

ion's effect to the specific risk of deportation is the central issue left in *Padilla's* wake.

4. *Eighth Amendment — Juvenile Life Without Parole Sentences.* — The Supreme Court's Eighth Amendment jurisprudence has measured punishments by "the evolving standards of decency that mark the progress of a maturing society,"¹ establishing that a civilized people may come to recognize as unacceptable punishments that were once commonplace. Last Term, in *Graham v. Florida*,² the Court held that the Constitution no longer tolerates juvenile life-without-parole (JLWOP) sentences for nonhomicide crimes. This groundbreaking ruling has important implications for another class of cases: JLWOP sentences for *homicide* offenders. Applying *Graham's* logic, it is doubtful that such punishments could survive a constitutional challenge.

In 2003, sixteen-year-old Terrance Graham was arrested following a robbery attempt.³ The prosecutor charged him as an adult, and Graham pled guilty to attempted armed robbery and armed burglary with assault or battery.⁴ After writing a letter to the court begging for a second chance so that he could "do whatever it takes to get to the NFL,"⁵ he was sentenced to concurrent three-year probation terms.⁶ A few months later, Graham, then seventeen, and two accomplices participated in two armed robberies and a high speed chase.⁷ Three handguns were recovered, and a member of the trio was shot.⁸

As a result, a trial court found that Graham had violated his probation.⁹ Under Florida law, the minimum sentence Graham could receive was five years in prison; the maximum was life.¹⁰ The State recommended thirty years on one count and fifteen on another; a presentence report recommended four years.¹¹ Judge Lance Day, however, took no pity on Graham, stating on behalf of the justice system that, "[W]e can't help you any further."¹² In Judge Day's mind, the State had given Graham "a great opportunity to do something with

less an affirmative misrepresentation was made). As this comment has shown, deportation is collateral, so at least the foundations of the direct-collateral distinction have been threatened.

¹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

² 130 S. Ct. 2011 (2010).

³ *Id.* at 2018.

⁴ *Id.*

⁵ *Id.* at 2040 (Roberts, C.J., concurring in the judgment) (quoting Joint Appendix, Vol. II at 380, *Graham*, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2163260, at *380) (internal quotation marks omitted).

⁶ *Id.* at 2018 (majority opinion).

⁷ *Id.* at 2018–19.

⁸ *Id.* at 2019.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Graham's attorney naturally requested the minimum sentence. *Id.*

¹² *Id.* at 2020 (quoting Joint Appendix, Vol. II, *supra* note 5, at 394).

[his] life” by previously giving him probation, an opportunity he had “throw[n] . . . away.”¹³ Thus, the only thing Judge Day could do was “to try and protect the community from [Graham’s] actions.”¹⁴ Judge Day then sentenced Graham to life in prison.¹⁵ Florida has no parole system, which effectively guaranteed that Graham would die in prison.¹⁶

The state appellate court affirmed Graham’s sentence as not “grossly disproportionate” to his crimes, reasoning that he was beyond rehabilitation, regardless of his age.¹⁷ The Florida Supreme Court denied certiorari.¹⁸

The Supreme Court reversed. Writing for the Court, Justice Kennedy¹⁹ determined that the Constitution prohibits JLWOP for non-homicide crimes.²⁰ Justice Kennedy began by explaining that most of the Court’s precedents “consider punishments challenged not as inherently barbaric but as disproportionate to the crime.”²¹ The Court then examined two forms of proportionality challenges. First, as-applied challenges attack a *particular* term-of-years sentence.²² Second, facial challenges seek *categorically* to restrict a punishment from being applied to an entire class of offenders.²³ Since the latter type had previously been applied only to death sentences, Graham’s case presented a novel issue: “[A] categorical challenge to a term-of-years sentence.”²⁴

In categorical challenges, courts apply a two-part test. The *Graham* Court first analyzed whether there were “objective indicia of national consensus” against JLWOP for nonhomicide crimes.²⁵ The Court conceded that thirty-seven states and the District of Columbia authorized nonhomicide JLWOP in some circumstances.²⁶ However, the Court asserted that the mere existence of legislation is not dispositive — “[a]ctual sentencing practices” must also be examined.²⁷ At the time of the opinion, there were only 129 juvenile offenders serving

¹³ *Id.* (quoting Joint Appendix, Vol. II, *supra* note 5, at 394).

¹⁴ *Id.* (quoting Joint Appendix, Vol. II, *supra* note 5, at 394).

¹⁵ *Id.* The sentence was life for armed burglary, and fifteen years for attempted armed robbery. *Id.*

¹⁶ *Id.* Graham’s sole avenue for release would be executive clemency. *Id.*

¹⁷ *Graham v. State*, 982 So. 2d 43, 51–52 (Fla. Dist. Ct. App. 2008).

¹⁸ *Graham v. State*, No. SC08-1169, 2008 WL 3896182 (Fla. 2008).

¹⁹ Justice Kennedy was joined by Justices Stevens, Ginsburg, Breyer, and Sotomayor.

²⁰ *Graham*, 130 S. Ct. at 2034.

²¹ *Id.* at 2021.

²² *See id.* at 2021–22.

²³ *See id.* at 2022.

²⁴ *Id.*

²⁵ *Id.* at 2023.

²⁶ *Id.* For a list of these state-by-state JLWOP laws, see *id.* at 2034–35.

²⁷ *Id.* at 2023.

JLWOP sentences for nonhomicide crimes, though in 2007 alone more than 380,000 juveniles were found guilty of nonhomicide offenses.²⁸ Only twelve jurisdictions *actually* imposed nonhomicide JLWOP — and Florida was responsible for almost sixty percent of such sentences.²⁹ Thirteen states did not permit nonhomicide JLWOP, and twenty-six states permitted but never imposed it.³⁰ From these statistics, the Court concluded that nonhomicide JLWOP “is as rare as other sentencing practices found to be cruel and unusual.”³¹

The majority then turned to the second prong of the test: the three-factor “independent judgment” analysis.³² Beginning with the culpability of the class at issue, precedents had established that juveniles were “less deserving of the most severe punishments” because of their “lessened culpability.”³³ This lessened culpability stems from a juvenile’s immaturity, undeveloped sense of responsibility, unformed character, and vulnerability to negative influences.³⁴ Moreover, the juveniles at issue had committed nonhomicide crimes, which differ from homicide “in a moral sense.”³⁵ Therefore, “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”³⁶

Turning to the punishment’s severity, the Court classified life without parole as the “second most severe penalty permitted by law.”³⁷ In fact, the Court stated that life without parole “share[s] some characteristics with death sentences”³⁸ — namely, that it “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency,” a “remote possibility.”³⁹ And the harshness of JLWOP is magnified because mathematically a juvenile “will on average serve more years and a greater percentage of his life in prison than an adult.”⁴⁰

Finally, the Court considered the penological justifications for nonhomicide JLWOP.⁴¹ The first, retribution, “must be directly related to

²⁸ See *id.* at 2023–25.

²⁹ See *id.* at 2024 (finding 77 of 129 nonhomicide JLWOP sentences imposed in Florida).

³⁰ See *id.* at 2023–24.

³¹ *Id.* at 2025.

³² *Id.* at 2022.

³³ *Id.* at 2026 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

³⁴ *Id.* (citing *Roper*, 543 U.S. at 569–70).

³⁵ *Id.* at 2027.

³⁶ *Id.*

³⁷ *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation mark omitted).

³⁸ *Id.*

³⁹ *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)).

⁴⁰ *Id.* at 2028.

⁴¹ *Id.*

the personal culpability of the criminal offender.”⁴² Since the Court had previously held in *Roper v. Simmons*⁴³ that the most severe penalty (death) could not be imposed on juvenile murderers, the *Graham* Court concluded that retribution could not justify “imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.”⁴⁴ Deterrence, the second justification, failed because juveniles, lacking maturity and a sense of responsibility, “are less likely to take a possible punishment into consideration when making decisions.”⁴⁵ The third, incapacitation, would require a finding that a juvenile could not be rehabilitated, a finding that would be in its nature “inconsistent with youth.”⁴⁶ Even expert psychologists, the Court explained, could not differentiate between those youths who are “irreparabl[y] corrupt[.]” and those suffering from a “transient immaturity.”⁴⁷ The final justification, rehabilitation, failed on a definitional level, since “[t]he penalty forswears altogether the rehabilitative ideal.”⁴⁸

Having concluded that the Eighth Amendment *categorically* bars nonhomicide JLWOP sentences, the Court then rejected two alternatives as inadequate — requiring that state laws consider the ages of nonhomicide offenders,⁴⁹ and taking a case-by-case approach to the gross disproportionality of JLWOP.⁵⁰ The Court bolstered its holding by looking to international practice. At the time, the United States was the only nation that imposed nonhomicide JLWOP sentences, indicating a strong global consensus against JLWOP.⁵¹

Justice Stevens concurred,⁵² primarily to respond to Justice Thomas’s argument that the Court should abandon proportionality review. Justice Stevens stressed that “unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.”⁵³

Chief Justice Roberts concurred in the judgment. While he agreed that *Graham*’s *individual* sentence was cruel and unusual, Chief Justice Roberts was unwilling to hold that nonhomicide JLWOP *categori-*

⁴² *Id.* (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)) (internal quotation mark omitted).

⁴³ 543 U.S. 551 (2005).

⁴⁴ *Graham*, 130 S. Ct. at 2028.

⁴⁵ *Id.* at 2028–29.

⁴⁶ *Id.* at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)) (internal quotation mark omitted).

⁴⁷ *Id.* (quoting *Roper*, 543 U.S. at 573) (internal quotation mark omitted).

⁴⁸ *Id.* at 2030.

⁴⁹ *Id.* at 2031. This approach would leave open the possibility of “subjective judgment[s].” *Id.*

⁵⁰ *Id.* at 2031–32. This approach would fail to consider the special problems inherent in representing youths at trial, as well as the impossibility of a court determining incorrigibility. *Id.*

⁵¹ *Id.* at 2034.

⁵² Justice Stevens was joined by Justices Ginsburg and Sotomayor.

⁵³ *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring).

cally violates the Constitution.⁵⁴ In Chief Justice Roberts's opinion, "the primacy of the legislature," "the variety of legitimate penological schemes," federalism, and the requirement of judicial objectivity all indicated that the Court should adhere to the "highly deferential" two-part "narrow proportionality" inquiry in noncapital cases.⁵⁵ First, the Court should compare "the gravity of the offense and the harshness of the penalty" in the instant case.⁵⁶ Only if this comparison leads to a finding of gross disproportionality should the Court conduct inter- and intrajurisdictional comparisons.⁵⁷

Chief Justice Roberts, applying the narrow proportionality test, concluded that Graham's sentence was unconstitutional. First, he found that the crimes Graham committed were "certainly less serious than . . . murder or rape."⁵⁸ This fact, coupled with Graham's youth, gave rise to a "strong inference that Graham's sentence . . . was grossly disproportionate."⁵⁹ Second, the Chief Justice found that "intrajurisdictional and interjurisdictional comparisons . . . confirm[ed] the threshold inference of disproportionality."⁶⁰ However, Chief Justice Roberts refused to make a categorical statement, asserting that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable," that JLWOP may be constitutionally justifiable.⁶¹

Justice Thomas dissented.⁶² In his view, the Court should have abandoned proportionality review, deferring to legislatures on the proportionality of punishments while ruling only on the form of punishment itself.⁶³ According to Justice Thomas, proportionality review, turning on vague concepts like national consensus and independent judgment, lacks a "limiting principle" that would prevent the Court from striking down "the law's third, fourth, fifth, or fiftieth most severe penalties as well."⁶⁴

Justice Thomas then applied the proportionality test to reach a conclusion opposite to that of the majority. First, on national consensus, Justice Thomas pointed to legislative trends punishing juvenile of-

⁵⁴ See *id.* (Roberts, C.J., concurring in the judgment).

⁵⁵ *Id.* at 2037 (citations omitted).

⁵⁶ *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 290–91 (1983)) (internal quotation marks omitted).

⁵⁷ *Id.* at 2038 (citing *Solem*, 463 U.S. at 291–92).

⁵⁸ *Id.* at 2040.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2042.

⁶² Justice Thomas was joined by Justice Scalia, and joined in part by Justice Alito. Justice Alito also dissented separately to emphasize the continuing validity of a term-of-years sentence without parole. *Id.* at 2058 (Alito, J., dissenting).

⁶³ See *id.* at 2043 (Thomas, J., dissenting) ("The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of . . . legislatures, judges, and juries regarding [a] . . . 'moral' question . . .").

⁶⁴ *Id.* at 2046.

fenders more severely, as well as the fact that federal law permits non-homicide JLWOP sentences.⁶⁵ As to “actual sentencing practices,” Justice Thomas insisted that a punishment’s rare imposition “demonstrates nothing more than a general consensus that it should be just that — rarely imposed.”⁶⁶

Second, on the “independent judgment” prong, Justice Thomas opined that retribution sufficed to uphold nonhomicide JLWOP.⁶⁷ Justice Thomas disputed the idea that no juvenile could ever warrant JLWOP, finding it “unacceptable that [the] Court, swayed by studies reflecting the general tendencies of youth, decree[d] that the people of this country are not fit to decide . . . when the rare case requires different treatment.”⁶⁸ Furthermore, Justice Thomas criticized the Court’s logic in categorically banning JLWOP only in nonhomicide situations. To Justice Thomas, this distinction indicated that the majority was more concerned with the offender’s *acts* than with his *youth*.⁶⁹

Justice Thomas was correct in pointing out the tension in the *Graham* Court’s differentiation between homicide and nonhomicide JLWOP. However, he was wrong in assuming that the *Graham* majority implicitly *approved* of homicide JLWOP.⁷⁰ In fact, the Court’s language calls into serious question existing laws permitting — and, in some cases, mandating — JLWOP for homicide crimes. Applying the *Graham* Court’s logic and its categorical test, it will be difficult for the Court, using its independent judgment, to uphold homicide JLWOP. The Court may thus be forced to confront a situation in which its independent assessment disapproves of the punishment, although it cannot clearly identify a national consensus against it.

As in *Graham*, the homicide JLWOP analysis would begin with an overview of “objective indicia of society’s standards.”⁷¹ Starting with existing legislation, forty-four states and the federal government permit homicide JLWOP sentences.⁷² In many states, homicide JLWOP is mandatory.⁷³ And numerous states passed their JLWOP statutes as a

⁶⁵ See *id.* at 2048–50.

⁶⁶ *Id.* at 2051.

⁶⁷ See *id.* at 2054.

⁶⁸ *Id.* at 2055 (internal quotation marks omitted).

⁶⁹ See *id.* at 2055–56.

⁷⁰ See *id.* at 2055.

⁷¹ *Id.* at 2022 (majority opinion) (quoting *Roper v. Simmons*, 543 U.S. 551, 552 (2005)) (internal quotation mark omitted).

⁷² Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008).

⁷³ See Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 49 (2008).

legislative compromise after the Supreme Court's abolition of the juvenile death penalty.⁷⁴

As the Court has made clear, however, actual sentencing practices also matter.⁷⁵ Homicide JLWOP is imposed at more than twenty times the rate of nonhomicide JLWOP — the sentence at issue in *Graham*. As of 2009, there were approximately 2589 juveniles serving JLWOP sentences.⁷⁶ Subtracting the nonhomicide cases, there are an estimated 2460 individuals serving homicide JLWOP sentences.⁷⁷ As in *Graham*, though, this raw number does not tell the whole story. First, because JLWOP prisoners are sentenced when they are young, they languish in prison for decades.⁷⁸ Thus, the 2460 number is the result of decades of aggregation. Second, the sentence is imposed on a very small percentage of those eligible for it. In 2000, for instance, a mere nine percent of juvenile homicide offenders received JLWOP.⁷⁹ And third, while the national JLWOP rate is 17.35 per 100,000 youths, homicide JLWOP sentences are heavily concentrated in seven states that impose the punishment at twice the national rate or higher.⁸⁰ This difference in imposition is not correlated to differing rates of violent crime in those states.⁸¹ Subtracting these outlier states, there are only 861 people serving JLWOP sentences in the remaining thirty-eight jurisdictions authorizing the sentence.⁸² This is an average of twenty-two people per state, accumulated over several decades.

With the evidence of consensus against homicide JLWOP not as clear-cut as the evidence in *Graham*, the next step in the analysis is the exercise of the Court's "independent judgment."⁸³ The three factors in this prong are no different in the homicide and nonhomicide JLWOP contexts, and thus are controlled by *Graham*. First, as to severity of punishment, JLWOP is the same punishment regardless of the context — a punishment made all the more severe by the fact that twenty-

⁷⁴ See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 175–77 (2008).

⁷⁵ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2657 (2008).

⁷⁶ *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), <http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole> [hereinafter HRW UPDATE].

⁷⁷ Cf. *Graham*, 130 S. Ct. at 2024 (stating there were 129 nonhomicide JLWOP sentences being served in 2009).

⁷⁸ *Id.*

⁷⁹ *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, 32 (2005), <http://www.amnestyusa.org/countries/usa/clwop/report.pdf> [hereinafter HRW REPORT].

⁸⁰ *Id.* at 123–24. The states are Virginia (132.94 per 100,000 youths), Louisiana (109.56), Michigan (52.87), Pennsylvania (49.27), Iowa (38.23), Missouri (35.13), and Florida (33.32). *Id.*

⁸¹ *Id.* at 36.

⁸² The seven outliers account for 1599 JLWOP sentences. See HRW UPDATE, *supra* note 76.

⁸³ *Graham*, 130 S. Ct. at 2022.

seven states *mandate* homicide JLWOP sentences in some circumstances,⁸⁴ preventing age from serving as a mitigating factor.⁸⁵

Second, regarding penological goals, the deterrence rationale behind homicide JLWOP will fail for the same reasons as in *Graham*. Children are categorically seen as being less susceptible to deterrence than adults. If a juvenile murderer will not be deterred “by the knowledge that a small number of persons his age have been executed,”⁸⁶ there is no reason to believe that he will be deterred by the knowledge that a similarly small number of persons have been sentenced to JLWOP. And third, on rehabilitation, the *Graham* Court made no attempt to differentiate between nonhomicide and homicide offenders, because there is no difference. Often, youths who receive JLWOP sentences “feel no motivation to improve their development toward maturity.”⁸⁷ They receive practically no rehabilitative programming.⁸⁸ By contrast, a life sentence with the chance of parole “gives the juvenile a reason to live, to learn and to grow”⁸⁹ — to be rehabilitated.

Thus, there are three potential areas for differentiation between *Graham* and homicide JLWOP: retribution, culpability, and incapacitation. Though the retributive rationale may suffice to uphold a life without parole sentence for an adult, “the case for retribution is not as strong with a minor.”⁹⁰ The Court has made it clear that retribution is just a variation on the culpability prong: the punishment “must be directly related to the personal culpability of the criminal offender.”⁹¹

Regarding culpability, the Court has previously held that murder is unique from other crimes in its “moral depravity and . . . injury to the person and to the public.”⁹² At the same time, youths are categorically viewed as less culpable for their acts⁹³ — which courts view as “a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”⁹⁴ Thus, homicide JLWOP stands at the intersection of two principles: the heightened culpability of murderers, and the diminished culpability of juveniles. The higher

⁸⁴ HRW UPDATE, *supra* note 76.

⁸⁵ Feld, *supra* note 73, at 49.

⁸⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion).

⁸⁷ De la Vega & Leighton, *supra* note 72, at 985.

⁸⁸ *Id.* (citing Christopher Hartney, *NCCD Fact Sheet: Youth Under 18 in the Adult Criminal Justice System*, NAT’L COUNCIL ON CRIME & DELINQUENCY, 1 (2006), http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf).

⁸⁹ Elizabeth Cepparulo, Note, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225, 252 (2006).

⁹⁰ *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

⁹¹ *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

⁹² *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

⁹³ *See, e.g., Roper*, 543 U.S. at 569–70.

⁹⁴ *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (quoting TWENTIETH CENTURY FUND, *CONFRONTING YOUTH CRIME* 7 (1978)) (internal quotation mark omitted).

culpability of *murder* has never before trumped considerations of the lessened culpability of a class of *murderers*: the Court has barred juvenile murderers and the mentally retarded from receiving the death penalty, based solely on their categorically lessened blameworthiness.⁹⁵ Similarly, the Court has suggested that “even a *heinous* crime committed by a juvenile” is less blameworthy than that of an adult.⁹⁶ This is the logic underlying *Roper* and *Graham*: children are more prone to impetuous actions, more susceptible to peer pressure, and possess “more transitory” personality traits — and thus, are more deserving of forgiveness, even for their most awful actions.⁹⁷

Of course, the juvenile murderer is more culpable than the *Graham*-type offender. But, though “‘death is different,’ children are different too.”⁹⁸ Chief Justice Roberts discussed at length two especially horrifying cases: a youth who beat and raped a young girl and left her to die in a recycling bin, and a pair of juveniles who gang-raped a woman and then forced her to perform oral sex on her son.⁹⁹ Doubtless, these crimes are shockingly gruesome. But the *Graham* majority, by not addressing them, implicitly accepted that juveniles as a class are entitled to a chance to atone and earn release, no matter how heinous their crimes. Murder is undoubtedly the crime most deserving of severe punishment. But *Graham*’s logic, when combined with *Roper*, seems to place a greater weight on youth than it does on the type of crime committed. This logic at least calls into question whether a juvenile murderer may be sentenced irrevocably to die in prison based purely on the heightened culpability of his crime — especially when the juveniles in Chief Justice Roberts’s extreme examples are barred from receiving such a sentence.

Finally, regarding incapacitation, no evidence shows that juvenile murderers are more likely to become recidivists than are juvenile rapists or burglars — meaning the Court’s dismissal of the incapacitation rationale in *Graham* also holds for juvenile murderers. True, the potential *consequences* of recidivism are worse in the homicide case. But *Graham*’s language focused on guaranteeing juveniles a chance to be released based on “maturity and rehabilitation” — again placing an emphasis on youth over the type of crime committed.¹⁰⁰ Furthermore, as *Graham* made clear, a life sentence with the chance for parole is

⁹⁵ See *Roper*, 543 U.S. 551 (juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (mentally retarded persons).

⁹⁶ *Roper*, 543 U.S. at 570 (emphasis added).

⁹⁷ See *id.*

⁹⁸ Cepparulo, *supra* note 89, at 252.

⁹⁹ *Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring in the judgment).

¹⁰⁰ *Id.* at 2030 (majority opinion).

purely that: a chance for release, not a guarantee.¹⁰¹ If a youth murderer is unable to reform himself, he will never be released. In fact, *Graham* contemplated the argument that truly heinous crimes may require that a juvenile never be released from prison — but then rejected it, holding that states may not make such a judgment “at the outset,” without an opportunity for later review.¹⁰²

Thus, homicide JLWOP presents a novel situation: national consensus is unclear, but independent judgment favors rejecting the punishment. So, what is the Court to do? *Graham* itself contains the answer: independent judgment should prevail. *Graham* marked a significant weakening of the national consensus test. In *Roper* and *Atkins*, the Court focused heavily on the trend away from the death penalty in diminished capacity situations.¹⁰³ However, in *Graham*, the Court disregarded the legislative trend toward JLWOP sentences.¹⁰⁴ Furthermore, *Graham*’s focus on the frequency of imposition contradicts the Court’s previous rejection of such an argument in *Gregg v. Georgia*.¹⁰⁵ Apparently, the Court is now willing to infer a national consensus not from laws passed by the people’s representatives, but from judicial leniency in sentencing. The weakened national consensus test now acts more as a buttress to the Court’s focus on the nature of the punishment itself, as applied to a particular class. As Justice Thomas pointed out, *Graham* goes a long way toward enshrining the idea that national consensus is merely “window dressing” — that what really matters is the “independent moral judgment” of the Court.¹⁰⁶ And by that judgment, homicide JLWOP likely violates the Eighth Amendment.

In 1988, the Supreme Court ruled in *Thompson v. Oklahoma*¹⁰⁷ that the State could not sentence a fifteen-year-old to death. Since *Thompson*, the arc of the Court’s juvenile sentencing jurisprudence has turned on one simple, yet fundamental, principle: kids change. As Justice Kennedy stated in *Graham*, “Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.”¹⁰⁸ Such maturity can arise in the juvenile homicide offender as readily as it can in the youth who commits a nonhomicide crime. Indeed, Justice Stevens’s statement — intended as an attack on Justice Thomas’s originalism in *Graham* — is just as applicable to the youth

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *See* Steiker & Steiker, *supra* note 74, at 181–85.

¹⁰⁴ *Graham*, 130 S. Ct. at 2049–50 (Thomas, J., dissenting).

¹⁰⁵ 428 U.S. 153, 182 (1976) (plurality opinion) (“[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*.”).

¹⁰⁶ *Graham*, 130 S. Ct. at 2053 (Thomas, J., dissenting).

¹⁰⁷ 487 U.S. 815 (1988).

¹⁰⁸ *Graham*, 130 S. Ct. at 2032.

homicide offender: “We learn, sometimes, from our mistakes.”¹⁰⁹ Years ago, the Model Penal Code, in disapproving of the juvenile death penalty, declared that “civilized societies will not tolerate the spectacle of execution of children.”¹¹⁰ After *Graham*, the Court appears poised to declare something equally powerful: nor will civilized societies tolerate the spectacle of sentencing children irrevocably to die in prison.

B. Establishment Clause

Endorsement Test. — For the last two decades, the endorsement test has been the touchstone inquiry in Establishment Clause challenges. This highly contextual test¹ considers whether a reasonable observer would deem a government action or display to have the purpose or effect of endorsing religion.² The Supreme Court has long resisted bright-line rules that would limit this contextual analysis only to those messages that are government owned or controlled.³ Last Term, in *Salazar v. Buono*,⁴ the Supreme Court overturned an injunction that barred Congress from transferring a Latin cross to private ownership. Congress sought to transfer the cross, which stood on federal land, in order to cure an Establishment Clause violation. Although the *Buono* Court technically declined to consider whether the transfer *itself* constituted impermissible endorsement, a majority of the Court indicated that it would not apply the endorsement test to a now privately owned display. The Court thus appears to be moving toward a circumscribed version of its endorsement test, applying the test only to publicly owned or controlled messages.

In 1934, the Veterans of Foreign Wars (VFW) erected a Latin cross on federal land in the Mojave National Preserve.⁵ The preserve encompasses 1.6 million acres of land, over ninety percent of which is federally owned and administered by the National Park Service (NPS).⁶ The cross stands on a granite outcropping known as “Sunrise Rock,”⁷ where it is visible to motorists from up to 100 yards away.⁸

¹⁰⁹ *Id.* at 2036 (Stevens, J., concurring).

¹¹⁰ MODEL PENAL CODE § 210.6 cmt. 5 at 133 (Official Draft and Revised Comments 1980 (withdrawn 2009)).

¹ See, e.g., *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 629 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice.”).

² See, e.g., *id.* at 592; see also *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005).

³ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 786–92 (1995) (Souter, J., concurring in part and concurring in the judgment).

⁴ 130 S. Ct. 1803 (2010).

⁵ *Id.* at 1811.

⁶ *Id.* The remaining land belongs either to the State of California or to private parties. *Id.*

⁷ *Id.*

⁸ *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008).