Graham on the Ground

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Abstract
In Graham v. Florida, the 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. What has yet to be examined are the thorny legal issues raised by Graham that judges and lawmakers need to address 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? These and other pressing questions are before judges and legislators today, and in this Article I endeavor to answer them. In Part I, I briefly describe the Graham opinion and survey what scholars to date have identified as salient aspects of the decision. In Part II, I seek to provide a blueprint for lower courts and legislatures implementing the Graham decision. Specifically, I argue 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 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 the promise of Graham a reality. Finally, in Part III, I situate 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.

Introduction
In Graham v. Florida, the Supreme Court held that it is unconstitutional to sentence a non-homicide juvenile offender to life in prison without parole. 1 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.” 2 Dissenting in Graham, Justice Thomas objected to the Court’s newly

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1 130 S. Ct. 2011 (2010).
2 130 S. Ct. 2011, 2030.
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.\textsuperscript{3}

Both the Court and the concurrence claim their decisions to be narrow ones, but both invite a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution. 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 provides no answers to these questions, which will no doubt embroil the courts for years.\textsuperscript{4}

Justice Thomas’s prediction on that count was correct, and this Article treats his prediction as its point of departure.

It has been only one year since the Court’s decision in \textit{Graham}, and yet confusion and disagreement over implementing the decision are apparent in lower courts and in state legislatures. To begin, there is the question of who benefits from the \textit{Graham} decision.\textsuperscript{5} Courts are split on the question whether \textit{Graham} is retroactively applicable,\textsuperscript{6}

\textsuperscript{3} 130 S. Ct. 2011, 2057.
\textsuperscript{4} \textit{Id}.
\textsuperscript{5} Soon 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.” Identifying the inmates to whom \textit{Graham} applies was the Clinic’s first challenging task. \textit{See generally} Nancy Kinnally, \textit{Foundation Supports Efforts to Ensure Fair Sentencing for Juveniles}, THE FLORIDA BAR NEWS, Oct. 15., 2010, available at: http://www.floridabar.org/DIVCOM/IN/innews01.nsf/8c9f13012b96736985256aa900624829/74f9f03449b09276852577b2006aedd4e!OpenDocument.
\textsuperscript{6} \textit{Compare} Bonilla v. State, 791 N.W.2d 697, 700-701 (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.”) \textit{and} Bell v. Haws, 2010 WL 3447218 at *9, n. 6 (July 14, 2010 C.D. Cal.) (“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 (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 \textit{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) \textit{with} Lawson v. Pennsylvania, Slip Copy, 2010 WL 5300531 at *3 (Dec. 21, 2010 E.D. Pa)(“there is no indication that the Supreme Court has held \textit{Graham} retroactively applicable on collateral review”); \textit{and} Jensen v. Zavaras, Slip Copy, 2010 WL 2825666 at *1 (July 16, 2010, D.
while recent changes in state law have enlarged the pool of inmates to whom *Graham* applies.\(^7\)

At the same time, judges must answer the question of what sentence is constitutional after *Graham* for non-homicide juvenile offenders. The Supreme Court held that a judge may not impose a life without parole sentence on a non-homicide juvenile offender, but how about a life sentence? Or a sentence of 75 years? In the year since the *Graham* decision was announced, only a few juvenile inmates in Florida have been resentenced, and the range of sentences imposed has been wide: while one inmate received a resentence of 30 years, another received a resentence of 107 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 opinion suggests that there is, in fact, 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.”\(^11\)

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

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7. See, e.g., Manuel v. State, 48 So. 3d 94 (Fl. App. 2 Dist. 2010) (holding that *Graham* applies to defendant convicted of attempted murder because, under Florida law, homicide requires the death of a human being); see also infra notes ___ and accompanying text.

8. Jeff Kunerth, “ ‘Lifers’ Sentenced as Teens: Do They Deserve A 2\(^{nd}\) Chance?”, South Florida Sun-Sentinel April 2, 2011


10. See infra Part II.3.

incarcerated, the state legislature eliminated parole for most felony convicts. At the very least, parole needs to be available under state law, and states housing Graham inmates 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. The Florida Prosecuting Attorneys Association similarly suggested giving juvenile convicts the possibility of parole after twenty years, but then-Governor Crist rejected both proposals as too lenient. Currently, there is a “Graham Law” pending before Florida’s legislature, but lawmakers have not been able to agree upon the meaning of terms like “maturity, rehabilitation and parole” all of which are crucial to pending legislation.

Even if legislators can agree upon a law to guide judges in their sentencing decisions, the aspiration of the Graham Court demands more still. That is, the Graham decision placed great emphasis upon the theme of rehabilitation and the promise of possible, if not eventual, release. 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.” Without even the possibility of future release, he further explained, juvenile offenders may have no incentive to “become a responsible individual”

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12 Dolan v. State, 618 So.2d 271, 272 (Fla. App. 2 Dist., 1993)(“For anyone convicted of a non-capital felony committed on or after October 1, 1983, the term “parole” no longer exists.”)(citing §921.001(8) Fla. Stat. (1983)).
13 Id.
14 Id.
16 130 S. Ct. 2011, 2026-2030.
17 130 S.Ct. 2011, 2032.
or to engage in “considered reflection which is the foundation for remorse, renewal, and rehabilitation.”\textsuperscript{18} In light of this language, the Court’s decision imposes certain affirmative obligations upon 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. This is a daunting task, as most states are barely able to ensure the physical safety of their juvenile inmates, let alone facilitate their healthy maturation.

In these ways, Justice Thomas was correct: the \textit{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 \textit{Graham} on the ground – are the focus of this Article.

This Article proceeds in four parts. In Part I, I briefly describe the \textit{Graham} opinion and survey what scholars to date have identified as salient aspects of the decision. In Part II I seek to provide a blueprint for lower courts and legislatures implementing the \textit{Graham} decision. Specifically, I argue that: 1) \textit{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 \textit{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 \textit{Graham}; and 4) long-term legislative and executive action are necessary in order to make the promise of \textit{Graham} a reality. Finally, in Part III, I situate \textit{Graham} in the context of our nation’s ongoing criminal justice failings. While the sentence challenged in \textit{Graham} ought to be viewed as

\textsuperscript{18} Id.
a symptom of such failings, the *Graham* decision may offer a window of hope for reform on that same front.

**Part I: The *Graham* Decision**

**A. The *Graham* Opinion**

At the age of 16, Terrence J. Graham and three other adolescents attempted to rob a restaurant in Jacksonville, Florida. In the course of the attempted robbery, Graham’s accomplice struck the restaurant manager in the head twice with a metal bar. Graham was arrested for attempted robbery, and the prosecutor elected to charge him as an adult. 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. He plead guilty to both charges under a plea agreement that resulted in three years probation and that required him to serve the first twelve months of his probation in county jail. Because of time Graham had served awaiting trial, he was released six months after his sentence. 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. Graham was a few weeks shy of eighteen when the probation violations were reported.

One year later, a different trial court judge than the one who had sentenced Graham to probation, presided over a trial regarding Graham’s alleged probation

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violations. Graham maintained that he had not been involved in the robbery, but he did admit to fleeing from police. The trial court found that “Graham had violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.” 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. The State recommended that Graham receive 30 years on the armed burglary count and 15 years on the attempted armed robbery count, while the Florida Department of Corrections recommended that Graham receive only a four year sentence. Instead, the trial court judge sentenced Graham to life imprisonment for the armed burglary and fifteen years for the attempted armed robbery. Because Florida abolished its parole system in 2003, Graham’s life

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31 130 S. Ct. 2011, 2019 (emphasis added).
32 130 S. Ct. 2011, 2020. Despite the fact that the state had 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.”).
sentence meant that he had no possibility of release unless he was granted executive
clemency.\textsuperscript{34}

The question presented to the Supreme Court in Graham’s case was “whether the
Constitution permits a juvenile offender to be sentenced to life in prison without parole
for a nonhomicide crime.”\textsuperscript{35} Writing for the majority, Justice Kennedy held that the
Constitution categorically forbids such a sentence.\textsuperscript{36} First, Justice Kennedy explained
that the Eighth Amendment bars both “barbaric” punishments and punishments that are
disproportionate to the crime committed.\textsuperscript{37} Within the latter category, the Court
explained that its cases fell into one of two classifications: “The Court’s cases addressing
the proportionality of sentences fall within two general classifications. The first involves
challenges to the length of term-of-years sentences given all the circumstances in a
particular case. The second comprises cases in which the Court implements the
proportionality standard by certain categorical restrictions on the death penalty.”\textsuperscript{38}
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,”\textsuperscript{39} the Court found
the categorical approach appropriate and looked to its recent death penalty case law for
guidance.\textsuperscript{40}

\textsuperscript{34} 130 S. Ct. 2011, 2020.
\textsuperscript{35} 130 S. Ct. 2011, 2017-18.
\textsuperscript{36} 130 S. Ct. 2011, 2034.
\textsuperscript{37} 130 S. Ct. 2011, 2021.
\textsuperscript{38} 130 S. Ct. 2011, 2021.
\textsuperscript{39} 130 S. Ct. 2011, 2022-23.
\textsuperscript{40} 130 S. Ct. 2011, 2021; \textit{see also} Barkow, \textit{supra} note __, at 49 (“The Court offered just four sentences to
justify its use of the capital proportionality test in Graham’s case.”).
In cases where the Court has taken a categorical approach to proportionality,\(^{41}\) the Court looks to objective indicia of national consensus, beginning with relevant legislation.\(^{42}\) Justice Kennedy explained that while thirty-seven states, and 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.\(^{43}\) 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 that 77 of these juveniles were in Florida prisons.\(^{44}\) Given the “exceedingly rare” incidence of the punishment in question, the Court held that a national consensus had developed against life-without-parole for non-homicide juvenile offenders.\(^{45}\)

The Court buttressed its canvassing of objective indicia of national consensus with its own exercise of independent judgment.\(^{46}\) In this regard, the Court focused on two aspects of the case: 1) the lessened culpability of juvenile offenders and their greater capacity for reformation\(^{47}\) and 2) the historical treatment of non-homicide crimes as less severe than crimes where a victim is killed.\(^{48}\) Looking at these two features, the Court held: “It follows that, when compared to an adult murderer, a juvenile offender who did


\(^{44}\) 130 S. Ct. 2011, 2024.

\(^{45}\) 130 S. Ct. 2011, 2026.


\(^{47}\) 130 S. Ct. 2011, 2026-2030.

\(^{48}\) 130 S. Ct. 2011, 2027.
not kill or intend to kill has a twice diminished moral culpability.\textsuperscript{49} On the other side of the equation, when the Court examined the various justifications for any criminal sanction, it determined that none could justify life-without-parole for defendants like Graham.\textsuperscript{50}

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. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. 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.\textsuperscript{51}

Chief Justice Roberts, concurring in the judgment, emphasized that the Court did not need to craft a categorical rule for all cases like Graham’s.\textsuperscript{52} Instead, under the Chief Justice’s approach, the Court could have relied upon its well-established (if somewhat unpredictable) “narrow proportionality” review historically applicable to non-capital cases.\textsuperscript{53} According to the Chief Justice, applying that precedent would have “provide(d)
a sufficient framework for assessing the concerns outlined by the majority”\(^{54}\) and it would have avoided the invention of “a new constitutional rule of dubious provenance.”\(^{55}\)

Justice Thomas and Alito each dissented. Justice Thomas’s dissent emphasized what he saw as the majority’s methodological flaws. First, Justice Thomas criticized the Court’s “eviscerat[ion]” of the “death is different” approach to Eighth Amendment proportionality review.\(^{56}\) This new approach, in Justice Thomas’s view, opened the door to unlimited judicial authority in the Eight Amendment realm: “The Court now claims not only the power categorically to reserve the ‘most severe punishment’ for those the Court thinks are ‘the most deserving of execution,’ but also to declare that ‘less culpable’ persons are categorically exempt from the ‘second most severe penalty.’ . . . . No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.”\(^{57}\)

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.”\(^{58}\) According to Justice Thomas, the Constitution assigned that decision to the voters and their elected officials.\(^{59}\) 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, in Justice Thomas’s mind, there was no role for the

\(^{54}\) 130 S. Ct. 2011, 2039.
\(^{55}\) 130 S. Ct. 2011, 2036.
\(^{56}\) 130 S. Ct. 2011, 2046.
\(^{57}\) 130 S. Ct. 2011, 2048 (citations omitted).
\(^{58}\) 130 S. Ct. 2011, 2058.
\(^{59}\) 130 S. Ct. 2011, 2058.
Supreme Court to play in this case. By tackling the question in this case, Justice Thomas wrote that the Court had “reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.”

Justice Alito joined in Justice Thomas’s dissent, but also raised a separate point that deserves attention. As 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, counsel for petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole ‘probably’ would be constitutional.”

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 the methodological import of Graham. Traditionally, the Court has reviewed Eighth Amendment proportionality challenges in one of two ways: 1) in term-of-years cases, the Court reviewed proportionality on a case-by-case basis, taking all factors into account; and 2) in death penalty cases, the court considered the propriety of certain categorical restrictions. Justice Kennedy explained that, because Graham’s case challenged “a particular type of sentence” and its application to “an entire class of

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60 130 S. Ct. 2011, 2058.
61 130 S. Ct. 2011, 2058.
offenders who have committed a range of crimes,”\textsuperscript{64} the categorical approach was appropriate in \textit{Graham}. 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 non-capital challenges to individual versus categorical challenges, “the window that \textit{Graham} appears to open relates to classes of noncapital offenders who can assert special grounds for avoiding especially harsh punishment.”\textsuperscript{65} Under the Court’s new approach, they suggest that \textit{Graham} permits juvenile challenges to life imprisonment and to excessive term of years sentences.\textsuperscript{66} At the same time, Professors Steiker and Steiker describe critical ways in which \textit{Graham} may shape future capital cases, including the way its methodology “bolster[s]” the “constitutional case against the death penalty” altogether.\textsuperscript{67}

Others have suggested that the \textit{Graham} Court’s “constitutional mathematics”\textsuperscript{68} of borrowing from two separate lines of analysis – juvenile limitations on the death penalty and homicide-based limitations on the death penalty – has potentially broad implications for future cases. For example, in the same way that the \textit{Graham} Court described juvenile non-homicide offenders as having “twice diminished moral culpability,”\textsuperscript{69} “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

\textsuperscript{64} 130 S. Ct. 2011, 2022-23.
\textsuperscript{65} Steiker and Steiker, \textit{supra} note 5, at 81.
\textsuperscript{66} Steiker and Steiker, \textit{supra} note 5, at 81.
\textsuperscript{67} Steiker and Steiker, \textit{supra} note 5, at 84.
\textsuperscript{69} 130 S. Ct. 2011, 2027.
homicide.”70 Professor 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 new category of Eighth Amendment review for life-without-parole sentences.”71 Already, lawyers have asked the Supreme Court to address the question whether fourteen year-old children who were convicted of homicide may be sentenced to life in prison without parole after Graham.72 Thus, scholars have correctly noted the vast implications of the Court’s methodology in Graham.

Second, legal scholars have identified the “youth is different”73 aspect of the Graham Court’s decision. The Graham Court borrowed heavily from its decision in Roper v. Simmons,74 which banned the death penalty for juveniles, and emphasized the psychological immaturity of juveniles and their unique capacity for rehabilitation.75 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: “As we learn more about juvenile psychology, it stands to reason that we will learn more about the appropriate punishments and treatments for juveniles. This 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

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71 See generally William W. Berry III, More Different From Life, Less Different than Death, 71 Ohio St. L.J. 1109 (2010).
74 543 U.S. 551 (2005).
75 130 S. Ct. 2011, 2026-2030.
punishment as juveniles." Another scholar has argued that the reasoning of *Graham* -- seen in the context of the Court’s precedents -- suggests that juveniles are not eligible for any kind of retributive punishment. Other scholars have argued that the *Graham* decision is only one example of this Court’s recent child-specific jurisprudence. In these ways, scholars have begun to consider 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 historically has driven American sentencing policy – and that moving away from the sentencing practice makes sense for individual inmates and taxpayers alike. 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. As this scholarship indicates, the long term implications of *Graham* may be both significant and far-reaching.

**Part II: Implementing *Graham* on the Ground**

In this Part of the paper, I turn to addressing several urgent collateral issues that flow from the *Graham* decision – all of which judges and lawmakers are confronting today. Specifically, I argue that: 1) *Graham* is retroactively applicable to all

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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 the promise of Graham a reality.

1. To Whom Does Graham Apply?

In the Graham opinion, the Supreme Court suggested that its decision applied to 
123 inmates nationwide, 77 of whom were in Florida. That number was a product of 
one scholarly report and the Court’s own research. Today, in Florida alone, lawyers 
estimate that there may be upwards of 115 inmates who are entitled to a resentencing 
hearing under Graham – a number much higher than the 77 juvenile life-without parole 
inmates that the Court had estimated were in Florida. At the same time, courts are split 
on the question whether Graham is retroactively applicable. In this sub-section of the 
paper I address the question: to whom does Graham apply? I argue that Graham applies 
retroactively to all inmates who received a life-without-parole sentence for a non-
homicide juvenile crime regardless of the procedural posture of those cases.

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81 130 S.Ct. 2011, 2052.
82 130 S.Ct. 2011, 2023-2024 (discussing the process by which the Court arrived at the number 123).
83 Barry University Awarded $100,000 Grant for New Center, Oct. 12, 2010, available at: 
http://www.nationaljurist.com/content/barry-university-awarded-100000-grant-new-center; 130 S.Ct. 2011, 
2024 (noting that 77 of the 123 inmates like Graham nationwide were in Florida).
84 See supra note 24 and accompanying text.
85 In this section of the paper, I am talking only about the inmates to whom Graham squarely applies. 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 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, April 21, 2011, available at: 
http://www.eji.org/eji/node/524. In this section, 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.
Historically, scholars have been heavily critical of the Supreme Court’s opaque retroactivity doctrine.\(^{86}\) To begin, it is clear that when the Supreme Court announces a new constitutional rule, that rule is applicable to all criminal cases still pending on direct review. As the Court explained in *Griffith v. Kentucky*: “Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.”\(^{87}\) Accordingly, the rule from *Graham* undoubtedly applies to inmates whose cases are still pending on direct review.

The question whether the *Graham* decision applies retroactively to cases pending on collateral review is a bit more complex, but even so, the *Graham* rule should also apply to defendants whose cases are at the habeas stage. In *Teague v. Lane*, the Court embraced a position previously advocated by Justice Harlan and held that “[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”\(^{88}\) Concerns of comity and finality motivated this ruling: “Habeas corpus always has been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The

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86 See, e.g., Christopher Strauss, *Collateral Damage: How the Supreme Court’s Retroactivity Doctrine Affects Federal Drug Prisoners’ Apprendi Claims on Collateral Review*, 81 North Carolina L. Rev. 1220, 1222 (2003) (“Over the course of the past thirty-six years, the Court has grappled with the issue of retroactivity and has crafted a theoretically incoherent doctrine that has proven difficult to apply.”); *Id.* at 1227-1239 (describing the Court’s retroactivity doctrine); see also Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, n. 310 (2004) (describing the jurisprudence of retroactivity as “widely thought to be confused and confusing”) (citations omitted).


interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.”

As a result, criminal defendants whose cases are pending on collateral review may only enjoy the benefit of a new rule when one of two exceptions applies. “The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, ... or addresses a ‘substantive categorical guarantee[e] accorded by the Constitution,’ such as a rule ‘prohibiting a certain category of punishment for a class of defendants because of their status or offense.’ The second exception is for ‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.’”

More recently, the Court has shifted its terminology somewhat 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. New substantive rules “generally 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.”

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

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92 542 U.S. 348, 352-353 (emphasis in original)(citations omitted).
offenders). As a result, the *Graham* rule is retroactively applicable even to cases pending on collateral review.

In the event that there are non-homicide juvenile offenders serving a life-without-parole sentence who have already filed a federal habeas petition, they too should be able to seek relief under *Graham*. The federal habeas statute bars second or successive petitions, but the statute itself does not define what constitutes a successive petition. Federal courts have determined that a habeas 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.” Because *Graham* announced a new substantive rule that renders a certain kind of sentence unconstitutional for an entire class of defendants, it allows inmates to challenge their sentence in a way they could not have in an earlier petition. Accordingly, the Graham rule may be the basis for relief even for those inmates who have already filed a federal habeas petition, as a petition based on the *Graham* rule will not be barred as a “successive” petition. Thus, one may say that *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.

And the application of *Graham* may reach even farther than the Court realized at the time of its decision. That is, the *Graham* Court relied heavily on one report to calculate the number of inmates nationwide serving a life-without-parole sentence for a

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93 See generally 28 U.S.C. §2244; see also In re Cain, 137 F.3d 234, 235 (5th Cir. 1998)(noting fact that federal statute does not define “successive”).
94 In re Cain, 137 F.3d 234, 235 (collecting cases on this point).
juvenile, non-homicide offense. The Report (hereinafter referred to as the “Annino Report”), estimated that there were 109 juvenile non-homicide offenders serving an LWOP sentence nationwide, 77 of whom were in Florida. 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.” The Annino Report’s estimate did not, include, for example, any convictions for attempted homicides.

While the Court relied heavily upon the Annino Report to document the incidence of juvenile life-without-parole sentences for non-homicide offenders, it did not appear to accept the Report’s definition of what constitutes 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. Justice Kennedy wrote: “The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. . . .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.’ This is because ‘[l]ife is over for the victim of the murderer,’ but for the victim of even a very serious nonhomicide crime, ‘life ... is not over and normally is not beyond repair.’” The Court’s language is more comprehensive than that of the Annino Report, which said that

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96 Annino Report, supra note 95, at 4-5.
97 Id. at 3-4.
98 Id. at 4.
99 130 S.Ct. 2011, 2027.
“[i]ndividuals convicted of attempted homicide or felony murder are defined as homicide offenders” and that “‘[n]on-homicide’ does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder.”100 While the Court seems focused on whether a victim died as the result of the defendant’s conduct, the Annino Report seems focused on whether the defendant was convicted of any type or degree of homicide under state law. A Florida appellate Court recently followed the Graham Court’s definition of non-homicide 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.101

In light of this analysis, it is simply not the case that Graham was a “narrow” case “which did nothing more than entitle a small group of offenders to the mere possibility of eventual parole.”102 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.

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

Having defined the pool of inmates to whom Graham applies (a pool that I hereinafter refer to as the “Graham inmates”), the next question becomes: to what are these inmates entitled under Graham? As I argue in this sub-section, Graham requires the states to provide each Graham inmate with a resentencing hearing, as well as

100 Annino Report, *supra* note 95, at 4.
101 Manuel v. State, 48 So. 3d 94 (Fl. App. 2nd Dist. 2010)(holding that Graham applied to non-homicide offenders and attempted murder with firearm was not homicide offense).
effective representation in preparation for and at that resentencing hearing. The 
resentencing hearing cannot be a pro forma protocol, either. It must afford the defendant 
and his counsel the opportunity to present the inmate’s full life picture – before and 
during his 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 defense.” The Supreme 
Court has interpreted this right to apply to “all critical stages of a criminal proceeding,” 
and sentencing is a critical stage for purposes of the Sixth Amendment. Not only does 
the defendant have a general interest in the “character” of the sentencing proceeding, 
but also defense counsel can take several measures throughout the sentencing process to 
safeguard the rights of the defendant. Defense counsel may advise the defendant 
regarding the range of potentially applicable sentences and pre-sentence investigations by 
the state; inform the defendant of certain rights that may be lost if not exercised at the 
sentencing stage; and present relevant mitigating evidence. For these reasons, the 
right to counsel at sentencing is almost as well-established as the right to counsel itself.

103 U.S Const. Amend. VI. 
104 Montejo v. Louisiana, 129 S.Ct. 2079, 2085 (2009)(“Under our precedents, once the adversary judicial 
process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at 
all ‘critical’ stages of the criminal proceedings.”)(citations omitted); Kansas v. Ventris, 129 S. Ct. 1841, 
1844-1845(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). 
107 U.S. 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.”). 
When an existing sentence is modified or corrected, the presence of the defendant, let alone defense counsel, may not be required.\textsuperscript{111} In contrast, when “an original sentencing package is vacated in its entirety on appeal and the case is remanded for resentencing,”\textsuperscript{112} the defendant has a constitutional right to be present\textsuperscript{113} and to be represented by counsel.\textsuperscript{114} This distinction makes sense. 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 task of the sentencing judge is purely ministerial.\textsuperscript{115} Accordingly, neither the defendant nor defense counsel needs to be present in order to satisfy the Sixth Amendment.\textsuperscript{116} In contrast, when a true resentencing takes place, the judge will need to exercise discretion, just as the initial sentencing judge did. As Justice Harlan explained: “The elementary right of a defendant to be present at the imposition of sentence and to speak in his own behalf ... is not satisfied by allowing him to be present and speak at a prior stage of the proceedings.... Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the

\textsuperscript{109} Hall v. Washington, 106 F.3d 742, 749-750 (7th Cir. 1997)(describing counsel’s role in developing and presenting mitigation evidence at sentencing).
\textsuperscript{110} Compare Gideon v. Wainwright, 372 U.S. 335 (1963)(holding the 6th Amendment right to counsel applicable to state criminal proceedings) with Mempa v. Rhay, 389 U.S. 128 (1967)(holding right to counsel applies to sentencing stage).
\textsuperscript{111} See e.g., U.S. v. Jackson, 923 F.2d 1494 (11th Cir. 1991)(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.”). \textit{Id.} at 1497.
\textsuperscript{112} U.S. v. Jackson, 923 F.2d 1494, 1496.
\textsuperscript{113} U.S. v. Moree, 928 F.2d 654, 655-56 (5th Cir. 1991).
\textsuperscript{114} Hall v. Moore, 253 F.3d 624, 627-628 (11th Cir. 2001); Johnson v. United States, 619 F.2d 366, 369 (5th Cir. 1980); People v. McDermott, 906 N.Y.S.2d 415 (NYAD Dept. 4, 2010)(remanding for second resentencing because defendant was not adequately advised regarding his right to counsel at resentencing); \textit{but see} Morris v. Buss, 2011 WL 837734 (N.D. Fl. March 7, 2011)(noting that while federal appellate courts have recognized the right to counsel at resentencing, the Supreme Court has not explicitly extended the right to counsel at sentencing to include resentencing).
\textsuperscript{115} Dougherty v. State, 785 So. 2d 1221, 1223 (Fl. App. 4th Dist. 2001).
\textsuperscript{116} U.S. v. Nolley, 27 F.3d 80, 81-82 (4th Cir. 1994)(where trial court has no role but to implement corrected sentence from appellate court there is no function for defendant or defense counsel). U.S. v. Brewer, 2010 WL 22847 (11th Cir. 2010)(defendant had not right to be present when court entered amended judgment).
district judge will remember the defendant's words in his absence and give them due weight.”

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. 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. Defense counsel will need to present her client’s social history prior to his initial sentence, his behavioral record during incarceration, and his prospects for rehabilitation. This is especially true in light of the *Graham* court’s emphasis upon the unique ability for juvenile rehabilitation and maturation. It may very well be the case that after several years – if not decades – in prison some of these inmates have demonstrated substantial growth and maturity. The sentence they receive in a resentencing hearing should reflect that development and their potential for further

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117 United States v. Behrens, 375 U.S. 162, 167-168 (1963)(Harlan, J., concurring); see also id. at 165-166 (describing the right of the defendant to speak at his own sentencing and to offer mitigating information as “ancient in the law” and recognized by the Federal Criminal Rules).

118 See supra notes 74-77 and accompanying text.

119 Lawyers representing the Graham inmates at resentencing have said that they are treating these resentencing hearings like capital mitigation hearings. See supra notes 71-73 and accompanying text. If so, then they will likely need to draw on the expertise of several outside consultants. See generally AM. BAR. ASS’N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1 (2003)(describing the “Team” approach and the necessity of mental health and mitigation expertise for capital cases).


121 130 S. Ct. 2011, 2026-2030.
rehabilitation. Accordingly, the *Graham* inmates are entitled to a resentencing hearing at which they are present and during which they have effective representation.

3. **Judges Sentences Juveniles after *Graham* Should Err in Favor of Rehabilitation over Retribution**

   The *Graham* Court determined that life without parole for non-homicide juvenile offenders is an unconstitutional sentence, but the Court declined to set an upper limit on what length of sentence would be constitutional. As a result, state court judges today need to delineate the boundaries of *Graham* whether they are re-sentencing a *Graham* inmate or imposing a sentence on a juvenile convicted in the wake of *Graham*. A judge may conclude that *Graham* permits any term-of-years sentence because the decision did not expressly set an upper limit on permissible sentences.  

   On the other hand, a judge may reason that the opinion implicitly – if not explicitly – does set an upper limit. For example, a judge may conclude that a sentence that exceeds the defendant’s life expectancy is unconstitutional on the theory that it is tantamount to a life-without parole sentence.

   In the year since *Graham* was decided, only a handful of inmates entitled to a resentencing have received a new sentence. The sentences handed down have ranged from 30 years to more than 100 years. Sentences on the high end of this range reflect a hollow and hyper-technical reading of Justice Kennedy’s opinion. Moreover, these

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122 130 S. Ct. 2011, 2058 (J. Alito, dissenting)(noting that nothing “Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.”); see also People v. Caballero, 119 Cal.Rptr.3d 920 (Cal.App. 2 Dist. Jan 18, 2011)(holding that sentence of 110 years to life for juvenile non-homicide offender not precluded by Graham)(review granted and opinion superseded, April 13, 2011).


124 See supra note 74 and accompanying text.
excessive sentences eviscerate central principles of the majority’s opinion – those of rehabilitation, the diminished culpability of youth, and the importance of hope. In this sub-section, I argue that judges sentencing juveniles after Graham should err on the side of rehabilitation over retribution.

The Supremacy Clause requires state judges to defer to the Supreme Court’s interpretation of federal constitutional questions. In order to comply with the Court’s decision in Graham, state court judges must read the opinion holistically, taking into account the various arguments before the Court and the rationale upon which the Court ultimately rested its decision. Justice Kennedy’s opinion reflects a keen interest in the potential for juvenile rehabilitation. “A sentence of life imprisonment without parole. . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.”

Lower court judges imposing sentences in the wake of Graham should take seriously the Court’s language regarding juvenile rehabilitation.

Moreover, the Court had at its disposal numerous arguments regarding the unconstitutionality of Graham’s life-without-parole sentence, and yet it focused its

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125 See generally Smith and Cohen, supra note 5.
126 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, anything in the constitution or laws of any state to the contrary notwithstanding.”).
127 130 S.Ct. 2011, 2029-2030.
128 Fourteen separate amicus briefs were filed with the Court in support of petitioner, Terrance Graham’s Eighth Amendment challenge. Briefs are available at: http://www.scotusblog.com/case-files/cases/graham-v-florida/.
opinion upon the finality and excessiveness of his sentence. For example, The Sentencing Project as amicus curiae argued that Graham’s life-without-parole sentence was unconstitutional because it was imposed in the absence of jury or judicial discretion.\(^{129}\) As The Sentencing Project explained in its brief:

> “[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.”\(^{130}\)

Despite the merit of this argument, Justice Kennedy’s opinion does not indicate that the Court’s primary concern was a prevalent lack of sentencing discretion. If it had been the Court’s main concern, then 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. But instead, the majority opinion focused on the unique characteristics of juvenile offenders, relying on the same brain science that had motivated its decision to ban the death penalty for juveniles.\(^{131}\) In addition, Justice Kennedy defended the Court’s categorical rule in part by asserting the *dangers* of unchecked judicial discretion at the sentencing stage. “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


\(^{130}\) *Id.* at 15-16.

\(^{131}\) 130 S.Ct. 2011, 2026-2027.
Amendment. Specific cases are illustrative. In Graham’s case the sentencing judge decided to impose life without parole—a sentence greater than that requested by the prosecutor—for Graham's armed burglary conviction. The judge did so because he concluded that Graham was incorrigible.”

Judges who hand down excessive juvenile sentences arguing, for example, that it is “cruel and unusual punishment for the victims to have endured the rage, brutality, the terror that [the defendant] exacted upon them” are acting precisely as Justice Kennedy feared: they are allowing the brutality of the crime to overshadow the immaturity and potential for growth in the juvenile defendant.

Thus, it is clear from Justice Kennedy’s opinion that the constitutional infirmity of Graham’s sentence was its finality and excessiveness in light of his youth. The sentence violated the Eight 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, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.” Accordingly, lower courts sentencing juveniles in the wake of Graham should err in favor of the defendant and avoid excessive sentences that foreclose the possibility of parole after a reasonable period of time. Such a sentence best reflects the spirit of the Graham decision and is required under the Supremacy Clause.

It is also true that judges should err on the side of rehabilitation when sentencing juveniles after Graham as a matter of constitutional etiquette. Under the Supremacy Clause, state courts are bound to apply the rule of Graham in relevant cases. When a

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130 S.Ct. 2011, 2031 (citation omitted).
132 130 S.Ct. 2011, 2026-2027.
133 130 S.Ct. 2011, 2033.
state court judge seizes upon Justice Alito’s dissenting comment that “[n]othing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole,” to the exclusion of the majority’s focus upon hope and redemption, the Supremacy Clause is not satisfied. And the Supreme Court will eventually recognize such an anemic reading of the Graham opinion as unconstitutional.

For example, in Missouri v. Seibert, law enforcement arrested and questioned the defendant without providing the requisite Miranda warning. Once a law enforcement officer had obtained a confession from the defendant, he then provided the Miranda warning, obtained a waiver and secured the confession again. The interrogating officer testified that he employed this protocol as a “conscious decision,” and that it was consistent with his interrogation training to question first and then provide the Miranda warning. The Supreme Court roundly rejected the protocol as a “police strategy adapted to undermine the Miranda warnings.” The Seibert court recognized this nationally promoted law enforcement technique for what it was: the work of “[s]trategists dedicated to draining the substance out of Miranda.” And it found this “end-run” around the Court’s Miranda decision unconstitutional.

Similarly, if state court judges persist in imposing sentences in the wake of Graham as excessive as 70, 80, or 100 years, eventually the Supreme Court will recognize such sentences as an evisceration of its decision in Graham and an end-run

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137 Id. at 604-605.
138 Id.
139 Id. at 605.
140 Id. at 617.
141 Id.
Lower court judges applying *Graham* should instead sentence juveniles in a way that seeks to avoid raising a constitutional issue. Rather than imposing the highest sentence a judge may think is legal under the letter of *Graham*, a judge should err on the side of imposing a sentence that is patently permissible under *Graham*. Not only will such a sentence avoid a subsequent constitutional challenge, but also such a sentence reflects the fact that state court judges take an oath to uphold the United States Constitution and their decisions should reflect that fact. \(^{143}\)

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

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\(^{142}\) Along the same lines, it is also important for litigators to think strategically and to work in concert as they seek resentencing hearings after Graham. Right now, there is a wide spectrum along which judges have imposed post-Graham sentences. *See supra* notes ___-___ and accompanying text. This wide spectrum suggests difference of opinion (even if there have only been a few opinions). If, over time, though more and more judges wisely recognize that a sentence of 100 years does not comport with the Graham mandate, as I have argued in Part II, *supra*, then a new theme emerges: the range of what is deemed acceptable after Graham begins to shrink and excessive sentences are seen as just that. But this may cut the other way, too. If more and more judges in the wake of Graham sign off on sentences as long as 80 years as technically compliant with Graham, the opposite consensus begins to emerge. Of course, there are many possible variations on these potential sentencing patterns. In particular, judicial notions of what is acceptable post-Graham may follow patterns according to geography, age of offender, nature of crime, and so forth. The point is this: if juvenile justice reformers want to challenge the 100 year sentence as unconstitutional under Graham at some point in the future, they need to shape the pattern of sentences that does emerge as much as possible. And the only way in which to even attempt to control such a pattern is to focus on strategic decisions one case at a time: which case to bring; in what order to bring cases; and what sentences can realistically be achieved in certain cases. This work is already underway, in part, through the efforts of the Equal Justice Initiative in Alabama. *See* Adam Liptak, *Lifers as Teenagers, Now Seeking Second Chance*, N.Y. TIMES, Oct. 17, 2007 (describing work of Equal Justice Initiative). In this way, hopefully, in 10 or 20 years, the 100 year post-Graham sentences will emerge as anachronistic outliers that are simply unconstitutional.

\(^{143}\) *See, e.g.* Rev. Code Wash. 2.04.080 (The several justices of the supreme court, before entering upon the duties of their office, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully and impartially discharge the duties of the office of judge of the supreme court of the State of Washington to the best of my ability.").
decisions. These appeals not only deprive the defendant and the victim of finality regarding the sentencing decision, but they are costly and time-consuming for courts to review. 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*.

4. **Legislative and Executive Action Are Needed to Make the Promise of *Graham* a Reality**

   In the long run, state lawmakers and executive actors need to take bold steps in order for the promise of *Graham* to become a reality. In this subsection, I describe two specific issues that require immediate attention from legislators and executive actors: A) parole policy and B) conditions of confinement for juvenile offenders.

A. **Parole Policy**

   As a threshold matter, in order for states to comport with the requirements of *Graham*, parole must be available under state law. Where it is not, an immediate legislative fix is required. 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,” 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

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144 See e.g., Kris Wernowsky, *Teen Rapist Sentenced to 80 Years*, Jan. 28, 2011, PNJ.com (describing resentencing of Graham inmate and counsel’s plan to appeal the 80 year resentencing).

145 See, e.g. supra notes 78-80 and accompanying text (discussing lawmakers attempts to enact legislation post-Graham).

have served ten years in prison. Lawmakers and lobbyists in Florida have suggested various models, allowing for parole under limited circumstances after 20 or 25 years of imprisonment. The optimal legislative fix is one that allows maximum flexibility in recognition of the reality that each inmate will present a different picture. For example, in 2009 Congressman Bobby Scott (D-VA) proposed a bill that would require states housing juvenile life-without-parole offenders “to grant a meaningful opportunity for parole at least once during their first 15 years of incarceration and at least once every three years thereafter.” One may argue that the initial period should be lower or higher, 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.

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. State legislatures need to make this a top priority.

B. Enabling the Promise of Graham through Conditions of Confinement

151 See e.g., Kent and Colgan, supra note 144 (arguing for review after 10 years).
Making parole available under state law is only the first step required of states that house Graham inmates. The Graham decision demands that juvenile non-homicide offenders be given a “meaningful opportunity to obtain release,”¹⁵³ and as I argue below, this language requires states to provide juvenile offenders with a meaningful opportunity to rehabilitate themselves prior to and in preparation for that parole hearing. 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-recognition of human worth and potential.”¹⁵⁴ Without even the possibility of future release, he further explained, juvenile offenders may have no incentive to “become a responsible individual” or to engage in “considered reflection which is the foundation for remorse, renewal, and rehabilitation.”¹⁵⁵ But above and beyond the idea that the possibility of release may incentivize individual reform, Justice Kennedy’s opinion reflects a concern 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 counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.”¹⁵⁶ If one takes seriously the Court’s emphasis upon allowing juvenile offenders the opportunity to “achieve maturity”¹⁵⁷ and to “reconcil[e] with society,”¹⁵⁸ one must recognize that these goals are not addressed by a parole hearing -- or even release after a

¹⁵³ 130 S.Ct. 2011, 2030.
¹⁵⁴ 130 S.Ct. 2011, 2032.
¹⁵⁵ Id.
¹⁵⁶ Id. at 2032-33; see also id. at 2029-30.
¹⁵⁷ Id. at 2032.
¹⁵⁸ Id. at 2032.
parole hearing. 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 faculties
currently have little opportunity to rehabilitate themselves. First, there are few
rehabilitative resources available to juvenile offenders because “adult prison systems
offer few treatment modalities to inmates.” And even when there are rehabilitative
resources available, inmates like Terrance Graham, who are serving life terms “go to the
end of the line” because priority is given to those inmates approaching the end of their
sentences. Second, adult prisons pose significant physical and mental health risks to
juvenile offenders. Many states that house juvenile offenders in adult facilities have no
regulations in place to protect or separate juveniles from adult inmates. As a result,
sexual and physical assaults are a common experience for juvenile offenders in adult
prisons. A 2006 study reports that – even though juvenile inmates constitute 1% of
inmates in adult jails – 21% of victims of substantiated inmate-on-inmate sexual violence
in jail were under the age of 18. 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

159 Christopher Mallett, Death is Not Different: The Transfer of Juvenile Offenders to Adult Criminal
Courts, 43 No. 4 CRIM. LAW BULLETIN Art. 3 (2007).
160 Jeff Kunerth, Lifers’ Sentenced as Teens: Do They Deserve A 2nd Chance?, SOUTH FLORIDA SUN-
SENTINEL April 2, 2011.
161 See generally CAMPAIGN FOR YOUTH JUSTICE, Jailing Juveniles: The Dangers of Incarcerating Youth in
Adult Jails in America (2007)[hereinafter Jailing Juveniles], available at
http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf; AMNESTY
INTERNATIONAL, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,
(2005)[hereinafter The Rest of Their Lives], available at
http://www.amnestyusa.org/countries/usa/clwop/report.pdf; Editorial, Raising Children Behind Bars,
162 Jailing Juveniles, supra note 156, at 24-30 (discussing dangers for youths in adult jails and indentifying
policies state-by-state).
163 Jailing Juveniles, supra note 156, at 13.
sexual assault. Because the experience of adult prison is so horrific for juvenile offenders, inmates under 18 have the highest suicide rate among all inmates. These are not humane conditions of confinement, let alone conditions of confinement amenable to “considered reflection which is the foundation for remorse, renewal, and rehabilitation.”

What conditions of confinement would facilitate the Graham Court’s goals of rehabilitation and possible re-entry into society? In general, developmental psychology and criminology research tells us that most youth can be rehabilitated. “[T]he crime rate peaks at age 17 and then declines steeply,” and “most youths mature out of their criminal tendencies; only about 5% are incipient career criminals.” Moreover, the literature documents the importance of a “healthy social context” in the “process of development toward psychosocial maturity.” Such contexts “provide ‘opportunity structures’ that facilitate normative development.” Ideally, a healthy social context entails positive authority figures, socialization with peers, and participation in education, extracurricular and employment activities that facilitate “autonomous decision-making and critical thinking skills.”

The state of Missouri has created a juvenile justice model that has many of these attributes, and the system is now viewed as a national model. Juvenile inmates are

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164 Jailing Juveniles, supra note 156, at 13; see also The Rest of their Lives, supra note 156, at 75.
165 Jailing Juveniles, supra note 156, at 10 (also noting juveniles in jail are 19 times more likely to commit suicide than adults in the same general population). Id.
166 139 S.Ct. 2011, 2032.
168 Scott and Steinberg, supra note 163, at 65.
169 Id.
170 Id. at 64-65.
kept in small facilities, as close to their home as possible so that they can maintain family connections. The staff 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.”

While New York state’s youth prisons have an 89% 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.” Despite what some skeptics have said about the ability to replicate Missouri’s model, Missouri’s youth prisons serve juveniles from racially-diverse, urban crime areas; they contend with mental illness; and even very serious offenders are treated with the same model of respect and rehabilitation.

Missouri’s youth prisons should serve as a model for states in the wake of *Graham* trying to create conditions of confinement that will enable maturity, rehabilitation and fitness to re-join society.

In sum, as state judges and lawmakers struggle with the task of implementing *Graham* on the ground, they should bear in mind several points: 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...

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174 Id.
175 Id.
retribution to comport with the spirit of *Graham*; and 4) long-term legislative and executive action are necessary in order to make the promise of *Graham* a reality.

**Part III: Graham Going Forward**

In Part II of the Paper, I addressed the many urgent collateral issues that flow from the *Graham* decision, and I advocated for courts and legislators to implement *Graham* in specific ways immediately. In this last Part of the Paper, my goal is to telescope back out and address two issues related to the *Graham* decision in the longer-run. Specifically, in this Part of the paper, I suggest that: 1) *Graham* ought to be viewed in the context of our national criminal justice failings; and 2) *Graham*, read alongside the Supreme Court’s 2011 decision in *Brown v. Plata*,\(^{176}\) suggests that the Supreme Court may be willing to tackle criminal justice failings on more than a case-by-case basis.

1. *Graham* as a Symptom of Broader Criminal Justice Failings

   If the decision is to generate meaningful reform in the long-run, *Graham* needs to be seen for what it is: a symptom of our nation’s ongoing criminal justice failings, in particular our over-reliance on incarceration and our entrenched indigent defense crisis.

   To begin, our nation leads the world in its rate of incarceration.\(^{177}\) There are more than 9.8 million people incarcerated worldwide, and 2.29 million are in the United States.\(^{178}\) Florida – where most of the *Graham* 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,

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\(^{176}\) 131 S.Ct. 1910 (2011).


life imprisonment, and prison conditions.” And 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 United States Supreme Court requiring a prison population reduction. 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. 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. We are a nation that relies far too heavily on the blunt instrument of incarceration to address criminal justice failings that require holistic reform.

At the same time, our judicial system continues to tolerate ongoing, systemic violations of the poor person’s right to counsel. Graham again is a good case in point. More than eighty percent of those who are prosecuted by the states are poor. Likewise, most of the Graham inmates in Florida were poor and were represented by public defenders. At every stage in the criminal process, people of color fare worse than

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182 Id.
185 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
white people. Similarly, when one looks at the profile of the *Graham* inmates in Florida, one has to wonder whether racial discrimination played a role in their 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. Of the 96 inmates for whom they have files, 92% are black or Hispanic.

There is much more to the stories of these inmates than their race and class. And yet, these statistics reveal a great deal. The statistics say that *Graham* is more than a potentially significant Eighth Amendment case or a hopeful case for juvenile justice advocates. At the end of the day, *Graham* also needs to be seen as an indictment of our nation’s indigent defense system. The juveniles who were sent to die in prison in Florida for non-homicide crimes were children at the time of their crimes. Many of them were mentally-ill and enrolled in special education classes. It now appears that at least one of them was borderline mentally-retarded. When one asks how these juveniles received these excessive sentences – excessive for the world and even excessive for this nationwide, usually resulting in sub-par representation. See, e.g. BUREAU OF JUSTICE STATISTICS, *County-based and Local Public Defender Offices, 2007* (noting that 73% 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., See John Kelly, *Will Ruling Save All Lifers?* June 1, 2010, Youth Today, available at http://www.youthtoday.org/view_article.cfm?article_id=4031 (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.”).

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).


186 Id.
187 Id.
188 Id.
189 Id.
nation – one has to recognize that the answer lies as much in the quality of their representation as it does in a Florida statute that authorized their sentence.\footnote{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 these cases? How many witnesses, if any, were put on to offer mitigation evidence at sentencing? While this paper 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.}

2. *Graham* and *Plata*: Change Afoot?

In thinking about *Graham* in the long-run, it may also be useful to view it alongside the Supreme Court’s recent decision in *Brown v. Plata*\footnote{131 S.Ct. 1910 (2011).}. Next to *Plata*, *Graham* looks like much more than a decision about a particular sentencing practice or group of offenders; instead the two decisions hint at a Supreme Court ready to address extreme criminal justice failings on more than a case-by case basis.

In *Brown v. Plata* the Supreme Court reviewed 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 violations.\footnote{*Id.* at 1922-1923.} 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.\footnote{Id. at 1926 (citing the two consolidated actions in the case, one of which was filed in 1990 and one of which was filed in 2001).} The conditions at issue in California’s prisons were – and continue to be – dire. At bottom, there are simply too many people in the prison system: “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.”\footnote{Id. at 1923-1924.} Because of this overcrowding, the Court found that the state simply could not provide...
sufficient mental health and medical services. 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.”196 At the same time, inmates with serious medical conditions must endure similar waits and conditions: “A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12–by 20–foot cage for up to five hours awaiting treatment.”197 Some prisons in California’s system had a backlog of up to 700 prisoners waiting to see a doctor.198 In light of this evidence and the case’s procedural history, in a 5-4 opinion, the Court upheld the prison reduction order.

As in Graham, Justice Kennedy wrote for the majority, and was joined by the four liberal Justices on the Court. While the Plata opinion arguably lacks the aspirational tone of Graham, which spoke of hope, redemption and self-reflection, the two opinions share several important common 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 recognizes that Florida is free to devise its own sentencing practices – even if they stand practically alone in this country and in the world at large in doing so – but those practices must comport with the Constitution. In Plata, again, the Court recognizes that California is free to make criminal justice decisions internally – such as incarcerating technical parole violators and employing its three strikes laws – but it must also comport with the Eighth Amendment in its conditions of confinement. 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. Politicians – or for that matter elected state judges – do not win

196 Id. at 1924.
197 Id. at 1925.
198 Id. at 1933.
elections by ensuring that 17 year old armed robbers have a shot at redemption. Quite the contrary: the evidence suggests that elected judges (like all elected officials) enforce tough-on-crime positions in order to earn voter approval. Likewise, elected judges and lawmakers do not garner funds and votes by promoting adequate health care and mental health services for 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 the prison system’s complicity in juvenile inmates’ failure to rehabilitate: “A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. . .it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. A categorical rule against life without parole for juvenile non-homicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.” Similarly, in *Plata*, not only does Justice Kennedy’s opinion document several representative stories of health care failures that caused serious harm or death, but his opinion also includes photographs of how dire California’s

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201 See, e.g., 131 S.Ct. 1910, 1924 (“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.’ ”); 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.”).
prison reality has become. If nothing else, Justice Kennedy’s opinion in both cases
shines a light on social problems that otherwise may receive little to no attention.

Third, both opinions simultaneously 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 discussed by
Justice Thomas’s dissent and in this Paper throughout. Similarly, Kennedy’s opinion in
Plata makes clear that California’s “extensive and ongoing constitutional violation
requires a remedy, and a remedy will not be achieved without a reduction in
overcrowding.” Yet, the majority opinion also cautions the district court to “exercise
its jurisdiction to 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.” It remains to be seen whether the balance struck in these decisions is a
manageable one, but the attempt at balance is there nonetheless.

Finally, both the Graham and Plata decisions force states to internalize more fully
the costs of their crime and sentencing polices. In the case of Graham, as I have argued
in Part II of this Paper, the opinion 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. If taken seriously, that requirement is
expensive, and it may be expensive enough to compel Florida lawmakers to reconsider

\(^{202}\) Id. at 1949-1950 (images show severe overcrowding in makeshift “cells” and “dry cage/holding cell for
people waiting for mental health crisis bed.) \(^{203}\) Id. For an interesting piece on the question 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

\(^{204}\) Id. at 1947.

\(^{205}\) See supra notes ___-___ and accompanying text.
the wisdom of transferring juveniles to adult court or to give Florida judges pause before
they sentence a juvenile offender to decades in prison. In California, the Plata decision
may have similar repercussions. Prison wardens forced to actually treat seriously ill and
mentally unstable inmates may recognize that the inmate population has grown out of
control – that the state’s appetite for incarceration far exceeds its budget. Lawmakers
may realize that building new prisons – especially when those prisons have to include
sufficient health care facilities and personnel – is not a panacea and that real statutory and
policy reform are necessary.

Recent polling data suggests that most Americans support juvenile justice reform.
A 2007 study by the Center for Children’s Law and Policy reports that “70 percent of the
general public agree that incarcerating youthful offenders without rehabilitation is the
same as giving up on them.”206 Moreover, nine out of ten people surveyed believe that
“almost all youth who commit crimes have the potential to change.”207 Another report
from the same year by the Research Network on Adolescent Development and Juvenile
Justice (ADJJ) found that surveyed people are “more willing to pay additional taxes for
rehabilitation than they are for incarceration.”208 The Graham decision validates these
sentiments: a majority of the Court also believes that (at least non-homicide) juvenile
offenders deserve the chance to rehabilitate themselves. The Plata decision bolsters the
case for reform even further by suggesting that those who are seeking meaningful
criminal justice reform may have an ally in the Supreme Court – at least where the
violations are long-standing and extreme.

206 Public Willing to Pay More for Rehabilitation of Juvenile Offenders, available at
http://www.macfound.org/site/apps/nlnet/content3.aspx?c=L7LXJ8MQRH&b=4294243&ct=4619969;
need actual report
207 Id.
208 Id.
Conclusion

In this Article, I have analyzed the thorny legal and policy issues that flow from the Court’s decision in *Graham* and that demand immediate answers. In the heart of the paper, I have attempted to provide a blueprint for state judges and legislators who are implementing *Graham* on the ground. Specifically, I have argued 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 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 the promise of *Graham* a reality. Finally, I have also suggested that going forward *Graham* ought to be viewed as a symptom of our ongoing criminal justice failings, and that the opinion may be a signpost of hope for those who seek to address these failings.