THE PARADOX OF *GRAHAM V. FLORIDA* AND THE JUVENILE JUSTICE SYSTEM

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INTRODUCTION

The theories underlying the juvenile justice system in the United States have undergone significant developments since the early twentieth century. It is only recently that the Supreme Court has analyzed how these theories and the U.S. Constitution comport with the ways in which states punish youth after their cases are adjudicated. In *Roper v. Simmons*[1], *Graham v. Florida*[2] in 2010, and *Miller v. Alabama*[3] in 2012, the Court held that the Constitution forbids sentencing youth under the age of eighteen to death (*Roper*), forbids life without parole (LWOP) for youth convicted of nonhomicide offenses (*Graham*), and forbids mandatory LWOP for youth convicted of any offense (*Miller*). *Roper* followed a series of Supreme Court cases categorically banning the death penalty for certain classes of defendants;[4] *Graham*, though, marks the first time that the Court has held a non-death-penalty sentence to be categorically unconstitutional when applied to a specific group.[5] As a result, juvenile justice advocates have hailed *Graham* as a "landmark,"[6] "pivotal,"[7] "revolutionary,"[8] and "game-changing"[9] case, and its influence continues with the recent expansion of its holding in *Miller*.

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1. 543 U.S. 551 (2005).

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

3. 132 S. Ct. 2455, 2469 (2012), *rev'g* 2011 Ark. 49 (2011) *and* 63 So. 3d 676 (Ala. Crim. App. 2010).

4. *See Roper*, 543 U.S. at 559–61 (citing cases categorically banning the death penalty for certain classes of convicts).

5. *See* Jackson v. Norris, 2011 Ark. 49, at 4–5 (2011), *rev'd* Miller v. Alabama, 132 S. Ct. 2455 (2012) ("The Supreme Court's decision in *Graham* marked the first time the Court elected to extend a categorical ban on a particular type of punishment in a case that did not involve the death penalty.").

6. John Evan Gibbs, Note, *Jurisprudential Juxtaposition: Application of* Graham v. Florida *to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 957 (2011).

7. Leslie Patrice Wallace, *"And I Don't Know Why it is that You Threw Your Life Away": Abolishing Life Without Parole, the Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for A Second Chance*, 20 B.U. PUB. INT. L.J. 35, 47 (2010).

8. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 102 (2010).

9. Michelle Marquis, Note, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 Loy. L.A. L. REV. 255, 288 (2011).

Yet, in *Graham*, *Miller*, and *Roper*, the Court justified its holdings largely by demonstrating how little impact they would have beyond the specific cases at issue. In sharp contrast to the extension of the right to counsel to juveniles in *In re Gault*,[10] one of a series of Warren Court due process holdings contributing to the Court's image as a "countermajoritarian savior,"[11] *Graham*, *Miller*, and *Roper* emphasized the existence of a majoritarian "national consensus" as a prerequisite to determining that the challenged sentencing practices violated the Eighth Amendment.[12] If the sentences forbidden by *Graham* and its progeny were already "most infrequent,"[13] what accounts for the transformative legal value so many ascribe to the holding?

In this Article, I posit that *Graham* is one of a handful of criminal justice cases that, by their logic and principles taken at face value, should be systemically transformative, but are paradoxically limited by their own transformative potential. This paradox emerges in the context of "prison cases"[14] when the Supreme Court is pressured to stray from its routine deference to state prison and juvenile justice officials because such deference risks directly exposing macro-level contradictions at the core of either the prison/juvenile justice system or the Court's prison/juvenile justice jurisprudence. In most cases, the contradiction between rights and the state justification for abridging them is particularized to the realities within a given facility or locality—in those cases, the prisoner will typically lose under the Court's traditional and deferential doctrines.[15] In "paradox cases" though, certain fundamental rights or core democratic beliefs categorically conflict with the reality of the prison/juvenile justice system as a *whole*—in these cases, the prisoner will typically win, as any other result would risk bringing those destabilizing and delegitimizing

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10. *In re* Gault, 387 U.S. 1, 34–36 (1967).

11. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 67 (1996) (disputing the popular characterization of Supreme Court judicial review as a countermajoritarian function).

12. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) ("The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue.") (quoting Roper v. Simmons, 543 U.S. 551, 552 (2005)); Miller v. Alabama, 132 S. Ct. 2455, 2470–71 (2012) (citing *Graham*, 130 S. Ct. at 2022).

13. *Graham*, 130 S. Ct. at 2023. The Court further cited a study indicating that, nationally, "there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses." *Id.*

14. I use the term "prison cases" to describe cases adjudicating the substantive rights of prisoners, both adult and juvenile. These substantive rights are those related to either treatment of confined prisoners, both post-conviction and pre-trial, or to judicial determinations of what that confinement will entail, as in *Graham*.

15. For the most applicable doctrines that apply to both adult and youth prisoners, see *infra* Part IV, discussing the *Turner* test and the Eighth Amendment conditions test.

contradictions to the forefront. But the Court's reasoning supporting such victories for prisoners is quickly reined in and narrowed, preserving the status quo and frustrating further reform efforts. I argue that *Graham* is such a case, one that creates a significant categorical rule but is premised on reasoning bearing little relationship to the reality of the juvenile justice system—a disjuncture that impedes the application of such reasoning to other areas in critical need of reform.

To be clear, this analysis does not contest or discourage the calls made by scholars and advocates to "seize on *Graham*'s transformative potential and push for additional reform,"[16] such as reform based on challenging the constitutionality of juvenile transfer laws,[17] practices that impede rehabilitation for juvenile offenders,[18] and adult sentencing policies.[19] Rather, this Article provides a descriptive assessment of *Graham* by situating it among other cases that I argue resulted from similar forces and exposed similar contradictions within the criminal justice system. Normatively, this Article contributes to the body of literature calling for a broad application of *Graham*, but it does so while recognizing that a consistent commitment to *Graham*'s principles would require a systemic transformation of juvenile justice law, including the potential release of many incarcerated youth, as well as placing demands on states and the political branches of government that are far more onerous than appears contemplated by *Graham*'s deferential language.[20] That is, the *Graham* Court was able to support its categorical sentencing rule with lofty reasoning and idealized assumptions because implementing the rule bears little economic or political cost. Holding the Court to its theory as properly applied to the *conditions* within juvenile justice systems, though, would entail economic and political costs so substantial that they virtually ensure such an application to be a non-starter.

In Part I, I discuss the notion of a right to rehabilitative treatment in the juvenile justice system, as youth's distinctive amenability to rehabilitation was a central factor in the *Graham* Court's reasoning. In Part II, I review the findings in *Graham*, *Roper*, and other sources that emphasize the distinctive characteristics of youth as compared to adults—differences which are at the heart of those two cases—and the strategies likely to be employed by advocates seeking to extend those cases to achieve further

16. Marquis, *supra* note 9, at 288.

17. Arya, *supra* note 8, at 103.

18. *See* Wallace, *supra* note 7.

19. *See* Gibbs, *supra* note 6.

20. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (stating that it is left to the states "to explore the means and mechanisms for compliance" with *Graham*'s mandate for youth convicted of nonhomicide offenses to have "some meaningful opportunity to obtain release").

juvenile justice reform. In Part III, I apply these findings to the purported goal of rehabilitation in the specific areas of mental health, education, and social needs. I first look at prevailing standards and best practices for these areas. I then look at how services in these areas are operationalized today, leading to the question of whether the system is triggering youth's "capacity for change"[21] in the direction of rehabilitation or regression. Finally, in Part IV, I explore the contradictions in *Graham* and the juvenile justice system by using two influential prison cases that held for the prisoner-plaintiffs as points of comparison, and by examining legal areas in which courts and Congress have made no distinction between youth and adult prisoners despite the apparent applicability of *Graham*'s logic. I then use one such area where no distinction is made—the Prisoner Litigation Reform Act (PLRA)[22]—to propose adapting the Act's provision for prisoner release to the unique issues and the realities of the juvenile justice system. In doing so, I potentially reconcile the paradox of *Graham* through a practicable realization of its underlying theory.

I. THE MEANING OF "MEANINGFUL OPPORTUNITY"

"A State . . . must impose a sentence that provides some *meaningful opportunity* for release based on demonstrated maturity and rehabilitation."[23]

"[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."[24]

Graham v. Florida's primary holding has what can be construed as a formalist component and a functionalist one. The formalist component is the categorical prohibition on sentencing convicted defendants to LWOP for nonhomicide crimes that were committed before the defendant turned eighteen.[25] The functionalist component is demonstrated by the requirement that states provide members of this class with "some meaningful opportunity for release based on demonstrated maturity and rehabilitation."[26] In other words, a judge sentencing a youth to life imprisonment, but not specifically

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21. *Id.* at 2032.

22. 18. U.S.C. § 3626(a)(3)(E)(1) (2006). The PLRA has been held to apply to juveniles in the same way it applies to adults, including its key provisions about exhaustion, Lewis v. Gagne, 281 F. Supp. 2d 429 (N.D.N.Y. 2003), attorneys' fees, Christina A. v. Bloomberg, 315 F.3d 990, 995 (8th Cir. 2003), and other general features. *See* Alexander S. v. Boyd, 113 F.3d 1373 (4th Cir. 1997) (discussing whether Congress intended the language of the PLRA to include juvenile detention facilities).

23. *Graham,* 130 S. Ct. at 2016 (emphasis added).

24. Sentencing Reform Act of 1984, 18 U.S.C. § 3582(a) (2006).

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

26. *Id.*

LWOP, in a state with no parole system is unconstitutional despite complying with *Graham*'s formalist language. The Court did not clarify or expand upon the definition of "meaningful opportunity," but rather left it to the states to "explore the means and mechanisms for compliance."[27] There are several interpretations of the Court's mandate that would plausibly conform to the Court's language but, functionally, would undermine the Court's intent and the articulated constitutional right. For example, a court would surely find unconstitutional a state parole system that raises the threshold for what constitutes "demonstrated maturity and rehabilitation" beyond what could reasonably be considered a meaningful opportunity for release.[28] Thus, the first step to interpreting *Graham* beyond its formal holding regarding sentencing is to ascertain the meaning of "meaningful opportunity."

The Court's reluctance to specify the means for complying with *Graham*'s categorical rule is unsurprising given federal courts' traditional "hands-off attitude toward problems of prison administration"[29] and the prominent role that federalism and separation of powers play in cases involving incarceration and sentencing.[30] But by casting rehabilitation as the basis of the meaningful opportunity for release, the *Graham* Court did not completely leave the means of compliance open to discretion. Much like *Roper*,[31] *Graham* is seen as revitalizing the Eighth Amendment requirement of proportionality between a sentence and the crime;[32] some also see *Graham* as revitalizing what several federal courts once declared to be a "constitutional right to rehabilitative treatment"[33] in the juvenile justice system.

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27. *Id.*

28. For example, denying parole solely based on the seriousness of the offense committed prior to the parole applicant's eighteenth birthday might be unconstitutional under *Graham* if the applicant indisputably demonstrates maturity and rehabilitation and meets all other parole criteria.

29. Procunier v. Martinez, 416 U.S. 396, 404 (1974). In language that would influence virtually all subsequent prison cases, the Supreme Court stated:

> Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Id. at 404–05.

30. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 364 (1996) (Thomas, J., concurring) ("Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.").

31. 543 U.S. 551 (2005).

32. *See, e.g.*, Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 94 (2010) ("The Supreme Court's recent decision in *Graham v. Florida* may indicate that proportionality is alive in some circumstances or has been even given new life.").

33. Pena v. N.Y. State Div. for Youth, 419 F. Supp. 203, 204, 206 (S.D.N.Y. 1976) ("While none of these cases required the Court to address itself squarely to the question of the juvenile's right to rehabilitative treatment, the conclusion which this court draws from a reading of those cases is that such

A. Past and Present Notions of a Right to Rehabilitative Treatment

In addition to its mandate of a "meaningful opportunity for release based on . . . rehabilitation,"[34] *Graham* held that it is "not appropriate" for a state to "deny[] the defendant the right to reenter the community [by] mak[ing] an irrevocable judgment about that person's value and place in society."[35] These two concepts—the opportunity for release and the opportunity for reentering the community—appear distinct, with the latter indicating not just freedom from incapacitation, but also meaningful "reconciliation with society"[36] as a citizen. Further, of all the reasons the Court provides for treating youths differently than adults for Eighth Amendment proposes, the Court found the potential for rehabilitation to be the most critical.[37] For *Graham*'s holding to apply in a principled way, I agree with Sally Terry Green that states' juvenile justice "policies and sentencing procedures must return to the rehabilitative model . . . in order to comply with *Graham*'s constitutional restraints."[38] Accepting Green's assertion for states that allow life sentences for youth, the obvious question would be: What form and level of rehabilitative treatment suffices to constitute a meaningful opportunity? For the purposes of this Article, I will assume a standard that is relatively low (though, relative to the realities of the system, quite high, as discussed in Part III): To comply with *Graham*, involvement in the juvenile justice system must not *impede* a child's rehabilitation. In other words, policies that either promote or have no effect

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a right does exist . . . . Because [the facility] is a part of the juvenile justice system of the State of New York, it is the conclusion of this court that the boys placed there have a constitutional right to rehabilitative treatment."). *See also* Manney v. Cabell, 654 F.2d 1280, 1284 n. 5 (9th Cir. 1980) ("There is also some authority that there is a constitutional right to rehabilitative treatment for the juveniles."); Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) ("We hold that on the record before us the district court did not err in deciding that the plaintiff juveniles have the right under the 14th Amendment due process clause to rehabilitative treatment." (footnote omitted)); Santana v. Collazo, 714 F.2d 1172, 1176 (1st Cir. 1983) ("A number of courts have found that juveniles involuntarily incarcerated have a right to rehabilitative treatment.").

34. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

35. *Id.*

36. *See id.* at 2032 ("Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

37. *See infra* notes 60, 61 (discussing the Court's finding that, theoretically, a youth can have sufficient maturity and commit a severe enough crime to make LWOP proportionate, but that the constitutionally dispositive factor would be identifying the youth's "capacity for change").

38. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 2 (2011). One qualification to this is that it would only apply regarding juveniles sentenced to life in prison. However, it seems fair to assume that, for example, a juvenile detention center housing youth sentenced to life would not reform its policies to promote rehabilitation for those youth only while walling off such reforms for youth sentenced to, say, a maximum of twenty years.

on a child's ability to demonstrate maturity and rehabilitation comply with *Graham*; policies that make it more difficult for a child to demonstrate maturity and rehabilitation than it would be without system involvement do not constitute a meaningful opportunity, and thus do not comply with *Graham*.

Green's argument that *Graham* compels returning to a rehabilitative model is premised on the original function of the juvenile justice system: to separate youth incarceration facilities and courts from those designed for adults in order to serve the best interests of youth offenders.[39] Focusing on children's interests became a purported goal of Progressive Era reformers,[40] who by the turn of the twentieth century realized that "putting children in adult prisons did not rehabilitate, but instead created the next generation of criminals, [which] led to the creation of a separate juvenile court system."[41] Thus, Progressive Era juvenile justice reformers sought "rehabilitation and treatment over punishment as the most effective means of dealing with juvenile delinquents."[42]

Through the twentieth century, the juvenile justice system increasingly departed from the goal of rehabilitation for youth offenders, replacing it with an emphasis on punishment, retribution, and a tolerance of harsh conditions of confinement.[43] It is important, though, to contextualize these developments and not overstate the system's evolution. While there has been a considerable shift between the Progressive Era and today regarding the procedure[44] and substance[45] of the juvenile justice system and societal

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39. *See* Charlyn Bohland, *No Longer A Child: Juvenile Incarceration in America*, 39 CAP. U. L. REV. 193, 195 (2011) ("[E]arly juvenile courts had a benevolent mission—to save and protect children.").

40. This goal, however, was not shared by all and was particularly frustrated by judicial intervention. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (striking down a congressional statute that banned the sale in interstate commerce of products made from child labor); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (striking down a congressional statute imposing a tax on companies using child labor).

41. Bohland, *supra* note 40, at 195.

42. Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1306 (2000). *See also* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 512 (1984) ("In the late 1800's, however, shifting attitudes toward children and an emerging sense of unease with retributive punishment heightened the effect of such [harsh] practices in the legal and public imagination and cleared the way for a radical transformation in the law's treatment of children.").

43. *See, e.g.*, Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821, 821–22 (1988) ("The shift in emphasis from treatment to punishment is also illustrated in dispositional decision making processes and the harsh reality of juvenile correctional confinement."); PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW (1999); Marquis, *supra* note 9, at 258.

44. *See, e.g.*, Walkover, *supra* note 42, at 523 ("The Supreme Court's transformation of procedural aspects of juvenile proceedings has had a profound, if less direct, effect on the conceptual foundations of positive juvenile justice law. Spurred by *Gault* and its progeny to rewrite juvenile

conceptions of childhood,[46] it may be the means that have transformed in response to changing social and material conditions, while the ends of social control remain constant.[47] Recognizing this consistency is necessary for understanding the obstacles to reform as well as the retrenchment of social control measures that are likely to follow rights-protective reforms in the juvenile justice system.

In the period between *In re Gault*[48]—the case often viewed as officially marking the end of the Progressive Era's model of juvenile justice—and *Graham*, rehabilitation for youth offenders did not disappear as an aspirational goal, as some judges and scholars in this period declared rehabilitative treatment to be a constitutional right.[49] In fact, in 1972, a federal court provided a lengthy discussion of legal developments supporting the assertion that:

> A new concept of substantive due process is evolving in the therapeutic realm. This concept is founded upon a recognition of the concurrency between the state's exercise of sanctioning

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procedural law, courts and legislatures have largely rethought the problems posed by juvenile delinquency."); Feld, *supra* note 45, at 821 ("The Progressives envisioned a procedurally informal court with individualized, offender-oriented dispositional practices. The Supreme Court's due process decisions [starting in the 1960s] impose procedural formality on the juvenile court's traditional, individualized-treatment sentencing schemes.").

45. *See, e.g.*, Feld, *supra* note 43, at 836–37 (describing the shift from Progressive Era juvenile courts imposing flexible, indeterminate sentences aimed at rehabilitation based on the individual offender's characteristics to modern courts' imposition of fixed sentences premised on the notion that a "juvenile's personal characteristics or social circumstances do not provide a principled basis for determining the length or intensity of coercive intervention and that 'only a principle of proportionality . . . provides a logical, fair, and humane hinge between conduct and an official, coercive response'").

46. *See* NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 67–68 (1982); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court,* 69 N.C. L. REV. 1083, 1084 (1991) (examining the development of the social construction of childhood and the contingent developments of juvenile courts).

47. For the ends of social control in the Progressive Era, see, for example, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 56 (1999) (describing juvenile courts during this era as "expansive agencies of coercive social control that used their discretionary powers primarily to impose sanctions on poor and immigrant children"). For the ends of social control in the modern juvenile justice system, see, for example, Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 148 (1997) ("The emphasis today is on social control—on protecting society from the harms inflicted by young offenders—and the clear trend has been toward imposing penalties on adolescents . . . that approximate sanctions imposed on adults."). Social control often operates as subtext, but at least one court has made its function in the juvenile justice system explicit: "The primary purpose of juvenile court intervention in delinquency cases is social control; and when one interest must predominate, it should be that of the public." *In Re* Seven Minors, 664 P.2d 947, 951 (Nev. 1983).

48. 387 U.S. 1 (1967).

49. Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for A Historical Promise*, 68 TEMP. L. REV. 1791, 1792 (1995); Andrew D. Roth, Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286 (1985).

> powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists.[50]

It is clear that one need not reach back to the Progressive Era to find the foundation on which to build *Graham*'s right to rehabilitative treatment for youth offenders.

II. THEORIZING *GRAHAM*: WHY THE DISTINCTIVE CHARACTERISTICS OF YOUTH MATTER

Today's juvenile justice reform efforts have found the most traction in the argument that the differences between children and adults make certain punishments unconstitutional when applied to children. The Supreme Court has used this premise to prohibit the death penalty, first for defendants who committed their crime before turning sixteen,[51] and then for those who committed their crime before turning eighteen.[52] In *Graham*, the Court prohibited LWOP for crimes committed before the age of eighteen.[53] Below, I review the Court's approach to and analysis of the constitutionally salient differences between children and adults, findings that contextualize my assessment of what states must provide in order to comply with the right to rehabilitative treatment.

In *Graham*, the Court divided its potentially relevant precedents into cases in which the Court considered "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive,"[54] and "cases turning on the characteristics of the offender."[55] The Court found the second category to represent the appropriate analysis, situating *Graham* as conceptually similar to *Roper* and *Atkins v. Virginia*, which held that executions of mentally retarded criminals were "'cruel and unusual punishments' prohibited by the Eighth Amendment."[56] While *Graham* and

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50. Martarella v. Kelley, 349 F. Supp. 575, 600 (S.D.N.Y. 1972) (quoting Nicholas Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L. J. 848, 870 (1969)).

51. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

52. Roper v. Simmons, 543 U.S. 551, 568 (2005).

53. Graham v. Florida, 130. S. Ct. 2011, 2030 (2010).

54. *Id.* at 2021 (noting that, "[u]nder this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check.").

55. *Roper*, 543 U.S. at 551.

56. Atkins v. Virginia, 536 U.S. 304, 307 (2002).

Roper employed reasoning echoing that in *Atkins*,[57] there is an important distinction that may be overlooked when considering the potential for broadly applying *Graham's* holding. In *Atkins*, the rule is concrete and the threshold is discretionary: States have a certain amount of discretion to define "mentally retarded," but that classification is shorthand for all those characteristics that make the death penalty disproportionately severe and therefore unconstitutional. In *Graham*, the rule is prophylactic and functionally discretionary while the threshold is concrete: States have no discretion to define the class, but inclusion in the class does not mean, by definition, that a sentence of LWOP is cruel and unusual. It only means that the risk that it will be cruel and unusual is too high to allow judges or lawmakers to have that sentencing discretion. The discretion they do have, though, is in the ambiguous task of deciding what, besides the formal sentence of LWOP, unconstitutionally negates a meaningful opportunity for release.[58]

Two aspects of this distinction in *Graham* are important to my analysis and the prospects for broader reform. First, unlike prohibitions against executing mentally retarded defendants, the *Graham* prohibition would not exist but for the impossibility of, "with sufficient accuracy[,] distinguish[ing] the few incorrigible juvenile offenders from the many that have the capacity for change."[59] Second, the only conceptually dispositive factor for the Court appears to be amenability to rehabilitation—"the capacity for change."[60] The first aspect represents the potential for retrenchment based on the nebulous

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57. *See id.* at 318 ("[B]y definition [mentally retarded defendants] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . . [T]here is abundant evidence that they often act on impulse . . ., and that in group settings they are followers rather than leaders. Their deficiencies . . . diminish their personal culpability.").

58. *See Graham*, 130 S. Ct. at 2031–32 (conceding that the maturity of some youth offenders and the severity of their crime might make death or LWOP constitutionally proportionate, and therefore permissible, sentences, but that there is an overall "unacceptable likelihood" of judges or juries inaccurately weighing the mitigating "differences between juvenile and adult offenders" and sentencing youth to death or LWOP "despite insufficient culpability" (quoting *Roper*, 543 U.S. at 572–73)).

59. *Graham*, 130 S. Ct. at 2032. *See also id.* at 2043 (Thomas, J., dissenting) ("The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the 'moral' question of whether this sentence can ever be 'proportionat[e]' when applied to the category of offenders at issue here.").

60. In fleshing out the theory underlying its categorical rule, the *Graham* Court in the quote above, *id.*, seems to find, or at least assume in arguendo, that there exists a rare objective fit between maturity and depravity that can conceptually justify LWOP for youth. However, regardless of the extent of maturity and depravity, the "capacity for change" is the clearest antithesis to a conceptually sound sentence of LWOP. Regarding the death penalty, it might be that the ban is theoretically prophylactic as applied to sixteen and seventeen year olds but *per se* cruel and unusual as applied to those under sixteen. *Compare Roper*, 543 U.S. at 572–73 (employing the same proportionality reasoning as in *Graham* for youth under eighteen) *with* Thompson v. Oklahoma, 487 U.S. 815, 832 (1988) (premising its death penalty ban for youth sixteen and under primarily on the "unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community").

concept of proportionality. This rationale allows the Court to distinguish *Graham* more easily from future challenges than if the rationale were premised on the conclusion that LWOP for juveniles is, for example, "abhorrent to the conscience of the community," as the Court stated when banning the death penalty for youth under the age of sixteen.[61] The second aspect, the emphasis on rehabilitative capacity, is explored below.

The Supreme Court's Constitutionalization of Difference

The distinctive characteristics of youth are at the heart of *Graham*'s paradox. The characteristics discussed below support *Graham*'s holding regarding sentencing, but the reasoning based on what these characteristics imply sharply contradicts with the realities of the juvenile justice system. As such, compliance with *Graham* would entail a far more transformative project than simply revising sentencing rules.

Graham adopted and expanded upon the findings in *Roper*[62] to support the conclusions that LWOP cannot be justified by any sound penological goals and that juveniles' diminished culpability makes them less deserving of the most severe punishments.[63] First, youth lack maturity, a sense of responsibility, and an understanding of long-term consequences, making criminal activity more likely the result of impulsive decisionmaking than the kind of premeditation necessary for the highest levels of criminal culpability.[64] Second, youth are less capable than adults of resisting negative influences and peer pressure, or of controlling their environments to avoid such pressures.[65] Third, and most importantly, a young person's character is still developing, meaning that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[66] The *Graham* Court further noted how these characteristics, combined with a mistrust of the "adult world," cast doubt not just on the substantive fairness of the sentence, but also the procedural fairness of criminal proceedings for

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61. *Thompson*, 487 U.S. at 832; *contra Graham*, 130 S. Ct. at 2021 ("For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime.").

62. The Supreme Court has acknowledged for decades that the reasoning behind *Roper* also applies to juveniles. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) (striking down a parental consent restriction on abortion for minors and recognizing that prior Court "rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them").

63. Graham v. Florida, 130. S. Ct. 2011, 2028 (2010).

64. *Id.* at 2026 (quoting *Roper*, 543 U.S. at 569).

65. *Id.* (quoting *Roper*, 543 U.S. at 569).

66. *Id.* (quoting *Roper*, 543 U.S. at 570).

juveniles in general.[67] One final point is a rationale that the Court does *not* adopt from earlier precedents: that "offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."[68]

III. PRACTICING *GRAHAM*: WHY THE DISTINCTIVE CHARACTERISTICS OF YOUTH MATTER

If compliance with *Graham*'s mandate for a "meaningful opportunity for release"[69] means that at a minimum, involvement in the juvenile justice system must not impede a child's rehabilitation efforts, it is necessary to ascertain what a system must do to meet this standard. Below, I use the *Graham* and *Roper* Courts' findings regarding the distinctive characteristics of youth to sketch out what compliance would entail. I then examine the current state of the juvenile justice system. These analyses reveal the profound transformation that would be necessary to close the gulf between what is currently done and what must be done under a principled and consistent application of *Graham*'s reasoning in states that permit life sentences with the possibility of parole for nonhomicide offenses.

A. Difference and Rehabilitation

The most important difference the Court recognizes between youth and adults—"the capacity for change"[70]—is also the one most in need of examination. It is also most contingent on the other characteristics, namely impulsivity and susceptibility to peer pressure. The crux of this analysis is that amenability to rehabilitation is the positive framing of the distinctive characteristic of youth; the converse framing is that youth are particularly

67. *Id.* at 2032 (noting that such mistrust could lead to an impaired defense when combined with the other factors). The Court's shift in focus here reflects the prophylactic nature of its categorical rule. Because cruel and unusual punishment is unconstitutional regardless of the fairness of the process—that is, the ends make the means inherently unfair—the Court's discussion about procedural disadvantage must be to support the need for preventative measures. At least one scholar has seized on this language as a potential basis for challenging the constitutionality of juvenile transfer laws under the Sixth or Fourteenth Amendments. Arya, *supra* note 8, at 133.

68. TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978). The Supreme Court adopted this language in multiple cases finding the death penalty unconstitutional as applied to the juvenile defendant. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Thompson v. Oklahoma, 487 U.S. 815, 834 (1988). Four dissents also used this language in 2002 to call for the categorical rule that would eventually be established in *Roper*. *See In re* Stanford, 123 S. Ct. 472, 473–74 (2002) (Stevens, J., dissenting) (arguing that the Court should reconsider its holding that individuals who committed a crime under the age of eighteen can be constitutionally executed).

69. *Graham*, 130 S. Ct. at 2016.

70. *Id.* at 2017.

amenable to regression and recidivism, with external conditions being the most important predictor of rehabilitation or regression.[71]

Recent studies indicate that within three years of release from juvenile correctional facilities, between 70 and 80 percent of youth are re-arrested; up to 72 percent in some states are found guilty of new offenses; and up to 62 percent in some states return to incarceration.[72] By contrast, the most recent figures from the Justice Department regarding adult prisoners indicate that, within three years of release from prison, 67.5 percent are re-arrested; 46.9 percent are found guilty of new offenses; and 25.4 percent return to incarceration.[73]

These discrepancies can be explained in part by the distinctive characteristics of youth generally and of youth involved in the juvenile justice system specifically, as well as by the current conditions in juvenile justice facilities. Below, I review the distinctive and interrelated characteristics of system-involved youth regarding mental health, educational, and social needs, all of which demand a sufficient level of services in order to not impede rehabilitation.[74]

1. Mental Health

In recent years, scholars, advocates, and state agencies have extensively studied the mental health needs of incarcerated youth, which may present the most significant obstacles to rehabilitation.[75] While data collection methodologies and definitions of mental health disorders vary, the prevailing view among experts is that "an overwhelming majority of [system-involved

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71. *Cf.* B.H. v. Johnson, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) ("Children are by their nature in a developmental phase of their lives and their exposure to traumatic experiences can have an indelible effect upon their emotional and psychological development and cause more lasting damage than many strictly physical injuries.").

72. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS 10 (2011).

73. *Recidivism*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (last revised Sept. 15, 2012), http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17.

74. *Cf.* Mary M. Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey,* 71 EXCEPTIONAL CHILDREN 339, 339 (2005) ("Many [incarcerated youth] enter juvenile correctional facilities with intense educational, mental health, . . . and social needs.").

75. *See, e.g.*, JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 1 (2006) *available at* http://ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf (expressing concern over the increase in youth with "significant mental health needs" in the juvenile justice system); GAIL A. WASSERMAN ET. AL., U.S. DEPT. OF JUSTICE, ASSESSING THE MENTAL HEALTH STATUS OF YOUTH IN JUVENILE JUSTICE SETTINGS (2004); Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review,* 34 J. AM. ACAD. PSYCH. & LAW 204 (2006); Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles,* 14 CAN. CHILD ADOLESCENT PSYCHIATRY REV. 26 (2005).

youths] have mental health needs,"[76] leading to a "high burden of [addressing] mental health need[s] in juvenile justice populations."[77] Recent studies have concluded that 70.4 percent of system-involved youth meet the criteria for at least one mental health disorder;[78] 90 percent report exposure to trauma;[79] and, in at least one state system, over half of incarcerated youth meet full or partial criteria for Post Traumatic Stress Disorder (PTSD).[80] Further, there are unique needs for the growing number of incarcerated girls[81] who, compared to boys, have a significantly higher prevalence of PTSD;[82] other mental or emotional health issues; and past experiences of abuse and suicide attempts.[83] Such statistics may not even reveal the true extent of the mental health crisis in the system due to the persistent "underidentification of children with psychiatric disorders."[84]

The implications of these mental health needs for the prospect of rehabilitation are stark. The majority of mental health disorders originate during adolescence and denial or delay of treatment "can lead to a more severe, more difficult to treat illness, and . . . co-occurring mental illnesses."[85] For system-involved youth, the most common mental health problems are directly related to their rehabilitative potential. For example, the large proportion of youth in the juvenile justice system who have been exposed to trauma are likely to manifest aggression, defiant behavior, and poor impulse control and to experience an impaired ability to think, learn, self-regulate, and undergo "healthy physical, emotional, and intellectual development."[86] Thus, "while effective childhood treatment can prevent adult disorders,"

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76. Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 576 (1998).

77. Gail A. Wasserman et al., *Psychiatric Disorder, Comorbidity, and Suicidal Behavior in Juvenile Justice Youth*, 37 CRIM. JUSTICE & BEHAVIOR 1361, 1361 (2010).

78. SHUFELT & COCOZZA, *supra* note 75, at 2.

79. JULIAN D. FORD ET AL., NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS 1 (2007) (noting that, for system-involved youth, trauma "overwhelms their ability to cope with what they have experienced").

80. *Id.* at 2 (discussing findings regarding the California Youth Authority).

81. Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9, 10 (2003).

82. FORD ET AL., *supra* note 79, at 2 (finding a 49 percent prevalence rate for girls as compared to 32 percent for boys).

83. ANDREA J. SEDLAK & KARLA S. MCPHERSON, U.S. DEPT. OF JUSTICE, YOUTH'S NEEDS AND SERVICES: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 6 (2010).

84. Quinn, *supra* note 74, at 343.

85. Press Release, Nat'l Inst. of Mental Health, Science News, Mental Illness Exacts Heavy Toll, Beginning in Youth (June 6, 2005), *available at* http://www.nimh.nih.gov/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml.

86. FORD ET AL., *supra* note 79, at 1; Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA J. SOC. POL'Y & L. 61, 68–69 (2004).

untreated childhood disorders "are associated with a wide range of adverse effects and worse prognoses in adulthood"[87] and can disrupt "critical aspects of brain and personality development."[88] The result for these youth is that, when they become adults, they may exhibit the same culpability-diminishing characteristics the Court has attributed to youth but without the constitutional protections afforded by *Graham* and *Roper*.

Serving the mental health needs of system-involved youth is an overwhelming burden for two primary reasons: the substantial percentage of youth entering the system with serious mental health needs[89] and the substantial likelihood that those needs will grow while incarcerated, as elaborated below.[90] At the outset, to prevent youth from demonstrating a regressive capacity for change, "all youth entering the juvenile justice system should undergo a standardized mental health screening to identify . . . psychiatric conditions, including traumatic stress disorders, which require immediate attention or further clinical assessment."[91] In fact, several courts have found such screening legally mandatory.[92] Further, mental health assessments and services must recognize the varying needs based on different levels of system penetration.[93] For one example of such varying mental health issues at different levels of incarceration, the lifetime suicide attempt rate was found to be 10.8 percent for youth at the intake level but 17.7 percent for youth at the detention level.[94]

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87. Hafemeister, *supra* note 86, at 70.

88. FORD ET AL., *supra* note 79, at 2.

89. While the studies cited have employed specific medical and psychological criteria for classifying and diagnosing mental health disorders, a lay observer might reasonably conclude that for youth removed from their homes and placed in prison-like facilities, the prevalence of mental health issues is invariably 100 percent. *Cf.* Hafemeister, *supra* note 86, at 63–64 ("[M]ental health needs can be defined either relatively narrowly to include only juveniles with a diagnosed mental illness, or relatively broadly to encompass all juveniles who demonstrate a dysfunctional psychological state even though it is not typically classified as a mental illness, such as anger, rage, alienation, and frustration.").

90. One additional factor outside the scope of this Article is the state's obligation to provide mental health care for all children in its custody, which, in addition to those in the juvenile justice system, includes children in foster care and in mental health hospitals. Combined, these children constitute "a significant percentage of all persons in state custody." K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 2 (1990).

91. FORD ET AL., *supra* note 79, at 3.

92. *See* Hafemeister, *supra* note 86, at 111 (reviewing court holdings and state statutes mandating mental health screening for youth at various points in the incarceration process and under various circumstances).

93. *See* Wasserman et al., *supra* note 77, at 1370 ("Since both the burden and complexity of those [mental health] needs increase with system penetration, justice authorities need to consider this when deriving assessment protocols and addressing clinical staffing needs, although evidence suggests that they do not do so consistently.").

94. *Id.* at 1366.

2. Education

The topic of education permeates all discussion of juvenile justice, and with good reason. The intersection of the prison system with school discipline practices[95] and educational quality[96]—particularly regarding children with learning disabilities[97]—is a critical point of focus for ascertaining the nature of the overall U.S. "incarceration crisis."[98] For this discussion, the salient issue is the nature of educational services required under *Graham's* mandate for youth to have a meaningful opportunity for release from the juvenile justice system,[99] "where education has been consistently linked with reduced recidivism rates and successful reintegration into society."[100]

While there is no fundamental right to an education under the U.S. Constitution,[101] state constitutions mandate that education be provided under various standards.[102] Federal law has recognized the need for a high-quality education[103] and has mandated that appropriate educational services be provided to youth with learning disabilities both in and out of state

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95. *See, e.g.,* Aaron Sussman, Comment, *Learning in Lockdown: Race, Police, and the Limits of Law*, 59 UCLA L. REV. 788 (2012).

96. *See, e.g.*, Lizbet Simmons, *Buying Into Prisons, and Selling Kids Short*, 6 MOD. AM. 51, 51 (2010) ("There is an increasing need to account for the role of the nation's failing public school system in structuring incarceration risk among minority populations and to link theories of the minority achievement gap with those of disproportionate minority confinement.").

97. *See* Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 28 WHITTIER J. CHILD & FAM. ADVOC. 3 (2003) (arguing that the failure of school system personnel to serve children with disabilities contributes to the disproportionate representation of disabled children in the delinquency system); Peter E. Leone et. al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995).

98. Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 616 (1998) ("The United States is besieged by an incarceration crisis which far surpasses that of any other nation.").

99. The Disability Rights Legal Center, which filed an amicus brief in *Graham* calling for the prohibition of LWOP, also demonstrates the need for appropriate educational services in juvenile facilities to promote rehabilitation and reintegration into the community. *See* Brief of Disability Rights Legal Ctr. as Amicus Curiae Supporting Petitioners, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2197341, at *21 [hereinafter Disability Rights Legal Center].

100. Katherine Twomey, Note, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 767 (2008).

101. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

102. Twomey, *supra* note 100, at 767.

103. *See, e.g.*, No Child Left Behind Act, 20 U.S.C. § 6301 (2006) (defining its purpose as "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education"); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments . . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.").

custody.[104] Like the task of providing adequate mental health services, the burden of providing educational services for all youth and particularized services for learning disabled youth is daunting.

In the juvenile justice system, 30% of youth have been diagnosed with a learning disability—more than seven times the rate in the general student population[105]—and "a large proportion . . . have undetected learning-related disabilities."[106] One study by the American Bar Association Justice Center found that between 28% and 60% of incarcerated youth have an educational disability, with a strikingly disproportionate rate of youth classified as Severely Emotionally Disturbed.[107] According to one youth advocate: "The prevalence of [disabilities] among the juvenile justice population has led some professionals to characterize juvenile justice as a default system for youth who can't read or write well [and] who have mental health problems . . . ."[108] Consequently, those youth who will later enter the adult prison population are especially likely to be one of the 70% of prisoners performing at one of the two lowest levels of literacy.[109]

3. Social Needs

The Supreme Court recognized in *Graham* and *Roper* that youth are especially susceptible to negative influences and peer pressure. This should call into question the wisdom of placing large numbers of youth offenders together in juvenile detention facilities, particularly when those facilities maintain the harmful practices described below. As one advocacy organization put it, "Even if juvenile corrections facilities provide high-quality education, mental health, and substance abuse treatment services, youth are unlikely to benefit when the overall environment of the facility is

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104. It is widely accepted that, with various caveats, the Individuals with Disabilities Education Act, 20 U.S.C. §§1400-82 (2006), is applicable to youth in juvenile detention facilities. *See, e.g.*, Green v. Johnson, 513 F. Supp. 965 (D. Mass. 1981) (applying rights under federal disability rights statutes to incarcerated youth, one of the first federal court opinions to explicitly do so); Doe v. Ariz. Dep't of Educ., 111 F.3d 678, 680, 683 (9th Cir. 1997) (noting that the IDEA's procedural requirements apply to incarcerated youth as they do for youth outside state custody). Additionally, the No Child Left Behind Act makes federal funding contingent on states' working to improve educational services for incarcerated youth. *See* 20 U.S.C. §§ 6315(b)(2)(D), 6471.

105. SEDLAK & MCPHERSON, *supra* note 83, at 6.

106. Disability Rights Legal Center, *supra* note 99, at 1–2.

107. ABA JUVENILE JUSTICE CENTER, SPECIAL ED KIDS IN THE JUSTICE SYSTEM 2 (2000), *available at* http://www.njdc.info/pdf/maca5.pdf. For more detailed information on the categories and points of contention regarding identifying and defining educational disabilities generally and in the juvenile justice system specifically, see ROBERT B. RUTHERFORD, JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES (2002), *available at* http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf.

108. Quinn, *supra* note 74, at 339–40 (internal citations omitted).

109. KARL O. HAIGLER ET AL., LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii (1994).

permeated with fear, violence, or maltreatment."[110] Denying young people the opportunity for positive social interaction and growth directly inhibits the prospect of rehabilitation and a meaningful opportunity for release. For example, one study found that "the strongest predictors of sustained gang affiliation are a high level of interaction with antisocial peers and a low level of interaction with pro-social peers."[111] Further, when youth are mistreated by staff or other prisoners, they are likely to cope by "resorting to . . . [the same] behaviors that bring youth into the juvenile justice system" in the first place, such as "risk taking, breaking rules, fighting back, and hurting others."[112] To meet the social needs of incarcerated youth, facilities must provide positive and pro-social "opportunities that lend emotional and practical support, give young people life skills and ultimately pave paths toward success . . . ."[113]

One way experts recommend to better serve youths' social needs is to place them in small facilities in their communities rather than in large training schools or residential facilities far from home. Doing so would provide "the chance to keep youth close to home and engage their families; greater opportunity to recruit mentors and other volunteers; and a more hospitable treatment environment."[114] Addressing the social needs of youth offenders may be the most immediately effective way of complying with *Graham's* meaningful opportunity, as "[o]ne of the most consistent findings of research in juvenile corrections is that interventions aiming to build skills and address human needs are far more effective than those aimed at deterrence or punishment."[115] Punitive intervention, in fact, has proven in many instances to impede rehabilitation, worsen behavior, and increase recidivism.[116]

B. Difference and Regression

State juvenile justice systems routinely fail to meet the rehabilitative needs arising from the distinctive characteristics of youth on which *Graham's* reasoning was based, especially regarding mental health, education, and social needs. However, my goal here is not to reveal horrific conditions of juvenile justice facilities or to demonstrate damaging trends that demand reformative action. In fact, the legal gains for children's rights

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110. MENDEL, *supra* note 72, at 25.

111. CHARLES HAMILTON HOUSTON INST. FOR RACE & JUSTICE, NO MORE CHILDREN LEFT BEHIND BARS 13 (2008) [hereinafter HOUSTON INST.].

112. FORD ET AL., *supra* note 79, at 3.

113. HOUSTON INST., *supra* note 111, at 5.

114. MENDEL, *supra* note 72, at 34.

115. *Id.*

116. *Id.* at 15–16.

seen in cases like *Graham* and *Roper* have occurred simultaneously with generally improved conditions, the most significant of which is the steep overall decline in the incarcerated youth population since roughly 1997.[117] Rather than demonstrating a deteriorating situation, this section emphasizes the profound gulf between current juvenile justice conditions and what is necessary to meet the needs described in Part III.A. That is, I demonstrate that the *Graham* Court's reasoning based on youth's capacity for change and its mandate for a meaningful opportunity is sharply disconnected from the realities of the criminal justice system.

1. Mental Health

The juvenile justice system is severely lacking in mental health services, creating a dilemma for judges who want to send youth offenders to facilities that promote rehabilitation.[118] Juvenile justice officials are well aware that mental health services are deficient—one survey in 2003 found that over half of the responding facilities holding youth awaiting mental health services "report[ed] that staff receive poor, very poor, or no mental health training" and 27% of them reported that youths in detention received "poor, very poor, or no mental health treatment."[119] A 2011 report describes these facilities as "dumping grounds" for "youth with mental health conditions and other serious disadvantages—youth who would be more appropriately and effectively served by other human service systems."[120]

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117. In almost all categories for offenders and types of placement, the numbers have gone down significantly between 1997 and 2010, the earliest and most recent years in which the Justice Department has collected data. *See* M. SICKMUND ET AL., U.S. DEP'T OF JUSTICE, EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT: 1990-2010 (2011) [hereinafter CENSUS DATA], *available at* http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp (marking the point-in-time juvenile justice population at 105,055 in 1997 and 70,792 in 2010). During roughly that same period (2000–2010), the overall population of youth in the United States increased by 1,076,084. C. PUZZANCHERA ET AL., U.S. DEP'T OF JUSTICE, EASY ACCESS TO JUVENILE POPULATIONS: 1990-2010: POPULATION PROFILES, (2012), *available at* http://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp. One of the only categories demonstrating an alarming trend is the number of youth convicted in criminal courts, as opposed to adjudicated in juvenile court. After dropping after 1997, the number has steadily risen, with 1,365 convictions in 2010 (as compared to 761 in 2007). CENSUS DATA, *supra*. Within the offender population, there is also an upward trend of arrest and incarceration for girls. *See* Allison S. Burke, *Girls and the Juvenile Court: A Historical Examination of the Treatment of Girls*, 47 CRIM. LAW BULLETIN 117, 117 (2011) ("Although the juvenile justice system continues to be dominated by boys, the past decade has also witnessed a significant increase in the number of girls entering the system.").

118. *See* Hafemeister, *supra* note 86, at 62 ("[J]udges from across the country seeking to promote the rehabilitation of juvenile offenders are frustrated by the lack of available mental health treatment options for this population, notwithstanding its widely accepted value.").

119. MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION OF HOUSE COMM. ON GOVERNMENT REFORM, 108TH CONG., INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN THE UNITED STATES 9–10 (2004).

120. MENDEL, *supra* note 72, at 14.

Many juvenile justice facilities routinely fail to conduct the necessary mental health screenings, even when such screenings are mandated by state law.[121] Over half of youth offenders are in facilities that do not screen all residents;[122] 64% of facilities do not use standardized mental health assessments;[123] and very few facilities adapt their assessments to the variation in needs accompanying increased system penetration[124] or screen for trauma-related symptoms.[125] And when mental health screenings are conducted, it is often "in a haphazard fashion or by untrained staff."[126] For example, screening for suicide threats is frequently done by untrained personnel. Only 31% of youth offenders are in facilities that require this screening to be done by mental health professionals.[127] As for the mental health services available after entry into the system, 88% of youth are in facilities where "some or all counselors are not mental health professionals"[128] and two out of five incarcerated youth have not received any mental health services.[129] Thus, despite the decrease in the juvenile justice population, the mental health situation today is largely unchanged from the late 1990s, when "many correctional facilities provide[d] almost no mental health . . . programming."[130] For this reason, up to half of incarcerated youth "experience chronic health and psychological impairments related to trauma," a far higher proportion than the overall population of youth exposed to trauma, most of whom rehabilitate and regain healthy cognitive functioning.[131]

Specific examples of deficient mental health services are plentiful. In New York's Tryon Residential Center, a "penal colony for kids"[132] that was closed in 2011 after operating since 1960,[133] the overrepresentation of

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121. *See supra* note 92–93 and accompanying text (discussing the need for and frequent failure to provide such screenings).

122. MENDEL, *supra* note 72, at 24.

123. Wasserman et al., *supra* note 77, at 1370 ("[O]nly 36% of residential facilities used standardized mental health assessments.").

124. *Id.*

125. FORD ET AL., *supra* note 79, at 5–6.

126. MENDEL, *supra* note 72, at 24.

127. *See* SEDLAK & MCPHERSON, *supra* note 83, at 3.

128. *Id.*

129. MENDEL, *supra* note 72, at 24. The report further states that "youth with serious mental health symptoms (anger, anxiety, suicidal feelings, attention deficits—even hallucinations) were less likely than other youth to receive counseling." *Id.*

130. Pattison, *supra* note 76, at 598.

131. FORD ET AL., *supra* note 79, at 2.

132. Jennifer Gonnerman, *The Lost Boys of Tryon*, N.Y. MAGAZINE, Jan. 24, 2010, http://nymag.com/news/features/63239/.

133. *See* Bill Hammond, *Andrew Cuomo Tours the Belly of the Beast: Tryon Youth Prison Is a Textbook Case of N.Y. Dysfunction*, NY DAILY NEWS, Nov. 23, 2010, http://www.nydailynews.com/opinion/andrew-cuomo-tours-belly-beast-tryon-youth-prison-a-textbook-case-n-y-dysfunction-article-1.455824 ("Opened in the 1960s as a showcase of modern thinking on how to rehabilitate teenaged

children with mental disorders and the "mangled, unprofessional mental-health treatment"[134] they receive led the state commissioner overseeing the juvenile justice system to say: "Who do we incarcerate in the state of NY? Kids with serious mental-health disorders . . . . I feel like I'm running a psychiatric hospital."[135] But, as the *New York Magazine* article in which the commissioner was quoted points out, "unlike a psychiatric hospital, there are no psychiatrists here—or at any of the state's juvenile prisons. (A psychiatrist working on contract visits once every two weeks.)"[136] At Tryon prior to its closing, virtually every child had a mental health diagnosis, "if not four or five,"[137] though such diagnoses were often murky—one fifteen-year-old prisoner, "with no agreed-upon diagnosis, was found to be on six psychotropic medications at once."[138]

Deficiencies in mental health services have also been central to recent federal lawsuits, such as a class action filed in 2010 against Mississippi's Walnut Grove Youth Correctional Facility. The complaint alleged severe understaffing for mental health care, failure to provide adequate assessments, failure to monitor youth taking medication, a significant population of youth with "untreated serious mental health needs," and a privately contracted mental health provider that fell far short of providing the already-substandard minimum services required under the contract.[139] Further, the complaint asserted that if any staff member claims that a child is suicidal, the child is forced to remain isolated until evaluated by a psychiatrist, which might not happen for up to a week.[140] Similar accusations were made in a 2007 class action against New Orleans's Youth Study Center[141] and in a 2010 lawsuit against the New Jersey Juvenile Justice Commission.[142]

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lawbreakers, Tryon devolved over the decades into an increasingly brutal, prison-like institution."); Bill Pitcher, *Tryon case settled for $3.5 million*, LEADER-HERALD Dec. 4, 2011, http://www.leaderherald.com/page/content.detail/id/542686/Tryon-case-settled-for--3-5-million.html?nav=5011.

134. Ken Stier, *Why Reforming the Juvenile Justice System Is So Hard*, TIME, Sept. 16, 2009, http://www.time.com/time/nation/article/0,8599,1924255,00.html.

135. Gonnerman, *supra* note 132.

136. *Id.*

137. *Id.*

138. Stier, *supra* note 134.

139. Complaint at 3, 13, 36–37, C.B. v. Walnut Grove Corr. Auth., No. 3:10-cv-00663-CWR-FKB (S.D. Miss. Nov. 16, 2010).

140. *Id.* at 32.

141. Complaint at 11, J.D. v. Nagin, No. 07-9755 (E.D. La. Dec. 21, 2007). The court entered a consent decree in 2010. Katy Reckdahl, *Federal judge approves decrees governing operation of Youth Study Center*, NOLA.COM, (Feb. 13, 2010, 9:30 PM), http://www.nola.com/politics/index.ssf/2010/02/federal_judge_approves_decrees.html.

142. Troy D. v. Mickens, 806 F. Supp. 2d 758, 758 (D.N.J. 2011) (denying defendants summary judgment against allegations that the fifteen-year-old plaintiff was denied mental health treatment while he was held in isolation for roughly 180 days).

2. Education

In general, involvement in the juvenile justice system means having one's regular education disrupted and replaced with educational programming that is seriously inadequate, if it exists at all.[143] The result is the "systemic denial of appropriate education services for countless youth, despite state and federal statutory and constitutional mandates" to the contrary.[144] The most persistent problems include lack of qualified teachers, particularly those trained in special education, frequent movement of individuals among facilities, overcrowding, and lack of continuity and collaboration with the public school system.[145] Nationally, fewer than half of incarcerated youth are provided education for the six hours that comprise the minimum time of the typical school day.[146]

Most harmful to any prospect of rehabilitation is the prevalence of youth receiving no substantive education at all. This is the case for many children in adult prisons[147] or in adult jails while awaiting trial.[148] This is particularly true for youth with educational disabilities who, under the Individuals with Disabilities Education Act (IDEA), are not required to be included in state assessments.[149] Educational services are also frequently denied to youth who are placed in isolated holdings, like the previously discussed plaintiff in the 2011 New Jersey lawsuit, who was denied any educational programming or materials for the six months he spent in isolation.[150] Youth offenders receive particularly limited and sporadic educational services—in some cases going days at a time without

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143. *See* Robert Balfanz et al., *High-Poverty Secondary School and Juvenile Justice Systems: How Neither Helps the Other and How That Could Change*, 99 NEW DIRECTIONS FOR YOUTH DEV. 71, 82 (2003) ("Nationally, the educational programs of many state juvenile justice systems receive failing grades.").

144. Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (2010).

145. *See id.* at 30 (explaining the deficiencies in special education programs in state penetentiaries); LAURA ROTHSTEIN, 4 SPECIAL EDUCATION LAW § 2:14 (2009).

146. SEDLAK & MCPHERSON, *supra* note 83, at 6.

147. *See* Cate, *supra* note 144, at 2 ("Youth incarcerated in adult prisons, especially those with learning disabilities, are often denied their right to education, despite clearly defined legal mandates to the contrary.").

148. For one example, children receive no education services while awaiting trial in the District of Columbia jail. *See* COALITION FOR JUVENILE JUSTICE, AIN'T NO PLACE ANYBODY WOULD WANT TO BE: CONDITIONS OF CONFINEMENT FOR YOUTH 4 (1999).

149. 20 U.S.C. § 1414(d)(7)(A) (2006). The IDEA also allows Individual Educational Plans, which are created to comport with the best interests of the child, to be modified due to a "compelling penological interest." 20 U.S.C. § 1414(d)(7)(B).

150. Troy D. v. Mickens, 806 F. Supp. 2d 758, 763 (D.N.J. 2011).

educational programming—in states including Ohio,[151] New York,[152] Louisiana,[153] Indiana, California, and Maryland.[154]

3. Social Needs

The most pervasive cause of behavioral regression among incarcerated youth is likely the decline in services to meet their social needs, a decline that corresponds with the juvenile justice system's shift away from a rehabilitative model toward a punitive, prison-like model. By "lump[ing] troubled kids in with other troubled kids"[155] to the point where roughly half of all youth offenders are housed in large facilities with over one hundred prisoners,[156] incarcerated youth are denied exposure to positive influences and put at heightened risks of recidivism. These large detention centers typically feature prison-like regiments and "hardware such as razor-wire, isolation cells, and locked cell blocks."[157] The effects of these facilities are reflected by the words of a former employee at the Tryon Residential Center, who recalls the installment of a razor-wire fence as having "a very negative effect on the whole place . . . . I think kids stopped feeling like they were residents and started feeling like they were prisoners. And I think staff stopped feeling like staff and started feeling like guards. I think that was the beginning of the end."[158]

Worse than the lack of exposure to positive influence, incarcerated youth are frequently victimized. One study focusing only on sexual abuse found that, in just one year, over 3,000 youths were sexually victimized by

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151. *See* MENDEL, *supra* note 72, at 7 (noting the scant educational services provided to the Ohio youth who spent a combined 66,023 hours in isolation during just one month in 2009).

152. *See* Gonnerman, *supra* note 132 (noting that the State Department of Education failed to accredit or even oversee a school in Tryon, New York).

153. J.D. v. Nagin, 255 F.R.D. 406, 410–11 (E.D. La. 2009) ("Plaintiffs allege that Defendants do not provide youth with adequate and appropriate individualized academic education, including special needs determination and failure to develop and implement Individualized Education Programs ("IEP") for eligible children. Plaintiffs assert overcrowded classrooms in violation of the state mandated student/teacher ratio and claim that all YSC youth receive the same education from a single teacher who is without access to prior education records. Other inadequate education claims include failure to ensure the state requirements regarding minimum minutes of daily instruction and curriculum development standards.").

154. Twomey, *supra* note 100, at 807–08.

155. Maia Szalavitz, *Why Juvenile Detention Makes Teens Worse*, TIME.COM, AUG. 7, 2009, http://www.time.com/time/health/article/0,8599,1914837,00.html.

156. SARAH HOCKENBERRY ET AL., U.S. DEPT. OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULLETIN, JUVENILE RESIDENTIAL FACILITY CENSUS, 2008: SELECTED FINDINGS, 5 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/231683.pdf.

157. MENDEL, *supra* note 72, at 2.

158. Gonnerman, *supra* note 132.

staff or other youth in their facility.[159] Trauma of this nature is the most likely to "lead to impairment in psychosocial functioning"[160] and, by extension, is the most likely to impede rehabilitative efforts.[161] Even for those youth who have not been victimized, many live with perpetual fear of being attacked by their peers or staff.[162]

Finally, the juvenile justice system fails to meet youth's social needs by placing them far from their home communities and impeding family visits and support.[163] This practice is contrary to the well-supported claim that "kids who remain with their families, or at least close to home, are better able to maintain the sorts of relationships—with, say, a supportive aunt or a caring parent—that will help them stay out of trouble once they leave the criminal-justice system."[164] These impediments to family support are exacerbated by deficient levels of counseling services and programs based on reintegration into the community.[165]

IV. *GRAHAM*'S PARADOX

It is clear that states have a long way to go if *Graham* in fact mandates that facilities holding minors sentenced to life in prison for nonhomicide crimes promote rehabilitation. But that may be beside the point. *Graham*'s "meaningful opportunity [for] release based on demonstrated maturity and rehabilitation"[166] is not merely contradictory to the realities of the juvenile justice system in an aspirational, need-for-improvement way—it is fundamentally in conflict with all impulses and designs upon which the system is built. As discussed in Part I, the *Graham* Court, unwilling to take

159. *See* MENDEL, *supra* note 72, at 6–7 (describing the findings of a report released by the Federal Bureau of Justice Statistics).

160. FORD ET AL., *supra* note 79, at 2.

161. *See, e.g.*, Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work*, 13 UDC/DCSL L. REV. 71, 93 (2010) ("[C]onfinement exacts more than a temporary deprivation of liberty. It imposes the heightened prospect that a youth will commit future crime against society once the youth is ultimately released. Moreover, by halting the youth's development, confinement increases the likelihood that the youth will become a drain on society instead of a producer of wealth and wellbeing."); *see also* Gonnerman, *supra* note 132 (quoting the head of New York's division that oversees juvenile justice as saying, "[W]e're adding to the trauma with the violence and the inability to provide for their needs").

162. ANDREA J. SEDLAK & KARLA S. MCPHERSON, CONDITIONS OF CONFINEMENT: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 6 (2010) (reporting that 38 percent of surveyed youth stated that they feared being physically attacked).

163. *See, e.g.*, MENDEL, *supra* note 72, at 34 (describing the advantages of replacing large institutions with an alternative model).

164. Gonnerman, *supra* note 132.

165. *See, e.g.*, Roberts v. Cnty. of Mahoning, 495 F. Supp. 2d 670, 680 (N.D. Ohio 2005) (finding that two large youth detention facilities failed "to provide programs and services to the inmates, including but not limited to, recreation, visitation, religion, and inmate counseling programs" and failed to "safely and securely house inmates"); MENDEL, *supra* note 72, at 24.

166. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

a substantive due process approach by finding LWOP for youths who committed nonhomicide offenses shocking to the conscience, instead devised a prophylactic constitutional rule meant to protect the Eighth Amendment right against disproportionate sentences, a right towards which members of the Court have been particularly skeptical.[167] To justify such a categorical rule, the *Graham* Court relied on the science of why youth are less culpable. This is where the paradox arises: Youth are less culpable because they have a greater capacity for change, but the juvenile justice system's structure impedes rehabilitation, making that change more likely to be regressive. The Court likely recognized that continuing to sentence children to LWOP for nonhomicide offenses would threaten the legitimacy of the juvenile justice system in the eyes of many, both domestically and internationally, who consider the practice unconscionable. And any indication from the Court that the juvenile justice system does not in fact rehabilitate, or for the most part even try to, would reveal a destabilizing truth that sharply contradicts the cultural and political rhetoric that uses children's futures to justify even the most distantly related policies. Thus, to achieve the desired expansion of youth offenders' rights without revealing the macro-level contradictions between the expressed American value system and the juvenile justice system, the Court essentially constitutionalized the paradox: A state can imprison children for life as long as they have a meaningful opportunity for release based on rehabilitation, with rehabilitation being a concept that is not just absent from the system,[168] but is actively impeded by the system.

Graham's categorical rule places it in the same lineage as *Roper* and similar cases prohibiting a type of sentence for a specific class of offenders. Nevertheless, its purported collateral holdings[169] place it among less obviously related prison cases that also expose the contradictory nature of the criminal justice system. Two prison cases from the last decade that illuminate this category are *Johnson v. California*[170] and *Hope v. Pelzer*.[171] In *Johnson*, a divided Court[172] found that a prison's reception-center policy of placing new prisoners in cells with individuals of the same race for up to

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167. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (holding that there is no Eighth Amendment guarantee of proportionality).

168. *See, e.g.*, Marquis, *supra* note 9, at 258 ("The current [juvenile justice] systems that exist . . . across the nation have abandoned these rehabilitative objectives.").

169. *See supra* notes 16–19 (citing scholars interpreting *Graham* as extending rights beyond its categorical rule to different classes and to the same class in different circumstances).

170. 543 U.S. 499, 502–15 (2005).

171. 536 U.S. 730 (2002).

172. The complicated and contradictory nature of the questions presented by *Johnson* is perhaps demonstrated by the unlikely grouping of Justice Stevens with Justices Thomas and Scalia as dissenters. *Johnson*, 543 U.S. at 517–24.

sixty days to prevent gang-related violence violated the Fourteenth Amendment. The Court applied strict scrutiny rather than the more deferential review typically reserved for prison cases under *Turner v. Safely*,[173] as urged in Justices Scalia and Thomas's dissent. *Johnson* begs the paradoxical question: If this case is about race, then what are all the other prison cases about?

The paradox arises because the Court was asked to address an allegedly racially discriminatory policy in the context of what many consider an inherently racially discriminatory institution[174]—the paradox emerges of how one should think about this when racialization in prison is pervasive and systemic. In *Hope*, a divided Court[175] denied qualified immunity to prison guards for alleged Eighth Amendment abuses, finding that qualified immunity was not appropriate because the prisoner's right to be free from the abuse in question was clearly established. The Court strayed from its increasingly restrictive qualified immunity jurisprudence requiring a clear precedent that is factually and legally similar and instead relied on the notion that the asserted right was "obvious."[176] Yet, the highly deferential standards allowing curtailment of prisoners' rights announced in *Turner* (for rights generally) and *Farmer v. Brennan*[177] (for Eighth Amendment rights) have resulted in a regime in which prisoners' rights can never really be said to be "clearly established." Thus, the paradox emerges of how one should think about this when clear and inalienable rights in prison are virtually nonexistent. And then there is *Graham*, joining these prison paradox cases by prompting the question of how one should think about rehabilitation and the right to a meaningful opportunity for release from a life sentence when the juvenile justice system is fundamentally antithetical to rehabilitation.

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173. 482 U.S. 78, 89 (1987) (creating the deferential inquiry of whether the challenged prison policy is reasonably related to legitimate penological interests and upholding a prison policy that restricted prisoners' First Amendment rights).

174. As of June 30, 2008, "[a]mong inmates held in custody in prisons or jails, black males were incarcerated at 6.6 times the rate of white males." Press Release, U.S. Dep't of Justice, Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners (Mar. 31, 2009).

175. Justice Thomas was joined by Justices Rehnquist and Scalia in dissent. *Hope*, 536 U.S. at 748 (Thomas, J., dissenting).

176. *See id.* at 738 (describing the violation of a prisoner's Eighth Amendment rights were violated).

177. 511 U.S. 825, 837 (1994) (establishing a standard of deliberate indifference for Eighth Amendment claims, holding that a prison official's conduct is not unconstitutional "unless the official knows of and disregards an excessive risk to inmate health or safety" and is "aware of facts from which the inference can be drawn that a substantial risk of serious harm exists . . . [and] also draw[s] the inference").

The Elusive and Contradictory Definition of "Juvenile Justice"

Graham's paradox emerges not just from the practical realities of the juvenile justice system but also from the web of conceptually inconsistent laws and precedents regarding the nature of the system. The fiction that the juvenile justice system is designed to be nonpunitive and to benefit the interests of the child[178] is preserved in part through a terminological separation from the adult criminal justice system: "criminals" become "delinquents"; "trials" become "fact-finding hearings"; "convictions" become "adjudications"; and, most disingenuously, "prisons" become "out-of-home placements" despite operating and looking like prisons in almost every way.[179] According to Congress in the PLRA, though, a "prison" is a facility "that incarcerates or detains *juveniles* or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law."[180] Also according to Congress in the Sentencing Reform Act, "imprisonment is not an appropriate means of promoting correction and rehabilitation."[181] And in 2011, the Supreme Court interpreted this language by referring to congressional findings that "the system's attempt to achieve rehabilitation of offenders had failed" and that "[l]awmakers and others increasingly doubted that prison programs could rehabilitate individuals on a routine basis—or that parole officers could determine accurately whether or when a particular prisoner ha[d] been rehabilitated."[182] If *Graham*'s right to rehabilitative treatment and meaningful opportunity for release conflicts with the facts of the system, it just as strikingly conflicts with the laws and philosophy underlying the system.

A more substantive legal contradiction is the identical standards for the rights of incarcerated adults and children, with only the narrowest of exceptions.[183] Applying the same standards—and the same PLRA restrictions[184]—is difficult to justify when rehabilitative treatment is

178. *See* ELIKANN, *supra* note 43, at 123.

179. Michael J. Ritter, Note, *Just (Juvenile Justice) Jargon: An Argument for Terminological Uniformity Between the Juvenile and Criminal Justice Systems*, 37 AM. J. CRIM. L. 221, 223–24 (2010) (quoting ARK. CODE. ANN. § 9-27-303(4), (15), (19), (38)–(39) (2009)). *See supra* Part III.B (discussing the trend of juvenile facilities adopting the regiments and design of adult prisons).

180. 18 U.S.C. § 3626(g)(5) (2006) (emphasis added).

181. 18 U.S.C. § 3582(a) (2006).

182. Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (internal quotation marks omitted).

183. These exceptions appear to be limited to federal education statutes and, to a lesser extent, the Juvenile Justice and Delinquency Prevention Act,18 U.S.C. §§ 5031–5042 (2006), which is primarily focused on physically separating incarcerated children from adults but has many discretionary loopholes.

184. *See supra* note 22 (citing cases finding that the same PLRA standards that apply to adults apply to juveniles); *see also* Brock v. Kenyon Cnty., Ky., No. 02-5442, 2004 WL 603929 at *3–4 (6th Cir. 2004) (rejecting a juvenile inmate's argument that his young age should excuse him from the PLRA's exhaustion requirement regarding the facility's grievance procedure). The exhaustion requirement is particularly pernicious for the 33 percent of incarcerated youth found by a 2010

purportedly at the core of the juvenile system but essentially abandoned and, by law, barred as a consideration for placement in the adult system. For example, the *Turner* standard has been used to uphold prison policies that move in the opposite direction of serving educational or social needs, such as restrictions or outright bans on family visitation,[185] prohibitions on access to newspapers,[186] and restrictions on access to law libraries or the maintenance of substandard law libraries.[187] Under *Graham*'s reasoning, it would seem that the legal standards for juveniles should include the effects that policies or conditions have on the potential for rehabilitation, specifically given the distinctive characteristics of youth that may make certain policies and conditions far more developmentally damaging. For example, regarding the policy of strip searching children in juvenile justice facilities, the Second Circuit stated:

> Perhaps the *Turner* standard applies to a state facility confining juveniles who have been convicted of conduct that would be a crime if committed by an adult, and, perhaps it even applies to juveniles awaiting trial for such conduct. This would be so if "penological interests" include the interests of a state in confining juveniles convicted of, or awaiting trial for, such conduct. If that is so, there would be a substantial argument that a strip search of juveniles upon their initial admission to such a facility would satisfy the *Turner* standard of being reasonably related to valid penological interests.[188]

Yet, under the *Turner* standard, there would be little accounting for the fact that, as the Second Circuit stated, the "adverse psychological effect of a strip search is likely to be more severe upon a child than an adult," and would be particularly "traumatic" for the 29 percent of the state's female juvenile justice population that has been sexually abused.[189]

Similarly, courts have rejected *Graham*'s Eighth Amendment reasoning regarding sentencing and the distinctive characteristics of youth when it comes to non-sentencing Eighth Amendment claims. Recently, in

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government study to either not know how to file a complaint or to fear retribution if they did so. SEDLAK & MCPHERSON, *supra* note 162, at 9.

185. *See* Overton v. Bazzetta, 539 U.S. 126, 132, 136 (2003) (holding that limitations on visitations were rationally related to a legitimate interest and therefore did not violate inmates' constitutional rights); *cf.* Block v. Rutherford, 468 U.S. 576, 589 (1984) (suggesting that family visitation is "a factor contributing to the ultimate reintegration of the detainee into society").

186. Beard v. Banks, 548 U.S. 521, 528–530 (2006).

187. *See* Lewis v. Casey, 518 U.S. 343, 361–63 (1996) (discussing the district court's failure to defer to the judgment of prison authorities).

188. N.G. v. Connecticut, 382 F.3d 225, 234–35 (2d Cir. 2004).

189. *Id.* at 232.

Troy D. v. Mickens,[190] a federal court rejected plaintiffs' argument that, "because punishment is not the primary goal for juveniles . . . their constitutional claims should be evaluated under the Fourteenth Amendment, which applies to constitutional challenges by individuals confined for treatment purposes . . . ."[191] Instead, the court analyzed the juvenile plaintiffs' "constitutional claims concerning their conditions of confinement, failure to protect from harm and lack of medical care" under the far more permissive Eighth Amendment *Farmer* standard.[192] *Farmer* denies relief unless the conditions "deprive prisoner[s] of the necessities of life," the prison officials were actually aware that such conditions existed and posed "a substantial risk of serious harm," and the officials were "deliberately indifferent" to that risk.[193] Another federal court, assessing claims that staff at a juvenile justice facility abused children by, among other things, denying bathroom breaks as a form of punishment, quoted a Supreme Court Eighth Amendment opinion regarding an adult prison stating that "extreme deprivations are required to make out a conditions-of-confinement claim . . . [b]ecause routine discomfort is part of the penalty that criminal offenders pay for their offenses against society."[194] Not only did the court fail to include in its analysis the distinctive characteristics of youth and the likelihood of such policies causing behavioral regression, it supported the reasoning that substandard prison conditions are part of the punishment, a dubious notion for adult prisons and one diametrically opposed to the purported nature of the juvenile justice system.[195]

A CONCLUDING PROPOSAL: RECONCILING *GRAHAM*'S PARADOX?

The potential for expanding *Graham*'s reforms based on its collateral holdings is questionable due to: (1) the disparity between the substantial needs of incarcerated children and the low level of services provided to address those needs, and (2) the contradictions among the various laws and

190. 806 F. Supp. 2d 758 (D.N.J. 2011).

191. *Id.* at 771.

192. *Id.* at 772.

193. *See id.* (citing the adult prison cases Farmer v. Brennan, 511 U.S. 825 (1994) and Rhodes v. Chapman, 452 U.S. 337 (1981) to demonstrate the requirement for proof of deliberate indifference); *see also* J.P. v. Taft, 439 F. Supp. 2d 793 (S.D. Ohio 2006) (quoting Wilson v. Seiter, 501 U.S. 294, 297) (applying the Eighth Amendment standard to juvenile justice claims and citing various adult prison cases).

194. *Taft*, 439 F. Supp. 2d at 809–10 (internal quotation marks omitted) (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992)).

195. The idea that a sentence is not just a court's length-of-time determination, but also the inconsistent and in-flux prison conditions about which a sentencing court is likely unaware is revealing as a mechanism for social control: for any crime or charge resulting in incarceration, one never really knows what the penalty is going to look like, making perpetual uncertainty a form of punishment and control in itself.

legal standards governing juvenile justice facilities and *Graham*'s language regarding rehabilitation, capacity for change, and meaningful opportunity for release. Yet, the paradox might be reconcilable: Wide-ranging reform consistent with *Graham* can be possible without the prohibitive economic and political cost of transforming the system in order to adequately promote rehabilitation for all incarcerated youth.[196] Ironically, this potential stems from one of the laws that fails to account for the differences between children and adults: the PLRA, specifically its provision allowing a three-judge panel to order the release of prisoners to alleviate systemic violations of federal rights for which "crowding is the primary cause."[197]

One clear objection to such a proposal is the fact that, of all the problems plaguing juvenile justice facilities, overcrowding is likely the one that has seen the most improvement: The percentage of children in facilities at or above their standard bed capacity dropped from 40 percent in 2000 to 21 percent in 2008,[198] and is likely even lower today given the continuous decrease in the number of incarcerated youth.[199] And litigation alleging unconstitutional overcrowding, while prevalent in the 1980s and 1990s,[200] has become increasingly rare.[201] However, this objection is mitigated under a more principled definition of overcrowding regarding juveniles that is consistent with *Graham*'s reasoning: A facility should be considered overcrowded not based on the facility's physical capacity,[202] but when it lacks the resources and/or staffing to provide the level of services necessary to meet the mental health, educational, and social needs distinctive to juveniles. In other words, a facility that impedes a child's rehabilitative process because of the impracticality of providing to each child the services discussed in Part III should be considered overcrowded for the purposes of the PLRA.

In *Brown v. Plata*, the Supreme Court upheld a prisoner release order under the PLRA for California prisons, identifying overcrowding as the

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196. This possibility appears at least more plausible than, for instance, *Johnson v. California*'s aspiration of "eradicate[ing] racial prejudice from our criminal justice system." 543 U.S. 499, 512 (2005) (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987)).

197. 18 U.S.C. § 3626(a) (2006).

198. HOCKENBERRY, *supra* note 156, at 1–6.

199. *See supra* note 117 (showing the sharp decrease as of 2010).

200. *See, e.g.*, Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980); Alexander S. *ex rel* Bowers v. Boyd, 876 F. Supp. 773 (D.S.C. 1995); Bobby M. v. Chiles, 907 F. Supp. 368 (N.D. Fla. 1995); T.Y. *ex rel* Petty v. Bd. of Cnty. Comm'rs of Shawnee, 912 F. Supp. 1416 (D. Kan. 1995); Doe v. Washington Cnty., 150 F.3d 920 (8th Cir. 1998).

201. None of the recent lawsuits discussed in this Article alleged overcrowding as defined by the facility's population capacity. As discussed below, a more pertinent definition, and the source of allegations that do appear in recent litigation, would be the level of services and staffing compared to the number of youth in the facility.

202. The prevailing current understanding is that "[c]rowding occurs when the number of residents occupying all or part of a facility exceeds some predetermined limit based on square footage, utility use, or even fire codes." HOCKENBERRY, *supra* note 156, at 6.

primary cause of constitutional violations related to mental health and medical needs.[203] While the juvenile justice system does not face the population levels of the adult prison system, this is largely offset by the significantly higher needs of youth, particularly regarding mental health, educational, and social needs. Juvenile justice facilities already struggle— and routinely fail—to meet these needs under the current standards; it is exceedingly unlikely that many facilities could meet these needs under the inferred *Graham* standard of not impeding rehabilitation. Thus, a PLRA-based lawsuit modeled on *Plata* is more principled and logically coherent than it may at first appear.

The PLRA further requires a court ordering a prisoner's release to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[204] The argument regarding incarcerated youth on this point is far stronger and more supported by a clear consensus of evidence than it is for the adult prison population. A multitude of studies demonstrate that punitive sanctions for youth do not curb, and can in fact increase, criminal behavior and recidivism.[205] In California, sharply reducing the number of incarcerated youth has been accompanied by a substantial decline in the juvenile arrest rate, including for violent crimes, which fell in 2009 to its lowest level since 1970.[206] Such results are common, as "[j]urisdictions that have substantially reduced youth confinement in recent times have not suffered any increase in juvenile offending. Indeed, sharply reducing juvenile custody populations seems not to exert any independent upward impact on juvenile offending rates."[207] Thus, with the exception of the actual physical capacity of juvenile justice facilities compared to the number of prisoners, all of the reasoning in *Plata* and all the requirements of the PLRA's prisoner-release provision give rise to claims as strong or stronger for prisoner release based on *Graham* and the distinctive characteristics of youth.

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Graham can be a paradox case or not a paradox case—it depends on how one looks at its mandate for a meaningful opportunity for release based on rehabilitation. If the focus is on reforming juvenile justice facilities to meet this inferred rehabilitation standard, *Graham*'s paradox emerges; its hopeful language for further reform limited by its disjuncture with existing

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203. Brown v. Plata, 131 S. Ct. 1910 (2011).

204. *Id.* at 1918.

205. *See* HOUSTON INST., *supra* note 111, at 13 (quoting a report's finding that, for youth, "[i]ncarceration is a spectacularly unsuccessful treatment" (emphasis removed)); MENDEL, *supra* note 72, at 9 ("[T]he overall body of recidivism evidence indicates plainly that confinement in youth corrections facilities doesn't work well as a strategy to steer delinquent youth away from crime.").

206. MENDEL, *supra* note 72, at 26.

207. *Id.*

law and by the size and cost of such an undertaking. However, instead of reshaping the system to meet the rehabilitative needs of the incarcerated youth population, the paradox may be reconciled by reshaping the incarcerated youth population to meet the rehabilitative capabilities of the system. What additional reform may emanate from *Graham*, or if any will at all, is difficult to predict. At a minimum, however, *Graham*'s reasoning and language should compel system-wide adherence and attention to its principles of difference and its expressed commitment to affording youth offenders a second chance at freedom, citizenship, and life.