the path of criminal activity even after being given a second chance.<sup>10</sup> The judge based his conclusions on the fact that Graham had pled guilty to the earlier attempted robbery and armed burglary offenses and served the first twelve months of a concurrent three-year term of probation in a county jail only to commit the later offense a mere six months later.<sup>11</sup> The judge concluded that Graham's life was beyond redemption because the sixteen year old had continually made poor decisions and demonstrated an "escalating pattern of criminal conduct."<sup>12</sup>

The U. S. Supreme Court granted certiorari<sup>13</sup> to address whether the sentence of life without parole for juveniles convicted of non-homicide crimes is cruel and unusual punishment under the Eighth Amendment to the United States Constitution.<sup>14</sup> Finding that

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withheld adjudication as to the charges and sentenced Graham to concurrent three-year terms of probation of which he was serving when arrested for the home invasion robbery. *Id.* at 2018–19.

<sup>9</sup> *Id.* at 2020.

<sup>10</sup> *Id.* at 2019–20.

<sup>11</sup> *Id.* at 2018.

<sup>12</sup> *Id.* at 2020.

<sup>13</sup> See *Graham v. Florida*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008). The First District Court of Appeals of Florida determined that the life sentence without parole was not grossly disproportionate under an Eighth Amendment analysis because of the seriousness of the crimes and their violent nature. The Florida Supreme Court denied review. *Graham v. Florida*, No. SC08-1169, 2008 WL 3896182, at \*1 (Fla. Aug. 22, 2008). In light of the *Graham v. Florida* decision, the U.S. Supreme Court dismissed the writ of certiorari for Florida case, *Sullivan v. Florida*, as being improvidently granted. 130 S. Ct. 2011, 2031 (2010). In this case, Sullivan was charged as an adult for a sexual assault committed while he was thirteen years old. *Id.* After the trial court judge concluded that "he had demonstrated himself to be unwilling to follow the law and needed to be kept away from society for the duration of his life," he was sentenced to life without parole. *Id.*

<sup>14</sup> The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Generally, determining cruel and unusual punishment involves consideration of several factors based on the Supreme Court's interpretation of the Amendment. First, the Court interprets the standard of cruel and unusual as non-stagnate, and based on "evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 130 S. Ct. at 2021 (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))). This article suggests that *Graham* stretches this precept to its fullest bounds when ruling that juveniles as a class of offenders are less culpable, and therefore changes in "the basic

juveniles are subject to the doctrine of diminished culpability, the Court held that the Constitution protects them from the most severe penalties provided for under the law.<sup>15</sup>

In addition to determining that juveniles are less culpable than adult offenders, the Court extended its Eighth Amendment precedent to the sentence of life without parole for juvenile offenders. The statutes enacted by state legislatures reflect the contemporary values of society. These legislative enactments indicate acceptable criminal sanctions and thus provide an “objective indicia” for measuring sentencing practices. While these enactments serve as a measure of consensus,<sup>16</sup> the *Graham* Court was more focused on the actual sentencing practices of the States or, more specifically, with how often the sentence of life without parole was imposed on non-homicide juvenile offenders.<sup>17</sup> Because many states only impose life without parole sentences on juvenile non-homicide offenders in delineated circumstances,<sup>18</sup> the Court viewed the States’ willingness to impose

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mores of society” indicate that life imprisonment without parole is cruel and unusual. *See id.*

<sup>15</sup> *Graham v. Florida*, 130 S. Ct. at 2026. Most recently, the Court in *Roper v. Simmons* ruled that the death penalty is constitutionally impermissible based on lessened culpability of juveniles as compared to adults. 543 U.S. 551, 567 (2005). *Roper* opined on the “lack of maturity and an underdeveloped sense of responsibility” of juveniles that make them “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Id.* at 569.

<sup>16</sup> *Roper v. Simmons*, 543 U.S. at 569. The State fashioned its argument based on the fact that only six jurisdictions do not allow life without parole sentences for any juvenile offenders and the remaining jurisdictions permit life without parole for juvenile offenders, either only for homicide crimes (seven jurisdictions) or in some circumstances set forth in the statutes (thirty-seven jurisdictions) as well as the District of Columbia. For example, Alabama does not permit prosecution as an adult of offenders less than fourteen years of age at the time the crime was committed. ALA. CODE § 13A-3-3 (2010). However, those convicted of a Class A felony (e.g., first degree burglary of a dwelling) who are considered “habitual offenders” (one or more convictions or in the judge’s discretion) can be sentenced to life without possibility of parole. ALA. CODE § 13A-5-9(c)(3)-(4) (2010). Likewise, in California, anyone who has served three or more prior separate prison terms for felonies involving great bodily injury is also considered a habitual offender who shall be punished with life imprisonment without possibility of parole. CAL. PENAL CODE § 667.7(a)(2) (West 2010).

<sup>17</sup> The Court stated, “Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile non-homicide offenders, those sentences are most infrequent.” *Graham v. Florida*, 130 S. Ct. at 2023.

<sup>18</sup> Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. Thirty-seven states, the District of Columbia, and the Federal

the punishment as restrained rather than liberal.<sup>19</sup> In fact, the Court viewed specific legislative enactments authorizing treatment of juveniles as adults as nothing more than a charging decision, rather than an endorsement of adult penalties.

The dissent pointed to the States' transfer laws<sup>20</sup> as a sufficient indicator of the nation's consensus in favor of harsher penalties for juveniles.<sup>21</sup> However, the majority cited *Thompson v. Oklahoma*,<sup>22</sup>

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Government permit sentences of life without parole for a juvenile non-homicide offender in some circumstances. *Id.* at 2015.

<sup>19</sup> The fact that the states have injected circumstances like "habitual offenses" into their statutes supports the argument that the punishment is available under the law; however, its imposition is not widely encouraged.

*See generally id.* at 2025. Additionally, Florida law is an illustration of how statutory enactment does not always indicate realistic sentencing outcomes. The Court states, "For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law. . . . All would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the 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." *Id.* at 2025–26.

<sup>20</sup> Transfer or waiver is the term used when a child moves from juvenile court adjudication to adult court prosecution. States typically use the following three methods for attaining criminal court jurisdiction over a child: judicial, legislative, and prosecutorial waiver. Brenda Gordon, *A Criminal's Justice or A Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 204–08 (1999).

<sup>21</sup> *See Graham v. Florida*, 130 S. Ct. at 2050 (Thomas, J., dissenting). Justice Thomas points to the laws of all fifty states, the federal government, and the District of Columbia that have adopted provisions for prosecuting juveniles in adult court. Out of fifty states, forty-five, including the federal government and the District of Columbia, sentence juvenile offenders as if they are adults being charged with the same crimes. *Id.* at 2048. The implication is that the States have expressed agreement over a sentencing practice (life imprisonment without parole) by enacting statutes that avail juvenile offenders to punishment equivalent to their adult counterparts. The dissent also cited to several other indicators of a national consensus besides transfer laws that favor life without parole for juveniles. This includes abolishment of the States' parole systems and consideration for the States' transfer laws that have spoken in favor of imposing harsher punishment on juveniles like that imposed on adults. The abolishment of parole systems shows the States' consensus in favor of sentencing without the availability of parole. Justice Thomas cites to statistics from 1990–2000 when sixteen states had abolished parole for all offenses and four states for certain ones. *Id.* at 2050 (Thomas, J., dissenting). The

where a plurality concluded that the transfer laws might subject children to adult punishment (e.g., the death penalty). But, these transfer laws do not support the conclusion that the States condone the death penalty as acceptable punishment for juvenile offenders.<sup>23</sup> Here, the mere **possibility** of a court sentencing a juvenile to life without parole does not demonstrate the States' intent to impose such a punishment on juveniles prosecuted as adults for non-homicide crimes.<sup>24</sup> While it is true that the States enacted many transfer laws in response to increased levels of violent crimes committed by juveniles,<sup>25</sup> this legislative response does not necessarily indicate a societal consensus that all juvenile offenders should be subject to the same punishment.<sup>26</sup> In the end, the Court applied the same view taken

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rarity of life without parole sentencing imposed on juvenile offenders is not a sufficient indicator of consensus against the penalty according to the dissent. Justice Thomas states, "No plausible claim of a consensus against this sentencing practice can be made in light of this overwhelming legislative evidence . . . the additional reality that [thirty-seven] out of [fifty] States (a supermajority of [seventy-four percent]) *permit* the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability." *Id.* at 2049 (emphasis added). Justice Thomas borrows from the same criticism articulated in Justice Alito's dissent in *Kennedy v. Louisiana* on the role of legislation. He states, "[The Court is] 'stunt[ing] the legislative consideration' of new questions of penal policy as they emerge." *Id.* at 2045 (Thomas, J. dissenting) (citing *Kennedy v. Louisiana*, 128 S. Ct. at 2665 (2008)).

<sup>22</sup> See generally *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (ruling that the death penalty for children under sixteen was unconstitutional).

<sup>23</sup> See *Graham v. Florida*, 130 S. Ct. at 2025.

<sup>24</sup> *Id.* at 2025–26. In referencing the hypothetical case of a five-year-old in Florida who is charged with certain crimes making him eligible for life without parole, the Court illustrates its point in stating that while "[t]he State acknowledged . . . that even a [five]-year-old, theoretically, could receive such a sentence under the letter of the law . . . [a]ll would concede this to be unrealistic, but the example underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Id.*

<sup>25</sup> The transfer laws are a product of state legislative "hyperpunitiveness" during the 1990s when the States were determined to increase the sanctions applicable to juveniles. See Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms As Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 514 (2009) (discussing the role of prosecutorial discretion and race in the juvenile justice system) (emphasis added).

<sup>26</sup> *Graham v. Florida*, 130 S. Ct. at 2025.

in death penalty precedent that “evolving standards of decency” require adoption of a categorical rule.<sup>27</sup>

The Court imposed a categorical rule distinguishing its precedential application of the Eighth Amendment in death penalty cases.<sup>28</sup> Because existing state laws allow judges and juries to make discretionary and subjective judgments on a case-specific basis, the categorical model provides the only adequate framework.<sup>29</sup> It also eliminates the subjectivity allowed by the States’ governing criminal

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<sup>27</sup> *Id.* at 2021. Justice Marshall said in *Furman v. Georgia*, “Perhaps the most important principle in analyzing ‘cruel and unusual’ punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.” *Furman v. Georgia*, 408 U.S. 283, 329 (1972). This article suggests that constitutional protections such as prohibition of “cruel and unusual punishment” must be viewed in light of an evolving society. If not, we arguably fail to evolve at all.

<sup>28</sup> *Graham v. Florida*, 130 S. Ct. at 2046. The categorical rule is based on the premise that youth possess diminished culpability as evidenced by poor judgment and resulting criminal behavior patterns. The dissent criticized creating a separate class of offender other than those facing the death penalty because the approach was historically applied based on the disproportionality argument that “death is different.” *Id.*; see also Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 88 (2010) (summarizing the death-is-different approach in various death penalty cases). Under the guise of its own independent judgment, the dissent disputed application of the underlying categorical proportionality review *outside* death penalty cases based on protection of less culpable persons. The Court’s application is an impermissible intrusion upon the States’ rights to define moral judgment and appropriate punishment and an unjustified extension of the death penalty cases. See *Graham v. Florida*, 130 S. Ct. at 2031.

<sup>29</sup> See *Graham v. Florida*, 130 S. Ct. at 2023. The dissent, on the other hand, returned to its argument favoring a case-specific approach by focusing its opinion more narrowly on the retributive purpose of incarcerating the most incorrigible and depraved juvenile rather than the “average” less culpable one. *Id.* at 2054 (Thomas, J., dissenting). Justice Thomas states, “Our society tends to treat the average juvenile as less culpable than the average adult. But the question here does not involve the average juvenile. The question, instead, is whether the Constitution prohibits judges and juries from *ever* concluding that an offender under the age of [eighteen] has demonstrated sufficient depravity and incorrigibility to warrant his permanent incarceration.” *Id.* Regardless, the landmark decision in *Roper* most closely parallels the legal analysis in *Graham* because it puts forth a categorical rule that prohibits imposition of the death penalty for defendants committing crimes before the age of eighteen. Because the issue in *Graham* involves a categorical challenge to a term of years sentence pertaining to a class of offenders, the Court utilizes the categorical approach case precedent.



procedure where an offender's age and maturity does not receive appropriate consideration.<sup>30</sup> For example, Florida has enacted an elaborate statutory scheme that reflects extensive consideration for treatment of its "youthful offenders."<sup>31</sup> Unfortunately, while these same laws are comprehensive in setting forth charging decisions, they also permit a level of subjectivity in sentencing decisions that deprives the juvenile offender of the same comprehensive consideration for his age, moral culpability, and potential for change.<sup>32</sup>

Finally, the Court ruled consistently with its basic premise of diminished culpability when addressing the retributive aspects of life without parole sentencing. The Court accepted the principle that retributive purposes served in criminal sentencing should proportionately reflect the defendant's personal culpability.<sup>33</sup> Nevertheless, the case for retribution is unjustifiable<sup>34</sup> when imposing a sentence on the less culpable juvenile non-homicide offender. Retributive sentencing amounts to judging the juvenile offender an irredeemable risk to society at the outset of his youth.<sup>35</sup> The moral balance of society is not restored when a minor receives a punishment that improperly condemns him to life behind bars<sup>36</sup> without a goal toward rehabilitation. Even though there are depraved, incorrigible youth that readily justify incapacitation for life as a penological goal,<sup>37</sup>

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<sup>30</sup> *Id.* at 2031 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2027, 2054 (Thomas, J., dissenting) (both majority and dissenting opinions citing to *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

<sup>34</sup> *Id.* at 2028; *Furman v. Georgia*, 408 U.S. 283, 342 (1972). Justice Marshall stated six purposes for capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. He opines on retribution encouraging the States to take a broader view on its meaning when he states, "The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment." *Furman v. Georgia*, 408 U.S. at 343.

<sup>35</sup> *Graham v. Florida*, 130 S. Ct. at 2028–29.

<sup>36</sup> *See id.* at 2030.

<sup>37</sup> *Id.* at 2029 (citing to *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (stating that "[i]ncorrigibility is inconsistent with youth" where a fourteen-year-old challenged a life without parole sentence)).

personal, diminished culpability<sup>38</sup> draws the line between rehabilitation and retribution. It is disproportionate to conclude that a juvenile offender is depraved or incorrigible at the early stages of his adolescent life, and then impose a punishment that reflects such an assessment.

The Eighth Amendment protects all juveniles who commit non-homicide crimes from society's expression of moral outrage if it robs them of the opportunity to demonstrate maturity and growth.<sup>39</sup> For these reasons, rehabilitation as a penological goal is not served by a life sentence without possibility of parole for this class of juvenile offender.<sup>40</sup> Accordingly, if the States impose a life sentence on the juvenile non-homicide offender, they must do so with the goal of rehabilitation so as to afford him protection under the Eighth Amendment. This is accomplished by providing the juvenile offender with some "meaningful opportunity to obtain release."<sup>41</sup>

## II. WHAT IS "A MEANINGFUL OPPORTUNITY FOR RELEASE"? A CIRCUMLOCUTION FOR MANDATING REHABILITATION

In *Graham*, the Court extended constitutional protection to juvenile offenders of non-homicide crimes from the cruel and unusual punishment of spending a potential lifetime in prison.<sup>42</sup> Nevertheless, *Graham* does not generally preclude sentencing juveniles to life in

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<sup>38</sup> Developments in psychology and adolescent brain science research continually inform the Court's rulings on the issue of juvenile culpability. Mark Hansen, *What's the Matter with Kids Today, A Revolution in Thinking About Children's Minds is Sparking Change in Juvenile Justice*, A.B.A. J., July 2010, at 50, available at [http://www.abajournal.com/magazine/article/whats\\_the\\_matter\\_with\\_kids\\_today/](http://www.abajournal.com/magazine/article/whats_the_matter_with_kids_today/). Generally, the adolescent brain provides a scientific explanation that adolescents' brain activity promotes risky and reward-based behavior. The research is particularly relevant when adolescents are subjected to life sentences based on patterns of criminal behavior in their youth. In reality, the brains of all adolescents (including those who engage in crime) continue to mature well beyond adolescence in areas responsible for controlling thoughts, actions, and emotions. *Id.* Nevertheless, the dissent criticized using this data in *Graham* when it effectively constrains the States' democratic sentencing processes that will sometimes distinguish treatment of some offenders more harshly than others in their democratic sentencing practices. *Graham v. Florida*, 130 S. Ct. at 2055 (Thomas, J., dissenting).

<sup>39</sup> *Graham v. Florida*, 130 S. Ct. at 2029.

<sup>40</sup> *Id.* at 2030.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

prison,<sup>43</sup> but rather interjected an implicit standard of rehabilitation that must be met if the juvenile offender seeks release into society. The Court stated the following:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.<sup>44</sup>

Interestingly, the Court did **not** rule that a life sentence for persons under eighteen was principally a violation of the Eighth Amendment, but instead, dictated that life without parole sentencing practices must be imposed within constitutionally indicated bounds that will afford the juvenile offender an opportunity for release.<sup>45</sup> The States must construct guidelines for release with full consideration of the juvenile's diminished culpability. The constitutionally permissible bounds are supported by the Court's precedential view of the juvenile offender whose age and capacity must be taken into consideration.<sup>46</sup> This is especially important in a climate where the States exercise their

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<sup>43</sup> *Id.* at 2030. The Court states, "It bears emphasis . . . that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life." Justice Thomas wrote sparsely on what a "meaningful opportunity to obtain release" standard means mostly because the dissent viewed the issue presented as one resolved through "legislatively authorized" use of the States' rights, rather than constitutionally prohibited by the Eighth Amendment. However, the dissent fairly posed questions as to the practical implications of the standard, especially as it related to the role of parole boards and in light of the States' restrained legislative sentencing. Justice Thomas views the ultimate question presented to the court to be *who* the Constitution empowers to make decisions about life without parole sentences and not so much *whether* the sentence is proportional to the crime. *Id.* at 2056–57 (Thomas, J., dissenting).

<sup>44</sup> *Id.* at 2030.

<sup>45</sup> *Id.* The Court specifically indicated that the ruling does not foreclose a life sentence behind bars for persons under the age of adulthood (eighteen years of age). It stated that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." *Id.*

<sup>46</sup> The Court's entire opinion embodied the prevailing law and sentiment put forth in *Roper* and other precedents that mandate varying treatment of children and those with diminished or impaired capacity.

power to construct sentencing practices for all juveniles under the same penalties as those imposed on adults.<sup>47</sup>

How, therefore, must the juvenile offender obtain opportunity for release remains the ensuing question. The answer was intentionally left to the province of the States to develop the “means and mechanisms for compliance.”<sup>48</sup> The States must employ a rehabilitative model for incarceration of juveniles especially where judges and juries adjudge juveniles as incorrigible and depraved from the outset without giving adequate consideration to their immaturity and underdevelopment.<sup>49</sup> This article suggests that these factors must be operationalized in a rehabilitative plan to be implemented throughout the juvenile’s entire period of incarceration.

It would be incongruent to constitutionally prohibit the sentence of life without parole for juvenile offenders because of their diminished culpability, and then not require the States to consider the underlying basis for such culpability when imposing the sentence. The States must give credence to the Court’s conclusions by providing juveniles with sufficient opportunity for personal development. Otherwise, the opportunity for personal growth will effectively become a non-opportunity as incarcerated juveniles learn to become seasoned criminals while subjected to the highly criminogenic adult prison culture.<sup>50</sup> If the States fail to adequately counter this likelihood, an incarcerated juvenile will effectively serve a life sentence “without parole.” The Court captured these issues, both legally and practically, in the following statements:

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<sup>47</sup> See Alison M. Grinnell, *Searching for a Solution: The Future of New York’s Juvenile Offender Law*, 16 N.Y.L. SCH. J. HUM. RTS. 635, 651 (2010) (stating in a climate where many states enact statutes authorizing more punitive measures in the fight against juvenile crime rather than focusing on the individual characteristics of the perpetrator, retribution is not a workable solution).

<sup>48</sup> *Graham v. Florida*, 130 S. Ct. at 2030.

<sup>49</sup> *Id.* at 2029.

<sup>50</sup> See Grinnell, *supra* note 47, at 652. Juvenile crime indicates several underlying causes which include poverty, abuse, and possible neglect. This article asserts that the *Graham* court recognized how *graham* court recognized how growth and maturity over the span of incarceration for the juvenile offender means addressing the underlying causes for delinquent behavior. Incorporating rehabilitative goals into the sentencing scheme means that the punishment is not disproportionately harsh given the underlying causes of delinquent behavior. Absent rehabilitative programs, the juvenile offender will serve the life sentence without parole simply because of his mere inability to cope with potential issues such as poverty and abuse.

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.<sup>51</sup>

Just as the States' legislation elaborately contemplates the treatment of juveniles,<sup>52</sup> it must now reflect on how its existing, or perhaps defunct, rehabilitative model will operate for juvenile inmates serving life sentences. The Court in *Graham* intentionally empowered the States to implement procedures for compliance with the "meaningful opportunity for release" standard.<sup>53</sup> It also empowered the States to formulate appropriate and effective rehabilitative techniques.<sup>54</sup> As one of the more active jurisdictions in imposing life without parole sentences on juvenile non-homicide offenders, Florida offers a relevant model for studying the impact of the Court's ruling. A more detailed examination of *Graham* provides illustration of and support for construction of a rehabilitative model.

**A. How Must the States Afford "Meaningful Opportunity for Release"? A More Expansive Consideration of Juvenile Treatment under the States' Codes**

The Supreme Court's decision in *Graham* charges the States to do more in their treatment of juvenile offenders. It encourages them to examine not just the scope of their sentencing and programming statutes, but also their charging decisions and the corresponding impact that they have on sentencing and available treatment options. For instance, a juvenile charged as a delinquent is adjudicated in the State's juvenile court system where rehabilitative options are most prevalent.<sup>55</sup> Conversely, a juvenile charged as an adult is prosecuted in criminal court and subjected to the full array of punishment allowed

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<sup>51</sup> *Graham v. Florida*, 130 S. Ct. at 2032.

<sup>52</sup> *See id.* at 2031.

<sup>53</sup> *Id.* at 2030.

<sup>54</sup> *Id.* at 2029.

<sup>55</sup> *See, e.g.*, FLA. STAT. § 958.04 (2010); FLA. STAT. § 944.801 (2010) (Florida's Juvenile Justice Code provides rehabilitative options in the form of "youthful offender" and "serious habitual juvenile offender" classifications.).

in that jurisdiction.<sup>56</sup> If the States expansively reconsider their charging provisions with an eye toward providing as many alternative treatment options for juvenile offenders *other than* life imprisonment, then they effectively afford him “meaningful opportunity for release” from the life sentence.

A more detailed analysis of *Graham*’s procedural history displays a compelling example of the primary reasons stated by the Court for imposing a “meaningful opportunity for release” standard, and offers context for suggested alternative approaches in light of Florida’s charging decision. *Graham*’s first chargeable criminal offense occurred when he was sixteen and a half years old.<sup>57</sup> He and two other youths attempted to rob a restaurant.<sup>58</sup> During commission of that offense, the manager was struck with a metal bar by one of *Graham*’s accomplices.<sup>59</sup> *Graham* was arrested and charged as an adult with armed burglary with assault or battery and attempted robbery under section 985.557(1)(b) of the Florida Statutes. The prosecutor charged him under a transfer statute<sup>60</sup> that resulted in *Graham* being exposed to possible adult sanctions even though his involvement was limited to running away and escaping in a car driven by an accomplice. After serving the required first twelve months of a three-year term of probation in jail for that offense,<sup>61</sup> *Graham* was released.<sup>62</sup> Six months later, he re-offended. And, in ruling on the second offense, the trial court judge labeled *Graham* as “incorrigible” and pointed to a “decision” *Graham* made to lead a life of crime.<sup>63</sup>

Some of the most salient points made by the *Graham* Court address the subjectivity of judicial sentencing—and the powerful influence such subjectivity can have on a juvenile offender’s future.

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<sup>56</sup> *See, e.g.*, FLA. STAT. § 921.141 (2010) (Florida’s Criminal Punishment Code allows for the harshest penalty, that is death, for non-homicidal crimes such as sexual battery); *see also* *Roper v. Simmons*, 543 U.S. 551 (2005) (ruling that execution of children under the age of eighteen is unconstitutional).

<sup>57</sup> *Graham v. Florida*, 130 S. Ct. at 2018.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> FLA. STAT. § 985.557(1)(b) (2010) (providing in pertinent part, “[w]ith respect to any child who was [sixteen] or [seventeen] years of age at the time the alleged offense was committed, the state attorney may file an information when in the state attorney’s judgment and discretion the public interest requires that adult sanctions be considered or imposed”).

<sup>61</sup> *Graham v. Florida*, 130 S. Ct. at 2018.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2020.

For example, in *Graham*'s case, the prosecutor exercised discretion and subjectivity in a charging decision that ultimately influenced the case disposition. And when the charging decision was made, *Graham* was exposed to the same subjective judgment inherent to the sentencing process that the Court in *Graham* specifically rejected as violating juvenile offenders' Eighth Amendment rights.<sup>64</sup> Even though the States defend their statutes that consider the age of the juvenile offender as "salutary,"<sup>65</sup> the Court properly determined that such statutory provisions are ultimately insufficient to protect a juvenile non-homicide offender from the discretion and subjectivity of judges and juries.<sup>66</sup>

Furthermore, the *Graham* trial judge pronounced his sentence contrary to the State's recommendation and the statutorily provided presentence report<sup>67</sup> and recommendation prepared by the Florida Department of Correction. The State recommended that *Graham* be sentenced to thirty years for the armed burglary count and fifteen years on the attempted armed robbery count.<sup>68</sup> The Florida Department of Corrections recommended at most four years imprisonment.<sup>69</sup> Both the prosecutor and the state agency charged with reviewing the suitability of disposition called for less than a life sentence for *Graham*'s second criminal offense.<sup>70</sup> Moreover, the trial judge passed on the opportunity to utilize other sentencing options that would have afforded *Graham* the kind of rehabilitative opportunity to which the Court refers.

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<sup>64</sup> *Id.* at 2031 (recounting the lower court judge's rationale before imposing sentence on *Graham* as an example for why use of a categorical rule is necessary).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> FLA. STAT. § 985.565 (2010) (providing for sentencing powers and alternatives for juveniles prosecuted as adults). Under subsection (3) the court must receive and consider a presentence investigation report regarding the suitability of the offender for disposition as an adult or juvenile. The report must contain comments and recommendations as to disposition. *Id.* § 985.565(3)(a).

<sup>68</sup> *Graham v. Florida*, 130 S. Ct. at 2019.

<sup>69</sup> *Id.* Life imprisonment is the maximum sentence allowed for armed burglary and fifteen years is the maximum for attempted armed robbery. *Id.*

<sup>70</sup> *Id.* Based on a presentence report prepared by the Florida Department of Corrections (FDC), *Graham* would have received no more than four years of imprisonment if the trial court judge followed the recommendation of the FDC. Similarly, even the State did not recommend the maximum sentence of life, but rather, thirty years on the armed burglary count and fifteen years on the attempted armed robbery count.

Certainly, the seriousness of the charging offenses had to be considered in light of the specific facts of Graham's personal involvement. The alternative recommendation of at most four years imprisonment could have provided Graham with a meaningful opportunity for rehabilitation through psychological counseling<sup>71</sup> and vocational training. Nevertheless, the trial judge followed the prohibited course of subjectivity that the *Graham* Court ruled as an infringement of juvenile offenders' Eighth Amendment protections. The categorical approach is, therefore, the most adequate way to protect against the potentially cruel and unusual punishment that can result from a process in which the gravity of the crime blinds the judge's ability to see the offender's lack of moral culpability.

When considering the case presented by Terrence Graham, the trial court still possessed discretion to impose a sentence other than life imprisonment even after Graham was found guilty of armed burglary and attempted robbery.<sup>72</sup> The prosecutor did not have to charge him as an adult for the armed burglary, and the decision to charge him with a life felony obviated other sentencing options. In light of the procedural and dispositional decisions made by the lower court in *Graham*, consider how Florida could construct a statutory scheme that complies with the "meaningful opportunity for release" mandate. Initially, the States can borrow from existing statutory language that considers the growth, maturity, and rehabilitative potential of the juvenile offender in their jurisdictional waiver statutes.

The purpose and intent behind existing legislation can guide the States in their efforts to construct statutory provisions that comply with *Graham*. The "spirit" of the meaningful opportunity for release standard already appears in the States' jurisdictional waiver statutes (statutes that allow the juvenile court judge, or authorize the prosecutor, to determine whether juvenile court jurisdiction should be

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<sup>71</sup> Graham's sociological and psychological background included diagnoses of attention deficit hyperactivity disorder and parental drug addiction to crack cocaine. *Id.* at 2018.

<sup>72</sup> Notwithstanding possible abuse of discretion issues, Florida case law supports alternative disposition of juveniles to high-risk residential facilities who have committed similar offenses as Graham. *See State v. Drury*, 829 So. 2d. 287 (Fla. Dist. Ct. App. 2002) (exercising discretion to sentence a sixteen-year-old defendant, who pled no contest to aggravated assault with a deadly weapon, as a youthful offender rather than under the 10/20/Life sentence enhancement statute); *see also W.W. v. Florida*, 890 So. 2d. 361 (Fla. Dist. Ct. App. 2004) (exercising discretion in placement of a juvenile who committed attempted burglary).



retained or waived for subsequent prosecution in adult criminal court). In *Kent v. United States*,<sup>73</sup> the Court recommended criteria<sup>74</sup> for jurisdictional waiver determinations. Due process requires these criteria to be included in a statement of reasons prepared by the juvenile court upon waiver of its jurisdiction.<sup>75</sup> The statement might include, among other things, a determination of whether the child is amenable to, or presents, a reasonable likelihood for rehabilitation.<sup>76</sup> The implication in *Kent* is that the juvenile court system is a more appropriate venue for adjudication than the adult court system because it, unlike the latter, places an emphasis on rehabilitation.

Florida has codified the *Kent* criteria, not only in its waiver statutes, but also in its sentencing statutes.<sup>77</sup> Consideration of the juvenile offender's sophistication and maturity can likewise guide programming and training opportunities so as to afford the offender a meaningful opportunity for release. Just as the *Kent* Court provided constitutionally permissible guidelines in the procedural context of jurisdictional waiver, the *Graham* Court similarly provided a constitutionally permissible guide (meaningful opportunity for release) for the States' juvenile life sentencing authority. The same criteria for waiver of juvenile court jurisdiction under *Kent* is embedded in the "meaningful opportunity for obtaining release" standard, as illustrated by the *Graham* Court's statement, "What the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>78</sup> Stated otherwise, non-homicide juvenile offenders must not be sentenced to

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<sup>73</sup> The Court held that due process requires a statement of reasons if a juvenile court waives jurisdiction. The juvenile court must conduct a full investigation, must hold a hearing, and must allow the juvenile defendant's counsel access to the social records. See *Kent v. United States*, 383 U.S. 541 (1966).

<sup>74</sup> Specified factors in the opinion were offered for consideration by the trial court judge. Such factors have been codified by the individual states as judicial guidance in more than just waiver determinations. *Id.* at 566–67.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 567.

<sup>77</sup> FLA. STAT. § 985.565(1)(b)(1)–(8) (2010) (The statute provides that a child may be committed to a treatment program as an alternative to adult dispositions or be placed on juvenile probation. In determining whether juvenile or adult sanctions are appropriate, the court may consider, among several criteria, the sophistication and maturity of the offender and the likelihood of deterrence and reasonable rehabilitation.).

<sup>78</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

life behind bars without being given the opportunity, while incarcerated, to develop emotionally, socially, and psychologically.

Compliance with *Graham* could require nothing more than the implementation of existing statutes as a basis for providing appropriate training and services to the juvenile offender sentenced to life. But, since States' sentencing statutes and programming options are directly connected to charging offenses, the legislatures must genuinely delve into the policies for treatment of juvenile offenders. In constructing statutory authority consistent with *Graham*, the States must "deconstruct," or break apart, existing statutory schemes that impede compliance with *Graham*.

**B. Jurisdictional and Sentencing Statutes: Meaningful Opportunity for Release Requires Statutory Deconstruction**

Providing statutory authority in order to comply with the *Graham* decision is complicated by the fact that the States' existing statutory schemes often afford "meaningful opportunities" to juvenile offenders who are sentenced to *less severe* penalties than life imprisonment. In fact, the issue is more complicated than simply including new statutory options for imprisoned juvenile offenders because the connection between jurisdictional and sentencing statutes often restricts programming options based on the levels of the charged offense and the court in which the case is heard.<sup>79</sup> Many states, like Florida, will be challenged to deconstruct their statutory schemes to allow for treatment and education options that contribute to further growth and development of juvenile offenders serving a life sentence.

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<sup>79</sup> Under most states' statutes, juveniles within specified ages become subject to adult court rather than criminal court depending on the nature of the offense or the number of times the juvenile has been charged with the offense. FLA. STAT. § 985.557(1)(b) (2010) states, in pertinent part, "any child who was [sixteen] or [seventeen] years of age at the time the alleged offense was committed, the state attorney may file an information when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed. However, the state attorney may not file an information on a child charged with a misdemeanor, unless the child has had at least two previous adjudications or adjudications withheld for delinquent acts, one of which involved an offense classified as a felony under state law." Although not applicable in the *Graham* case, the Florida statute also provided for mandatory filing by the prosecutor in adult criminal court where, likewise, the juvenile offender would be subject to adult sanctions depending on factors such as whether he had previously committed a criminal act or if a firearm or destructive device was involved during commission of the crime. FLA. STAT. § 985.557(2)(a)–(d) (2010).

This section will use Florida to illustrate the interplay of jurisdictional and sentencing statutes and to show how each type of statute ultimately influences the rehabilitative options for providing juvenile offenders with a “meaningful opportunity for release.” The States must thoroughly and comprehensively address the interconnectedness between the jurisdictional and sentencing statutes in order to eliminate restrictions on the rehabilitative options for juvenile offenders.

When a juvenile offender is arrested for allegedly committing a crime under Florida’s current jurisdictional statutes, the state’s prosecutor plays a very key role in deciding two crucial, yet interconnected issues: (1) the charging offense and (2) the court in which the charge will be heard.<sup>80</sup> The second issue pertains to whether the authority to hear the case should be transferred from a juvenile court to an adult criminal court.<sup>81</sup> These issues, and the statutory authority under which the prosecutor determines them, are extremely important because they ultimately influence the nature and extent of available sentencing and programming options for the juvenile offender. Generally, dispositions in juvenile court focus more heavily on reformation and on considering more comprehensively those psychosocial factors that contribute to delinquent behavior.<sup>82</sup> The goal to prevent further delinquent patterns of conduct drives the disposition in juvenile court, with treatment or programming opportunities greatly

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<sup>80</sup> See generally FLA. STAT. § 985.557(1)(a) (2010).

<sup>81</sup> The majority and dissenting opinions in *Graham* disputed whether the existence of transfer laws constituted a sufficient endorsement by the states for or against imposition of harsher penalties like life sentencing without parole. The transfer laws became part of the analysis because they typically represent operation of the State’s charging decision and its impact on which court has jurisdiction to hear the case and impose sentencing or other sanctions. Arguably, if the States enact and implement transfer statutes, this indicates the legislature’s willingness to expose the juvenile offender to adult rather than juvenile sanctions. The Court ultimately concluded that the transfer statutes are not a sufficient indicator of national consensus in favor of harsher penalties so as to make life sentence without parole for juveniles permissible under the Eighth Amendment. *Graham v. Florida*, 130 S. Ct. at 2023. See Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 251 (2009) (discussing how the transfer laws represent a “zeal for retribution” and have unfortunately replaced the spirit of reforming the individual child so much that the interests of the child and ultimately of the country are ignored).

<sup>82</sup> See Kerrin C. Wolf, *Justice by Any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana*, 12 WM. & MARY BILL RTS. J. 275, 290 (2003).

influencing the court's final determination. Conversely, adult court sentencing practices are largely based upon punitive considerations.

For example, in the *Graham* case, Graham was first arrested when he was sixteen and one-half years old and charged with first-degree felonies of armed burglary with assault or battery and attempted armed robbery.<sup>83</sup> Under the applicable statute the prosecutor had the discretion<sup>84</sup> to either bring charges in juvenile court or to “transfer”<sup>85</sup> the authority to hear the case to the adult criminal court. Since the prosecutor decided to file the information in adult court, Graham was subject to adult sanctions, which would apply unless the trial judge was provided with other options under statute.<sup>86</sup> Therefore, to comply with the “meaningful opportunity for release” mandate, the States must address how current laws limit rehabilitative options for juveniles and instead expose them to adult sanctions. The content of the States’ sentencing statutes ultimately determines the options for the treatment, education, and training needed for the development of the juvenile offender. If the States choose to impose a life sentence on a juvenile offender, then *Graham* says that they must also provide useful rehabilitative opportunities, thereby increasing the likelihood of eventual parole.

Next, we will examine how Florida’s sentencing statutes overtly operate to punish rather than rehabilitate,<sup>87</sup> thereby availing

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<sup>83</sup> *Graham v. Florida*, 130 S. Ct. at 2018; FLA. STAT. § 810.02(2) (2010); FLA. STAT. § 776.08 (2010).

<sup>84</sup> FLA. STAT. § 985.557(1)(b) (2010).

<sup>85</sup> *Graham v. Florida*, 130 S. Ct. at 2018. Generally, Florida’s criminal procedure and corrections code provides for treatment of juveniles (FLA. STAT. §§ 985.01–985.8025) separately from adults (FLA. STAT. §§ 775.01–775.31). Treatment of juvenile offenders is most likely addressed in separate juvenile code provisions, however, depending on the convicted offense; there may be exceptions that mandate treatment under the criminal code.

<sup>86</sup> FLA. STAT. § 985.557(1)(a) (2010) states, in pertinent part, “the state attorney may file an information when in the state attorney’s judgment and discretion the public interest requires that *adult sanctions be considered or imposed*.” (emphasis added).

<sup>87</sup> See Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and Its Ex Post Facto Implications*, 26 FLA. ST. U. L. REV. 361, 442 (1999). The author opines on the punitive emphasis of Florida’s sentencing and corrections policies along with the movement away from rehabilitative goals as evidenced by the destruction of the parole system. The author states, “By taking away parole, the Legislature removed the safety net that had been designed to give hope, opportunity, and reward to those who rehabilitate themselves and are capable of returning to society as productive, law-abiding citizens before their prison terms are set to expire.” *Id.* This article discusses in Part V alternatives

more treatment options to the offenders who commit *lesser* offenses. While the correlation between more violent offenses and harsher penalties is permissible for adult sentencing schemes, *Graham* says that the juvenile offender serving a life sentence must, practically, receive treatment opportunities. Consequently, the sentencing statutes are incongruent as applied to juveniles like *Graham*. Those statutes must be dismantled and replaced by ones that give judges more definite sentencing guidelines that operate despite prosecutorial discretion or other jurisdictional mechanisms that limit rehabilitative options for the juvenile life sentence offender.

### **C. Necessary Amendments to the States' Sentencing Authority**

The States must construct statutory authority that complies with the constitutional directive set forth in *Graham* by first accomplishing a “marriage” of collective legislative purposes. The legislative intent behind the Juvenile Justice, Criminal Punishment, and “serious or habitual juvenile offender” code provisions collectively illustrates how a “marriage” of applicable code sections can provide sufficient legal bases for compliance with *Graham*. The States’ legislatures should merge their intent in existing Criminal Punishment and Juvenile Justice Codes to create the basis for a new classification and corresponding statutory provisions that would govern sentencing of “juvenile life sentence offenders.” The following proposed legislative policy directive can guide the States:

The desired goal of the juvenile life sentence offender provisions is to achieve rehabilitative potential in the offender. The offender must receive meaningful opportunity for release while also serving a punitive debt to society for his crimes. The life sentence provides sanction for his crimes, but the laws must provide judges sentencing and programming options that facilitate completion of a separately created prison release model.

The States must then enact sentencing statutes that substantively and procedurally empower trial court judges with constitutionally

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for the States to establish in the form of a separately created release model for juvenile life sentence offenders.

permissible options under which juveniles must serve life sentences. For instance, the Criminal Punishment Code states, “The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment . . . . The penalt[ies] imposed [are] commensurate with the severity of the . . . offense and the circumstances.”<sup>88</sup> A state cannot impose life sentences on juvenile offenders under such an overtly articulated intent in its adult sentencing scheme and still comply with *Graham*. Compare this intent to that of the Juvenile Justice Code,<sup>89</sup> which is historically viewed as the antithesis of the adult criminal code regarding disposition and sentencing issues. Interestingly, the Juvenile Justice and Criminal Punishment Code provisions reflect an established “marital balance” between retributive and protective societal goals and rehabilitative goals. While punishment of the offender is the **primary** stated goal under the Criminal Code, the Juvenile Justice Code states its primary policy as: “to first protect the public from acts of delinquency.”<sup>90</sup> Thereafter, the policy is to develop and implement effective programs that can conduct rehabilitative treatment for the delinquent child.<sup>91</sup> These provisions show that both adult criminal sentencing schemes as well as juvenile justice statutes reflect primary concern with the protecting society when addressing treatment of juvenile offenders.

The stated intent in the two codes is congruent with the constitutional boundaries set by *Graham*. The Court acknowledged society’s need to condemn illegal acts and restore moral imbalance by imposing severe sanctions on juvenile offenders.<sup>92</sup> The juvenile life sentence offender is punitively sanctioned and society is well protected by simply imposing punishment that potentially removes him from society for the rest of his life. Despite society’s need to protect itself by imposing such severe sanctions, the *Graham* Court demands that the States do more for the juvenile offender committed to prison for life. Consequently, compliance with the Court’s mandate for a meaningful opportunity for release means that Criminal Punishment

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<sup>88</sup> FLA. STAT. § 921.002(1)(b)–(c) (2010).

<sup>89</sup> FLA. STAT. § 985.02(3)–(5) (2010). The statute states legislative intent in terms of delinquency prevention, detention of delinquent children, and those separately labeled as “serious or habitual juvenile offenders.”

<sup>90</sup> FLA. STAT. § 985.02(3) (2010).

<sup>91</sup> FLA. STAT. § 985.02(3)(b),(d) (2010).

<sup>92</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

codes, like Florida's, must move away from a punitive focus, especially where it obstructs compliance with the *Graham* mandate.

The Florida legislature also states its intention in the Juvenile Justice Code for secure placement of delinquent children. The provision in that code providing for possible removal of delinquent children from detention to adult prison is quite striking. It states the following:

The Legislature also finds that certain juveniles have committed a sufficient number of criminal acts, including acts involving violence to persons, to represent sufficient danger to the community to warrant sentencing and placement within the adult system. It is the intent of the Legislature to establish clear criteria in order to identify these juveniles and remove them from the juvenile justice system.<sup>93</sup>

Here, the Florida legislature carved out an exception for circumstances in which a juvenile offender commits numerous, violent criminal acts such that a focus on rehabilitation becomes improper. Moreover, in addition to removal of delinquent children from the juvenile justice system, the Florida legislature has created yet another separate classification for juvenile offenders. Under the Juvenile Justice Code, juvenile offenders whose criminal behavior arguably straddles the Juvenile Justice and Criminal Punishment Codes are classified as “serious or habitual juvenile offenders” (SHO)—a classification of juvenile offenders that requires treatment potentially apart from the adult system, but which is not wholly adequate for juvenile justice detention.<sup>94</sup>

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<sup>93</sup> FLA. STAT. § 985.02(4)(b) (2010).

<sup>94</sup> See FLA. STAT. § 985.47 (2010). Under the statute, a “serious or habitual juvenile offender” means a child who has been found to have committed a delinquent act and who is at least thirteen-years of age at the time of the disposition for the current offense and has been adjudicated on the current offense for, among several delineated offenses, robbery and aggravated assault. The child is then eligible for treatment and placement in a serious or habitual juvenile offender program or facility. FLA. STAT. § 985.47(1)(a) (2010). Such treatment and placement includes intensive secure residential placement where the juvenile offender is subjected to various rehabilitative treatment and services. This section establishes criteria for placement of the SHO into intensive secure residential facilities where programs

The Florida legislature already recognizes SHOs as a particular class of delinquent children that “requires a multi-pronged effort focusing on . . . the development of particular programs. . . . In addition, a significant number . . . have been adjudicated in adult criminal court and placed in this state’s prisons where programs are inadequate to meet their rehabilitative needs and . . . [r]ecidivism rates . . . exceed those tolerated by the Legislature and by the citizens of this state.”<sup>95</sup> Even though the juvenile life sentence offender serves one of the most severe punishments possible next to death, the *Graham* decision requires the States to view this class of offenders differently. The “marriage” of the collective legislative purposes from the Criminal Punishment and Juvenile Justice codes serves as a guidepost for developing “juvenile life sentence offender” code provisions. While the States’ traditional posture is to first ensure punishment and then provide treatment as an afterthought, opportunities for education, training, and rehabilitation must accompany the sentence of life for juvenile non-homicide offenders. To comply with *Graham*, the States should create a separate classification, “juvenile life sentence offender,” that mimics treatment provided for SHOs and any other similar classifications of offenders. Refabrication of these statutory authorities can provide for a new “juvenile life sentence offender” classification. Examination of Florida’s “SHO” and “youthful offender” provisions serves as a model.

Florida currently provides for youthful offender treatment under a separate chapter of its criminal procedure and corrections code.<sup>96</sup> In order to comply with *Graham*, judges must have statutory authority to prescribe treatment options similar to those available under the youthful offender statutes. Unfortunately, these statutes often dictate the permissible treatment options (classifications) based upon offense levels.<sup>97</sup> This statutory stumbling block impedes trial judges’ sentencing discretion. Accordingly, the deconstruction of sentencing statutes should include the elimination of statutorily

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provide diagnostic evaluation services, appropriate treatment modalities, vocational and educational services as well as independent living skills.

<sup>95</sup> FLA. STAT. § 985.02(5) (2010).

<sup>96</sup> See generally FLA. STAT. § 958.11 (2010) (mandating separate institutions and programming).

<sup>97</sup> In Florida, the court may sentence as a youthful offender any person who has been transferred for prosecution to the adult system, or who has been found guilty of a felony if the offender is younger than twenty-one. FLA. STAT. § 958.04(1)(a),(b) (2010).



mandated levels of offenses that direct the classification of offender status.

By revamping the States' youthful offender statutes so that level of offense classification does not preclude eligibility for rehabilitative treatment options, the juvenile offender serving a life sentence becomes eligible for those rehabilitative treatment options that are currently limited to juveniles who commit lesser offenses.<sup>98</sup> Once these statutory obstacles have been removed, the trial judge will have the authority to sentence juveniles to life while still providing them with a "meaningful opportunity for release." Without such authority, the interconnectedness between sentencing and programming statutes will remain a stumbling block as judges continue to impose life sentences.

With these barriers removed, judges may properly exercise their discretion to focus on rehabilitation, as has been the historical practice.<sup>99</sup> Currently, Florida provides priority participation in their correctional general education program to youthful offenders.<sup>100</sup> Additionally, Florida requires its Juvenile Justice Department to establish separate institutions and programs for "youthful offenders" that are employed by specially trained personnel.<sup>101</sup> These separate institutions must exclusively house those sentenced by a court and designated as youthful offenders.<sup>102</sup> Some of the provisions, like those providing for separate institutions, may be impractical. Moreover, the treatment protocols allowing for community residential release upon successful completion of a basic training program<sup>103</sup> do not apply to cases involving life sentences. Nevertheless, the existing statutory framework provides a blueprint to model provisions for the "juvenile

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<sup>98</sup> See generally FLA. STAT. § 958.04(1)(c) (2010) (stating that a person who has been found guilty of a life felony may *not* be sentenced as a youthful offender).

<sup>99</sup> See Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 2 (2008) (discussing separate juvenile justice system advantages).

<sup>100</sup> See FLA. STAT. § 944.801(3)(i)(2) (2010); see also Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 29 (2010) (putting forth the states' obligation to educate their incarcerated youth and address the inadequacies in providing better special education to juveniles incarcerated in adult prisons). Priority given to youthful offenders in the general education programs in Florida and New York is an example of how some states attempt to develop standards for meeting the obligation.

<sup>101</sup> FLA. STAT. § 958.11(1) (2010).

<sup>102</sup> *Id.* § 958.11(1),(2).

<sup>103</sup> FLA. STAT. § 958.045(6)(a) (2010).

life sentence offender.” It authorizes education and treatment programs<sup>104</sup> outside the adult correctional system. These treatment options comply with *Graham*’s mandate for meaningful opportunity for release. If the States fail to statutorily authorize programming options for the juvenile life sentence offender, the existing adult prison culture will counteract any rehabilitative efforts and obviate his potential release.<sup>105</sup>

Similarly, “serious or habitual juvenile offender” (SHO) treatment<sup>106</sup> acts as a model for the proposed juvenile life sentence offender model because those acts address the rehabilitative needs of juveniles who have been adjudicated delinquent in adult court, but should not be housed in state prisons for various reasons.<sup>107</sup> These

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<sup>104</sup> *Id.* § 958.045(1)(a).

<sup>105</sup> See Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J.L. REFORM 653 (2003). The author provides a thoughtful discussion on the end result of waiver and transfer laws—youth incarceration in adult facilities. This article asserts that juvenile offenders serving life sentences must be placed in an environment that is not the antithesis of rehabilitation. Instead, the *Graham* ruling requires that the incarceration period facilitate reform. Juvenile crime is oftentimes a result of social and psychological underdevelopment, and thus the penological goal to rehabilitation must be served if the juvenile offender has any hope of reform. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010). Shefi addresses the concept of hope as it butts against the reality of adult prison culture. She states, “[I]ncarcerating juveniles with adults is deleterious to both the individual offender and society.” Shefi, *supra*, at 653. Furthermore, Shefi refers to prisons as “schools for crime” where juvenile offenders are taught new criminal techniques and methods for evading the authorities. She points to key aspects of adult prison culture that counteract rehabilitative goals such as fewer treatment and counseling services, lack of educational and professional resources, and absence of trained adult corrections staff who are skilled in addressing the special needs of young offenders. *Id.* at 664. Most importantly, when juvenile offenders are incarcerated with adult offenders, it exposes them to a higher risk of sexual and physical assaults. *Id.* This is particularly tragic if they have suffered psychological or physical abuse prior to incarceration. In effect, the juvenile inmate is nearly eight times more likely to commit suicide than their adult counterpart. *Id.* For these reasons, the States must provide separate incarceration of juvenile offenders serving life sentences so that they are afforded a meaningful opportunity for release.

<sup>106</sup> FLA. STAT. § 985.47 (2010).

<sup>107</sup> FLA. STAT. § 985.02(5) (2010). Florida acknowledges the improper placement of SHOs in state prisons where the rehabilitative treatment needs are not met, yet the SHO is still placed in adult facilities. Juvenile life sentence offender provisions might reflect similar consideration for separate housing from adults in order to combat contrary influences emanating from an adult prison culture. See C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive*

provisions may appear, more appropriately, to pertain to the juvenile life sentence offender because the criteria for classification includes those children who have been adjudicated for most major felonies including murder, sexual battery, aggravated assault, etc.<sup>108</sup> This article asserts that, notwithstanding the crime committed under the statute, rehabilitative principles must guide juvenile life sentence offender models.

Just as the SHO provisions operate as an alternative to adult disposition, similar provisions that provide the States with sentencing alternatives for the juvenile life offender would comply with the *Graham* requirement. In Florida, for example, juveniles may be committed to treatment programs outside the adult correctional system if the court determines that certain criteria are met.<sup>109</sup> These criteria include factors such as the seriousness of the offense,<sup>110</sup> whether the offense was committed against a person or property,<sup>111</sup> the sophistication and maturity of the offender,<sup>112</sup> and, perhaps most importantly, the amenability to rehabilitation.<sup>113</sup>

Now, the same alternative adult disposition statute also considers the likelihood of deterrence and whether adult sanctions provide more appropriate punishment under the circumstances.<sup>114</sup> Certainly, society expects the juvenile offender to refrain from continuing to commit criminal offenses; however, the *Graham* Court ruled that “[d]eterrence does not suffice to justify [life] sentence.”<sup>115</sup> That is, because juveniles are less culpable than adults, they are less “susceptible”<sup>116</sup> to deterrence. Accordingly, the States must modify their statutory guidelines to include alternatives to adult disposition that reduces the focus on retributive and deterrence factors, while

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*Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 719 (2005) (arguing against the punitive philosophy of juvenile justice policy and the hazards of exposing them to an adult criminal prison culture).

<sup>108</sup> FLA. STAT. § 985.47(1)(a) (2010).

<sup>109</sup> FLA. STAT. § 985.565(1)(a),(b) (2010).

<sup>110</sup> *Id.* § 985.565(b)(2).

<sup>111</sup> *Id.* § 985.565(b)(3).

<sup>112</sup> *Id.* § 985.565(b)(4).

<sup>113</sup> *Id.* § 985.565(b)(6).

<sup>114</sup> *Id.* § 985.565(b)(6),(8).

<sup>115</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

<sup>116</sup> *Id.* The Court cites *Roper* where the issue of retribution and deterrence was examined in consideration of the Eighth Amendment protection from the most severe penalty—death. The Court follows *Roper* by affording constitutional protection for juvenile offenders from life sentences without parole.

increasing the focus on rehabilitative factors. The States do not need to abandon retributive goals altogether,<sup>117</sup> but rather must redirect the manner in which these goals are accomplished. *Graham* encourages the States to move beyond the idea that retaliation for wrongdoing committed by a juvenile is achieved through incarceration for life without possibility of parole.<sup>118</sup>

This author suggests that imprisonment alone is retributive. But incarcerating a juvenile without possibility of rejoining society means that the States are not only retaliating, but also condemning the juvenile life offender based on the flawed premise that his criminal acts today (or historically) preclude further growth and maturity.<sup>119</sup> The States' current statutory sentencing authority inappropriately legitimizes more severe adult dispositions in lieu of appropriate alternatives based on this flawed premise.

As applied to the facts in *Graham*, the trial judge could have sentenced Graham to an alternative to adult disposition that would still have resulted in his incarceration in a secure residential facility apart from an adult corrections facility. While armed burglary, armed robbery, and home invasion robbery are all serious offenses, the trial judge still had some discretion in weighing the statutory criteria. In fact, he defended his decision by stating, "I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate."<sup>120</sup> Judicial sentencing policy must reflect a broader vision for statutorily available options so that juvenile offenders have a

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<sup>117</sup> The Court opines on the constitutionality and effect of deterrence as a penological goal in the context of a life sentence by stating, "[I]n light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.* at 2029.

<sup>118</sup> While retribution generally serves as society's retaliation against the offender whose moral culpability is commensurate with his legal responsibility, punishment for the juvenile offender should not be concerned with rehabilitation or deterrence. See Grinnell, *supra* note 47, at 653.

<sup>119</sup> The Court's ruling specifically cautions the States against making determinations about the *future* nature of the juvenile offender at the sentencing stage. It states, "Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was *made at the outset*." *Graham v. Florida*, 130 S. Ct. at 2029 (emphasis added). If juvenile offenders are truly incorrigible, then timing is everything when making that determination. Penological goals are constitutionally disproportionate if, in effect, his punishment relegates the juvenile offender to confinement for the remainder of his natural life without possibility of release based on his diminished legal culpability.

<sup>120</sup> *Id.* at 2020.

meaningful opportunity for release. The *Graham* trial judge could have concluded that Graham was amenable to “reasonable rehabilitation”<sup>121</sup> based on a totality of factors (i.e., the seriousness of the armed offenses<sup>122</sup> and the prior criminal history comprised of two criminal episodes committed within a time span of approximately eighteen months).<sup>123</sup>

Opponents will view these details of Graham’s record as support for the sentence of life without parole. Nevertheless, the *Graham* Court labeled the potential for diametrically opposed outcomes in judicial sentencing as “subjective judgment.”<sup>124</sup> That is why sentencing of juvenile non-homicide offenders to life without parole was deemed unconstitutional. The point is no matter how the factual details of individual criminal activity vary, juvenile offenders like Graham must be sentenced under a statutory framework that provides for alternatives to traditionally imposed adult sanctions. Judicial discretion must favor statutorily created life sentencing options that include appropriate rehabilitative treatment programs.

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<sup>121</sup> In its Eighth Amendment review of the case, the Florida Court of Appeals agreed with the trial court’s assessment and cited to the record for evidence of Graham’s “inability to rehabilitate.” *Graham v. Florida*, 982 So. 2d 43, 53 (Fla. Ct. App. 2008). The Florida Court of Appeals addressed the issue of disproportionality by focusing on the leniency of the trial court’s probation sentence given after commission of two armed robberies in the record and confession of an additional three. It also considered that Graham was not “preteen,” but seventeen when he committed the crimes. *Id.* at 52. Undoubtedly, the seriousness of the crimes is notable. Nevertheless, the U.S. Supreme Court in *Graham* ruled that because of Graham’s youth, we must view disproportionality differently. The Court stated, “Graham deserved to be separated from society for some time in order to prevent what the trial court described as an ‘escalating pattern of criminal conduct,’ but it does not follow that he would be a risk to society for the rest of his life.” *Graham v. Florida*, 130 S. Ct. at 2029. Despite the fact that the *Roper* decision set the foundation for how the Eighth Amendment applies to youth who commit crimes, neither the Florida trial court nor the Court of Appeals recognized the U.S. Supreme Court jurisprudence on this issue. After *Graham*, the States’ sentencing policies must adhere to the constitutional boundaries drawn despite the “preteen” or older teenaged status of the juvenile offender.

<sup>122</sup> Ordinarily, carrying, displaying, or threatening to use a weapon or firearm requires reclassification of felony charges to a “life felony,” thereby enhancing the sentence. FLA. STAT. § 775.087(1)(a) (2010). In the armed burglary offense, the “weapon” was a metal bar that the accomplice used. During the home invasion robbery, Graham held the homeowner at gunpoint. *Graham v. Florida*, 982 So. 2d at 52.

<sup>123</sup> *Graham v. Florida*, 130 S. Ct. at 2018.

<sup>124</sup> *Id.* at 2031.

Moreover, statutory amendments could dismantle any barriers that would otherwise make juvenile sanctions unavailable.<sup>125</sup>

### III. MEANINGFUL OPPORTUNITY FOR RELEASE REQUIRES A SEPARATELY CREATED PRISON RELEASE MODEL FOR JUVENILE LIFE SENTENCE OFFENDERS

In *Graham*, the Supreme Court ruled that the Eighth Amendment prohibits the sentence of life without the possibility of parole for juvenile non-homicide offenders.<sup>126</sup> The logical inference is that the alternative sentence of life **with** the possibility of parole is constitutional for such offenders. The possibility of parole, however, is not a guarantee that the juvenile offender will eventually be released.<sup>127</sup> Thus, the sentence of life with the possibility of parole for juvenile offenders violates the Eighth Amendment **unless** the States provide a “meaningful opportunity for release.”<sup>128</sup> The question then is whether the traditional parole model in which a board administratively releases inmates from prison<sup>129</sup> can adequately determine the release of juvenile life sentence offenders, or whether an entirely different scheme is warranted.

The central issue here is whether the States’ existing, or perhaps defunct, parole systems can provide a “meaningful opportunity for release.” A separate prison release model for juvenile life sentence offenders that focuses on substantive rehabilitation could satisfy the *Graham* requirement. Unfortunately, the parole model may prove inappropriate considering the long-standing problems that have plagued such systems.<sup>130</sup> Accordingly, this section will address the

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<sup>125</sup> For instance, the same Florida statute that authorizes alternatives to adult disposition also prevents youthful offender treatment or serious or habitual juvenile offender treatment if the child is found to have committed an offense punishable by life imprisonment.

<sup>126</sup> *Graham v. Florida*, 130 S. Ct. at 2034.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2030.

<sup>129</sup> *Parole: Then and Now*, SENATE OF TEXAS IN BRIEF 2 (May 1999), [www.senate.state.tx.us/SRC/pdf/ib0599.pdf](http://www.senate.state.tx.us/SRC/pdf/ib0599.pdf).

<sup>130</sup> See Joel M. Caplan, *Parole System Anomie: Conflicting Models of Casework and Surveillance*, 70 FED. PROBATION 32, 35 (2006), available at <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2006-12/parolesystem.html>. The author describes the underlying problems that exist within the parole system as a combination of incompatible supervision styles of casework and surveillance and an overwhelming societal concern for public safety. He refers to the problem as an “anomic state of parole” borrowing from Emile

history of the parole system, including its purpose and problems, and then follow with brief recommendations for establishing an effective “parole-like” model.

**A. The States Must Yield to the Origins of Reform Historically Present In U.S. Parole Systems**

The parole system in the United States was initiated in 1876 by the Michigan penologist Zebulon Brockway. It was first utilized under a proposal for youth reformatory.<sup>131</sup> Under that system, offenders received sentences of indeterminate length with their actual release date established at the “discretion of a releasing authority.”<sup>132</sup>

The underlying theory of the parole system was to reform, rather than punish, the prisoners so that they could eventually become productive members of society.<sup>133</sup> Under this system, prisoners were not considered people to be thrown away forever.<sup>134</sup> The theory functioned under the belief that each prisoner’s treatment should be individualized.<sup>135</sup> Brockway’s system spread rapidly through the United States, with New York becoming the first state to adopt all the components of a parole system: “indeterminate sentencing, a system for granting release, post release supervision, and specific criteria for parole revocation.”<sup>136</sup> Unfortunately, the parole concept morphed into a system for controlling prison growth.<sup>137</sup> Out of the concept developed boards that determined prisoner’s release, good time reductions for satisfactory behavior, and earned-time incentives for participation in work or educational programs.<sup>138</sup> One of the largest complaints pertained to the inequities in treatment of similar offenders based on the discretion of parole boards.<sup>139</sup> Incarcerating criminals for

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Durkheim’s term “anomie” which is a state of normlessness, confusion, or lack of regulation in modern society.

<sup>131</sup> *Parole: Then and Now*, *supra* note 129, at 1.

<sup>132</sup> *Id.*

<sup>133</sup> The original parole systems were designed to assist inmates with transition from reformatories back into their respective communities. *See* Caplan, *supra* note 130, at 35.

<sup>134</sup> *Parole: Then and Now*, *supra* note 129, at 1.

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 3.

longer periods of time replaced the original rehabilitative purpose.<sup>140</sup> And discretionary parole became the lynchpin for the new punitive goal. With the increase in release of U.S. prisoners escalating to seventy-two percent of the total U.S. prison population in 1977, skeptics questioned whether the release laws were becoming too lenient.<sup>141</sup>

Despite these concerns, the origins of reform are congruent with the standard set forth in *Graham*. The Eighth Amendment prohibits sentencing non-homicide juvenile offenders to life without parole because such sentence effectively precludes any possibility that they will ever become an effective member of society. Youthful offenders, who often act impulsively without considering the long-term consequences of their actions,<sup>142</sup> are denied opportunity for societal reentry when they are sentenced to life without parole.

*Graham* requires that a release process operate during the incarceration of the juvenile life sentence offender. Unfortunately, many States responded to the predicaments presented by their parole systems by abolishing them altogether or limiting the parole commission's functions.<sup>143</sup> Florida, for example, abolished its parole system in 1983 and subsequently enacted a series of sentencing guidelines incorporating greater sanctions and upward discretion in sentencing.<sup>144</sup> Therefore, the reinstatement of a parole-like system that focuses on rehabilitative reform purposes is paramount to the States' compliance with *Graham*.

### **B. A Separately Created Prison Release Model Must Not Fall Victim to the Inherent Subjectivity of Discretionary Decision-Making**

The *Graham* decision specifically directed the States to develop the process for measuring a juvenile life sentence offender's

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<sup>140</sup> See Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California Parolees in Parole Revocation Proceedings*, 33 W. ST. U. L. REV. 1, 2 (2006) (referring to the "reformatory" purpose of parole).

<sup>141</sup> In response to a perceived break down in the parole system, states enacted sentencing laws with mandatory minimum sentences. See *Parole: Then and Now*, *supra* note 129, at 2.

<sup>142</sup> Johanna Cooper Jennings, *Juvenile Justice, Sullivan, and Graham: How The Supreme Court's Decision Will Change The Neuroscience Debate*, DUKE L. & TECH. REV. 6, 7 (2010).

<sup>143</sup> *Parole: Then and Now*, *supra* note 129, at 2.

<sup>144</sup> *Florida's Criminal Punishment Code: A Comparative Assessment*, FLORIDA DEP'T OF CORRECTIONS 6 (Sept. 2009), available at [http://www.dc.state.fl.us/pub/sg\\_annual/0809/sg\\_annual-2009.pdf](http://www.dc.state.fl.us/pub/sg_annual/0809/sg_annual-2009.pdf).



entitlement for release.<sup>145</sup> But in light of the concerns with the traditional parole model, the States should be particularly judicious regarding the discretionary aspects of parole board functions when constructing the process for determining the personal development of juvenile life sentence offenders. The States should develop specific guidelines for determining juvenile life sentence offender release in order to cabin the inherent subjectivity of discretionary decision-making that plagued the traditional parole systems.

Because the *Graham* Court expressed concern over discretion and subjective judgment in sentencing,<sup>146</sup> the States should proceed cautiously in constructing the procedural structure under which they will comply with *Graham*. Otherwise, it is conceivable that a discretionary release model for juvenile life sentence offenders will obviate any “meaningful opportunity” as the nature of the committed offense, the severity of the sentence, and various other factors cloud the decision maker’s judgment.<sup>147</sup> Since the *Graham* Court ruled that “[t]he case-by-case approach to sentencing must . . . be confined by some boundaries,”<sup>148</sup> such as the operation of a categorical rule to eliminate sentencing subjectivity, then the States must also guard against discretionary procedures that potentially defeat compliance with *Graham*.

### C. A Separately Created Prison Release Model Must Evaluate the Psychosocial Growth of the Juvenile Life Sentence Offender

Thus far, this article has advocated for a legal framework grounded in statutory authority for compliance with *Graham*’s “meaningful opportunity for release” standard. Additionally, it has examined how existing statutory programming models pertaining to other classifications of offenders might present the basis for mandating rehabilitative treatment of juvenile life sentence offenders. Evaluating

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<sup>145</sup> See *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

<sup>146</sup> *Id.* at 2031.

<sup>147</sup> See Marques P. Richeson, *Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration’s Potential Racial Side Effects*, 25 HARV. BLACKLETTER L.J. 95, 97 (2009). The author opines on the disparate sentencing of black men for sex-related crimes when fears and miseducation about black male hypersexuality and hyperaggression cloud the judgment and perception of judges and juries. Richeson argues for repeal of chemical castration statutes as a mode of punishment under the Eighth Amendment and equal protection laws.

<sup>148</sup> *Graham v. Florida*, 130 S. Ct. at 2031–32.

the effectiveness of treatment is the next integral component of the “meaningful opportunity for release” mandate. A prison release process for juveniles facing incarceration for potentially the rest of their lives should differ from traditional release models.

The immaturity of incarcerated juveniles presents particular vulnerabilities that can impede positive social growth, especially in an adult prison culture. When the States impose a life sentence, they subject the incarcerated juvenile to an environment that frustrates personal development. The *Graham* decision is rooted in the notion that rehabilitation of juvenile offenders must follow if the States impose life sentences. The juvenile life sentence offender must receive meaningful opportunity for release, which logically includes determining whether he has “meaningfully” transformed into a productive member of society. Therefore, a separately created prison release model should be constructed to determine if, in fact, the rehabilitative programming has succeeded.

Because the desired goal of rehabilitation encompasses psychological, social, vocational, and educational growth, it is necessary to design assessment guidelines that measure specific targeted areas of human conduct. The States should develop prison release guidelines that assess the individual juvenile life sentence offender’s success in attaining growth with a focus on the psychology of human conduct. The guidelines can be based on the Risk Need Responsivity (RNR) model.

Canadian researchers in Ottawa propose a Risk Need Responsivity model<sup>149</sup> as an effective programming structure that fully incorporates an individual’s needs and risk factors with treatment and responsivity. Generally, the RNR model<sup>150</sup> addresses three primary

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<sup>149</sup> See D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL’Y & L. 39 (2010).

<sup>150</sup> The following three principles of the RNR model can inform the States on developing effective programming and corresponding measures for the individual juvenile life sentence offender’s success: (1) Risk principle: Direct intensive services to the higher risk offenders and minimize services to the low risk offenders; (2) Need principle: Target criminogenic needs in treatment; (3) Responsivity principle: Provide the treatment in a style and mode that is responsive to the offender’s learning style and ability. Under the risk principle, Andrews and Bonta believe that only the high-risk offender is worthy of treatment focus and benefits. This principle is ill-suited for the prison release model advocated here because all juvenile offenders, regardless of the level of crime committed, are worthy of rehabilitation based on notions of limited culpability cited to by the *Graham* Court. See Andrews & Bonta, *supra* note 149, at 45.

concerns: (1) who should receive services (moderate and higher risk cases), (2) the appropriate targets for rehabilitation services (criminogenic needs), and (3) the powerful influence strategies for reducing criminal behavior (responsivity to rehabilitation).<sup>151</sup> The RNR model recognizes the failed “get tough” approach to criminal justice and places greater effort on the rehabilitation of offenders.<sup>152</sup> The researchers offer an expansive approach to crime prevention and correctional rehabilitation of offenders<sup>153</sup> by placing value on the psychology of human conduct as it relates to punishment as well as rehabilitative prison services.<sup>154</sup>

Unlike adult inmates (those over the age of twenty-one) who become incarcerated after periods of crucial psychological and social development, juvenile offenders should have the opportunity to demonstrate considerable change to whatever deficiencies contributed to their incarceration (e.g., physical, psychological or substance abuse).<sup>155</sup> An effective prison release model should function under psychosocial considerations for specific areas of juvenile offenders’ growth. Moreover, the RNR model also pertains directly to increased success for reducing recidivism rates—one of the more relevant obstacles confronting juvenile life sentence offenders.<sup>156</sup> This article

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<sup>151</sup> *Id.* at 47. While these primary areas formulate the core principles for the RNR model, Bonta and Andrews have recently outlined seventeen additional principles ranging from respect for the person to the organizational context for service delivery (e.g., services are more effective when delivered in the community as opposed to custodial and residential settings).

<sup>152</sup> *Id.* The researchers’ discussion on punishment within the prison structure as a means of curtailing criminal behavior is less instructive for the prison release model asserted in this article. However, discussion on delivery of rehabilitative services and the effectiveness on reduced recidivism provide relevant direction.

<sup>153</sup> *Id.* at 51.

<sup>154</sup> *Id.* at 39–40 (“Our underlying approach suggests that crime prevention efforts that ignore, dismiss, or are unaware of the psychology of human behavior are likely to underperform in regard to successful crime prevention. As we will show, the psychology of human behavior has much to say about the effectiveness of punishment and the effectiveness of human, social, and clinical services.”). The researchers further posit that many models fail when treatment services do not attend to the psychology of human behavior.

<sup>155</sup> *See* *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010). The Court explains the need for a categorical rule to ensure constitutional protection from cruel and unusual life punishment without parole for all juvenile non-homicide offenders who must be afforded an opportunity to demonstrate maturity and reform.

<sup>156</sup> *See* Andrews & Bonta, *supra* note 149, at 39; *see also* Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 988–89 (2003) (advocating for a more cautious approach to

advocates for a separately created prison release model that primarily employs appropriate targets for rehabilitation services (criminogenic needs) and the powerful influence strategies for reducing criminal behavior (responsivity to rehabilitation). Focusing on these primary concerns will allow proper measurement of rehabilitative services based on the offender's needs and the success each one demonstrates through the development of cognitive social learning skills.

Developments over the past two decades in the psychology of criminal conduct that focus more on individual criminal behavior have caused a new perspective to emerge on how to enhance correctional treatment effectiveness.<sup>157</sup> Consequently, the States should construct a release model that embodies the psychology of criminal conduct and considers various antisocial personality factors such as impulsiveness, thrill-seeking, and egocentrism.<sup>158</sup> Juveniles function under adolescent levels of impulsivity and poor decision making.<sup>159</sup> The *Graham* standard requires the States to acknowledge these facts when punishing adolescents. The States therefore must create the meaningful opportunity to progress beyond impulsive behavior patterns. It follows that a separately created prison release model for juvenile life sentence offenders should include measuring demonstrated success in relevant psychosocial areas, thereby leading to release. The RNR model is appropriate for this purpose.

The model is comprised of three primary concerns including inquiry into *whom* should receive services—the Risk principle.<sup>160</sup> The *Graham* Court held that diminished culpability of the juvenile offender requires the States to provide meaningful opportunity for release. Consideration for moderate or high-risk offenders is arguably implied in the Court's development of a categorical rule for non-homicide juvenile offenders serving life sentences. Therefore, the States do not need to assess who should receive services under the Risk principle of the RNR model.

The separately created release model for juvenile life sentence offenders should first encompass the Need principle because it speaks to what types of services can most successfully address the issues

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imposing sanctions on juveniles outside the protection of the juvenile justice system in order to avoid the terrible consequences of incarceration in adult facilities, such as abuse, increased recidivism, and suicide).

<sup>157</sup> See Andrews & Bonta, *supra* note 149, at 44.

<sup>158</sup> *Id.*; see also Powers, *supra* note 81, at 257.

<sup>159</sup> See Jennings, *supra* note 142, at 6–7.

<sup>160</sup> See Andrews & Bonta, *supra* note 149, at 44.

presented by the juvenile offender.<sup>161</sup> These issues are referred to as “criminogenic needs”—that is, dynamic risk factors (those related to criminal behavior)<sup>162</sup> that should be targeted when constructing individual rehabilitative programming.<sup>163</sup> In addition, the Need principle accounts for high-risk offenders who might need a broader range of service given the amount of risk factors. For the juvenile life sentence offenders, the “meaningfulness” of their opportunity for release is directly related to participation in whatever rehabilitative programs are available. Consequently, the breadth of available programming is important, as well as measured success in achieving specific outcomes.

The third major principle, Responsivity, reaches beyond the services provided and the needs targeted. Instead, it provides the most important component to a separately created prison release model—the necessary framework for correlating responsiveness with levels of intervention.<sup>164</sup> For incarcerated children, its focuses on structured, cognitive behavioral intervention lead to more effective correctional treatment.<sup>165</sup> Most importantly, specific responsivity<sup>166</sup> in the RNR model measures individualized treatment according to strengths, ability, motivation, personality, and bio-demographic characteristics such as gender, ethnicity, and age.<sup>167</sup> The juvenile life sentence offenders will not achieve release if the models implemented by the States do not consider individualized success or lack thereof. Without delineated measures for success in psychosocial areas of growth, the juvenile life sentence offender will fall victim to the subjective discretion and ill-directed policies of traditional parole models. Moreover, the RNR model contains progressive policy and practice implications that would be useful in a separately created prison release model for juvenile life sentence offenders. It strives for reduced recidivism by utilizing properly selected, trained, supervised, and

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<sup>161</sup> *Id.* at 45.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 46. While the Need principle targets the high risk factors, it also distinguishes criminogenic needs from other “noncriminogenic needs” that are considered to be minor and unrelated to criminal behavior (i.e., self esteem).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 46. Specific responsivity also refers to the cognitive social learning practices.

<sup>167</sup> *Id.* at 47. The Responsivity principle also calls for connection between treatment models and client characteristics.

resourced staff who contribute to the success of the model. Specially trained staff can more effectively employ cognitive-behavioral techniques with difficult clientele.<sup>168</sup>

Finally, this article asserts that since the *Graham* Court gave power to the States' legislatures and judges to construct their own models for compliance, the ruling supports innovative prison release models that focus on targeted needs and measure success in key areas of human conduct. Canadian researchers Andrews and Bonta provide a cutting edge model that speaks to the dilemma we face as a society between punishment for criminal behavior and prevention of the same. The researchers state, "Additional psychological contributions in the domains of assessment and crime prevention are welcomed at a time when the financial, human, and moral costs of official punishment have reached crisis proportions."<sup>169</sup> Incarcerating juveniles for life in prison indicates societal crisis on many levels and warrants non-traditional models for release.

#### IV. GRAHAM AFTERMATH

Quite expectedly, Florida's initial response to the Supreme Court ruling in *Graham* was to address the issue of re-establishing a parole system. Identical proposed bills offered by both the House and Senate have, to date, been referred to subcommittee, but not yet scheduled for hearing. Generally, the "Graham Compliance Act,"<sup>170</sup> provides that a juvenile offender who was less than eighteen years of age at the time of commission of a nonhomicide offense and who was sentenced to life imprisonment is eligible for parole after a minimum period of incarceration. The bill requires an initial eligibility interview to determine whether the juvenile offender has demonstrated the maturity and reform required for parole, provides criteria to determine

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<sup>168</sup> *Id.* at 50. The researchers also point to the importance of refresher courses, feedback from experienced staff, and managerial encouragement of skill development.

<sup>169</sup> *Id.* at 51.

<sup>170</sup> House Bill 29: Parole for Juvenile Offenders was introduced by House representatives Michael Weinstein and Ari Porth. H.B. 29, 2011 Leg., Reg. Sess. (Fla. 2010). Senate Bill 160 was introduced by Senator Arthenia Joyner. S.B. 160, 2011 Leg., Reg. Sess. (Fla. 2010). Both the House and Senate versions of the bill have been referred to their respective criminal justice subcommittees, but have not been scheduled for hearing.

maturity and reform, and provides eligibility for reinterview after a specified period for those initially denied parole.<sup>171</sup>

While providing statutory authority for possible parole of the juvenile life sentence offender commences the process, the Graham Compliance Act strains the “spirit” of the Supreme Court opinion in that an “initial eligibility interview” under the proposed legislation must occur “only after the juvenile offender serves [twenty-five] years of incarceration.”<sup>172</sup> Practically, a juvenile offender who is incarcerated at the age of seventeen might not spend his entire life in prison, but could arguably attain cognitive, social, and educational maturity long before expiration of twenty-five years. The proposed legislation in effect imposes a minimum twenty-five-year sentence on juvenile offenders. The “meaningful opportunity for release” might be afforded the juvenile in this post-*Graham* era, but not before a minimum period of his life term is served.

## CONCLUSION

Life imprisonment of juveniles without possibility of parole is unconstitutional. Juveniles commit crimes, but their criminal conduct does not attenuate their status as adolescents. The United States Supreme Court has accepted scientific brain imaging data (applied with respect to those less than eighteen) that explains the impulsivity,

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<sup>171</sup> The proposed criteria for demonstrated maturity and reform include the following eight factors: the wishes of the victim or the opinions of the victim’s next of kin; whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or domination of another person; whether the juvenile offender has shown sincere and sustained remorse for the criminal offense; whether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected her or his behavior; whether the juvenile offender, while in the custody of the department, has aided inmates suffering from catastrophic or terminal medical, mental, or physical conditions or has prevented risk or injury to staff, citizens, or other inmates; whether the juvenile offender has successfully completed any General Educational Development, other educational, technical, work, vocational, or available self-rehabilitation program; whether the juvenile offender was a victim of sexual, physical, or emotional abuse prior to the time of the offense; the results of any mental health assessment or evaluation that has been performed on the juvenile offender. H.B. 29 § 2(d)(1)-(8). Eligibility for reinterview under subsection (e) for a juvenile offender who is not granted parole after an initial eligibility interview is eligible for a reinterview seven years after the date of the denial of the grant of parole and every seven years thereafter. H.B. 29 § 2(e).

<sup>172</sup> H.B. 29 § 2(c).

lack of judgment, and poor decision-making skills of adolescents.<sup>173</sup> In applying this data to an Eighth Amendment analysis, the Court in *Graham* concludes that it would be constitutionally impermissible to relegate adolescents to a life in prison for their criminal behavior.

If society (otherwise referred to, by collective reference, as the “States” and their legislative enactments) chooses to punish juveniles for non-homicidal criminal acts by sequestering them to life in prison among other adult criminals, then the U.S. Constitution prohibits this punishment in its most unyielding form—no possibility of release. In a post-*Graham* era, the States that impose life sentences on juveniles seek retribution on behalf of society, but also assume responsibility to do more. The States must construct a comprehensive legal framework that applies to juvenile life sentence offenders. The statutory framework must begin with jurisdictional statutes and extend to sentencing and release provisions that reflect a rehabilitative model.

Through this framework, the juvenile offender is punished for his crimes, but is also afforded a realistic and meaningful opportunity to redirect his behavior and to grow into a productive member of society. The States’ model for treatment of the juvenile life sentence offender must gain authority through legislative enactment lest the juvenile offender never rehabilitates, but instead becomes engulfed by an adult prison culture where recidivism predominates.<sup>174</sup>

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<sup>173</sup> See Michael E. Tigar, *What Are We Doing to the Children?: An Essay on Juvenile (In)justice*, 7 OHIO ST. J. CRIM. L. 849, 858 (2010) (referencing how other areas of the law recognize undeveloped cognitive ability of those under age eighteen).

<sup>174</sup> See Amanda M. Kellar, *They’re Just Kids: Does Incarcerating Juveniles with Adults Violate the Eighth Amendment?*, 40 SUFFOLK U. L. REV. 155, 156 (2006) (arguing that transferring juveniles and incarcerating them with adults increases the likelihood of recidivism).



