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What Does *Graham* Mean in Michigan?

by Kimberly A. Thomas, Clinical Professor, University of Michigan Law School

Introduction

In *Graham v. Florida*, the United States Supreme Court held that life without parole could not be imposed on a juvenile offender for a nonhomicide crime.¹ In this context, the *Graham* Court extensively discussed the diminished culpability of juvenile criminal defendants, as compared to adults. The Court relied on current scientific research regarding adolescent development and neuroscience. While the narrowest holding of *Graham* has little impact in Michigan, the science it relies on, and the potential broader implications for adolescents in Michigan, are significant.

Graham Summary

Terrance Graham, was 16 years old when he and three other youths attempted to rob a restaurant and one of Graham's accomplices hit the manager in the head with a metal bar.² Graham was charged, as an adult, with armed burglary with assault or battery, a first-degree felony with a maximum penalty of life without parole, as well as with attempted armed robbery, and he pleaded guilty to both offenses.³ At his sentencing hearing, Graham stated that it was his "first and last time getting in trouble," and that he "made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the [National Football League]."⁴ Graham was sentenced to 3 years of probation, with the first 12 months served in jail.

While on probation, Graham was arrested again after a high speed chase with police; this time for a home invasion robbery that allegedly occurred about one month before his 18th birthday. At his violation of probation hearing on the burglary case, Graham denied involvement in the robbery, but admitted violating probation by fleeing police.⁵ At the hearing, the state also presented evidence about the robbery, including victim testimony. Although the presentence

investigation report recommended a sentence of 4 years and the prosecution recommended 30 years, the judge, who was not the original judge on the case, sentenced him to the maximum sentence available – life without parole.⁶

The *Graham* Court distilled two strands of Eighth Amendment cases addressing the proportionality of sentences: cases challenging "the length of term-of-years sentences given all the circumstances in a particular case" and cases "in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."⁷ In the first line of cases,⁸ the Court considers the circumstances of the cases to, first, compare the gravity of the offense and the severity of the penalty. "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."⁹ In the second class of cases, which, until *Graham*, had involved only death penalty cases, the Court had used categorical rules to evaluate the nature of the offense¹⁰ and characteristics of the offender.¹¹ In these cases, the Court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is national consensus against the sentencing practice at issue . . . [then], guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."¹²

The Court determined that Graham's case, despite not involving the death penalty, fit in the second class of cases because it involved a challenge to a

“sentencing practice” as applied to a “class of offenders who have committed a range of crimes.”

The Court found that although 37 states permit life without parole for non-homicide juvenile offenders in some circumstances, actual sentencing practice showed a consensus against the imposition of life without parole in these cases.¹³ Though many states have moved to make it easier to prosecute juveniles in adult court instead of juvenile court, the Court was not persuaded that this showed that states intended to give life without parole sentences to these offenders.¹⁴

Second, the Court exercised its “independent judgment” to consider the “culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment,” including an inquiry into whether the sentence serves legitimate penological goals. As for the offenders, the Court stated that *Roper* “established that because juveniles have lessened culpability they are less deserving of the most severe punishments.”¹⁵ The Court approvingly cited modern brain science, discussed in *Roper*, which shows “fundamental differences between juvenile and adult minds” including the fact that “parts of the brain involved in behavior control continue to mature through late adolescence.”¹⁶

As to the nature of the offenses, the Court said that it “has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”¹⁷ Therefore, juveniles who do not kill or intend to kill have “twice diminished moral culpability.”¹⁸ The Court also found that the severity of the sentence was significant – it is “irrevocable” and “deprives the convict of the most basic liberties without giving hope of restoration.”¹⁹ Finally, the Court found that the sentence lacked any penological justification, as it was disproportionate to the goals of retribution, deterrence, incapacitation or rehabilitation when imposed on a juvenile for a nonhomicide offense.²⁰

The Court rejected a non-categorical approach as inadequate. It determined that a categorical rule would allow all of the relevant juveniles a chance to show their “maturity and reform” through parole eligibility.²¹ A categorical rule also better avoids the difficulty encountered by juvenile advocates and courts when considering the culpability of a youth who has committed a particularly brutal crime.²²

Adolescents in Michigan Sentenced to Life Without Parole

Graham’s narrow holding on non-homicide offenses will have almost no impact in Michigan; more broadly, however, *Graham* may result in greater challenges to the sentence of life without parole by the unusually high number of juveniles in Michigan given this sentence. It may also result in challenges to extremely long term-of-years sentences for juveniles for non-homicide offenses.

In Michigan, prior to *Graham*, it was hypothetically possible for a 17 year-old to be sentenced to life without parole for an offense that did not involve a death. Under the sentencing provisions for criminal sexual conduct in the first-degree against a person under 13, there is a the mandatory sentence of life without parole for someone who was previously convicted of a criminal sexual conduct offense against someone under 13 years old.²³ According to the study cited by the *Graham* court, no juveniles are serving sentences under this provision.²⁴

Approximately 350 individuals are serving life without parole in Michigan for homicide crimes committed when they were a juvenile. These persons received a life without parole sentence for crimes committed under 18 years old because they were either 17 years old and, therefore, considered an adult under Michigan law,²⁵ or were 16 or under, but were tried and sentenced like an adult. Adolescents can be tried and given an adult sentence if cases are directly filed by the prosecution in adult circuit court,²⁶ the juvenile is tried and sentenced as an adult in family court,²⁷ or if the case is waived by a judge into adult court.²⁸ When tried in adult court, if the juvenile is convicted of first-degree murder the sentence is automatically life without parole.²⁹

Some of these persons serving life without parole were juveniles who were not directly responsible for causing a death. For example, under an aiding and abetting theory, someone can even be held responsible for “those crimes that are the natural and probable consequences of the offense he intends to aid or abet.”³⁰ For felony murder liability, a defendant may intend to be the getaway driver for a robbery, yet can be convicted of murder if the defendant committed acts that assisted the commission of the killing, had “the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with

knowledge that death or great bodily harm was the probable result . . . while committing, attempting to commit, or assisting in the commission of the predicate felony.”³¹

Impact of Graham on the Sentence of Life Without Parole for Juveniles in Michigan

Challenges to Life Without Parole for Juveniles under Graham

Broadly, the *Graham* Court reaffirmed that “[t]he concept of proportionality is central to the Eighth Amendment.”³² The Court also raised the hopes of those opposed to life without parole for juveniles through its discussion of the lesser culpability of juveniles. The Court also did this by focusing, in some parts of the opinion, on offenders “who did not kill or intend to kill,” suggesting that juveniles who did not commit the act or intend to commit the act also may not constitutionally receive the sentence of life without parole.

Litigation following *Graham*³³ will more clearly determine the meaning of the Court’s language, but for now both a categorical and a case-by-case approach to challenges to juvenile sentences remain viable. Under *Graham*, a defendant who makes a broad challenge to the unconstitutionality of a sentence for a particular offense (such as felony murder) or class of offenders (such as 14-year olds) should take the same approach as the *Graham* majority. However, nothing in the Court’s opinion eliminated an Eighth Amendment challenge to life without parole for a particular juvenile charged or convicted of homicide. The Court’s analysis suggests that such a challenge should be brought under the “gross proportionality” test, as in *Solem v. Helm*³⁴ and *Harmelin v. Michigan*,³⁵ previously applied to term of years challenges. Therefore, at this point, courts can expect to see Eighth Amendment challenges that both raise categorical challenges to the sentence of life without parole under the *Graham* analysis, and raise individual challenges to the proportionality of the sentence for the particular juvenile under the more traditional “gross proportionality” standard.

The constitutionality could be litigated at the time of a waiver hearing,³⁶ during sentencing when the court is deciding whether to sentence as an adult or as a juvenile,³⁷ at sentencing in a direct file case, or the

case of a 17 year old in adult court. Parties should anticipate that counsel for the juvenile may submit expert affidavits, records, scientific information or articles, or other documents to support the motion. An evidentiary hearing, where counsel can present evidence or testimony may be helpful to making a full record of the facts and law considered by the court.

Challenges to Juvenile Life Without Parole Under the Michigan Constitution

In light of *Graham*, the sentence of life without parole for any juvenile may also fail under the broader protections of the Michigan constitution. Our constitution provides that “cruel or unusual punishment shall not be inflicted.”³⁸ Though the language of this provision is similar to the Eighth Amendment, Michigan courts have given greater protection under its “cruel or unusual punishment” clause.³⁹ The greater protection results, in part, from the differences in the constitutional texts.⁴⁰ The state provision, banning “cruel or unusual punishment” rather than the “cruel and unusual punishments” of the Eighth Amendment, “necessarily encompass[es] a broader sweep” of disallowed punishments.⁴¹ A punishment need not be *both* cruel and unusual to violate the state constitution; falling within one of these categories will suffice.⁴² Additionally, the distinct history of Michigan’s constitution and the weight of case law in the state support a broader reading of the state provision.⁴³

As a result of this distinct history, language, and case law, to determine whether a sentence is cruel or unusual “requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation.”⁴⁴

The first prong weighs the gravity of the offense against the severity of the penalty, taking into account relevant facts about the culpability of the offender.⁴⁵ As emphasized by the *Graham* Court, juveniles have diminished culpability compared to adult offenders, a fact that must be taken into account when examining the gravity of an offense.⁴⁶ In addition, children have a reduced ability to escape outside influences and inner impulses once in a bad situation because of their incomplete biological and mental development.⁴⁷

A comparison of life without parole sentences imposed on other offenders within Michigan shows

that juveniles who receive the sentence are treated disproportionately. Life without parole is the most serious sentence that a Michigan offender can receive.⁴⁸ In Michigan, a large proportion of juveniles sentenced to life without parole committed felony murder or were convicted as aiders and abettors.⁴⁹ Yet under state law, the same sentence will be given for youthful accomplices as for mature adults who commit premeditated murder.⁵⁰

In Michigan, the second prong compares the sentences imposed on other offenders in the same jurisdiction, and the third prong compares sentences imposed for the same crime in other jurisdictions.⁵¹ On these, the sentence of life without parole for juveniles whose cases were directly filed into adult court may be particularly vulnerable to challenge. Once a charging decision has been made,⁵² if convicted, these adolescents automatically receive life without parole,⁵³ without the ability of a judge to ever consider the maturity, potential for rehabilitation, circumstances of the case, or culpability of the child.

The lack of discretion available in juvenile sentencing may also render the sentences imposed in this state unusual when compared to other states. Less than 10 other states restrict discretion as severely as Michigan.⁵⁴ Michigan's complete denial of any individualized consideration of the youth by the court in being tried in adult court and mandatory imposition of life without the possibility of parole makes it an outlier among the states. This results in a disproportionately high number of juvenile life without parole sentences in Michigan, and the imposition of the penalty in cases where it would be unlikely for another state to impose the penalty.⁵⁵

Finally, Michigan requires an analysis of whether the challenged sentence serves the goal of rehabilitation.⁵⁶ As emphasized by the *Graham* Court, life without the possibility of parole for a juvenile completely eliminates any goal of rehabilitation.⁵⁷ "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."⁵⁸ Further, most children "age out" of criminal behavior.⁵⁹

Even if non-rehabilitation goals are considered, little to no additional purpose of punishment is gained.⁶⁰ "The case for retribution is not as strong with a minor as with an adult" because of their

diminished culpability and maturity.⁶¹ Further, the added deterrent effect of life without the possibility of parole on a juvenile is minimal, as "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."⁶² Lastly, public safety is not furthered by incarcerating children after the danger they posed has passed. In fact, as the *Graham* Court stated in the nonhomicide context, the State's "irrevocable judgment" about an adolescent's value "is not appropriate in light of a[n] . . . offender's capacity for change and limited moral culpability."⁶³

The Michigan Supreme Court has never ruled on the constitutionality of life without parole for juveniles.⁶⁴ The one published Michigan Court of Appeals opinion on a juvenile life without parole sentence was issued before *Roper*, and ruled on the previous juvenile transfer system, in which a judge made a determination about whether or not the child should be sentenced as an adult.⁶⁵ In fact, this determination was integral to the Court's analysis of the required factors and its finding of constitutionality.⁶⁶

Broader Lessons of *Graham*

Courts and advocates in Michigan can certainly expect the impact of *Graham* to ripple for some time. Most directly, advocates will likely be advancing challenges to the sentence of life without parole for juveniles in Michigan. Less directly, *Graham*'s decision provides instruction for all legal professionals working with juvenile offenders.

Developmental Psychology and Neuroscience of Adolescence in a Nutshell: What we can learn from Graham making juvenile sentencing and dispositional decisions.

The court, advocates for juveniles, and prosecutors should make sure they are up-to-date on information on adolescent development and neuroscience that has influenced the *Graham* Court. The amicus briefs in *Graham* from the American Medical Association, et al⁶⁷ and the American Psychological Association et al⁶⁸ discuss these ideas in more detail and are summarized here.

Developmental psychology and neuroscience research confirm that juveniles, even those in late adolescence, are less able to control their impulses and exercise self-control,⁶⁹ are less capable of weighing

risks and rewards,⁷⁰ and are less future-oriented and able to take into account the consequences of their actions.⁷¹ Mature judgment requires cognitive, social, and emotional skills, and while late adolescents may have logical reasoning ability, they “nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment.”⁷²

In addition to these individual immaturities, adolescents are particularly susceptible to the influences of their environment and other people. Adolescents, more than adults, commit crimes in groups, because they want to conform to peer expectations and obtain respect from others and cannot resist peer pressure, the way an adult can.⁷³

Additionally, a normal part of adolescence is engaging in risk-taking and criminal activity, which results, in part, from their lower capacity for judgment. “[N]umerous . . . self-report studies have documented that it is statistically aberrant to refrain from crime during adolescence.”⁷⁴ Further, research shows that the majority of youthful offenders will cease criminal activity.⁷⁵ As the *Roper* Court said, it is “the rare juvenile offender whose crime reflects irreparable corruption.”⁷⁶ Psychologists and psychiatrists, let alone courts, cannot determine which youth will desist and which youth will go on to commit future crimes.⁷⁷

Modern neuroscience also shows differences between adolescents and adults. MRI imaging has permitted scientists to understand the human brain’s progression from childhood through adolescence into adulthood.⁷⁸ In its brief, the American Medical Association explained:

In this regard, two complementary observations have been especially revealing. First, the parts of the brain that work together to support the control of behavior, including the prefrontal cortex⁷⁹ (which comprises roughly the front third of the human brain) continue to mature even through late adolescence.⁸⁰ Second, in making behavioral choices, adolescents rely more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior.⁸¹

Application of the science to effectively communicate with juveniles

All parties who interact with juvenile defendants know that communication with these persons can be particularly challenging or frustrating. The challenge is particularly daunting for attorneys representing these juveniles. In discussing why the Court chose to reject a case-by-case approach, the *Graham* court also highlighted the difficulty of representing adolescents. “[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.”⁸² The Court also noted that juveniles’ difficulty in weighing long-term consequences, impulsiveness and lack of trust “impair the quality of a juvenile defendant’s representation.”⁸³

Attorneys representing these adolescents are keenly aware of this ethical and professional challenge. Attorneys must, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client” who is impaired due to his age,⁸⁴ including following the duties to maintain client confidences⁸⁵ and to abide by the client’s decisions on the major choices in the case, such as pleas, jury waiver and client testimony.⁸⁶ Maintaining a normal client relationship is especially difficult when parents, probation officers, or others do not understand or appreciate the need for a vigorous, confidential advocate for the accused adolescent.⁸⁷

Make decisions based on full information about the juvenile

As part of the inquiry into the sentencing or disposition of a juvenile (or in evaluating any challenges to the constitutionality of a sentence of life without parole), advocates and the court will need adequate information about the particular juvenile offender.

Juvenile advocates may be familiar with information about their client’s role in the offense and the offense itself; however, fewer attorneys are adept at uncovering information about the client himself. This investigation must begin as soon as counsel is retained or appointed, even if anticipated only in the sentencing or disposition hearing, because some documents may take time to obtain.

Common sources of information include:

- School records, including individualized education programs (IEPs);
- County Community Mental Health (CMH) records;
- Other service providers, including pediatricians, therapists, counselors;
- Juvenile court records, including information on investigations and allegations of abuse and/or neglect by the client's parent(s).

Further, courts may need to provide funds for, or obtain information from, an expert in order to give thorough consideration to the constitutional challenge.⁸⁸ Counsel for the juvenile may wish to apply to the court for funds in order to obtain an expert to evaluate a juvenile, obtain affidavits or testimony about the client or about adolescent development, or other unique aspects of the case.

Conclusion

While the narrowest holding of *Graham* may not have a significant impact in Michigan, the ripples of *Graham*, especially in terms of challenges to the sentence of life without parole for juveniles and the discussion of adolescent culpability, will extend throughout Michigan. ©

Endnotes

- 1 *Graham v. Florida*, 130 S. Ct. 2011 (2010). The Court dismissed as having improvidently granted certiorari another case which raised a similar challenge, *Sullivan v. Florida*. The Court in *Graham*, and in *Roper v. Simmons*, 543 U.S. 551 (2005), before it, has defined juveniles as those under 18 years old at the time of the offense. *Graham*, 130 S. Ct. at 2030. Of course, in Michigan, 17 year olds are considered adults and are not charged in the family court. See MICH. COMP. LAWS § 712A.2 (2010) (defining jurisdiction of juvenile court).
- 2 *Id.* at 2018.
- 3 *Id.*
- 4 *Id.* at 2018.
- 5 *Id.* at 2018-19.
- 6 *Id.* at 2020. Florida has abolished parole, so the life sentence imposed by the court is automatically without parole. The only possibility of release is executive clemency. *Id.*
- 7 *Id.* at 2021.
- 8 This line of cases includes *Rummel v. Estelle*, 445 U.S. 263 (1980); *Solem v. Helm*, 463 U.S. 277 (1983); *Harmelin v. Michigan*, 501 U.S. 957 (1991); and *Ewing v. California*, 538 U.S. 11 (2003).
- 9 *Graham*, 130 S. Ct. at 2022.
- 10 These cases included *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (*modified by* 129 S. Ct. 1 (2008)); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Coker v. Georgia*, 433 U.S. 584 (1977).
- 11 These cases included *Roper v. Simmons*, 543 U.S. 551 (2005), *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
- 12 *Graham*, 130 S. Ct. at 2022.
- 13 In practice, just over 100 juvenile offenders are serving the sentence for nonhomicide crimes, and twelve jurisdictions impose the sentence on these offenders. *Id.* at 2023.
- 14 *Id.* at 2025.
- 15 *Id.* at 2026 (quoting *Roper*, 543 U.S. at 569).
- 16 *Id.*
- 17 *Id.* at 2027.
- 18 *Id.*
- 19 *Id.*
- 20 *Id.* at 2028-2030.
- 21 *Id.* at 2032.
- 22 *Id.*; see also *Roper v. Simmons*, 543 U.S. 551, 573 (2005).
In a concurring opinion, Chief Justice Roberts advanced a case-by-case approach. *Graham*, 130 S.Ct. at 2041. Roberts argued that there are some people under 18 years old whose culpability, though “diminished” relative to adults, would be sufficient to justify life without parole. *Id.* at 2041-42.
- 23 MICH. COMP. LAWS § 750.520b(2)(c) (2010).
- 24 Annino et al., *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation*, Table A (Fla. State Univ. Coll. of Law, Working Paper No. 399, 2009).
- 25 MICH. COMP. LAWS § 712.A.2 (2010).
- 26 MICH. COMP. LAWS § 712A.2 (2010) (prosecutors can charge youths 14 years and older, accused of specified juvenile violations, directly in adult court).
- 27 See MICH. COMP. LAWS § 712A.2d(1) (2010) (prosecutor can designate that a youth of any age, accused of a “specified juvenile violation” be tried as an adult in a family court). Life without parole is not available for crimes that are not “specified juvenile violations. See MICH. COMP. LAWS § 712A.18(m) (2010) (can sentence as an adult).
- 28 MICH. COMP. LAWS § 712A.4(1) (2010); MICH. COMP. LAWS § 712A.4(4) (2010).
- 29 MICH. COMP. LAWS § 750.316 (2010).

- 30 *People v. Robinson*, 475 Mich. 1, 15 (2006).
- 31 *People v. Riley*, 468 Mich. 135, 140 (2003).
- 32 *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).
- 33 *See, e.g.*, Joan Biskupic and Martha T. Moore, *Court Limits Harsh Terms For Youths*, USA TODAY (May 18, 2010) (available at http://www.usatoday.com/news/washington/judicial/2010-05-17-supreme-court-juvenile-sentences_N.htm) (noting that the National District Attorneys Association spokesman predicted that the ruling would lead “widespread appeals of juvenile sentences”).
- 34 463 U.S. 277 (1983).
- 35 501 U.S. 957 (1991).
- 36 MICH. COMP. LAWS § 712A.4 (2010).
- 37 MICH. COMP. LAWS § 712A.18(1)(m) (2010).
- 38 MICH. CONST. art. I, § 16 (emphasis added).
- 39 *People v. Bullock*, 440 Mich. 15, 28 (1992) (finding the state cruel or unusual punishment protection broader than the federal in striking down a drug sentencing statute found constitutional by the U.S. Supreme Court).
- 40 *Bullock*, 440 Mich. at 30-31.
- 41 *Id.* at 31.
- 42 *Id.*
- 43 *Id.* at 32-41.
- 44 *People v. Dipiazza*, 286 Mich. App. 137, 153-54 (2009) (finding the sex offender registry unconstitutional as applied to individual in that case).
- 45 *See, e.g.*, *People v. Lorentzen*, 387 Mich. 167, 176 (1972) (noting the severity of the sentence and its application to a marijuana sale by “a first offender high school student”).
- 46 *See, e.g.*, *Lorentzen*, 387 Mich. at 176 (noting the severity of the sentence and its application to a marijuana sale by “a first offender high school student”).
- 47 *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).
- 48 MICH. CONST. art. IV, § 46 (banning the death penalty).
- 49 *See id.* at 4 (reporting that of those Michigan juveniles serving life without parole surveyed, almost half were convicted under an aiding and abetting theory or convicted of felony murder).
- 50 *See, e.g.*, *Second Chances* at 5, 7, 13, 17 (describing Michigan cases in which children received life without parole for crimes in which they had far less serious involvement than other, often older, individuals and often received harsher punishment).
- 51 *Bullock*, 440 Mich. at 33-34; *Lorentzen*, 387 Mich. at 176-81.
- 52 MICH. COMP. LAWS § 712A.2 (2010); MICH. COMP. LAWS § 600.606 (2010) (leaving prosecutor discretion to file in adult or juvenile court).
- 53 MICH. COMP. LAWS § 769.1(1)(g) (2010) (requiring that juveniles tried in circuit court must be sentenced the same as adults. The law in effect before 1996 allowed judges to determine whether to sentence as an adult or a juvenile); MICH. COMP. LAWS § 750.316 (2010) (mandatory life without parole sentence).
- 54 As of 2001, in 42 states, courts had discretion in either the decision to transfer children in the mid-teens to adult court or in sentencing for first-degree murder offenses. Brief for the Edwin F. Mandel Legal Aid Clinic and Other Interested Individuals and Organizations as Amici Curiae Supporting Appellee, *People v. Miller*, 781 N.E.2d 300 (Ill. 2002) (No. 89795), 2001 WL 34387680 at *21-22. Only five states, including Illinois, had no discretion at all in transfer or sentencing, while Michigan, California and Colorado allowed minimal prosecutorial discretion in determining the location of trial but enforced mandatory sentences for children tried in adult court. Colorado has, since this study, eliminated the sentence for juveniles. COLO. REV. STAT. 17-22.5-104(IV) (2007). Courts in both California, *In re Nuñez*, 173 Cal. App. 4th 709 (2009), and Illinois, *People v. Miller*, 781 N.E.2d 300 (Ill. 2002), have found the sentence unconstitutional in specific cases.
- 55 *See Second Chances* at 8 (showing statistics related to juvenile sentencing for some of the most populated states that allow juvenile life without parole); *see also* FRONTLINE, *When Kids Get Life* (May 21, 2009), <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html> (showing that Michigan has the second-highest number of persons serving life without parole for crimes committed as juveniles).
- 56 *Bullock*, 440 Mich. at 34; *Dipiazza*, 286 Mich. App. at 154.
- 57 *Graham*, 130 S.Ct. at 2029-30.
- 58 *Roper*, 543 U.S. at 570.
- 59 Terrie E. Moffitt, *Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) (“[The] rates for both the prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood. [B]y the early 20s, the number of active offenders decreases by over 50%, and by age 28, almost 85% of former delinquents desist from offending.”).
- 60 *People v. Fernandez*, 427 Mich. 321, 339 (1986) (looking to other purposes served when considering an adult sentence); *see also* *Graham v. Florida*, 130 S. Ct. 2011, 2028-29 (2010).
- 61 *Roper v. Simmons*, 543 U.S. 551, 571 (2005).
- 62 *Id.* 571.
- 63 *Graham*, 130 S. Ct. at 2030.
- 64 The Michigan Supreme Court has found a life without parole sentence constitutional for an adult convicted of first-degree murder. *People v. Hall*, 396 Mich. 650 (1976).

- 65 *People v. Launsburry*, 217 Mich. App. 358 (1996). A few unpublished Court of Appeals opinions have rejected a *per se* challenge to life without parole for juveniles. For example, in *People v. Jarrett*, unpublished opinion per curiam of the Court of Appeals, the court rejected the challenge based at least in part on the ability of minors to have a “thorough disposition hearing,” in which the court considered mitigating factors and potential for rehabilitation. *People v. Jarrett*, No. 173921, 1996 Mich. App. LEXIS 1387 (Mich. Ct. App. Aug. 9, 1996) (per curiam). See also *id.* (Bandstra, J. concurring) (noting that the broader scope of the Michigan Constitution might prevent life without parole sentences for juveniles and encouraging the Michigan Supreme Court to examine the question); *People v. Espie*, No. 222303, 2002 Mich. App. LEXIS 65 (Mich. Ct. App. Jan. 22, 2002) (per curiam) (rejecting challenge to life without parole).
- 66 See *Launsburry*, 217 Mich. App. at 364 (“The fourth factor, the need for rehabilitation, is taken into consideration by Michigan courts when they determine whether juvenile defendants should be sentenced as adults rather than as juveniles.”) (emphasis added).
- 67 Brief for the AMA and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-7412_NeutralAmCuAMAandAACAP.pdf [hereinafter *AMA Brief*].
- 68 Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioner, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-7412_PetitionerAmCu4HealthOrgs.pdf [hereinafter *APA Brief*].
- 69 *Id.* at 9; see also *id.* at 10 (quoting FRANKLIN E. ZIMRING, PENAL PROPORTIONALITY FOR THE YOUNG OFFENDER, IN YOUTH ON TRIAL 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000)) (“[E]xpecting the experience-based ability to resist impulses . . . to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.”).
- 70 *APA Brief*, *supra* note 68 at 10-11.
- 71 *Id.* at 11-12 (“[S]tudies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.”).
- 72 *Id.* at 15 (citations omitted).
- 73 *Id.* at 18 (quoting ZIMRING, *supra* note 69 at 280-81) (“A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure, a social skill that is not fully developed in adolescents.”).
- 74 *Id.* at 8 (quoting Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685-86 (1993)).
- 75 *Id.* at 20.
- 76 *Roper v. Simmons*, 543 U.S. 551, 573 (2005).
- 77 *APA Brief*, *supra* note 68 at 20. As another example, the American Psychiatric Association will not diagnose anyone with antisocial personality disorder – also known as psychopathy or sociopathy – before the age of 18. See *id.* See also *Roper*, 543 U.S. at 573 (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).
- 78 *AMA Brief*, *supra* note 67 at 14.
- 79 The prefrontal cortex controls a variety of the brain’s “cognitive abilities” including “those associated with voluntary behavioral control and inhibition, such as risk assessment, evaluation of reward and punishment, and impulse control. More generally, other functions associated with the prefrontal cortex include decision-making, the ability to judge and evaluate future consequences, recognizing deception, responses to positive and negative feedback, working memory, and making moral judgments.” *AMA Brief*, *supra* note 67 at 16-17. See also *APA Brief*, *supra* note 68 at 24-27 (describing processes at work in brain maturation).
- 80 See also *APA Brief*, *supra* note 68 at 23 (“Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence.”)
- 81 *AMA Brief*, *supra* note 67 (citations omitted).
- 82 *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).
- 83 *Id.* at 2032.
- 84 MRPC 1.14.
- 85 MRPC 1.6.
- 86 MRPC 1.2.
- 87 See, e.g., Kristin Henning, *It Takes A Lawyer To Raise A Child?: Allocating Responsibilities Among Parents, Children, And Lawyers In Delinquency Cases*, 6 NEV. L.J. 836, 839, 851 & 855 (2006) (noting that “parents often do not fully understand or appreciate the rights and risks at stake in the juvenile case,” that there is often conflict between the parents’ legal interests and the child’s legal interests, that parents often initially believe that the probation officer is the child’s ally, and that parents sometimes forge alliances with prosecutors and probation officers to the detriment of the child’s interests).
- 88 See, e.g., *In re Nunez*, 173 Cal. App. 4th at 722-23 (describing contents of declaration from expert defense witness).