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Abstract: In *Graham v. Florida*, the U.S. Supreme Court held that it is unconstitutional to sentence a non-homicide juvenile offender to life in prison without parole. While states need not guarantee release to these juvenile offenders, they cannot foreclose such an outcome at the sentencing phase. Scholars have identified several long-term ramifications of *Graham*, including its likely influence on juvenile sentencing practices and on retributive justice theory. As yet unexamined, though, are the important and thorny legal questions that *Graham* raises for state judges and lawmakers in the very short term. To whom does the *Graham* decision apply? What is the appropriate remedy for those inmates? What affirmative obligations does the *Graham* decision impose upon the states? This Article endeavors to answer these and other pressing questions that confront judges and legislators today. Part I briefly describes the *Graham* opinion and surveys what scholars to date have identified as salient aspects of the decision. Part II seeks to provide a blueprint for lower courts and legislatures implementing the *Graham* decision. Specifically, it argues that: (1) *Graham* is retroactively applicable to all inmates who received a life-without-parole sentence for a juvenile non-homicide crime; (2) those inmates entitled to relief under *Graham* require effective representation at their resentencing hearings; (3) judges presiding over resentencing hearings should err in favor of rehabilitation over retribution to comport with the spirit of *Graham*; and (4) long-term legislative and executive action are necessary in order to make *Graham*'s promise a reality. Finally, Part III situates *Graham* in the context of our nation's ongoing criminal justice failings. While the sentence challenged in *Graham* ought to be viewed as a symptom of such failings, the *Graham* decision may offer a window of hope for reform on that same front.

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INTRODUCTION

In *Graham v. Florida*,[1] the U.S. Supreme Court held that it is unconstitutional to sentence a non-homicide juvenile offender to life in prison without parole.[2] The Court was careful to note that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but it must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[3] Dissenting in *Graham*, Justice Thomas objected to the Court's newly crafted categorical Eighth Amendment rule on several grounds, including the concern that the decision was destined to raise a host of vexing collateral legal issues:

> The Court holds that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," but must provide the offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." But what, exactly, does such a "meaningful" opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court

1. 560 U.S.__, 130 S. Ct. 2011, 2034 (2010).
2. *Id.*
3. *Id.* at 2030.

> provides no answers to these questions, which will no doubt embroil the courts for years.[4]

As Justice Thomas predicted, lower courts and legislatures have struggled with how to implement the decision since *Graham* was decided in 2010. To begin, there is the question of who benefits from the *Graham* decision.[5] Courts are split on the question whether *Graham* is retroactively applicable,[6] while recent changes in state law have enlarged the pool of inmates to whom *Graham* applies.[7]

At the same time, judges must determine what sentences are constitutional after *Graham* for non-homicide juvenile offenders. The *Graham* Court held that a judge may not impose a life-without-parole sentence on a non-homicide juvenile offender, but what about a parole-eligible life sentence? Or a sentence of seventy-five years? Since the Court announced the *Graham* decision, close to twenty juvenile inmates in Florida have been resentenced, and there has been a wide range of sentences imposed: while one inmate received a resentence of 30 years, another received a resentence of 170 years.[8] Despite Justice Alito's contention that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole,"[9] the logic of the majority's opinion suggests that there must, in fact, be an upper limit on what sentences will comport with *Graham*.[10] State court judges are faced with discerning what that upper limit is, and, as one Florida judge presiding over a juvenile sentencing said, "It's a huge dilemma."[11]

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4. *Id.* at 2057 (Thomas, J., dissenting) (citation omitted).

5. After the Court's decision in *Graham*, the Florida Bar Foundation awarded Barry University Law School a $100,000 grant to "address the legal and policy questions raised by the *Graham* decision, as well as individual client needs." Nancy Kinnally, *Foundation Supports Efforts to Ensure Fair Sentencing for Juveniles*, FLA. B. NEWS (Oct. 15, 2010), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/74f9f03449b09276852577b2006aed4e!OpenDocument. Identifying the inmates to whom *Graham* applies was one of the Barry Law School clinical program's initial challenging tasks. *Id.*

6. *See infra* note 90 and accompanying text.

7. *See, e.g.*, Manuel v. State, 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010) (holding that *Graham* applies to a defendant convicted of attempted murder because, under Florida law, homicide requires the death of human being); *see also infra* notes 118–119 and accompanying text.

8. Shemir Wiles, *Sentenced a Second Time, Man Given 170 Years: Jessie Cade's Life Sentence Voided by* Graham v. Florida, CITRUS COUNTY CHRON. (Jan. 27, 2011), http://www.chronicleonline.com/content/sentenced-second-time-man-given-170-years; *see also* Jeff Kunerth, *Dangerous but Different: 'Lifers' Sentenced as Teens Get 2nd Chance*, ORLANDO SENTINEL, Apr. 3, 2011, at A1 [hereinafter Kunerth, *'Lifers' Sentenced as Teens Get 2nd Chance*].

9. *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting).

10. *See infra* Part II.C.

11. Alexandra Zayas, *Judges Ponder Tricky Ruling*, ST. PETERSBURG TIMES, Oct. 6, 2010, at 3A

State lawmakers are also grappling with an appropriate response to *Graham*. For example, in Florida, where most of the inmates affected by the *Graham* decision are incarcerated, the state legislature had previously eliminated parole for most felony convicts.[12] At the very least, *Graham* suggests that parole needs to be available for juvenile offenders under state law, and states housing *Graham* inmates[13] need to craft an appropriate parole protocol specific to juvenile offenders. Florida Representative Michael Weinstein proposed legislation that would give juvenile defendants affected by the *Graham* decision the opportunity for parole after twenty-five years, assuming the inmates met certain criteria, such as good behavior in prison and obtaining a GED.[14] The Florida Prosecuting Attorneys Association similarly suggested giving juvenile convicts the possibility of parole after twenty years, but then-Governor Charlie Crist rejected both proposals as too lenient.[15] A "*Graham* Law" is pending before Florida's legislature, but lawmakers have not been able to agree on the meaning of terms such as "maturity, rehabilitation and parole," all of which are crucial to pending legislation.[16]

Even if legislators can agree on a law to guide judges in their sentencing decisions, the *Graham* Court's aspiration demands additional measures. In particular, the *Graham* decision placed great emphasis on the theme of rehabilitation and the promise of possible, if not eventual, release.[17] Justice Kennedy wrote that "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[18] Without even the possibility of future release, he further explained, juvenile offenders have no incentive to "become . . . responsible individual[s]" or to engage in the "considered reflection which is the foundation for remorse,

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(quoting Circuit Judge Chet A. Tharpe).

12. Dolan v. State, 618 So. 2d 271, 272 (Fla. Dist. Ct. App. 1993) ("For anyone convicted of a non-capital felony committed on or after October 1, 1983, the term 'parole' no longer exists." (citing FLA. STAT. § 921.001(8) (1983)).

13. There is some debate as to the question of which inmates fall within the purview of the *Graham* decision. I address this issue below in Part II.C.

14. Zayas, *supra* note 11.

15. *Id.*

16. Jeff Kunerth, *Dangerous but Different: Bill: Juvenile Lifers Wait 25 Years for Way Out*, ORLANDO SENTINEL, Apr. 13, 2011, at A1 [hereinafter Kunerth, *Juvenile Lifers Wait 25 Years for Way Out*].

17. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2029–30 (2010).

18. *Id.* at 2032.

renewal, and rehabilitation."[19] In light of this language, the Court's decision imposes certain affirmative obligations on the states. Not only must the states leave open the possibility of eventual release, but they must also create the opportunity for reflection and maturity through appropriate conditions of confinement for juvenile offenders.[20] This is a daunting task, as most states are barely able to ensure the physical safety of their juvenile inmates,[21] let alone facilitate their healthy maturation.

In these ways, Justice Thomas was correct: the *Graham* decision has raised a host of collateral legal issues that state judges, legislatures, and policymakers need to address. These issues—the tasks of implementing *Graham* on the ground—are the focus of this Article.

This Article proceeds in three parts. Part I briefly describes the *Graham* opinion and surveys what scholars to date have identified as salient aspects of the decision. Part II seeks to provide a blueprint for lower courts and legislatures implementing the *Graham* decision. Specifically, it argues that: (1) *Graham* is retroactively applicable to all inmates who received a life-without-parole sentence for a non-homicide juvenile crime; (2) those inmates entitled to relief under *Graham* require effective representation at their resentencing hearings so that their full life pictures can be presented; (3) judges presiding over resentencing hearings should err on the side of rehabilitation over retribution to comport with the spirit of *Graham*; and (4) long-term legislative and executive action are necessary to make *Graham*'s promise a reality. Finally, Part III suggests two broader lenses through which to view *Graham*. First, it suggests that *Graham* should be viewed as a symptom of our nation's ongoing criminal justice failings. Second, it argues that, when read alongside the U.S. Supreme Court's recent decision in *Brown v. Plata*,[22] the *Graham* decision provides some hope for broader criminal justice reform.

I. THE *GRAHAM* DECISION

A. The Graham *Opinion*

At the age of sixteen, Terrance J. Graham and three other adolescents

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19. *Id.*

20. *See* discussion *infra* Part II.A.

21. *See infra* notes 191–196 and accompanying text (discussing juvenile vulnerability in adult prisons).

22. 563 U.S.__, 131 S. Ct. 1910 (2011).

attempted to rob a restaurant in Jacksonville, Florida.[23] In the course of the attempted robbery, Graham's accomplice struck the restaurant manager in the head twice with a metal bar.[24] Graham was arrested for attempted robbery, and the prosecutor elected to charge him as an adult.[25] Graham was charged with armed burglary with assault or battery and attempted armed robbery; he faced a maximum sentence of life imprisonment without the possibility of parole.[26] He pleaded guilty to both charges under a plea agreement that resulted in three years probation and required him to serve the first twelve months of his probation in county jail.[27] Because of time Graham had served while awaiting trial, he was released six months after his sentence.[28] Less than six months later, Graham was allegedly involved in another robbery, and his probation officer reported to the trial court that Graham had violated the conditions of his probation.[29] Graham was a few weeks shy of eighteen when the probation violations were reported.[30]

One year later, a different trial court judge presided over a trial regarding Graham's alleged probation violations.[31] Graham maintained that he had not been involved in the robbery, but he did admit to fleeing from police.[32] The trial court found that Graham violated his probation by committing a home invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity.[33] Under Florida law, without a downward departure by the judge, Graham was eligible for a sentence ranging from five years to life imprisonment without the possibility of parole.[34] The State recommended that Graham receive thirty years on the armed burglary count and fifteen years on the attempted armed robbery count, while the Florida Department of Corrections recommended that Graham receive *only a four-year*

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

24. *Id.*

25. *Id.*; *see also* John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL'Y 1, 14–21 (2005) (discussing prosecutorial waiver generally and identifying criticisms of models like the one in Florida).

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

27. *Id.*

28. *Id.*

29. *Id.* at 2019.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

sentence.[35] Instead, the trial court judge sentenced Graham to life imprisonment for the armed burglary and fifteen years for the attempted armed robbery.[36] Because Florida abolished its parole system in 2003,[37] Graham's life sentence meant that he had no possibility of release unless he was granted executive clemency.[38]

The question presented to the U.S. Supreme Court in Graham's case was whether a life-without-parole sentence was permissible for a non-homicide juvenile offender.[39] Writing for the majority, Justice Kennedy held that the Constitution categorically forbids such a sentence.[40] First, he explained that the Eighth Amendment bars both "barbaric" punishments and punishments that are disproportionate to the crime committed.[41] Within the latter category, the Court explained that its cases fell into one of two classifications: (1) cases challenging the length of term-of-years sentences given all the circumstances in a particular

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35. *Id.*

36. *Id.* at 2020. Despite the fact that the state offered no rehabilitative services to Graham during his probation, the sentencing judge apparently thought that his case was hopeless. *See id.* ("[I]n a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2. And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do. So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice. I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." (alteration in original) (quoting trial court)).

37. FLA. STAT. § 921.002(1)(e) (2003).

38. *Graham*, 130 S. Ct. at 2020. "Clemency" is a general term, and it may entail a pardon, reprieve, or the commutation of a sentence. *See* Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 39–40 (2009) (defining the term and its various forms). Executive clemency grants of any kind are incredibly rare, and as a result, Graham's sentence was tantamount to a sentence to die in prison. *See* Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 250–51 (2003) (discussing a downward trend in clemency grants from 1973 to 1999).

39. *Graham*, 130 S. Ct. at 2017–18.

40. *Id.* at 2034.

41. *Id.* at 2021.

case and (2) cases where the Court has considered categorical restrictions on the death penalty.[42] Because Graham's case challenged "a particular type of sentence" and its application to "an entire class of offenders who have committed a range of crimes,"[43] the Court found the categorical approach appropriate and relied upon its recent death penalty case law for guidance.[44]

When the Court has taken a categorical approach to proportionality,[45] it looks to objective indicia of national consensus, beginning with relevant legislation.[46] Justice Kennedy explained that while thirty-seven states, the District of Columbia, and the federal government permit life-without-parole sentences for non-homicide juvenile offenders, the actual sentencing practices of these jurisdictions tell another story.[47] Based on the evidence before it, the Court determined that, at the time of the decision, there were 123 non-homicide juvenile offenders serving a life-without-parole sentence nationwide and seventy-seven of them were in Florida prisons.[48] Given the "exceedingly rare" incidence of the punishment in question, the Court held that there was a national consensus against life-without-parole sentences for non-homicide juvenile offenders.[49]

While the Court acknowledged that "community consensus"[50] was "entitled to great weight,"[51] it proceeded to render its own judgment regarding the constitutionality of Graham's sentence.[52] In this regard, the Court focused on two aspects of the case: first, the uniqueness of juvenile offenders—specifically their lessened culpability and their greater capacity for reformation[53]—and second, the historical treatment

42. *Id.*

43. *Id.* at 2022–23.

44. *Id.* at 2023; *see also* Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49 (2010) ("The Court [wrote] just four sentences to justify its use of the capital proportionality test in Graham's case.").

45. *See generally, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (banning death penalty for child rape); Roper v. Simmons, 543 U.S. 551 (2005) (banning death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (banning death penalty for mentally retarded offenders).

46. *Graham*, 130 S. Ct. at 2023.

47. *Id.*

48. *Id.* at 2024.

49. *Id.* at 2026.

50. *Id.*

51. *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)).

52. *Id.* For a criticism of the U.S. Supreme Court's assessment of evolving standards of decency, see John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87 (2010).

53. *Graham*, 130 S. Ct. at 2026.

of non-homicide crimes as less severe than crimes where a victim is killed.[54] Looking at these two features, the Court reasoned: "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."[55] At the same time, when the Court examined the various justifications for any criminal sanction, it determined that none could justify life without parole for defendants like Graham.[56] Accordingly, the Court held:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation . . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.[57]

Chief Justice Roberts, concurring in the judgment,[58] emphasized that the Court did not need to craft a categorical rule for all cases like Graham's.[59] Instead, under the Chief Justice's approach, the Court could have relied upon its well-established "narrow proportionality" review historically applicable to non-capital cases.[60] According to the Chief Justice, applying that precedent would have "provide[d] a sufficient framework for assessing the concerns outlined by the majority"[61] and

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54. *Id.* at 2027.

55. *Id.*

56. *Id.* at 2028–30.

57. *Id.* at 2030.

58. *Id.* at 2036–43 (Roberts, C.J., concurring). Justice Stevens also wrote a concurring opinion, in which Justices Ginsburg and Sotomayor joined. *Id.* at 2036 (Stevens, J., concurring) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes.").

59. *Id.* at 2036 (Roberts, C.J., concurring); *see also* Barkow, *supra* note 44, at 51–52 (discussing the potential import of the Chief Justice's concurring opinion for future proportionality review at the U.S. Supreme Court and among lower courts).

60. *Graham*, 130 S. Ct. at 2039–41 (Roberts, C.J., concurring). Historically, narrow proportionality review has required the reviewing courts to conduct an initial inquiry that compares the gravity of the offense with the harshness of the penalty. This initial inquiry is a deferential one. Only in rare cases where the reviewing court finds a sentence to be grossly disproportionate to the crime committed should the court then conduct both an intrajurisdictional and interjurisdictional comparison with sentences imposed for the same crime. If these two comparisons confirm the court's initial finding of gross disproportionality, only then should the reviewing court find the defendant's sentence in violation of the Eighth Amendment. *Id.* at 2037–38 (explaining the narrow proportionality review process).

61. *Id.* at 2039.

avoided inventing "a new constitutional rule of dubious provenance."[62]

Justices Thomas and Alito each dissented. Justice Thomas' dissent emphasized what he saw as the majority's methodological flaws. First, he criticized the Court's "eviscerat[ion]" of the "death is different" approach to Eighth Amendment proportionality review.[63] This new approach, in Justice Thomas' view, opened the door to unlimited judicial authority in the Eighth Amendment realm. According to Justice Thomas, if the Court has the authority to categorically exempt a certain class of offenders from the "*second* most severe penalty,"[64] there is nothing to prevent the Court from also exempting additional classes of offenders "from the law's third, fourth, fifth, or fiftieth most severe penalties as well."[65]

Second, Justice Thomas viewed the majority's decision as raising serious separation of powers concerns: "The ultimate question in this case is not whether a life-without-parole sentence 'fits' the crime at issue here or the crimes of juvenile nonhomicide offenders more generally, but to whom the Constitution assigns that decision."[66] According to Justice Thomas, the Constitution assigned that decision to the voters and their elected officials.[67] Because the Florida legislature authorized a sentence of life without parole for non-homicide offenses and because the trial judge in Graham's case lawfully imposed that sentence, Justice Thomas saw no role for the U.S. Supreme Court to play in this case.[68] By tackling this question, Justice Thomas wrote that the Court "reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives."[69]

Justice Alito joined in Justice Thomas' dissent, but also raised a separate point that deserves attention. He stated, "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional."[70]

Thus, the U.S. Supreme Court found life-without-parole sentences

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62. *Id.* at 2036.

63. *Id.* at 2046 (Thomas, J., dissenting).

64. *Id.* (emphasis in original) (quoting majority opinion).

65. *Id.* (citations omitted).

66. *Id.* at 2058.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (Alito, J., dissenting).

unconstitutional for juvenile non-homicide offenders and, with its decision, entitled Terrance Graham and those similarly situated to a new sentence.

B. Early Graham *Scholarship*

Scholars have already identified several long-term, downstream implications that may flow from the Court's decision in *Graham*. For example, some scholars have seized upon *Graham*'s methodological import.[71] As discussed earlier, the *Graham* Court departed from the Court's traditional use of narrow proportionality review in its non-death penalty cases.[72] Scholars have argued that this methodological shift may have significant impact upon the Court's jurisprudence both within and outside of the capital context.

Professors Carol and Jordan Steiker have noted that, by shifting the Court's methodology away from capital-versus-noncapital challenges to individual-versus-categorical challenges, "the window that *Graham* appears to open relates to *classes* of noncapital offenders who can assert special grounds for avoiding especially harsh punishment."[73] Under the Court's new approach, the authors suggest that *Graham* permits juvenile challenges to life imprisonment and to excessive term-of-years sentences.[74] At the same time, Professors Steiker and Steiker describe critical ways in which *Graham* may shape future capital cases, including the way its methodology "bolster[s]" the "constitutional case against the death penalty" altogether.[75]

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71. *See generally, e.g.*, Barkow, *supra* note 44 (considering implications of the *Graham* decision in future Eighth Amendment challenges); Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010) (describing *Graham* Court's departure from prior Eighth Amendment jurisprudence and implications); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79 (2010) (discussing implications of *Graham* decision for capital and noncapital Eighth Amendment challenges).

72. *See supra* note 60 and accompanying text.

73. Steiker & Steiker, *supra* note 71, at 81 (emphasis in original).

74. *Id.* To date, though, many courts continue to read *Graham* narrowly. *See, e.g.*, Saeliaw v. Allison, No. C 11–2716 RS (PR), 2011 WL 3516171, at *2 (N.D. Cal. Aug. 11, 2011) (rejecting juvenile non-homicide offender's challenge to indeterminate life sentence after *Graham*); Angel v. Commonwealth, 704 S.E.2d 386, 401–02 (Va. 2011) (upholding life sentence for non-homicide juvenile crime because state statute provided for conditional release upon a certain age); State v. Ninham, 797 N.W.2d 451, 465–74 (Wis. 2011) (upholding life without parole for fourteen-year-old homicide offender after *Graham*).

75. Steiker & Steiker, *supra* note 71, at 84 ("[I]f death sentencing rates and execution rates continue to fall, or even remain stable at the current low levels, one can make a plausible claim that

Others have suggested that the *Graham* Court's "constitutional mathematics" of borrowing from two separate lines of analysis—age- and homicide-based limitations on the death penalty—has potentially broad implications for future cases.[76] For example, in the same way that the *Graham* Court described juvenile non-homicide offenders as having "twice diminished moral culpability,"[77] "it would appear that a claim exists that a sentence of [life without parole] would also be unconstitutional for a mentally retarded defendant who did not kill or participate in a homicide."[78] Professor William Berry has argued that life without parole is different from all other forms of punishment and that, after *Graham*, the Court should consider establishing a separate category of Eighth Amendment review.[79] Only two years after the *Graham* decision, the U.S. Supreme Court granted certiorari to decide whether fourteen-year-old children who were convicted of homicide may be sentenced to life in prison without parole after *Graham*.[80] Thus, scholars have correctly noted the vast implications of the Court's methodology in *Graham*.

Legal scholars have also identified the "youth is different"[81] aspect of the *Graham* Court's decision. The *Graham* Court borrowed heavily from its decision in *Roper v. Simmons*,[82] which banned the death penalty for juveniles, and emphasized the psychological immaturity of juveniles and their unique capacity for rehabilitation.[83] Scholars have argued that the *Graham* Court's emphasis upon juvenile psychology and neurological development may lay the foundation for future limitations on juvenile sentencing practices. For example, one scholar posits that

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the legislative authorization of capital punishment is undercut by its small and very sporadic use, in much the same way that *Graham* found that the widespread legislative authorization of [life without parole] for juvenile nonhomicide offenders . . . was undercut by its relatively small actual use relative to its formally authorized use.").

76. Smith & Cohen, *supra* note 71, at 91.

77. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2027 (2010).

78. Smith & Cohen, *supra* note 71, at 91. *But see* United States v. Moore, 643 F.3d 451, 456–57 (6th Cir. 2011) (distinguishing the Eighth Amendment challenge of a mentally retarded adult from that presented by *Graham*).

79. *See generally* William W. Berry III, *More Different from Life, Less Different than Death*, 71 OHIO ST. L.J. 1109 (2010).

80. Jackson v. Norris, 2011 Ark. 49, __S.W.3d__ (2011), *cert. granted sub nom.* Jackson v. Hobbs, 132 S. Ct. 548 (U.S. Nov. 7, 2011) (No. 10-09647); *see also* Adam Liptak, *Justices Will Hear 2 Cases of Life Sentences for Youths*, N.Y. TIMES, Nov. 8, 2011, at A13.

81. *See generally* Stephen St. Vincent, *Commentary: Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9 (2010).

82. 543 U.S. 551 (2005).

83. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2026–30 (2010).

increased knowledge about juvenile psychology will suggest more appropriate punishments and treatments for juveniles.[84] Such knowledge "may lead to our societal standards of decency evolving more quickly towards less harsh sentences for juveniles than for adults, especially if there is no corresponding evidence that adult offenders would benefit from the same types of punishment as juveniles."[85] Another scholar has argued that *Graham*'s reasoning—seen in the context of the Court's precedents—suggests that juveniles are not eligible for any kind of retributive punishment.[86] Other scholars have argued that the *Graham* decision is only one example of the U.S. Supreme Court's recent child-specific jurisprudence.[87] With these recent arguments, scholars have begun to articulate how the *Graham* Court's emphasis upon the unique aspects of juveniles may shape future cases.

Finally, many scholars have used *Graham* as an opportunity to re-examine the validity of life-without-parole sentencing nationwide. One scholar has argued that life-without-parole sentencing abandons altogether the notion of personal reformation—a notion that has historically driven American sentencing policy—and that moving away from the sentencing practice makes sense for individual inmates and taxpayers alike.[88] Another scholar has made the case that executive actors should revive their use of clemency as an antidote to the life-without-parole sentencing trend.[89] As this scholarship indicates, *Graham*'s long-term implications may be both significant and far-reaching.

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84. St. Vincent, *supra* note 81, at 13.

85. *Id.*

86. Dan Markel, *May Minors Be Retributively Punished After* Panetti *(and* Graham*)?*, 23 FED. SENT'G REP. 62, 65 (2010) (arguing that in light of recent U.S. Supreme Court cases, "juveniles must be treated *somewhat* like the incompetent: that is, as sources of risk and objects of compassion who can hopefully be cured or treated or contained until they exhibit the competence expected from them as adults. Until that time . . . they should be spared the special sting of condemnation associated with the retributive rebuke commonly connected to punishments in prisons or trials as adults").

87. *See, e.g.*, Tamar R. Birckhead, Graham v. Florida*: Justice Kennedy's Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL'Y 66 (2010) (noting Justice Kennedy's consistent theme of youths as works in progress in areas such as the Establishment Clause, criminal sentencing, and due process); Deana Pollard Sacks, *Children's Developmental Vulnerability & the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777 (2011) (noting the Court's recent concern for the vulnerability of children in media and criminal sentencing cases).

88. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27 (2010).

89. Molly M. Gill, *Clemency for Lifers: The Only Road Out Is the Road Not Taken*, 23 FED. SENT'G REP. 21 (2010).

What has yet to be—and needs to be—examined are the vexing legal issues before judges and legislators today. The next Part of this Article addresses those issues.

II. IMPLEMENTING *GRAHAM* ON THE GROUND

This Part addresses several urgent collateral issues that flow from the *Graham* decision—all of which judges and lawmakers are addressing today. Specifically, it argues that: (1) *Graham* is retroactively applicable to all inmates who received a life-without-parole sentence for a non-homicide juvenile crime; (2) those inmates entitled to relief under *Graham* require effective representation at their resentencing hearings; (3) judges presiding over resentencing hearings in the wake of *Graham* should err on the side of rehabilitation over retribution to comport with the spirit of *Graham*; and (4) long-term legislative and executive action are necessary in order to make *Graham*'s promise a reality.

A. Graham *Applies Retroactively*

In the last year, lower courts have disagreed over whether *Graham* applies retroactively.[90] Perhaps this disagreement should not be surprising, as scholars historically have criticized the U.S. Supreme Court's opaque retroactivity doctrine.[91] Nonetheless, the Court's most

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90. *Compare* Bell v. Haws, No. CV09-3346-JFW (MLG), 2010 WL 3447218, at *9 n.6 (C.D. Cal. July 14, 2010) ("The Court notes that application of *Graham* to Petitioner's case is permitted by the first exception to the *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), non-retroactivity doctrine because it announced a new rule that 'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.' . . . Here, the *Graham* Court announced a new rule that prohibits a category of punishment—life without parole sentences—for juveniles based on their status and the type of offense, and the rule is thus retroactive on collateral review." (citations omitted)), *and* Bonilla v. State, 791 N.W.2d 697, 700–01 (Iowa 2010) ("*Graham* applies retroactively to Bonilla because it is a new rule of substantive law clarifying the Eighth Amendment prohibition on cruel and unusual punishment."), *with* Lawson v. Pennsylvania, No. Civ.A. 09-2120, 2010 WL 5300531, at *3 (E.D. Pa. Dec. 21, 2010) ("[T]here is no indication that the Supreme Court has held *Graham* retroactively applicable on collateral review . . . ."), *and* Jensen v. Zavaras, Civil Action No. 08-cv-01670-RPM, 2010 WL 2825666, at *1–2 (D. Colo. July 16, 2010) ("Given the Court's recognition of the many state statutes that permit life without parole for juvenile non-homicide offenders shown in the appendix to the opinion and the premise that Graham's sentence was contrary to the majority's view of 'evolving standards of decency' it is inconceivable that this new rule will be applied retroactively to invalidate sentences imposed in those states.").

91. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 100 n.310 (2004) ("[T]he present jurisprudence of retroactivity is widely thought to be unnecessarily confused and confusing." (citations omitted)); Christopher Strauss, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1222 (2003) ("Over the course of the past thirty-six years, the Court

recent relevant case law makes clear that a new substantive rule, like the one announced in *Graham*, does apply retroactively.[92] Accordingly, a juvenile non-homicide offender serving a life-without-parole sentence is entitled to challenge that sentence under *Graham*, regardless of the procedural posture of the offender's case.[93] This sub-part explains retroactivity in general and its application to the *Graham* decision.

The question of who benefits from a new constitutional rule hinges on both the nature of the rule and the posture of the individual's case. When the U.S. Supreme Court announces a new constitutional rule, that rule is applicable to all criminal cases still pending on direct review.[94] This is because the Court, unlike a legislative body, decides only one case at a time, and each case must serve as "the vehicle for announcement of a new rule."[95] The Court has long recognized that similarly situated individuals whose cases are pending on direct review fall within the purview of a new rule.[96]

Whether a new constitutional rule of criminal procedure applies retroactively to cases pending on collateral review is more complex. In *Teague v. Lane*,[97] the Court embraced a position previously advocated by Justice Harlan and held that, in general, new constitutional rules of criminal procedure are not applicable to cases on collateral review.[98] Under this so-called "non-retroactivity doctrine," a defendant whose case is at the habeas corpus stage may only invoke a new rule in one of two situations.[99] First, the defendant may raise a claim based on the new rule if the rule itself "places a class of private conduct beyond the power

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has grappled with the issue of retroactivity and has crafted a theoretically incoherent doctrine that has proven difficult to apply."); *see also* Strauss, *supra*, at 1227–39 (describing the Court's retroactivity doctrine).

92. *See infra* note 108 (discussing the retroactive application of *Atkins* and *Roper*).

93. It may very well be the case that the logic of *Graham* has an even wider application than I argue herein. For example, lawyers may prevail before the U.S. Supreme Court in arguing that *Graham* also precludes a life-without-parole sentence for some juvenile *homicide* offenders. *See EJI Challenges Death-in-Prison Sentences for Young Teens in Two Cases at U.S. Supreme Court*, EQUAL JUST. INITIATIVE (Apr. 21, 2011), http://www.eji.org/eji/node/524. In this sub-part, I am focused on those inmates who are legally entitled to a resentencing hearing immediately as a result of *Graham*, rather than future extensions of *Graham*.

94. Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987); *see also* Davis v. United States, 564 U.S.__, 131 S. Ct. 2419, 2430 (2011) (stating the rule from *Griffith*).

95. *Griffith*, 479 U.S. at 322.

96. *Id.* at 323.

97. 489 U.S. 288 (1989).

98. *Id.* at 310.

99. *Id.* at 311; Hoffman v. Arave, 236 F.3d 523, 537 & n.22 (9th Cir. 2001) (explaining the two exceptions).

of the State to proscribe" or prohibits a certain kind of punishment for a certain kind of offender.[100] Second, a defendant may argue for the new rule to be retroactively applied if the new rule qualifies as a "watershed" rule of criminal procedure and thus calls into question the "fundamental fairness and accuracy of the criminal proceeding."[101] More recently, the Court has shifted its terminology somewhat[102] and has described new rules as "substantive" when they "alter[] the range of conduct or the class of persons that the law punishes," rather than describing them as falling within the first of the two non-retroactivity exceptions.[103] Generally, new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."[104]

Applying this doctrine to *Graham*, it is evident that all juvenile non-homicide offenders serving a life-without-parole sentence may challenge that sentence under *Graham*. Because all new rules are applicable to cases pending on direct review,[105] those offenders whose cases are at the direct review stage should not even need to address the retroactivity question. Those inmates whose cases are on collateral review are also entitled to challenge their sentence under *Graham*, as even the narrowest reading of *Graham* renders a certain type of punishment—life without parole—unconstitutional for a certain class of persons—non-homicide juvenile offenders.[106] Courts that have held otherwise have overlooked the distinction between new substantive and procedural rules.[107] New substantive rules, like the one in *Graham*, are retroactively applicable even to cases pending on collateral review.[108]

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100. Horn v. Banks, 536 U.S. 266, 271 n.5 (2002) (citing Saffle v. Parks, 494 U.S. 484, 494 (1990)).

101. *Id.* (citations omitted).

102. Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004).

103. *Id.* at 353.

104. *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

105. *See supra* note 94 and accompanying text.

106. *In re* Sparks, 657 F.3d 258, 262 (2011) (holding that *Graham* applies retroactively on collateral review as matter of logical necessity).

107. *See, e.g.*, *supra* note 90.

108. *See* Atkins v. Virginia, 536 U.S. 304 (2002). In *Atkins*, the U.S. Supreme Court barred a certain type of punishment—the death penalty—for a certain class of offenders—the mentally retarded. *Id.* at 321. Lower courts have recognized that this rule applies retroactively to cases pending on collateral review, even though the U.S. Supreme Court did not expressly say so in *Atkins*. *See In re* Holladay, 331 F.3d 1169, 1172–73 (11th Cir. 2003). Instead, the rule applied retroactively "by logical necessity." *Id.* at 1172 (citation omitted). That is, the U.S. Supreme Court had already identified what class of rules are retroactively applicable, namely those that are

Even non-homicide juvenile offenders serving a life-without-parole sentence who have already filed a federal habeas corpus petition should be eligible to seek relief under *Graham*. The federal habeas corpus statute bars second or successive petitions, but the statute itself does not define what constitutes a successive petition.[109] Federal courts have determined that a habeas corpus petition is successive—and thus barred except under very limited circumstances—"when it: (1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ."[110] Because *Graham* announced a new substantive rule that renders a certain kind of sentence unconstitutional for an entire class of defendants, the decision allows inmates to challenge their sentence in a way they could not have in an earlier petition. Accordingly, because a petition based on the *Graham* rule should not be barred as a "successive" petition, the *Graham* rule may serve as the basis for relief even for those inmates who have already filed a federal habeas corpus petition.[111] Thus, *Graham* applies to inmates nationwide who were sentenced to life without parole for a juvenile non-homicide offense, regardless of the procedural posture of those cases.

It is also worth noting that the application of *Graham* may reach even further than the Court realized at the time of its decision. In particular, the *Graham* Court relied heavily on one report—the *Annino Report*—to calculate the number of inmates nationwide serving a life-without-parole sentence for a juvenile non-homicide offense.[112] The *Annino Report*

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substantive in nature and preclude a kind of punishment for a class of offenders; the Court announced such a rule in *Atkins*. *Id.*; *see also In re* Morris, 328 F.3d 739, 740 (5th Cir. 2003) (holding *Atkins* retroactively applicable). Courts also held *Roper v. Simmons*, 543 U.S. 551 (2005), in which the U.S. Supreme Court held that the Eighth Amendment barred execution for juveniles, to be retroactively applicable for similar reasons. *See* Holly v. State, No. 3:98CV53-D-A, 2006 WL 763133 (N.D. Miss. Mar. 24, 2006); Wimberly v. State, 934 So. 2d 411, 416 (Ala. Crim. App. 2005) ("The *Roper v. Simmons* decision also applies retroactively to cases on collateral review because it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" (quoting Duncan v. State, 925 So. 2d 245, 251 (Ala. Crim. App. 2005)).

109. *See generally* 28 U.S.C. § 2244 (2006); *see also In re* Cain, 137 F.3d 234, 235 (5th Cir. 1998) (noting that the statute does not define "successive").

110. *In re Cain*, 137 F.3d at 235 (collecting cases on this point).

111. *In re* Sparks, 657 F.3d 258, 260–62 (5th Cir. 2011) (granting inmate's motion to file successive habeas petition on the basis of *Graham*'s retroactive application); *cf. In re* Brown, 457 F.3d 392, 396 (5th Cir. 2006) (holding that successive petition is not barred based on the Court's new rule that it is unconstitutional to use the death penalty against the mentally retarded).

112. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2023 (2010) (citing Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation*, FLA. ST. U. C.L. 2 (Sept. 14, 2009),

estimated that there were 109 juvenile non-homicide offenders serving a life-without-parole sentence nationwide, seventy-seven of whom were in Florida.[113] In order to arrive at this number, the *Annino Report* defined a "non-homicide" crime as "any criminal conviction where the juvenile is not convicted of any type or degree of homicide."[114] In other words, according to the *Annino Report*, a defendant convicted of attempted homicide or felony murder counted as a homicide offender.[115]

While the Court relied heavily upon the *Annino Report* to document the incidence of juvenile life-without-parole sentences for non-homicide offenders, it is not clear whether the Court accepted the report's *definition* of a non-homicide offense. The Court explained that defendants like Terrance Graham are less culpable than others, in part, because their crimes did not result in the death of another human being.[116] However, the same argument could apply to a defendant convicted of attempted homicide, and yet the *Annino Report* treated attempted homicide as a homicide offense. Moreover, citing felony murder precedents, the Court stated that those "defendants who do not kill, intend to kill, or foresee that life will be taken," are less culpable than murderers.[117] This suggests that the Court may view a defendant who was convicted of felony murder as a non-homicide offender, even though the *Annino Report* did not. A Florida appellate court recently applied a broader definition of non-homicide than that used in the *Annino Report* and held that *Graham* applies to all cases where the juvenile was convicted of a crime that did not result in the death of the victim.[118] The U.S. Supreme Court denied Florida's petition for certiorari challenging this interpretation on October 11, 2011.[119]

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http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf [hereinafter *Annino Report*]).

113. *Annino Report*, *supra* note 112, at 2.

114. *Id.* at 3–4.

115. *Id.* at 4.

116. *Graham*, 130 S. Ct. at 2027 ("Serious nonhomicide crimes 'may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, . . . they cannot be compared to murder in their severity and irrevocability.'" (omissions in original) (quoting Kennedy v. Louisiana, 554 U.S. 407, 410 (2008)).

117. *Id.*

118. Manuel v. State, 48 So. 3d 94, 96–97 (Fla. Dist. Ct. App. 2010) (holding that *Graham* applied to non-homicide offenders and that attempted murder with firearm was not a homicide offense). *But cf.* Cox v. State, 2011 Ark. 96, 2011 WL 737307, at *2 (2011) (holding that *Graham* permits imposition of life-without-parole sentence in case where defendant was convicted as accomplice to homicide).

119. *See* Florida v. Manuel, __U.S.__, 132 S. Ct. 446 (2011) (mem.), *available at* http://www.supremecourt.gov/orders/courtorders/101111zor.pdf; *see also U.S. Supreme Court*

In light of this analysis, it is simply not true that *Graham* was a "narrow" case "which did nothing more than entitle a small group of offenders to the mere possibility of eventual parole."[120] Rather, the *Graham* decision applies retroactively to all juvenile offenders serving a life-without-parole sentence whose crime did not result in the death of the victim. The full extent of *Graham*'s application is still emerging as lawyers working to implement *Graham* continue to identify inmates who fall within its purview.[121]

B. Graham *Requires the States to Provide Effective Representation at Resentencing Hearings*

Having defined the pool of inmates to whom *Graham* applies ("*Graham* inmates"), the next question becomes: what are these inmates entitled to under *Graham*? *Graham* requires that the states provide each *Graham* inmate with a resentencing hearing, as well as effective representation in preparation for and at that resentencing hearing. The resentencing hearing cannot be a pro forma protocol; rather, it must afford the defendant and the defendant's counsel the opportunity to present the inmate's full life picture—before and during incarceration.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[122] The U.S. Supreme Court has interpreted this right to apply to "all critical stages of a criminal prosecution,"[123] and sentencing

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Upholds Decision Barring Life Without Parole for Kids Convicted of Attempted Murder, EQUAL JUST. INITIATIVE (Oct. 14, 2011), http://www.eji.org/eji/node/571.

120. Richard M. Re, *Can Congress Overturn* Graham v. Florida*?*, 34 HARV. J.L. & PUB. POL'Y 367, 375 (2011).

121. For example, lawyers in Florida are also seeking the application of the *Graham* rule to felony murder defendants, again, despite the fact that the *Annino Report* did not include felony murder defendants. Telephone Interview with Ilona Vila, Dir., Juv. Life Without Parole Def. Res. Ctr., Barry Univ. Sch. of Law (Oct. 4, 2011, 12:00 PM).

122. U.S CONST. amend. VI.

123. Montejo v. Louisiana, 556 U.S.__, 129 S. Ct. 2079, 2085 (2009); *see also* Kansas v. Ventris, 556 U.S.__, 129 S. Ct. 1841, 1844–45 (2009) (affirming that right to counsel extends to various pretrial stages where defendant confronts agents of state); Maine v. Moulton, 474 U.S. 159, 170 (1985) ("[W]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . . This is because, after the initiation of adversary criminal proceedings, the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." (citations omitted) (internal quotation marks omitted)).

is a critical stage for purposes of the Sixth Amendment.[124] Not only does the defendant have a general interest in the "character"[125] of the sentencing proceeding, but also defense counsel can take several measures throughout the sentencing process to safeguard the defendant's rights. Defense counsel may advise the defendant regarding the government's range of potentially applicable sentences and pre-sentence investigations;[126] inform the defendant of certain rights that may be lost if not exercised at the sentencing stage;[127] and present relevant mitigating evidence.[128] For these reasons, the right to counsel at sentencing is almost as well-established as the right to counsel itself.[129]

When an existing sentence is modified or corrected, the defendant's presence, let alone defense counsel's, may not be required.[130] In contrast, when "an original sentencing package is vacated in its entirety on appeal and the case is remanded for resentencing,"[131] the defendant has a constitutional right to be present[132] and to be represented by counsel.[133] This distinction is appropriate. When a trial court merely corrects a sentencing error and adjusts the sentence to make it less onerous for the defendant, there is no evidentiary hearing; the sentencing judge's task is purely ministerial.[134] Accordingly, neither the defendant nor defense

124. Gardner v. Florida, 430 U.S. 349, 358 (1977); Mempa v. Rhay, 389 U.S. 128, 130–37 (1967).

125. *Gardner*, 430 U.S. at 358.

126. United States v. Washington, 619 F.3d 1252, 1260 (10th Cir. 2010) ("[K]nowledge about the structure and mechanics of the sentencing guidelines and the sentencing process will often be crucial to advising a defendant about how to conduct himself through the sentencing process.").

127. *Mempa*, 389 U.S. at 135–36.

128. Hall v. Washington, 106 F.3d 742, 749–50 (7th Cir. 1997) (describing counsel's role in developing and presenting mitigation evidence at sentencing).

129. *Compare* Gideon v. Wainwright, 372 U.S. 335, 339–45 (1963) (holding the Sixth Amendment right to counsel applicable to state criminal proceedings), *with Mempa*, 389 U.S. at 134–37 (extending *Gideon* to the sentencing stage only four years later).

130. *See, e.g.*, United States v. Jackson, 923 F.2d 1494, 1497 (11th Cir. 1991) (holding that defendant had no right to be present nor to have counsel when court's action was "a remedial reduction of sentence after a successful [statutory] challenge to the legality of the original sentence").

131. *Id.* at 1496.

132. United States v. Moree, 928 F.2d 654, 655–56 (5th Cir. 1991).

133. Hall v. Moore, 253 F.3d 624, 627–28 (11th Cir. 2001); Johnson v. United States, 619 F.2d 366, 369 (5th Cir. 1980); People v. McDermott, 906 N.Y.S.2d 415, 415–16 (2010) (remanding for second resentencing because defendant was not adequately advised regarding his right to counsel at resentencing). *But see* Morris v. Buss, 776 F. Supp. 2d 1293, 1306 (N.D. Fla. 2011) (noting that while federal appellate courts have recognized the right to counsel at resentencing, the U.S. Supreme Court has not explicitly extended the right to counsel at sentencing to include resentencing).

134. Dougherty v. State, 785 So. 2d 1221, 1223 (Fla. Dist. Ct. App. 2001).

counsel needs to be present in order to satisfy the Sixth Amendment.[135] In contrast, when a true resentencing takes place, the judge exercises discretion, just as the initial sentencing judge did, and so the defendant's right to be present and to have counsel is constitutionally mandated.[136]

The *Graham* inmates are entitled to a resentencing hearing at which the right to counsel attaches. Contrary to cases where the state court judge will perform a purely ministerial task to the advantage of the defendant, in the wake of *Graham*, state court judges presiding over resentencing hearings will exercise great discretion.[137] Precisely because the *Graham* Court did not delineate the scope of a permissible term-of-years sentence, defendants will need to argue for a specific sentence and demonstrate why it is appropriate. In order to do so, the defendant will need the assistance of counsel and perhaps other experts.[138] Defense counsel will need to present the defendant's social history prior to the initial sentence, behavioral record during incarceration, and prospects for rehabilitation.[139] This is especially true in light of the *Graham* Court's emphasis on the unique ability for juvenile rehabilitation and maturation.[140] After several years—if not decades—in prison, some of these inmates may have demonstrated substantial growth and maturity.[141] The sentence they receive in a resentencing hearing should

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135. *See, e.g.*, United States v. Nolley, 27 F.3d 80, 81–82 (4th Cir. 1994) (holding that where trial court has no role but to implement corrected sentence from appellate court there is no function for defendant or defense counsel); United States v. Brewer, No. 09-12945, 2010 WL 22847 (11th Cir. Jan. 6, 2010) (affirming modification of sentence entered without defendant present).

136. United States v. Behrens, 375 U.S. 162, 167–68 (1963).

137. State v. Casiano, 922 A.2d 1065, 1068–69 (Conn. 2007) (holding that state law entitles indigent defendant to representation when seeking to correct sentence); Acosta v. State, 46 So. 3d 1179, 1180–81 (Fla. Dist. Ct. App. 2010) (holding it was reversible error where trial judge exercised discretion at resentencing and neither defendant nor counsel was present); State v. Littleton, 982 So. 2d 978, 980 (La. Ct. App. 2008) (distinguishing ministerial from discretionary act of judge).

138. Lawyers representing the *Graham* inmates at resentencing have said that they are treating these resentencing hearings like capital mitigation hearings. Kinnally, *supra* note 5. If so, then they will likely need to draw on the expertise of several outside consultants. *See generally* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952–60 (2003) (describing the "team" approach and the necessity of mental health and mitigation expertise for capital cases).

139. Kinnally, *supra* note 5.

140. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2026–30 (2010).

141. Scholars have debated whether and how prison sentence length and recidivism are correlated. *See, e.g.*, Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, WASH. ST. INST. FOR PUB. POL'Y (Sept. 1993), http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf (looking at studies showing both positive and negative correlation). Recent work indicates that there is a positive correlation between sentence length and recidivism. *See, e.g.*, David S. Abrams, *Building Criminal Capital v. Specific Deterrence: The Effect of Incarceration Length on Recidivism*, NW. U. L. SCH. (Oct. 25, 2010),

reflect that development and their potential for further rehabilitation. Accordingly, the *Graham* inmates are entitled to a resentencing hearing at which they are present and during which they have effective representation.

C. Judges Sentencing Juveniles After Graham *Should Err in Favor of Rehabilitation over Retribution*

The *Graham* Court determined that the Eighth Amendment precludes the states from imposing life-without-parole sentences on non-homicide juvenile offenders, but the Court declined to set an upper limit on what sentence such offenders could receive.[142] Since the *Graham* decision, lower court judges have grappled with that question and have come to widely divergent conclusions.[143] The *Graham* Court's rationale precludes excessive term-of-years sentences, for they, too, deprive the juvenile offender of "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[144] Judges sentencing juveniles after *Graham* should err on the side of rehabilitation over retribution.

The Supremacy Clause requires state judges to defer to the U.S. Supreme Court's interpretation of federal constitutional questions.[145]

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http://www.law.northwestern.edu/colloquium/law_economics/documents/AbramsRecidivism102510.pdf (finding a specific deterrent effect for sentencing, but one that diminishes as sentences get longer); Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment*, SENT'G PROJECT 6–8 (Nov. 2010), http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf (discussing studies showing positive correlation between sentence and recidivism rate). To the extent that prison conditions—and the experience of them over longer periods of time—contribute to an increased recidivism rate, I argue in Part II.D that juvenile conditions of confinement must affirmatively seek to promote rehabilitation.

142. *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.").

143. *Compare* People v. Caballero, 119 Cal. Rptr. 3d 920, 924–27 (Cal. Ct. App. 2011) (holding that sentence of 110 years to life for juvenile non-homicide offender was not precluded by *Graham*), *petition for review granted*, 250 P.3d 179, *with* People v. Mendez, 114 Cal. Rptr. 3d 870, 881–83 (Cal. Ct. App. 2010) (holding that eighty-four-year sentence for juvenile carjacker was precluded by *Graham* because sentence that exceeds life expectancy is tantamount to life without parole).

144. *Graham*, 130 S. Ct. at 2030.

145. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Moreover, "[l]aw is not an exercise in mathematical logic,"[146] and a holding from the U.S. Supreme Court must be understood in its appropriate context. Justice Kennedy's opinion reflects an acceptance that juveniles are both less morally culpable and more amenable to rehabilitation than adults.[147] According to the majority's rationale, the very nature of juveniles makes the life-without-parole sentence impermissible outside the homicide context. Judges who impose excessive term-of-years sentences in the wake of *Graham* engage in a hollow and hyper-technical reading of the Court's decision. Moreover, judges who do so eviscerate one of the most central themes of the opinion: hope and its importance for the incarcerated juvenile.[148] Lower court judges imposing sentences in the wake of *Graham* should heed the Court's language regarding the nature of juveniles and impose sentences that enable possible rehabilitation and release.

The Court had at its disposal numerous arguments regarding the unconstitutionality of Graham's life-without-parole sentence,[149] yet it focused its opinion upon the finality and excessiveness of his sentence.[150] In an amicus brief, The Sentencing Project argued that Graham's life-without-parole sentence was unconstitutional because it was imposed in the absence of jury or judicial discretion.[151] The Sentencing Project explained:

> [J]uvenile offenders are frequently subject to mandatory transfer and mandatory sentencing statutes, whose use has exploded during the past two decades. The combined effect of these laws often dooms juvenile offenders. At the outset, they require many juveniles to be tried as adults. Then, upon conviction in the adult system, they mandate life-without-parole sentences for certain crimes. Together, these laws deny juveniles any opportunity to have their age and diminished culpability considered by any decision-maker at any stage of the proceedings against them.[152]

Despite the merit of this argument, Justice Kennedy's opinion does

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146. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 831 (2007) (Breyer, J., dissenting).

147. *Graham*, 130 S. Ct. at 2029–30.

148. *See generally* Smith & Cohen, *supra* note 71.

149. Fourteen amicus briefs were filed with the Court in support of Petitioner Terrance Graham's Eighth Amendment challenge. *See* Graham v. Florida, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/graham-v-florida/ (last visited Dec. 27, 2011).

150. *Graham*, 130 S. Ct. at 2030.

151. *See* Brief for The Sentencing Project as Amicus Curiae Supporting Petitioner at 14–22, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412 & 08-7621).

152. *Id.* at 15–16.

not indicate that the Court's primary concern was a widespread lack of sentencing discretion. If it were the Court's main concern, one could credibly argue that an excessive term-of-years sentence—even an 80- or 100-year sentence—in the wake of *Graham* was permissible, as long as it was the product of independent judicial discretion. Instead, the majority opinion focused on the unique characteristics of juvenile offenders, relying on the same brain science that motivated its decision to ban the death penalty for juveniles.[153] In addition, Justice Kennedy defended the Court's categorical rule in part by asserting the *dangers* of unchecked judicial discretion at the sentencing stage.[154] For example, the sentencing judge in Graham's case imposed life without parole despite significantly lower recommendations from the state, because the judge "concluded that Graham was incorrigible."[155] When judges who hand down excessive juvenile sentences argue, for example, that it is "cruel and unusual punishment for the victims to have endured the rage, the brutality, the terror that [the defendant] exacted upon them,"[156] they act precisely as Justice Kennedy feared: they allow the brutality of the crime to overshadow the immaturity and potential for growth in the juvenile defendant.[157]

Thus, Justice Kennedy's opinion indicates that the constitutional infirmity of Graham's sentence was its finality and excessiveness in light of his youth. The sentence violated the Eighth Amendment because it "guarantee[d] he [would] die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character . . . ."[158] Accordingly, lower courts sentencing juveniles in the wake of *Graham* should avoid excessive sentences that foreclose the possibility of parole review after a reasonable period of time.[159]

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153. *Graham*, 130 S. Ct. at 2026–27.

154. *Id.* at 2031 ("Nothing in Florida's laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character.' This is inconsistent with the Eighth Amendment." (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

155. *Id.* (citation omitted).

156. Kunerth, *'Lifers' Sentenced as Teens Get 2nd Chance*, *supra* note 8 (quoting Florida Circuit Judge).

157. *Graham*, 130 S. Ct. at 2031.

158. *Id.* at 2033.

159. If judges continue to impose sentences that are tantamount to life without parole, the U.S. Supreme Court will most likely recognize an anemic reading of *Graham* as unconstitutional in due course. For example, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court considered the question of whether a documented police technique of questioning a suspect first and then providing a *Miranda* warning was permissible in light of the Court's *Miranda* case law. *Id* at 604. The Court

Finally, judges sentencing juveniles in the wake of *Graham* should err in favor of potential release in order to promote finality and to protect scarce judicial resources. In the handful of cases to date where judges have imposed excessive sentences in the wake of *Graham*, defense counsel has indicated, of course, that they will appeal the decisions.[160] These appeals not only deprive the defendant and the victim of finality regarding the sentencing decision, but also they are costly and time-consuming for courts to review.[161] Such time and cost cannot be justified when a sentencing judge can impose an alternate sentence that both serves the state's penological goal and comports with *Graham*.

D. Legislative and Executive Action Are Needed to Make Graham*'s Promise a Reality*

In the long term, state lawmakers and executive actors need to take bold steps in order for *Graham*'s promise to become a reality. Two specific issues require immediate attention from legislators and executive actors: (1) parole policy and (2) conditions of confinement for juvenile offenders.

1. Parole Policy

There is no federal constitutional provision that requires the states to provide inmates with parole.[162] In the early twentieth century, though, most states recognized the need for corrections policy to address rehabilitation and reentry into society.[163] As a result, at that time, most

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roundly rejected the protocol as a "police strategy adapted to undermine the *Miranda* warnings," and it held this "end run" around the Court's *Miranda* decision unconstitutional. *Id.* at 616. Similarly, if state court judges persist in imposing sentences in the wake of *Graham* as excessive as 70, 80, or 100 years, eventually the Court will recognize such sentences as an evisceration of its decision in *Graham* and an end run around it analysis.

160. *See, e.g.*, Kris Wernowsky, *Teen Rapist Sentenced to 80 Years*, PENSACOLA NEWS J. (Jan. 28, 2011) (on file with Washington Law Review) (describing resentencing of *Graham* inmate and counsel's plan to appeal the eighty year resentencing).

161. It is difficult to identify precisely the costs of an appeal, but mainstream press accounts of criminal cases demonstrate that, at every stage, our criminal justice system is expensive. *See, e.g.*, Evelyn Larrubia & Stephanie Stassel, *The Cost of Justice*, L.A. TIMES, Sept. 13, 1998, at B2, *available at* http://articles.latimes.com/1998/sep/13/local/me-22481 (cataloging notorious criminal trials in L.A. County, some of which cost ten million dollars or more); Trish Hartman, *The High Cost of Trials*, WNEP (Feb. 24, 2011), http://www.wnep.com/news/countybycounty/wnep-cost-trial-lackawanna-schuylkill,0,7928109.story (describing trial that may cost taxpayers $100,000 exclusive of public defender expenses and additional courthouse security).

162. Vitek v. Jones, 445 U.S. 480, 488 (1980) ("There is no constitutional or inherent right to parole." (citation omitted)).

163. *The Future of Parole as a Key Partner in Assuring Public Safety*, U.S. DEP'T JUSTICE NAT'L

states introduced the possibility of parole, typically at the discretion of a parole board.[164] In the late twentieth century, amid predictions of increasing violent crime and "super-predators,"[165] lawmakers and academics grew skeptical of parole and perceived it as a threat to public safety.[166] By 2000, sixteen states abolished discretionary parole altogether, while another five abolished discretionary parole for certain violent crimes.[167] This is not to say that today inmates do not leave prison before the end of the sentence that is imposed upon them. Inmates do leave prison before they have served their full sentences, but today when they do so it is typically because they have served a statutorily set percentage of their sentence—not because they have demonstrated to a parole board that they are prepared to re-join society.[168]

In Florida, where Terrance Graham is serving his sentence, there is almost no discretionary parole. Through a series of legislative changes in the 1980s and 1990s,[169] the state legislature created a system whereby defendants must serve at least eighty-five percent of their sentences before they are parole-eligible, and no inmate serving a life sentence will ever be parole-eligible.[170] Because of the timing of the statutes, the State's Parole Commission still hears parole petitions for a small number of inmates whose crimes were committed when discretionary parole was

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INST. CORRECTIONS 1 (2011), http://static.nicic.gov/Library/024201.pdf [hereinafter *The Future of Parole*].

164. *Id.* at 1–2.

165. *See* John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23; *see also generally* WILLIAM J. BENNETT, JOHN J. DILULIO, JR. & JOHN P. WALTERS, BODY COUNT (1996) (advancing theory that new wave of young criminals would increase level of violence by end of century).

166. *See* Jeff Bleich, *The Politics of Prison Crowding*, 77 CALIF. L. REV. 1125, 1147–48 (1989) (describing states abolishing parole during this period); *The Future of Parole*, *supra* note 163, at 1–2.

167. Timothy A. Huges et al., *Trends in State Parole, 1990–2000*, BUREAU JUST. STAT. 1 (Oct. 2001), http://www.bjs.gov/content/pub/pdf/tsp00.pdf.

168. For example, in Florida, inmates must serve eighty-five percent of their sentence before they are eligible for release. *See Misconceptions About Florida Prisons*, FLA. DEP'T CORRECTIONS, http://www.dc.state.fl.us/oth/myths.html (last visited Dec. 26, 2011) ("Offenders who committed their offenses on or after October 1, 1995, are required to serve a minimum of 85% of their court-imposed sentences prior to their release. Offenders released in January 2011 served an average of 86.4% of their sentence.").

169. *What is Parole?*, FLA. PAROLE COMM'N, https://fpc.state.fl.us/Parole.htm (last visited Dec. 26, 2011) (describing evolution of parole in Florida and who is eligible); *see also* FLA. PAROLE COMM'N, ANNUAL REPORT 2009–2010, at 12–13 (2010) [hereinafter FLA. PAROLE COMM'N, ANNUAL REPORT].

170. *Doing Time*, FLA. DEP'T CORRECTIONS (Aug. 2011), http://www.dc.state.fl.us/pub/timeserv/doing/.

still in place.[171] For most purposes, though, there is no parole in Florida.[172]

As a threshold matter, parole must be available under state law in order to comport with *Graham*'s requirements.[173] Immediate legislative reform is needed in states such as Florida, where parole is largely unavailable.[174] What should such a statute look like? While juvenile advocates have been largely reluctant to articulate a number of years before which a juvenile should receive a parole hearing "out of fear that such a suggested ceiling would immediately become a norm,"[175] they have made some suggestions. For example, some advocates have suggested that all inmates serving a juvenile life-without-parole sentence for a non-homicide crime receive a parole hearing when they turn thirty or when they have served ten years in prison.[176] Lawmakers and lobbyists in Florida have suggested various models, allowing for parole under limited circumstances after twenty or twenty-five years of imprisonment.[177] The optimal legislative solution is one that allows maximum flexibility in recognition of the reality that each inmate will present unique circumstances.[178] For example, in 2009 Congressman

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171. FLA. PAROLE COMM'N, ANNUAL REPORT, *supra* note 169, at 20–22 (showing that only a small percent of Commission's work deals with parole services).

172. *See, e.g.*, Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2020 (2010) ("Because Florida has abolished its parole system . . . a life sentence gives a defendant no possibility of release unless he is granted executive clemency.").

173. As I described above in Part II.C, the *Graham* opinion requires states to provide *Graham* inmates with at least the possibility of release during their lifetime. If current state law precludes such a possibility, the law must be changed. *See* Leslie Patrice Wallace, *"And I Don't Know Why It Is that You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 67–74 (2010) (arguing that *Graham* requires states to have active parole boards in place).

174. *See, e.g.*, *supra* notes 12–16 and accompanying text.

175. John Kelly, *States Begin Reacting to Ban on Juvenile Life Without Parole*, YOUTH TODAY (Nov. 23, 2010), http://www.youthtoday.org/view_article.cfm?article_id=4469.

176. *See* John Kelly, *Will Ruling Save All Lifers?*, YOUTH TODAY (June 1, 2010), http://www.youthtoday.org/view_article.cfm?article_id=4031 [hereinafter Kelly, *Will Ruling Save All Lifers?*] (discussing parole proposals). Juvenile advocates in Florida make two important arguments in favor of parole for *Graham* inmates after ten years or when they turn thirty. First, advocates cite the fact that before parole was abolished for convicted murderers, such offenders were eligible for parole after twenty-five years. The argument is that if adult homicide offenders were once eligible for parole after twenty-five years, non-homicide juvenile offenders should be eligible after a shorter period of time. Juvenile advocates also argue that the longer juveniles remain in prison, the less likely they are to be able to re-join society. *See* Kunerth, *Juvenile Lifers Wait 25 Years for Way Out*, *supra* note 16.

177. Zayas, *supra* note 11. Twenty-five years was the numbers of years served before a homicide convict could seek parole prior to the abolition of parole. *Id.*

178. *See generally* Jody Kent & Beth Colgan, *A Just Alternative to Sentencing Youth to Life in*

Bobby Scott (D-Va.) proposed a bill that would require states housing juvenile life-without-parole offenders to grant "a meaningful opportunity for parole or other form of supervised release" at least once during their first fifteen years of incarceration and at least once every three years thereafter.[179] One may argue that the initial period should be lower or higher,[180] but Congressman Scott's proposal recognizes that there should be an opportunity for review early in the juvenile's sentence and that review should be ongoing.

In the wake of *Graham*, state legislatures need to make parole reform a top priority, and ideally resultant parole policy should include a provision specific to juvenile offenders. While there has been much debate regarding so-called "*Graham* Laws" in Florida and in other states housing juvenile offenders like Terrance Graham, to date, no such legislation has been passed.[181]

2. States Should Facilitate Graham*'s Promise Through Conditions of Confinement*

Making parole available under state law is only the first step required of states that house *Graham* inmates. The *Graham* decision demands that states provide juvenile non-homicide offenders a "meaningful opportunity to obtain release,"[182] and a meaningful opportunity to *rehabilitate themselves* prior to and in preparation for that parole hearing.[183] In order to do so, many—if not all—states that house offenders like Graham need to critically examine and potentially overhaul prison conditions for juvenile offenders.

In *Graham*, Justice Kennedy wrote that "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-

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Prison Without the Possibility of Parole, AM. CONST. SOC'Y 8 (Mar. 2010), http://www.acslaw.org/files/Kent%20Colgan%20Juvenile%20Life%20Issue%20Brief_0.pdf (proposing "periodic review" of each inmate after at least ten years in prison).

179. Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 111th Cong. (1st Sess. 2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2289:.

180. *See, e.g.*, Kent & Colgan, *supra* note 178, at 8 (arguing for review possibly after ten years).

181. *See, e.g.*, *supra* notes 176–177 and accompanying text (discussing lawmakers' attempts to enact legislation post-*Graham*); *see also* Paul Hammel, *Lawmakers Reject Bill on Juvenile Lifers*, OMAHA WORLD-HERALD, Apr. 8, 2011, at 1B (discussing failure of such bill in Omaha); Don Thompson, *Bills Target California Prisons' Inspector General*, CBS SACRAMENTO (May 1, 2011), http://sacramento.cbslocal.com/2011/05/01/bills-target-state-prisons-inspector-general/ (discussing proposed legislation in California).

182. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2030 (2010).

183. *Id.* at 2029–30; *see also* Wallace, *supra* note 173, at 75 (discussing rehabilitation).

recognition of human worth and potential."[184] Without even the possibility of future release, he further explained, a juvenile offender may have no incentive to "become a responsible individual" or to engage in the "considered reflection which is the foundation for remorse, renewal, and rehabilitation."[185] Above and beyond the idea that the possibility of release may incentivize individual reform, Justice Kennedy's opinion reflects an expectation that prisons actually *enable* such reform. As he explained, "[i]n some prisons . . . the system itself becomes complicit in the lack of development . . . [by] withhold[ing] counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[186] In light of the Court's emphasis on allowing juvenile offenders the opportunity to "achieve maturity"[187] and to "reconcil[e] with society,"[188] states must recognize that a parole hearing—or even release after a parole hearing—does not address these goals. Rather, these goals require substantive measures during incarceration that would potentially allow a juvenile to rejoin society.

Juvenile offenders who are prosecuted as adults and incarcerated in adult facilities currently have little opportunity for rehabilitation. First, adult prisons rarely offer inmates the range of rehabilitative resources required to treat inmates' underlying conditions, such as substance abuse and mental illness.[189] Even when there are rehabilitative resources available, priority is given to those inmates approaching the end of their sentences, rather than to inmates serving life or life-without-parole sentences.[190] Second, adult prisons pose significant physical and mental health risks to juvenile offenders.[191] Many states that house juvenile

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184. *Graham*, 130 S. Ct. at 2032.

185. *Id.*

186. *Id.* at 2032–33; *see also id.* at 2029–30.

187. *Id.* at 2032.

188. *Id.*

189. Christopher Mallett, *Death Is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 CRIM. L. BULL. 523, 532 (2007) ("[A]dult prison systems offer few treatment modalities to inmates.").

190. Kunerth, *'Lifers' Sentenced as Teens Get 2nd Chance*, *supra* note 8 (noting that those serving life terms "go to the end of the line" to receive rehabilitative resources).

191. *See generally* Editorial, *Raising Children Behind Bars*, N.Y. TIMES, Nov. 20, 2007, at A22; *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUST. (2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf [hereinafter *Jailing Juveniles*]; *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, AMNESTY INT'L (2005), http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf [hereinafter *The Rest of Their Lives*].

offenders in adult facilities have no regulations in place to protect or separate juveniles from adult inmates.[192] As a result, sexual and physical assaults are a common experience for juvenile offenders in adult prisons. A 2006 study reports that twenty-one percent of victims of substantiated inmate-on-inmate sexual violence in jail were under the age of eighteen, even though juvenile inmates constitute only one percent of inmates in adult jails.[193] Those who are not victims of sexual assault often feel pressure to engage in physical violence and other coping mechanisms in order to ward off sexual assault.[194] Because the experience of adult prison is so horrific for juvenile offenders, inmates under eighteen have the highest suicide rate among all inmates.[195] These deplorable conditions of confinement are not amenable to the "considered reflection which is the foundation for remorse, renewal, and rehabilitation."[196]

What conditions of confinement would facilitate the *Graham* Court's goals of rehabilitation and possible reentry into society?[197] To begin, developmental psychology and criminology research suggest that most youth can be rehabilitated.[198] Social science research indicates that the crime rate peaks at age seventeen, and that most youth outgrow their criminal tendencies.[199] Moreover, most juvenile offenders have had unhealthy, unstable, and abusive home environments, and they need to experience a healthy environment of emotional expression, routine, boundaries, and consequences.[200] Ideally, "[h]ealthy social contexts"

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192. *Jailing Juveniles*, *supra* note 191, at 24–37 (discussing dangers for youths in adult jails and identifying policies state-by-state).

193. *Id.* at 13.

194. *Id.*; *see also The Rest of their Lives*, *supra* note 191, at 76–81.

195. *See Jailing Juveniles*, *supra* note 191, at 10 (noting juveniles in jail are also nineteen times more likely to commit suicide than adults in the same general population).

196. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2032 (2010).

197. Improving juvenile conditions of confinement is only one of many issues that demand reform within the realm of juvenile justice. A full discussion of juveniles in the criminal justice system is outside the scope of this paper. There is a wide body of literature on the topic. *See, e.g.*, Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189 (2007); Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option,* 95 IOWA L. REV. 1 (2009); *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, CAMPAIGN FOR YOUTH JUST. (2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf; *Jailing Juveniles*, *supra* note 191.

198. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 64 (2010) (noting that only five percent of youth are incipient career criminals).

199. *Id.*

200. *See id.* at 65 (discussing the need for "[h]ealthy social contexts" and enabling the "process of development toward psychosocial maturity").

entail positive authority figures, socialization with peers, and participation in education, extracurricular, and employment activities that facilitate "autonomous decision-making and critical-thinking skills."[201]

The State of Missouri created a juvenile justice system that has many of these attributes and is now viewed as a national model.[202] Juvenile inmates are kept in small facilities, as close to their home as possible so that they can maintain family connections.[203] The staff members are highly trained and experienced, and the model is based on respect and dignity: "the system uses a rehabilitative and therapeutic model that works towards teaching the young people to make positive, lasting changes in their behavior."[204] The juvenile offenders are housed in dorm rooms, rather than cell blocks, and their daily routine consists of school, chores, and therapy—a routine that Missouri's Division of Youth Services Director says is "much tougher than . . . sitting in a cell."[205] While New York State's youth prisons have an eighty-nine percent recidivism rate for boys, "fewer than 8 percent of the youths in the Missouri system return again after their release, and fewer than 8 percent go on to adult prison."[206] Despite what some skeptics have said about the ability to replicate this model, Missouri's youth prisons serve juveniles from racially diverse, urban areas; they contend with mental illness; and even very serious offenders are treated with the same model of respect and rehabilitation.[207] Already, Louisiana, New Mexico, the District of Columbia, and Santa Clara County, California, have begun to study and replicate the Missouri youth prison model.[208] In the wake of *Graham,* other states should follow suit in order to create conditions of

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201. *See id.*

202. *See generally* Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability and Public Safety*, 84 OR. L. REV. 1001, 1064–70 (2005) (describing the Missouri model and its success); *see also* Charlyn Bohland, *No Longer a Child: Juvenile Incarceration in America*, 39 CAP. U. L. REV. 193, 221–24 (2011).

203. Bohland, *supra* note 202, at 223.

204. Marian Wright Edelman, *Juvenile Justice Reform: Making the "Missouri Model" an American Model*, HUFFINGTON POST (Mar. 15, 2010, 9:50 AM), http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html.

205. Chris Cuomo et al., *Missouri's New Take on Juvenile Justice*, ABCNEWS.COM (Sept. 8, 2009), http://abcnews.go.com/GMA/missouris-juvenile-justice-system/story?id=8511600.

206. Edelman, *supra* note 204.

207. *Id.*

208. Richard A. Mendel, *The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders*, ANNIE E. CASEY FOUND. 51–52 (2010), http://www.aecf.org/~/media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/MOModel/MO_Fullreport_webfinal.pdf.

confinement that will enable maturity, rehabilitation, and fitness to rejoin society.

In sum, as state judges and lawmakers struggle with the task of implementing *Graham* on the ground, they should bear in mind the logical consequences of the decision. Not only does *Graham* apply more widely than one may initially assume, but also the decision requires both short- and long-term implementation measures. *Graham* inmates should receive effective representation at a resentencing hearing, and they should receive a sentence that leaves open the possibility of release rather than one that exacts the longest sentence technically permissible. In the long run, states housing *Graham* inmates need to revisit and potentially overhaul their parole policies and their conditions of confinement for juvenile offenders.

III. *GRAHAM* GOING FORWARD

Part II addressed several urgent collateral issues that flow from the *Graham* decision, and advocated for courts to implement *Graham* in specific ways immediately. Over time, how courts deal with discrete issues, like the ones raised in Part II, on a case-by-case basis may improve or worsen the criminal justice system in the aggregate. This Part addresses the relationship between *Graham* and the criminal justice system on a national scale. Specifically, this Part suggests that: (1) *Graham* ought to be viewed as a symptom of our national criminal justice failings; and (2) *Graham*, read alongside the U.S. Supreme Court's 2011 decision in *Brown v. Plata*, may signal the Court's increasing willingness to address criminal justice failings that it once left to the states to resolve.

A. Graham *Reflects Broader Criminal Justice Failings*

In order to generate meaningful reform in the long run, *Graham* needs to be understood as a symptom of our nation's ongoing criminal justice failings. Specifically, it reflects an over-reliance on incarceration in the United States and an entrenched indigent defense crisis.

To begin, our nation leads the world in its rate of incarceration.[209] There are more than 9.8 million people incarcerated worldwide, and 2.29 million are in the United States.[210] Florida—where most of the *Graham*

209. Roy Walmsley, *World Prison Population List*, KING'S C. LONDON INT'L CENTRE FOR PRISON STUD. 1 (8th ed. 2009) (citing incarceration rate of 756 per 100,000 in population), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

210. *Id.*

inmates are housed—"leads the nation in incarceration rates and stringency in law and sentencing, making it the most punitive of the 50 states as measured by more than 40 variables, including average prison sentences, life imprisonment, and prison conditions."[211] While Florida may lead the nation in this regard, it is by no means an outlier in its reliance on incarceration. California's ongoing prison overcrowding has garnered national media attention and an order from the U.S. Supreme Court requiring a prison population reduction.[212] Alabama, among the top five states in the nation for its rate of incarceration, has seen its prison population grow from 6000 in 1979 to 28,000 today.[213] Between 2000 and 2004, Alabama increased its spending on prisons by almost 45% while increasing its school budget only 7.5% in that same period.[214] We are a nation that relies far too heavily on the blunt instrument of incarceration to address criminal justice failings that require holistic reform.[215]

At the same time, our judicial system continues to tolerate ongoing, systemic violations of the poor person's right to counsel.[216] *Graham* again is a good example of this problem. More than eighty percent of

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211. *A Billion Dollars and Growing: Why Prison Bonding Is Tougher on Florida's Taxpayers than on Crime*, COLLINS CENTER FOR PUB. POL'Y 5 (2011) (citation omitted), http://www.collinscenter.org/resource/resmgr/prison_bonding/prisonbondingreport.pdf.

212. *See* discussion *infra* Part III.B (discussing the *Brown v. Plata* decision); *see also* Jack Dolan, *No New Taxes for Prisons, Residents Say*, L.A. TIMES, July 21, 2011, at A1; Adam Liptak, *Justices, 5-4, Tell California to Cut Prison Crowding*, N.Y. TIMES, May 24, 2011, at A1.

213. *Excessive Sentences*, EQUAL JUST. INITIATIVE, http://www.eji.org/eji/prisons/excessivesentences (last visited Dec. 27, 2011).

214. *Id.*

215. For example, mental illness and substance abuse are underlying issues for many inmates, and incarceration alone cannot address these issues—in fact, it may exacerbate them. A recent government report found that 56% of state prisoners and 45% of federal prisoners have a mental health problem. *See* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STAT. 1 (Sept. 2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf. Further, 74% of state prisoners who had a mental health problem also met the criteria for substance abuse or dependence. *Id.* Yet, state prisons devote far too few resources to mental health care. Only 13% of state prisoners receive therapy or counseling; 10% receive psychotropic medication. Allen J. Beck & Laura M. Maruschak, *Special Report: Mental Health Treatment in State Prisons, 2000*, BUREAU JUST. STAT. 1 (July 2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtsp00.pdf. Both the states and the federal government should focus more on preventing crime through mental health and substance abuse treatment rather than relying so heavily upon incarceration after the fact.

216. *See generally* ABA Standing Comm. on Legal Aid & Indigent Defendants, Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice*, AM. BAR ASS'N (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, CONST. PROJECT (Apr. 2009), http://www.constitutionproject.org/pdf/139.pdf.

those who are prosecuted by the states are poor.[217] Likewise, most of the *Graham* inmates in Florida are poor and were represented by public defenders.[218] At every stage in the criminal process, people of color fare worse than white people.[219] Similarly, the profile of the *Graham* inmates in Florida suggests that racial discrimination may have played a role in the inmates' convictions and sentences. The Juvenile Life Without Parole Defense Resource Center has files for 96 of what they estimate to be 115 *Graham* inmates in Florida.[220] Of the ninety-six inmates for whom they have files, ninety-two percent are black or Hispanic.[221]

While *Graham* is a significant case for juvenile justice advocates and for Eighth Amendment jurisprudence, these statistics suggest that *Graham* is also an indictment of our nation's indigent defense system. Many of the juveniles who were sentenced to life in prison in Florida for non-homicide crimes were mentally ill and enrolled in special education classes.[222] At least one of them was borderline mentally retarded.[223] The reason that these juveniles received these excessive sentences likely lies as much in the quality of their representation as it does in a Florida statute that authorized their sentence.[224] In addition to shining a light on

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217. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

218. I have begun to compile data regarding the *Graham* inmates in Florida, including the docket sheets for these inmates. While the data set is still missing the dockets of a few inmates, among the inmates whose cases I have reviewed, almost all had a public defender. Public defender caseloads are notoriously high nationwide, usually resulting in sub-par representation. *See, e.g.*, DONALD J. FAROLE & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2007) (noting that seventy-three percent of county-based public defender offices, including Florida, have caseloads that exceed the prevailing maximum). This is consistent with the mainstream press reports that the *Graham* inmates in Florida did not have adequate representation in the first place. *See, e.g.*, Kelly, *Will Ruling Save All Lifers?*, *supra* note 176 (quoting Jody Kent, director of the Campaign for the Fair Sentencing of Youth, as saying that most of the inmates "did not have top-performing attorneys during the proceedings that landed them in prison for life" (internal quotation marks omitted)).

219. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16 (1998) ("At every step of the criminal process, there is evidence that African Americans are not treated as well as whites—both as victims of crime and as criminal defendants."); *see also id.* at 16 n.10 (collecting sources on racial discrimination in the criminal justice system).

220. *Juveniles: Who's in Prison?*, ORLANDO SENTINEL (Apr. 2, 2011), http://www.orlandosentinel.com/news/local/crime/os-life-without-parole-barry-box-20110402,0,4643866.story.

221. *Id.*

222. *Id.*

223. *Id.*

224. In a future work, I plan to examine these cases more closely and to search for patterns. How many times did counsel meet with their client? What kind of investigation, if any, was conducted in

the state of juvenile justice in this country, the *Graham* decision should also augment the many voices who support broad, nationwide indigent defense reform.[225]

B. Graham *and* Plata*: The U.S. Supreme Court May Be Willing to Intervene in State Criminal Justice Matters that Are Egregious and Long-Standing*

As much as *Graham* reflects national criminal justice failings, the opinion also offers some grounds for hope on that same front. Specifically, when read alongside the U.S. Supreme Court's 2011 decision in *Brown v. Plata*, the Court appears increasingly willing to assert federal constitutional limits in areas that had typically been reserved for state judgment.

In *Brown v. Plata*, the U.S. Supreme Court addressed the question whether a three-judge panel in California acted properly under the Prison Litigation Reform Act in ordering California to reduce its prison population in the face of ongoing, systemic Eighth Amendment

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these cases? How many witnesses, if any, were put on to offer mitigation evidence at sentencing? While this Article has focused on the immediate task of implementing *Graham* on the ground, the question of whether Terrance Graham, and the other inmates like him, had effective representation at trial still needs to be answered. For a general discussion of Florida's ongoing right to counsel issues, see Wayne A. Logan, *Litigating the Ghost of* Gideon *in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885 (2010).

225. Scholars and various organizations have documented the nation's persistent indigent defense crisis. For recent reports discussing the crisis, see Backus & Marcus, *supra* note 217; ABA Standing Comm. on Legal Aid & Indigent Defendants, *supra* note 216; Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf [hereinafter Boruchowitz et al., *Minor Crimes, Massive Waste*]; Nat'l Right to Counsel Comm., *supra* note 216. In recent years, academics, practitioners, and politicians have proposed a number of creative and, in some cases, radical measures to address the nation's ongoing criminal justice failings, particularly regarding access to counsel and sentencing. *See, e.g.*, Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010) (arguing that Congress should enable systemic lawsuits in federal court that challenge state public defense systems); Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (arguing that grounds for federal habeas should be narrowed and resources saved should be dedicated to improving state indigent defense systems); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (arguing that appellate attorneys should be able to raise ineffective assistance of counsel claims on appeal); *Smart Reform Is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities*, AM. CIV. LIBERTIES UNION (Aug. 2011), http://www.aclu.org/files/assets/smartreformispossible_web.pdf (describing several state models for reducing reliance on incarceration while saving taxpayers money and enhancing public safety).

violations.[226] The three-judge panel ordered the prison population reduction after decades of litigation challenging a lack of adequate mental health and medical services for California inmates.[227] The conditions at issue in California's prisons were—and continue to be—dire. Simply put, there are too many people in the prison system. California currently houses almost twice the number of inmates for which its facilities were designed.[228] Because of this overcrowding, the Court determined that the state simply could not provide sufficient mental health and medical services.[229] For example, "[b]ecause of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets."[230] At the same time, inmates with serious medical conditions endured similar waits and conditions.[231] The lower court heard testimony that, in one prison, up to fifty sick inmates could be held together in a twelve-by-twenty-foot cage for up to five hours awaiting treatment.[232] Some prisons in California's system had a backlog of up to 700 prisoners waiting to see a doctor.[233] In light of this evidence and the case's procedural history, the Court upheld the prison reduction order in a five-to-four decision.[234]

As in *Graham*, Justice Kennedy wrote for the majority, joined by the four liberal Justices on the Court.[235] While the *Plata* opinion arguably lacks *Graham*'s aspirational tone, and, in particular, its discussion of hope, redemption, and self-reflection,[236] the two opinions share several important threads. First, both opinions stand for the proposition that, at some point, state sovereignty and autonomy in criminal justice affairs must yield to the protection of individual rights. In *Graham*, the Court recognized that Florida is free to devise its own sentencing practices—even if it stands practically alone in this country and in the world at large

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226. 563 U.S.__, 131 S. Ct. 1910, 1922–23 (2011).

227. *Id.* at 1926–28 (citing the two consolidated actions in the case, one of which was filed in 1990 and one of which was filed in 2001).

228. *Id.* at 1923–24 ("California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity for at least 11 years.").

229. *Id.* at 1923–26.

230. *Id.* at 1924.

231. *Id.* at 1925.

232. *Id.*

233. *Id.* at 1933.

234. *Id.* at 1947.

235. Justice Kennedy delivered the opinion of the Court and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

236. *See supra* notes 184–188 and accompanying text.

in doing so[237]—but those practices must comport with the Constitution.[238] In *Plata*, the Court again recognized that California is free to make criminal justice decisions internally, such as incarcerating technical parole violators and employing its three strikes laws,[239] but it must also comport with the Eighth Amendment in its conditions of confinement.[240] The opinions thus reflect a check on state autonomy.

Second, both opinions reflect an effort to protect the dignity of the voiceless and politically powerless, something that elected officials and elected judges are not always well-suited to do.[241] In the last twenty to thirty years, elected lawmakers have pursued tough-on-crime policies in order to satisfy the electorate.[242] Evidence suggests that elected judges—like elected lawmakers—may do the same in order to earn voter approval.[243] Specifically, many judges hesitate to render a defendant-friendly decision, as elections sometimes hinge on the outcome of one criminal case.[244] In light of these realities, elected judges and lawmakers

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237. In *Graham*, Justice Kennedy noted that Florida's practice of sentencing non-homicide juvenile offenders to life in prison without parole was an outlier within the United States, Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2024 (2010) (noting that 77 out of 123 inmates nationwide were serving the challenged sentence in Florida), and was rare worldwide, *id.* at 2033 (noting that only eleven nations authorized the sentence and only two, including the United States, imposed it in practice).

238. *Id.* at 2033.

239. Jack Dolan & Carol J. Williams, *No Easy Fix for State Prison Crisis*, L.A. TIMES, May 25, 2011, at A1 (noting that policy changes are required to stem the number of people entering California's prisons and citing parole violations and three-strikes as driving factors).

240. Brown v. Plata, 563 U.S.__, 131 S. Ct. 1910, 1947 (2011).

241. Elected officials in general reflect the sentiment of the majority. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980) ("No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account.").

242. Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 92 (2011) ("Because there is no political benefit from appearing soft on crime and because there may be quite a cost, politicians compete for the tough-on-crime label by continually 'enacting ever more numerous, more severe, and more expansive criminal laws.'" (citations omitted)); Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C.R. & ECON. DEV. 153, 157–58 (2010) (discussing recent increase in rate of incarceration and related "tough on crime" rhetoric).

243. *See* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731–40 (2010) (discussing the evidence that suggests elected judges are, in fact, influenced by majority preferences, especially in comparison to appointed judges); *see also* John Schwartz, *Effort Begun to Abolish the Election of Judges,* N.Y. TIMES, Dec. 24, 2009, at A12 (describing the lack of independence with elected judges). For a discussion of the problem of "judge override" in combination with the dynamic of elected judges, see *The Death Penalty in Alabama: Judge Override*, EQUAL JUST. INITIATIVE 13–14 (July 2011), http://eji.org/eji/files/Override_Report.pdf.

244. Anthony Champagne, *Judicial Selection from a Political Science Perspective*, 64 ARK. L. REV. 221, 236–37 (2011) (citing two studies that found "judges in politically competitive states

may be reluctant to champion the cause of prison inmates. Yet, Justice Kennedy's opinions in both *Graham* and *Plata* articulate the unique concerns of these groups in a way that would not resonate on the campaign trail. In *Graham*, Justice Kennedy speaks of prisons' complicity in juvenile inmates' failure to rehabilitate and insists on giving these inmates at least a chance to improve themselves.[245] Similarly, in *Plata*, not only does Justice Kennedy's opinion document several representative stories of health care failures that caused serious harm or death,[246] but his opinion also includes photographs of California's dire prison reality.[247] If nothing else, Justice Kennedy's opinion in both cases shines a light on social problems that may otherwise be eclipsed by majoritarian issues of the day.

Third, both opinions require systemic reform at the state level but leave implementation of such reform to state discretion in the first instance. The *Graham* opinion, for example, is virtually silent on issues of implementation, as Justice Thomas noted in his dissent and as discussed earlier in Part II.[248] Similarly, Kennedy's opinion in *Plata* makes clear that California's prison population must be reduced, but it leaves the question of how that reduction will happen to state decision-makers in the first instance.[249] At the same time, the *Plata* Court's opinion also cautions the district court to "exercise its jurisdiction to

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might be inclined to be sensitive to an electorate's tough-on-crime views"); Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 760 (2010) ("Empirical studies demonstrate that elected judges issue longer sentences and are more likely to impose the death penalty as elections approach, presumably because they fear being labeled 'soft on crime' by their opponent in the next election. Their concerns are reasonable; judges have lost election because they were perceived as too lenient on criminal defendants." (citation omitted)).

245. Graham v. Florida, 560 U.S.__, 130 S. Ct. 2011, 2032–33 (2010).

246. *See, e.g.*, Brown v. Plata, 563 U.S.__, 131 S. Ct. 1910, 1924 (2011) ("A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had 'no place to put him.'" (citation omitted)); *see also id.* at 1925 ("A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with 'constant and extreme' chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain.'" (citation omitted)).

247. *Id.* at 1949–50 (images show severe overcrowding in makeshift "cells" and "dry cages/holding cells for people waiting for mental health crisis bed"). For an interesting piece on the question of whether the appended photographs help or hurt the majority's position, see Dahlia Lithwick, *Show, Don't Tell: Do Photographs of California's Overcrowded Prisons Belong in a Supreme Court Decision About Those Prisons?*, SLATE (May 23, 2011), http://www.slate.com/id/2295331.

248. *See supra* text accompanying note 4.

249. *Plata*, 131 S. Ct. at 1946–47.

accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety."[250] Whether the balance struck in these decisions can be implemented effectively remains to be seen.[251]

Finally, both the *Graham* and *Plata* decisions force states to internalize more fully the costs of their crime and sentencing polices. *Graham*, as argued in Part II, demands more than a parole hearing at some point in an inmate's life; rather, it requires the states to facilitate self-reflection, maturity, and growth through conditions of confinement.[252] If applied strictly, that requirement is expensive, at least in the short run.[253] Accordingly, it may cause Florida state officials to consider more closely the economics of transferring a juvenile to adult court or sentencing a juvenile offender to a lengthy prison sentence. *Plata* may have similar repercussions in California. If prison officials must meet the medical and psychological needs of the system's bloated population in a timely manner, prison officials will need more staff, more space, and more money to facilitate both.[254] A legislature faced with additional funding requests may reconsider the feasibility of incarcerating so many people and explore alternatives to such mass incarceration.[255] In sum, both *Plata* and *Graham* impose requirements on

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250. *Id.* at 1946.

251. For example, in order to comply with the *Plata* mandate, counties will now bear a much larger burden for managing inmates and parolees than they have traditionally borne. Now, offenders who commit non-violent, non-serious, and non-sexual offenses will be sent to county jails instead of state prisons. George Skelton, *Chronic Prison Underfunding Leads to More Local Burdens*, L.A. TIMES, Oct. 6, 2011, at A2, *available at* http://articles.latimes.com/2011/oct/06/local/la-me-cap-prisons-20111006/2. Current state inmates serving time for these so-called "non-non-non" offenses, will be supervised by county probation officials when they are released on parole. Editorial, *Here Come the Inmates*, L.A. TIMES, Aug. 30, 2011, at A12. There is great debate and concern over whether the counties will have sufficient funding and experience to provide rehabilitation and reentry resources for these inmates. *Id.*

252. *See supra* Part II.C–D.

253. For example, while it may cost more in the short term to provide inmates with education, substance abuse treatment, counseling, parenting skills, and vocational training, these are the very services critical to their successful reentry. *See generally* Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility and Prospects*, 47 CRIM. L. BULL. 177 (2011) (describing the recent successes in the reentry movement along with its fragility in part due to the fact that reentry goals are hard to measure in the short run).

254. To the extent that overcrowding and related understaffing led to Eighth Amendment violations in *Plata*, 131 S. Ct. at 1926 ("[T]he prisons were 'seriously and chronically understaffed,' and had 'no effective method for ensuring . . . the competence of their staff' . . . The prisons had failed to implement necessary suicide-prevention procedures, 'due in large measure to the severe understaffing.'" (citations omitted)), more resources will be needed to address these issues.

255. *See generally* Boruchowitz et al., *Minor Crimes, Massive Waste*, *supra* note 225; *Smart Reform is Possible*, *supra* note 225; *see also* Robert C. Boruchowitz, *Diverting and Reclassifying*

states that may prompt legislative reform—reform that historically has been hard to achieve.[256]

Thus, while the *Graham* decision reflects broader criminal justice failings, when read alongside the Court's recent *Plata* decision, it may also indicate hope regarding criminal justice reform.

CONCLUSION

While many scholars have examined the long-term influence that the *Graham* decision may have on Eighth Amendment jurisprudence and on sentencing practices,[257] this Article addresses the immediate tasks of implementing *Graham* on the ground. Specifically, it argues for courts and legislatures to read the *Graham* opinion holistically and to embrace its vision of hope and rehabilitation for juvenile offenders—even serious offenders.

The future for inmates like Terrance Graham remains unclear. Since September 2010, the Juvenile Life Without Parole Project at Barry University has been working to identify inmates in Florida affected by the *Graham* decision and to secure legal representation for those inmates.[258] To date, the Project has identified more than 100 inmates in Florida who are entitled to a new sentence after *Graham*.[259] All but a few of those inmates currently have legal representation, and a handful of inmates have obtained significant relief as a result of their resentencing hearings.[260]

And yet there remains much work to be done. One inmate was resentenced to a term of 170 years;[261] another received a ninety-two-year sentence.[262] Legal appeals of these "virtual life sentences" are in the

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Misdemeanors Could Save $1 Billion Per Year: Reducing the Need for and Cost of Appointed Counsel, AM. CONST. SOC'Y (Dec. 2010), http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf.

256. The *Plata* Court noted that the two consolidated cases under its review had been in the courts for decades, yet had failed to generate reform. 131 S. Ct. at 1926–27 (One case had been filed in 1990, the other in 2001.).

257. *See supra* Part I.B.

258. Telephone Interview with Ilona Vila, *supra* note 121.

259. *Id.*

260. *Id.* Days before this Article went to press, Terrance Graham was resentenced to twenty-five years in prison. Email from Bryan Gowdy, Terrance Graham's Lawyer, Creed & Gowdy Appellate Law Firm (Feb. 24, 2012, 5:55 PM) (on file with author).

261. Wiles, *supra* note 8.

262. Alexandra Zayas, *No Life Term? Then 65 Years*, ST. PETERSBURG TIMES, Nov. 18, 2010, at 1B (stating the sixty-five-year sentence is to be served consecutively with a twenty-seven-year sentence from another county). For a video of the sentencing judge in this case criticizing the U.S.

works.[263] While inmates await resentencing hearings, lawyers must challenge their conditions of confinement. Several facilities in Florida have no rehabilitative programs,[264] and the Florida Department of Corrections maintains the policy that inmates are ineligible for rehabilitative programs until they are three years from their release date.[265] Accordingly, *Graham* inmates awaiting a resentencing hearing cannot access rehabilitation services, yet they need those services in order to demonstrate maturity and growth. Lawyers representing *Graham* inmates must articulate this catch-22 to the courts and challenge these policies.

There may be a silver lining to this painful process of implementing the *Graham* decision in Florida. The Project has brought together public defender offices, private counsel in Florida, and pro bono lawyers from across the nation to represent *Graham* inmates in their resentencing hearings. This kind of collaboration is a positive development. Hopefully, as these lawyers pursue their clients' legal claims they will generate a wider conversation about juveniles in the criminal justice system—a conversation that challenges the prosecution of children as adults and exposes the juvenile experience of adult prison.

Supreme Court's decision in *Graham*, see Warren Elly, *Judge Blasts Supreme Court During Teen's Resentencing*, MYFOX TAMPA BAY (Nov. 17, 2010, 6:03 PM), http://www.myfoxtampabay.com/dpp/news/local/hillsborough/walle-resentencing-tharpe-111710.

263. Telephone Interview with Ilona Vila, *supra* note 121.

264. *Id.*

265. *Id.*