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JURISPRUDENTIAL JUXTAPOSITION: APPLICATION OF *GRAHAM V. FLORIDA* TO ADULT SENTENCES

JOHN "EVAN" GIBBS*

I. INTRODUCTION

At best, the U.S. Supreme Court's Eighth Amendment proportionality jurisprudence has been fractured and uncertain since its inception.[1] This has lead to uncertainty in sentencing, as well as questions regarding the constitutionality of many sentences. However, with the Court's recent landmark decision in *Graham v. Florida*,[2] the Court revived its proportionality analysis and seemingly breathed new life into it, enunciating a somewhat different approach to scrutinizing sentence constitutionality under the Eighth Amendment.

The Court's approach in *Graham* focused on three factors for assessing a sentence's constitutionality: the offender, the sentence, and the crime.[3] Using these three factors, the Court ultimately held that life without parole ("LWOP") for a juvenile who did not commit homicide is unconstitutional, categorically banning such a sentence in the United States.[4] And while the holding in *Graham* is extremely important and a step in the right direction, broader applicability of the Court's analytical framework is uncertain given the proportionality

* J.D., Florida State University College of Law. I would like to thank my fiancé, Kaylie, for her support, love, and patience throughout my time in law school.

1. Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (arguing that the last twenty-five years of Supreme Court proportionality decisions "do not provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges").

2. 130 S. Ct. 2011 (2010).

3. *Id.* at 2026–30.

4. *Id.* at 2034.

principle's dubious past.[5] Therefore, this Note argues that the *Graham* decision provides a workable, fair, and robust analytical framework for the Court to apply when evaluating all LWOP sentences moving forward. To that end, Part II provides the background and context of the *Graham* decision, so that the underlying theoretical and factual bases are well understood, followed by an analysis of the Court's Eighth Amendment jurisprudence leading up to *Graham*. Next, Part III outlines the appropriate analytical framework and its justifications, with Part IV addressing potential concerns that may be raised contrary to my position in this article. Part V concludes this Note with a summary of my analysis.

II. *GRAHAM*: CONTEXT, PRINCIPLES, AND ANALYSIS

The *Graham* Court was faced squarely with the issue of whether LWOP for a juvenile who committed a nonhomicidal crime is constitutional under the Eighth Amendment.[6] In answering this question, the Court focused mainly on its own precedent and the legislative posture of the individual states.[7] However, for purposes of this Note, it is extremely important to understand the history and context not only of the Court's precedent and national conceptions of juvenile punishment, but also the underlying principles of juvenile justice, as this is helpful in understanding the Court's treatment of young offenders and the foundational ideas about *why* an offender's status as a juvenile entitles them to different treatment than their adult counterparts. After explaining these justifications, the factual and procedural background of the *Graham* decision will briefly be explained to properly elucidate the issues before the Court, followed by an analysis of the Court's Eighth Amendment jurisprudence prior to *Graham*.

A. Principles of the Juvenile Justice System

When the juvenile justice system was first created in the United States in the early twentieth century, rehabilitation for young offenders was initially the guiding principle, based largely on the idea that juveniles are less mature in their ability to make moral judgments, and that juveniles have the potential for being channeled away from further criminal conduct.[8] However, as more substantive

5. *Compare, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (forbidding the imposition of the death penalty for any individual under eighteen at the time the crime was committed) *with* Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion) (upholding a sentence of LWOP for possession of 672 grams of cocaine).

6. *Graham*, 130 S. Ct. at 2018.

7. It is important to note that while the Court found that a majority of states allowed juvenile LWOP for nonhomicidal crimes, the Court still went on to find the sentence unconstitutional. *Id*. at 2023–27.

8. Since its inception, the juvenile justice system has countered the stark differences between youth and adults through "individual assessment and treatment" of children in an

and procedural rights have been afforded juveniles,[9] juveniles have concomitantly been held to a higher degree of culpability, often being held to the same level as adults, which is most often seen when minors are "waived" into adult court proceedings.[10] These waivers into adult courts carry with them adult sanctions,[11] such as LWOP,[12] and until 2005, even the death penalty.[13] But a chorus of scholars is adamantly critical of such harsh treatment for juveniles,[14] citing minors' immaturity, as well as their potential for growth into productive, noncriminal citizens, as mitigating the need to retributively punish youthful offenders.[15] Moreover, only fourteen other countries in the world allow LWOP for juveniles,[16] and the international community has condemned the practice.[17] But despite such outspoken criticism, most states have statutes authorizing LWOP for juveniles: sixteen states impose juvenile LWOP as a mandatory sentence for certain enumerated crimes[18] and nineteen states allow juvenile LWOP on a

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effort to reintegrate young offenders into society. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667 (2005); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 685 (1998); Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 909–11 (1995).

9. *See, e.g.*, *In re* Gault, 387 U.S. 1, 30–31 (1967) (holding that juvenile proceedings must, *inter alia*, comply with Fourteenth Amendment requirements); Kent v. United States, 383 U.S. 541, 561–62 (1966) (holding that certain due process standards apply to juveniles).

10. Logan, *supra* note 8, at 685–89.

11. *See id.* at 689 (noting that the common perception is that "[o]nce waived into adult court, a juvenile offender is deemed an adult, and therefore, the thinking goes, should be treated like one"). Professor Logan goes on to say that courts typically rationalize imposing adult sanctions on juveniles by asserting that "punishment is a legislative prerogative--and that society is well within its rights to impose harsh punishment on juvenile offenders in response to their atrocious crimes." *Id.* at 722.

12. *Id.* at 689–90.

13. Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that crimes committed before the eighteenth birthday cannot subject an individual to the death penalty).

14. *See generally* Elizabeth Cepparulo, Roper v. Simmons*: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225, 226–27 (2006) (asserting that LWOP for juveniles is equivalent to the death penalty); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1085 (2006) (proclaiming juvenile LWOP as unconstitutionally harsh); Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?*, 5 HUM. RTS. L. REV. 393, 401 (2005) (advancing the idea that basic human dignity should prevent LWOP for juveniles).

15. Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. 4, 4–5 (2007).

16. Massey, *supra* note 14, at 1084–85 (citing AMNESTY INT'L HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1 (2005), http://www.amnesty.org/en/library/asset/AMR51/162/2005/en/209dd2da-d4a1-11dd-8a23-d58a49c0d652/amr511622005en.pdf.

17. Streib & Schrempp, *supra* note 15, at 11-12.

18. *Id.* at 10.

discretionary basis;[19] only nine states and Washington, D.C. altogether disallow LWOP for juveniles.[20]

The vast majority of cases handing down LWOP for juveniles involved homicide committed by the child, often provoking a visceral public outcry for the harshest of sentences.[21] For example, consider the case of Joshua Phillips of Jacksonville, Florida. Phillips, a fourteen-year-old, stabbed his eight-year-old neighbor, Maddie Clifton, to death and then hid her body in the frame of his waterbed for more than a week.[22] After Joshua's conviction for first-degree murder, the trial court judge told him during the sentencing hearing that "I'm certain that on Judgment Day, you, Joshua Earl Phillips, will be given a far harsher sentence than I can impose." Adding a biblical reference, the judge found that, "[i]t would be better if a millstone were hung around your neck and that you were thrown into [the] sea than to cause harm to a child."[23] Joshua Phillips was sentenced to life in prison without parole, with his conviction and sentence both affirmed on appeal.[24]

The judge's remarks are perfect illustrations of the basic, deep-seated anger that so frequently surfaces when a juvenile commits murder, as the offender is no longer seen as a child, but as a depraved pariah embodying all of the pernicious traits of a hardened, irredeemable criminal. However, while murdering someone, especially a child, can understandably elicit such raw emotion, nonhomicide offenses fall into a grey area, where the juveniles' crimes are egregious and can certainly evoke scornful emotion, but the child's age and immaturity may mitigate the need for sentencing the offender to LWOP.

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19. *Id.* Additionally, six other states allow mandatory LWOP for juveniles after certain other factors are proven at trial. *Id.*

20. *Id.* at 9.

21. *Id.* at 4 (citing Tate v. State, 864 So. 2d 44 (Fla. 4th DCA 2003) (twelve-year-old sentenced to LWOP for murder); Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992) (nine-year-old arraigned for murder and sentenced to LWOP); State v. Massey, 803 P.2d 340 (Wash. Ct. Ap. 1990) (thirteen-year-old sentenced to LWOP for robbery-murder).

22. Kathleen Sweeney, *Joshua Phillips Sentencing*, FLA. TIMES-UNION, Aug. 20, 1999, *available at* http://jacksonville.com/tu-online/stories/082099/met_082099maddie.html.

23. *Id.*

24. Phillips v. State, 807 So. 2d 713 (Fla. 2d DCA 2002), *rev. denied*, 823 So. 2d 125 (Fla. 2002), *cert. denied*, 537 U.S. 1161 (2003). The Second District Court of Appeal discussed and applied the U.S. Supreme Court's Eighth Amendment proportionality jurisprudence and held that even though "Phillips' culpability may be diminished somewhat because of his age . . . the factor of his age is outweighed by his heinous conduct and the ultimate harm-death-that he inflicted upon his victim," ultimately ruling that the sentence of life imprisonment for the specific intent crime of first-degree murder cannot be disproportionate. *Id.* at 718.

B. Graham: Factual and Procedural Background

The story of Mr. Graham's life is a sad tale. Born January 6, 1987, to parents who were both addicted to crack cocaine, Graham began using tobacco at age nine and marijuana at age thirteen.[25] Graham's first run-in with the legal system occurred in July 2003, when Graham and three accomplices attempted to rob a barbeque restaurant. Though their robbery attempt was foiled, Graham was ultimately arrested and charged as an adult for his involvement.[26] While the court withheld adjudication of guilt as to the charges of armed burglary with assault or battery, as well as attempted armed-robbery, Graham received concurrent three-year terms of probation per his plea agreement and was released from jail on June 25, 2004.[27]

Despite Graham's assertions to the trial court that he intended to "turn . . . [his] life around," Graham was again arrested on December 2, 2004, for his involvement in a home invasion robbery where Graham forcibly entered a home and held the resident at gunpoint while Graham's cohorts ransacked the home for money and valuables.[28] The trial court found Graham guilty of armed burglary, and attempted armed robbery, sentencing Graham to "the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery."[29] At the sentencing hearing, the court explained that "[g]iven . . . [Graham's] escalating pattern of criminal conduct, it is apparent . . . that this is the way . . . [Graham is] going to live . . . [his] life and that the only thing I can do now is to try and protect the community from . . . [Graham's] actions."[30] And as Florida abolished its parole system,[31] Graham's life sentence carried with it no possibility of release without being granted executive clemency. Graham was seventeen years old the night that he committed the robbery. [32]

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25. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

26. *Id.* During the attempted robbery, the manager was assaulted with a metal bar, and so the "charges against Graham were armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole . . . and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment." *Id.*

27. *Id.* at 2018.

28. *Id.* at 2018–19. Further, the State alleged that Graham and his compatriots were involved in a second armed robbery later that same night, during which one of Graham's accomplices was shot; Graham took the man to the hospital and dropped him off, subsequently being arrested after running into a telephone pole while trying to evade police officers. *Id.* at 2019.

29. *Id.* at 2020.

30. *Id.*

31. *See* FLA. STAT. § 921.002(1)(e) (2010).

32. *Graham*, 130 S. Ct. at 2019.

Graham subsequently appealed his sentence as unconstitutional under the Eighth Amendment, with the First District Court of Appeal affirming the trial court's decision.[33] In its opinion, the intermediate appellate court stated that Graham's original probation sentence was "extremely lenient"[34] considering Graham committed a potential life-in-prison felony. Further, because Graham had personally "held a gun to a man's head during the incident" and "committed at least two armed robberies and confessed to the commission of an additional three," Graham's sentence was not disproportionate to his crimes.[35] Following the First District's ruling, the Florida Supreme Court denied review,[36] with the Supreme Court of the United States subsequently granting certiorari.

C. Eighth Amendment Jurisprudence

The United States Constitution, through the Eighth Amendment, proscribes punishment that is "cruel and unusual"[37]—applicable to the states through the Fourteenth Amendment.[38] However, prior to *Graham*, state courts were split on whether or not juvenile LWOP was unconstitutional: Kentucky,[39] Nevada,[40] and California[41] all considered the sentence impermissible, while South Carolina,[42] Ohio,[43] and Florida[44] each upheld the sentence. And while the federal appellate courts had not ruled on the issue since *Roper*,[45] the Ninth Circuit

33. Graham v. State, 982 So. 2d 43, 54 (Fla. 1st DCA 2008).

34. *Id.* at 52.

35. *Id.* The First District Court of Appeal also addressed the issue of rehabilitation for Graham, finding that "[w]hile the United States Supreme Court has noted that juveniles in general are more amenable to successful rehabilitation," Graham had been given a fair chance at rehabilitation when he was given probation for his felony crimes as a seventeen-year-old; the Court held that Graham "rejected his second chance and chose to continue committing crimes at an escalating pace," warranting the trial court's chosen punishment. *Id.*

36. Graham v. State, 990 So. 2d 1058 (Fla. 2008).

37. U.S. CONST. amend. VIII. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958).

38. U.S. CONST. amend. XIV.

39. Workman v. Kentucky, 429 S.W.2d 374, 378 (Ky. 1968) (noting that because it is not possible to know whether or not a fourteen-year-old will be able to reform later in life, LWOP is cruel and unusual for such a young offender).

40. Naovarath v. State, 779 P.2d 944, 946–47 (Nev. 1989) (overturning LWOP for a thirteen-year-old offender, noting that juveniles should be judged by different standards than mature adults).

41. *In re* Nunez, 93 Cal. Rptr. 3d 242, 265 (Cal. 4th Ct. App. 2009) (finding that LWOP for a fourteen-year-old nonhomicide offender is cruel and unusual under the Eighth Amendment).

42. State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) (holding that LWOP does not violate contemporary standards of decency, and is therefore constitutional as applied to a fifteen-year-old juvenile).

43. State v. Warren, 887 N.E.2d 1145, 1154 (Ohio 2008) (affirming a LWOP sentence for a fifteen-year-old, nonhomicide offender).

44. Tate v. State, 864 So. 2d 44, 54–55 (Fla. 4th DCA 2003) (holding that LWOP for a twelve-year-old does not violate the Eighth Amendment).

45. 543 U.S. 551 (2005).

previously held in *Harris v. Wright*[46] that LWOP is permitted under the Eighth Amendment for a fifteen-year-old offender.[47]

Although the Supreme Court has developed its own Eighth Amendment jurisprudence, prior to *Graham*, the Court had yet to directly rule as to the constitutionality of LWOP for nonhomicide juvenile offenders. Therefore, the following two sections explore the Court's precedent and analysis of the Eighth Amendment leading up to the decision in *Graham*.

1. The Proportionality Principle

The Supreme Court has struggled to firmly determine whether or not the Eighth Amendment contains a proportionality principle for application to non-capital sentences, and, if such a standard exists, how its parameters should be defined.[48] First, in *Weems v. United States*,[49] the Court held that the Eighth Amendment prohibited sentencing a fifteen-year-old to twelve years hard labor in chains for falsifying a public document, because "the mischief and the remedy" were disproportionate.[50] Upholding this line of reasoning some five decades later, the Court reiterated and further enunciated the proportionality principle in *Robinson v. California*,[51] focusing its ruling on the proportionality of a certain crime with a certain punishment, and stating that although in the abstract a given punishment may not be unconstitutional, applied to a particular crime it may well be.[52]

Next, in *Rummel v. Estelle*,[53] the Court held that a state could sentence a repeat offender to life in prison with the possibility of parole for minor property theft without violating the Eighth Amendment, basically espousing the view that a proportionality analysis did not

46. 93 F.3d 581 (9th Cir. 1996).

47. *Id.* at 585-86 (affirming LWOP for a fifteen-year-old homicide offender).

48. 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, 9–11 (2008) (discussing life in prison without parole for juveniles). *See generally* Bruce Campbell, *Proportionality and the Eighth Amendment:* Harmelin v. Michigan, *111 S. Ct. 2680 (1991)*, 15 HARV. J.L. & PUB. POL'Y 284, 285–95 (1992) (providing in-depth discussion regarding each Justice's treatment of the proportionality principle); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 146 (1996) (discussing the background and various opinions applying the proportionality principle).

49. 217 U.S. 349 (1910).

50. *Id.* at 379. The Court stated that it is a "fundamental law" that "punishment for crime should be graduated and proportioned to the offense." *Id.* at 367.

51. 370 U.S. 660 (1962).

52. Explaining its rationale, the Court stated: "[t]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," but applied to specific facts it could be, since "one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

53. 445 U.S. 263 (1980).

apply to nonhomicide sentences.[54] "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare,"[55] wrote Justice William Rehnquist. He continued, "We all, of course, would like to think that we are 'moving down the road toward human decency.' . . . [H]owever, we have no way of knowing in which direction that road lies," concluding that the federal courts must defer to state legislatures and their sentencing regimes.[56]

However, three years later in *Solem v. Helm*,[57] the Court found that a life sentence without parole for a habitual perpetrator of minor property crimes violated the Constitution.[58] Despite the seemingly identical facts, the Court applied its "deeply rooted and frequently repeated" proportionality analysis.[59] In arriving at its ruling, the *Solem* Court used three factors to evaluate the proportionality of the sentence to the crime: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[60] If, after weighing these factors together, the punishment is "significantly disproportionate" to the crime, then the punishment is anathema to the Eighth Amendment and unconstitutional.[61]

However, the Court again changed direction in *Harmelin v. Michigan*.[62] The Court issued a plurality opinion with Justice Scalia straying from the *Solem* analysis, applying instead his originalist interpretation of the Eighth Amendment.[63] Justice Scalia reasoned that the drafters of the Eighth Amendment intended it as a check on the ability of Congress to authorize particular methods of punishment, rather than as a guarantee against disproportionate sentences.[64] Further, Justice Scalia specifically renounced the first two *Solem* factors as affording judges an inappropriate amount of personal discretion to influence their interpretations of sentences.[65] Scalia then touted the third *Solem* factor as having "no conceivable

54. *Id.* at 284–85. Rummel was sentenced to life in prison under a Texas recidivist statute for his third charge of felony theft after stealing $120.75. *Id.* at 266.

55. *Id.* at 272.

56. *Id.* at 283–84 (citing Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting)).

57. 463 U.S. 277 (1983).

58. *Id.* at 303.

59. *Id.* at 284.

60. *Id.* at 292.

61. *Id.* at 303.

62. 501 U.S. 957 (1991) (plurality opinion).

63. *See id.* at 961–96 (at times discussing the intent of the drafters, as well as historical context existing during drafting period).

64. *Id.* at 976.

65. *Id.*

relevance to the Eighth Amendment."[66] However, Justice Scalia's opinion seems to invoke circular reasoning, as he states that the Court's only province is to provide a check on the legislature against authorizing "cruel methods of punishment that are not regularly or customarily employed,"[67] while criticizing the second two *Solem* factors in part because there is "no objective standard of gravity."[68] Therefore, Justice Scalia's position seems to be that the Court cannot decide whether or not a sentence violates the Eighth Amendment because there are no standards, and the Court cannot create or establish standards because defining a standard inserts the Court's subjective interpretations; ergo, nothing can be cruel and unusual.

In contrast, Justice Kennedy's separate *Harmelin* concurrence asserted that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences,"[69] and that his analysis, using the three *Solem* factors, is the correct methodology for scrutinizing Eighth Amendment challenges.[70] However, Justice Kennedy also asserted that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence,"[71] but rather "[the Eighth Amendment] forbids only extreme sentences that are 'grossly disproportionate' to the crime."[72]

The seeds of Justice Kennedy's concurrence found fertile ground in which to flourish in *Ewing v. California*,[73] where the Court held that the Eighth Amendment in fact "contains a 'narrow proportionality principle' that 'applies to noncapital sentences,' "[74] even though the Court ultimately upheld Ewing's sentence of twenty-five years to life in prison for the theft of three golf clubs.[75] Writing for the majority, Justice O'Conner reemphasized the language from *Harmelin* that successful challenges under the rubric of disproportionality should be "exceedingly rare."[76]

As one can ascertain from the decisions leading up to *Graham*, the exact parameters of the Court's nonhomicide jurisprudence were uncertain; indeed, the Court had flip-flopped between rules so frequently that the rules themselves were essentially unknown. However, there existed prior to *Graham* another set of rules, a set of rules that, while newer than the proportionality principle, played a significant role in informing the Court's conclusions in *Graham*.

66. *Id.* at 988.
67. *Id.* at 976.
68. *Id.* at 988.
69. *Id.* at 997 (Kennedy, J., concurring).
70. *Id.* at 996–1001.
71. *Id.* at 1001.
72. *Id.* (quoting Solem v Helm, 463 U.S. 277, 288, 303 (1983)).
73. 538 U.S. 11 (2003) (plurality opinion).
74. *Id.* at 20 (quoting *Harmelin*, 501 U.S. at 996-97).
75. *Id.* at 30–31.
76. *Id.* at 21 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

2. The National Consensus and Evolving Standards of Decency

As mentioned previously, *Roper v. Simmons*[77] eliminated the death penalty as a sentencing option for juveniles. In *Roper*, the Court focused its Eighth Amendment analysis on objective indicators of the "evolving standards of decency that mark the progress of a maturing society,"[78] while also examining the differences between adults and juveniles in depth.[79] Justice Kennedy, authoring the majority opinion, employed a somewhat novel approach for evaluating juvenile death penalty sentences under the Eighth Amendment.[80] The first inquiry in *Roper* was whether or not there existed a national consensus on standards of decency regarding the juvenile death penalty demonstrated by objective evidence.[81] For such objective indicia, the Court looked to (1) the rejection of the practice in the majority of states; (2) the infrequency of its use in jurisdictions where it remained on the books; and (3) the consistency in the trend toward abolition of the practice.[82]

After finding a definitive trend nationally and internationally for the abolition of the juvenile death penalty,[83] the Court then evaluated whether or not juveniles' reduced culpability, increased susceptibility to influence, and inability to control their surroundings ultimately warranted an absolute prohibition of juvenile execution.[84] Weighing these factors together, the Court concluded that juvenile offenders do not qualify for the narrow category of persons "whose extreme culpability makes them 'the most deserving of execution,' "[85] thereby abolishing the death penalty for juvenile offenders.[86]

But while the *Roper* Court used the "national consensus" doctrine for abolishing the death penalty for juveniles, this concept first made its appearance in 1958 in *Trop v. Dulles*,[87] where Justice Frankfurter, in his dissent, noted that a century of what he considered objective evidence (namely federal practice and the laws of other countries), cut against the grain of the majority's holding, indicating that this should strongly influence the Court's decision.[88] Since *Trop*, the Court

77. 543 U.S. 551 (2005).
78. *Id.* at 561 (citing Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
79. *Id.* at 568–76.
80. *See* Julie Rowe, Note, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of* Roper v. Simmons *and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287, 304 (asserting that "Justice Kennedy essentially rejected the Stanford Court's [previously-established] analytical framework").
81. *Roper*, 543 U.S. at 565–67.
82. *Id.* at 564–65.
83. *Id.* at 568, 575–76.
84. Feld, *supra* note 48, at 9–10 (citing *Roper*, 543 U.S. at 569–70).
85. *Roper*, 543 U.S. at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
86. *Id.* at 578–79.
87. 356 U.S. 86 (1958) (plurality opinion).
88. *Id.* at 126.

has invoked the doctrine on a number of occasions in its Eighth Amendment jurisprudence,[89] sparking considerable debate among academicians over whether the Court should use such a majoritarian method for its constitutional analysis.[90]

D. Analysis of the Decision

Prior to beginning its constitutional exegesis, the *Graham* opinion opens with a brief soliloquy relating the circumstances of Terrance Graham's life: his parents were addicted to crack cocaine, young Terrance was diagnosed early on with Attention Deficit Disorder, and subsequently began alcohol and drug use at an early age.[91] After explaining the events leading to Graham's eventual conviction, sentencing, and incarceration,[92] the Court began its constitutional analysis.

The manner in which Justice Kennedy arrives at the Court's holding is interesting in that he essentially combines two different jurisprudential concepts to create a third—which is the Court's ultimate ruling. First, Justice Kennedy looked to *Kennedy v. Louisiana*[93] for the strict proportionality concept between crime and punishment. In *Kennedy*, the Court held that the Eighth Amendment proportionality principle forbids the execution of an offender for the nonhomicide rape of a child, finding that the Court must adhere to a rule that reserves use of the death penalty only "for crimes that take the life of the victim,"[94] with the Court in *Graham* seemingly declaring the nonhomicidal nature of an offense as being a mitigating factor.

The second prong of the Court's analysis began with Justice Kennedy stating, "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments."[95]

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89. *See, e.g.*, *Roper*, 543 U.S. at 562–64; *Atkins*, 536 U.S. at 314-16, 321–23; Stanford v. Kentucky, 492 U.S. 361, 370–73 (1989); Penry v. Lynaugh, 492 U.S. at 331, 334–35 (1989); McCleskey v. Kemp, 481 U.S. 279, 300 (1987).

90. *See, e.g.*, Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) (positing that in taking a majoritarian approach, the Court only enforces constitutional protections where they are least needed); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standard*s," 57 UCLA L. REV 365 (2009) (asserting that the Court takes a majoritarian approach in other civil liberties contexts, warranting use and consideration of the practice by scholars and practitioners); Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 63 (2008) (taking the position that a right against a majority is no right at all when the same majority interprets such right); Richard M. Ré, *Can Congress Overturn* Kennedy v. Louisiana*?*, 33 HARV. J.L. & PUB. POL'Y 1031 (2010) (concluding that Congress could possibly overturn the Court's ban on execution for rape by playing to the Court's national consensus jurisprudence).

91. The opening of the opinion seems important in setting the tone for the Court's later use of a person's individual characteristics and circumstances during constitutional evaluation of his or her sentence.

92. *See supra* Section II.A.

93. 128 S. Ct. 2641 (2008).

94. *Id.* at 2665.

95. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (citing *Roper*, 543 U.S. at 569).

The Court then combined the rules from *Roper* and *Kennedy* to create a third, which ultimately informs the Court's ruling: "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[96] This method of constitutional analysis may prove to have far-reaching consequences, as it seems to somewhat remedy the "tension between general rules and case-specific circumstances" that the Court noted in *Kennedy*.[97] Under the rationale employed in *Graham*, the Court seems to unify many of its previously disjointed principles of Eighth Amendment jurisprudence.

III. APPLICATION TO ADULT SENTENCES

Commentary recently cautioned that zealous anti-death penalty advocacy may serve to "obscure or normalize pathologies that afflict non-capital criminal punishment."[98] However, the holding in *Graham* seems contrary to this assertion, as the Court revived its proportionality doctrine to find Terrance Graham's LWOP sentence unconstitutional. But the three variables relied upon by the majority opinion in *Graham*—the seriousness of LWOP (the sentence), conviction for a nonhomicide offense (the offense), and Graham's status as a juvenile (the offender), may ultimately limit applicability of the opinion to other contexts, namely in the review of adult LWOP sentences. Within this Section, however, I posit that *Graham*'s rationale can and should be applied when reviewing noncapital LWOP adult sentences, as the theoretical and factual underpinnings of the factors in *Graham* would seem to support broader application, hopefully unifying the mess that seemingly is the Court's Eighth Amendment jurisprudence.[99]

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96. *Id.* at 2027.

97. *Kennedy*, 128 S. Ct. at 2659 (citing Tuilaepa v. California, 512 U.S. 967, 973 (1994)).

98. 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, 177 (2008). The authors posited that the increased focus on reducing capital sentencing throughout the U.S. could ultimately result in more stringent application of LWOP sentencing. *See id.* at 204–05.

99. Unfortunately, many assert that the Court's Eighth Amendment proportionality jurisprudence is a "mess." *See* Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (arguing that the Court's Eighth Amendment jurisprudence "is plagued by deep inconsistencies concerning the Amendment's text, the Court's own role, and a constitutional requirement of proportionate punishment" and is simply a "mess"); *see, e.g.*, Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1251-53 (2000) (arguing that the Court's refusal to subject custodial sentences to searching proportionality review is incompatible with its increasing scrutiny of punitive damages awards); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 107 (1996) (arguing that the Court's proportionality jurisprudence is "confused"); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (arguing that the last twenty-five years of Supreme Court proportionality decisions "do

A. Variable One: The Sentence

Arguably, the most important variable to assert in urging the application of *Graham* to noncapital adult LWOP sentences is the analogous nature of the sentence itself. In the only successful proportionality challenge before the Court for a LWOP sentence prior to *Graham*, the *Solem* Court established a somewhat bright line dichotomy between capital and noncapital cases, with Justice Scalia's lambasting of proportionality review in *Harmelin* further driving a dividing wedge between the two classifications, largely because of the "death is different" rationale.[100] Thus, prior to *Graham*, the likelihood for application of the Court's proportionality analysis to adult LWOP seemed somewhat dubious.

However, many commentators assert that the incarceration experience has become dramatically harsher in recent years: prisoners are regularly raped, beaten, and deprived completely of human contact.[101] These consequences of incarceration are seen in both the juvenile and adult contexts.[102] Part of the problem is that prisons have been overcrowded for decades, with states unable to keep up with the increasing demand for prison cells.[103] This overcrowding has led to a litany of serious problems, including increased incidents of serious inmate violence, as well as the spread of infectious diseases.[104] Over-

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not provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges").

100. "[Prison sentences] cannot be compared with death," wrote Justice Scalia, stating that the Court had "drawn the line of required individualized sentencing at capital cases, and s[aw] no basis for extending it further." Harmelin v. Michigan, 501 U.S. 957, 996 (1991). The "death is different" rationale has been a part of the Court's jurisprudence for decades:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

101. *See, e.g.*, Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007) (discussing the various manners in which prisoners are treated inhumanely while in prison, such as: prisoner rape, contraction of life-threatening diseases, and physical abuse); James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527 (2004) (biographical article of prison inmate who contracted AIDS after being made to perform sexual acts in prison).

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

103. Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 391-92 (2005).

104. Susanna Y. Chung, Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351 (2000) (examining problems with prison overcrowding); Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2211 (1998) (discussing that overcrowding has increased the instances of violence and infectious diseases).

crowding in prisons has also produced injurious physical conditions, inadequate sanitation, and decreased availability of basic necessities such as staff supervision and medical services.[105] Further, it was found that prison overcrowding poses a serious threat to increasing prisoner suicide, psychiatric problems, and the number of disciplinary infractions.[106] Separate and aside from the overcrowding issue, current prison practices severely damage inmates not only physically, but also mentally, creating serious mental disorders and abnormalities not present before entering prison.[107]

As the Court in *Graham* unequivocally stated, "life without parole sentences share some characteristics with death sentences," because the sentence "alters the offender's life by a forfeiture that is irrevocable" since there is deprivation "of the most basic liberties without giving hope of restoration."[108] The Court 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."[109] Therefore, because the austerity and seriousness of the sentence itself applies equally to both juveniles and adults, the Court should apply the reasoning of *Graham* to the review of adult prison sentences.

B. Variable Two: The Offender

In addition to the severity of the LWOP sentence itself, the *Graham* Court also examined and expounded upon the implications raised by imposing such a sentence on a juvenile.[110] The Court explained that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," reasoning that because a juvenile mind is still developing into late adolescence, a juvenile's brain is not essentially destined to be and remain criminal, thereby indicating that LWOP is too harsh for juveniles because of the potential for reform as the offender ages and ma-

105. *See* Mark Andrew Sherman, *Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts*, 3 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 719, 730 (1997).

106. Barrett, *supra* note 103, at 392-93, 400.

107. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328-29 (2006) (discussing the mental problems arising in the prison context resulting from the prison experience).

108. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010). The Court went on to quote a Nevada case where a juvenile's LWOP sentence was overturned, stating LWOP "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 2027 (alteration in original) (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)) (internal quotation marks omitted).

109. *Id.* at 2027 (citing Kennedy v. Louisiana, 128 S. Ct. 2641, 2664-65 (2008)).

110. *Id.* 130 S. Ct. at 2026–33.

tures.[111] This indicates that the underlying rationale for the Court's analysis is that an offender's mental state has a significant bearing on the proportionality of a given sentence to an offender, which has played a significant role in the Court's Eighth Amendment jurisprudence in the past.[112] Therefore, an offender's individual actual mental capacity is seemingly what the court is focusing on, using numerical age as a sort of de facto barometer for mental capacity. Thus, where the mental capacity of an adult is on par with that of a child (i.e., in cases of mental retardation), and that adult is sentenced to LWOP, it follows that a *Graham* proportionality approach should apply.

For centuries, the law has provided an exception for the severely mentally retarded, exempting them from criminal liability altogether.[113] And while a mentally retarded individual is not per se exempt from criminal liability contemporarily, mental handicap has a significant impact on an individual who finds himself involved with the criminal justice system.[114] For example, many mentally handicapped people may be less likely to withstand police coercion or pressure due to their limited communication skills, their heightened susceptibility to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive.[115] One report estimates 6.2 to 7.5 million people with serious cognitive disabilities live in the United States,[116] with the Centers for Disease Control and Prevention reporting approximately 1.5 million people with severe intellectual disability in the U.S.[117] These considerations and others have led some commentators to call for the imposition of more stringent protections for mentally handicapped offenders.[118]

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111. *Id.* at 2026.

112. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002). In *Atkins*, the Court categorically banned the death penalty for mentally retarded offenders as cruel and unusual, stating: "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.* at 318; *see also* Christopher Slobogin, *What* Atkins *Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (discussing issues with culpability and sentencing of mentally handicapped individuals).

113. *See* Penry v. Lynaugh, 492 U.S. 302, 331–33 (1989).

114. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 427–30 (1985).

115. Anna Scheyett, et al., *Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 13, 13–14 (2009), *available at* http://www.aaidd.org/media/PDFs/PeoplewithIDDDinjails.pdf.

116. WISCONSIN DEP'T OF PUBLIC INSTRUCTION, COGNITIVE DISABILITIES IN ADULTS WITH SPECIAL NEEDS: A RESOURCE AND PLANNING GUIDE FOR WISCONSIN'S PUBLIC LIBRARIES, 14, 20, *available at* http://www.dpi.state.wi.us/pld/pdf/sn04.pdf.

117. CTRS. FOR DISEASE CONTROL & PREVENTION, STATE-SPECIFIC RATES OF MENTAL RETARDATION—UNITED STATES, 1993, MORBIDITY AND MORTALITY WEEKLY REPORT (1996), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00040023.htm.

118. *See* Stephen B. Brauerman, *Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty*, 54 AM. U. L. REV. 401 (2004) (exploring Eighth Amendment jurisprudential issues with those who are mentally handicapped); Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a Na-*

Moreover, mental illness can severely impact an offender's overall mental capacity.[119] According to a 2006 study conducted by the Department of Justice, 56% of inmates in state prison, 45% of inmates in federal prison, and 64% of inmates in local jails suffer from some form of mental illness.[120] Similar to mental cognition issues such as mental retardation, mental illness can also affect a defendants' feelings and behaviors, as well as the nature of the defendant's confession, and whether or not he even confesses, and, if he does, whether or not such confession was voluntary or coerced.[121] Interestingly, one author discusses research indicating that 94% of homicide offenders, 49% to 78% of sex offenders, 61% of habitually aggressive offenders, and 76% of juvenile offenders have some type of brain dysfunction, which can significantly alter an offender's ability to understand and/or control his or her actions.[122]

Thus, while the Court has used an offender's numerical age to categorically reject LWOP for juvenile offenders under a proportionality analysis in *Graham*, the information adduced in this Section demonstrates that the Court should apply the same rationale to adult offenders where it is affirmatively demonstrated that the offender suffers from reduced mental capacity, whether stemming from intellectual disability or mental illness, as the Court's rationale in *Graham* finds its foundation in mental capacity rather than age.

C. Variable Three: The Crime

According to the *Graham* Court, "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."[123] The Court went on to examine its own precedent, further stat-

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tional Consensus to Exempt the Mentally Retarded from the Death Penalty, 52 ALA. L. REV. 911 (2001) (evaluating the problems with culpability for those with mental handicaps).

119. *See* James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978). It is important to note that there is a distinction between intellectual disability and mental illness: "[t]he mentally ill experience disturbances in their thoughts that may be cyclical, episodic, or temporary," as characterized by disorders such as "schizophrenia, bipolar disorder, psychosis, post-traumatic disorder, and the like," while "[m]ental retardation is not a psychological or medical disorder . . . [but] is a permanent developmental or functional condition. . . . [that] cannot be ameliorated by drugs or psychotherapy." Entzeroth, *supra* note 118, at 915–16.

120. DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf.

121. John M. Fabian, *Death Penalty Litigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOL. REV. 73, 82 (2003).

122. Richard E. Redding, *Why It Is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How To Do It)*, 14 WASH. U. J.L. & POL'Y 407, 417–18 (2004).

123. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (citing Kennedy v. Louisiana, 128. S. Ct. 2641, 2664–65 (2008)).

ing that "[nonhomicide] crimes differ from homicide crimes in a moral sense."[124] And these principles have long been recognized by the Court, as evidenced by the Court's holdings in *Kennedy*,[125] *Enmund*,[126] and *Coker*,[127] among others.

In *Solem*,[128] the gravity of the offense at issue was an important factor for the Court's analysis. Specifically, the Court enunciated the following four principles to consider when evaluating the harm caused by an offense: (1) crimes have varying "magnitude[s]," as reflected by statutory distinctions; (2) "a lesser included offense should not be punished more severely than the greater offense," thus assault should be viewed differently from assault with intent to kill; (3) "attempts are less serious than completed crimes"; and (4) "an accessory after the fact should not be subject to a higher penalty than the principal."[129] Moreover, commentators have opined that harms caused by an offender's crime fall into different categories, with these varying categories (ranked by severity) warranting different levels of culpability and concomitant punishment.[130] Other scholars have advanced the position that the gravity and severity of the offense in question are fundamental principles that should bare great weight in reviving and unifying the Court's fractured proportionality analysis as applied to nonhomicide offenses.[131]

Precedent and commentary make clear that the nature of the actual crime committed by the offender is an important consideration, and one that has, and should continue, to bear great weight on the Court's Eighth Amendment analysis. The *Graham* Court's holding is important as it highlights and further legitimizes the use of offense analysis in determining proportionality.

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124. *Id.*

125. *Kennedy*, 128 S. Ct. at 2665 (holding that the Eighth Amendment forbids execution for the rape of a child).

126. Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding that the Eighth Amendment does not allow imposition of the death penalty for a defendant who aids and abets a felony during which murder is committed by others).

127. Coker v. Georgia, 433 U.S. 584, 603 (1977) (holding that the sentence of death is grossly disproportionate to the offense of raping an adult woman).

128. Solem v. Helm, 463 U.S. 277 (1983).

129. *Id.* at 293.

130. Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 583 (2008).

131. *Id.* at 527. Professor Lee suggests that "[t]he key to resuscitating proportionality analysis in noncapital criminal sentencing lies in strengthening the rigor with which courts analyze offense gravity and sentence severity," and that "[p]roportionality in noncapital criminal sentencing can be resuscitated by clarifying the theoretical framework already contained in Supreme Court precedent." *Id.* at 583.

IV. ANCILLARY CONCERNS AND BENEFITS

As with any newly proposed avenue of analysis, critics may certainly be wary of reviving the Court's nonhomicide proportionality analysis and solidifying a firm base for such considerations. However, I think that the benefits of my theory outweigh the potential drawbacks, and I will explore two of the possible criticisms that may be raised, along with a strong ancillary benefit to my position.

A. Concerns Over Increased Litigation

At a time when judicial resources are stretched thin and state and federal budgets are shrinking, increased litigation may strain those resources even more. Critics may argue that creating a new method for potential appeals would greatly increase inmate litigation and open the proverbial floodgates with a tidal wave of habeas appeals and the like. And it seems that Congress has evinced intent to reduce suits by prison inmates through its passage of the Prison Litigation Reform Act,[132] providing support for such contentions. However, the Prison Litigation Reform Act is more narrowly focused on reducing civil litigation where money damages are sought, rather than appeals of an inmate's sentence;[133] therefore, reliance on that particular piece of legislation is misguided.

Further, while this Note's theory may well produce an increase in litigation, which would seemingly increase the costs associated with the judicial and correctional systems, it seems that if a prisoner's appeal is granted and they are released or have their sentence reduced, the state will save the costs that would have been expended in housing the inmate.[134] Therefore, whereas an increase in litigation may stretch judicial resources in some areas, the savings to state governments and the federal system would seemingly quickly outpace litigation costs.

B. Concerns Over Releasing Inmates Early

While in a perfect world every prisoner would be deterred from committing future crime after being released from prison, notions of such a positive correlation have been attacked and eroded through years of quantitative study. Particularly, it seems that the harsh en-

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132. *See* 18 U.S.C. § 3626 (2006) (evincing a strong preference for reducing inmate litigation).

133. *See* Lynn S. Branham, *The Prison Litigation Reduction Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483 (2001) (exploring the implications of the Prison Litigation Reform Act).

134. *See, e.g.*, Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially-Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007) (explaining the increased costs associated with housing an aging prison population).

vironments in which prisoners live while incarcerated likely *increase* recidivism rates among released inmates.[135] This may be a cause for concern among many, as releasing prisoners early seemingly equates to increasing crime rates when these former prisoners are rereleased into the community.

However, it appears that these concerns can be assuaged by pointing out two facts, combining them into one rule, and following that rule to its logical conclusion: (1) most inmates are likely to be released at some point in their lives, and (2) increased exposure to the prison environment increases likelihood of recidivism.[136] Taken together, these two facts mean that the longer an inmate serves time in prison, the more likely they are to reengage in criminal behavior when eventually released from prison. Followed to its natural conclusion, this results in the proposition that releasing inmates sooner rather than later results in a lower recidivism rate. Therefore, any concerns over releasing inmates early based on the analytical framework proposed herein should ultimately give way to the conclusion that earlier releases could result in lower recidivism rates.

C. The Benefit of Decreasing the U.S. Prison Population

Severe prison overcrowding has become an issue of growing concern over the past several years as inmate populations nationwide have rapidly expanded.[137] The problem has been largely attributed to the harshness with which sentences have been handed down following sentencing policy changes in the 1970s, as state and federal inmate populations have tripled, and sentence length has doubled[138] (that is, except for California, where the prison population has ballooned by 750%).[139] In trying to understand the problem and posit solutions, scholars have adduced that there are only two variables that affect the size of the inmate population: (1) how many people go to prison, and (2) how long they stay.[140] Thus, as the overcrowding

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135. *See* John D. Castiglione, *Qualitative and Quantitative Disproportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71 (2010) (stating that evidence suggests that harsh prison sentences increases recidivism); M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Sentences Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1 (2007) (explaining that their research adduces no evidence harsher confinement conditions reduce recidivism, and that such conditions seem to increase the likelihood of re-arrest).

136. *See* Castiglione, *supra* note 135, at 78–80 (explaining that quantitative proportionality examines the length of sentence with recidivism).

137. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307 (2009); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010).

138. Clear & Austin, *supra* note 137, at 307–08.

139. Amanda Lopez, *Coleman/Plata: Highlighting the Need to Establish An Independent Corrections Commission in California*, 15 BERKELEY J. CRIM. L. 97 (2010).

140. Clear & Austin, *supra* note 137, at 312.

issue becomes increasingly dire by the day, courts need to develop their future jurisprudence with an eye towards influencing these two variables to promote a downward trend in the inmate population.

The analytical framework developed in this Note fits the bill: by examining an offender's sentence using the three-variable approach, disproportionate sentences will be ratcheted down, decreasing the amount of time an inmate stays in prison, thereby directly influencing the second variable discussed above. *Lockyer v. Andrade*[141] provides a perfect example. In that case, Leandro Andrade was sentenced under California's "three strikes" law. His first strike was for misdemeanor theft and his second and third strikes were for stealing videotapes from Kmart, eighty-five dollars worth the first time, and seventy dollars worth the next.[142] For his crimes, Andrade was sentenced to two consecutive terms of twenty-five years to life in prison with the Supreme Court, on appeal, finding that the sentence "was not an unreasonable application of our clearly established law," and that this sentence was not grossly disproportionate because it was not an "extraordinary case" warranting relief.[143] Were the framework presented herein at work, the sentence would have been found unconstitutional under the Eighth Amendment, and Andrade would have to have been re-sentenced to a shorter prison stint.

First, the sentence, which amounted to life in prison, would have weighed heavily in favor of disproportionality because of the severe issues with inmate overcrowding in California and the serious problems it is causing for the citizens and inmates.[144] Next, focusing on the offender, Andrade was a serious heroine addict, and he admittedly committed his thefts to try and support his habit;[145] this indicates that Andrade's sentence should be mitigated since his actions were strongly influenced by a serious chemical dependency. Finally, stealing less than one hundred dollars worth of videos from Kmart[146] seems to also warrant mitigation under the third prong of the analysis, the crime itself. Therefore, when triangulated and applied together, the framework posited herein would clearly reduce the amount of time served by many inmates, ultimately resulting in a reduced inmate population.

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141. 538 U.S. 63 (2003).
142. *Id.* at 66.
143. *Id.* at 77.
144. *See* Lopez, *supra* note 139, at 97–98 (expounding on the issues associated with California's massive prison population).
145. *Andrade*, 538 U.S. at 66.
146. *Id.*

V. CONCLUSION

The Court's fractured Eighth Amendment proportionality jurisprudence has created uncertainty and confusion among practitioners, judges, and commentators alike. In order to remedy this pressing issue, the Court needs to adopt a proportionality framework that not only is cohesive and comprehensive, but also applicable across a wide and varying spectrum of offenders and crimes. By adopting the methodology presented in this Note, the Court would not only unify its Eighth Amendment jurisprudence, but would also promote justice and fairness in sentencing throughout the United States.