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The Supreme Court and the Rehabilitative Ideal

Chad Flanders
Saint Louis University

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Chad Flanders[*]

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I. INTRODUCTION

Graham v. Florida,[1] the Supreme Court's 2010 decision finding a life without parole sentence for a non-homicide crime committed by a juvenile "cruel and unusual" has rightly been recognized as a "watershed."[2] A major focus of the extensive commentary on the case has been on its application of the "evolving standards of decency" test to a punishment outside of the death penalty, and to whether *Graham* might apply also to adults.[3] Equally important in *Graham*, but subject to comparatively less critical attention,[4] is the central role that the rehabilitative theory of punishment plays in its holding both as a matter of rhetoric and as a matter of substance. A sentence to imprisonment without the possibility of parole for Graham, the Court explained, would foreswear "altogether the rehabilitative ideal," which was unacceptable.[5] "Life in prison without the possibility of parole," Justice Kennedy wrote for the Court, "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[6] "This,"

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[1] 560 U.S. 48 (2010).

[2] *See, e.g.*, Richard A. Bierschbach, *Proportionality and Parole* 160 U. PA. L. REV. 1745, 1746 (2012) (*Graham* as a "watershed"); *id.* at n.2 (*Graham* a "landmark").

[3] *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 79–80 (2010) ("Does *Graham* invite reconsideration of the Court's extraordinary deference embodied in its proportionality review of all noncapital sanctions, including term-of-years sentences short of life imprisonment[?] . . . Does *Graham* provide greater protection to adults as well as juveniles?"); Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49–51 (2010) (asking whether the Court will extend *Graham* to non-capital cases, and if so, how far); Eva S. Nilsen, *From* Harmelin *to* Graham*—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FED. SENT'G REP. 67, 67 (2010) (discussing what *Graham* might mean for the future of proportionality analysis and individualized sentencing).

Other commentators have speculated on whether *Graham* means the Court is abandoning some or all of its "evolving standards of decency" test. *See* Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 59–60 (2010) (suggesting that a post-*Graham* framework might make the culpability test the primary test); John F. Stinneford, *Evolving Away from Evolving Standards of Decency* 23 FED. SENT'G REP. 87, 87 (2010) (asserting that *Graham* and several other recent cases indicate that the Court is "prepare[d] to leave the evolving standards of decency test behind"); Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 304 (2013) (noting that the Court's *Miller v. Alabama* decision signals that the Court is abandoning an "objective indicia analysis").

[4] *But see infra* notes 164, 186–88 and accompanying text.

[5] *Graham*, 560 U.S. at 74.

[6] *Id.* at 79.

he concluded, "the Eighth Amendment does not permit" at least when dealing with those under the age of eighteen.[7] The state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and *rehabilitation*."[8]

What is rehabilitation, and what does it mean to have it as an ideal? Francis Allen in his major work on the subject, *The Decline of the Rehabilitative Ideal* (from which Justice Kennedy consciously or unconsciously borrowed the phrase[9]), noted that rehabilitation was an inherently complex term, filled with ambiguities.[10] Moreover, as the title to Allen's book reveals, rehabilitation was, as early as the 1970s, being abandoned as a primary justification for punishment and viewed with skepticism as *any* part of the justification for punishment.[11] Kennedy's use of rehabilitation was not merely surprising in the context of a Supreme Court opinion, where more attention is usually paid to retributive and deterrent theories;[12] it was surprising in the context of punishment theory and practice more generally.[13] The

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[7] *Id.*

[8] *Id.* at 75 (emphasis added).

[9] The first use seems to be in Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226, 226 (1959) (defining the "essential points" of this deal). *See also* FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25–41 (1964) (describing the rehabilitative ideal and analyzing its contours); Fred Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 35 (1968) (describing the consequences of a rehabilitative ideal theory, including, for example, revocation of probation if the offender does not reintegrate into society).

[10] FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2 (1981) ("The rehabilitative ideal concept requires description and amplification. It is not surprising to discover that the phrase embraces great complexity and, indeed, encompasses widely different and even conflicting kinds of social policies."); *id* at 52 ("Ambiguities afflict the very notion of what rehabilitation consists."); *see also* United States v. Williams, 793 F.3d 1064, 1065 (7th Cir. 2014) (Posner, J.) ("[C]ritically the defendant misses the ambiguity in the term 'rehabilitation' (more precisely, 'correctional rehabilitation') as used in discussions of criminal punishment.").

[11] ALLEN, *supra* note 10, at 5–7 (explaining the nearly "unchallenged sway of the rehabilitative ideal" in the mid-twentieth century and describing its decline in the 1970s); *cf.* FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 67, 149 (2d ed. 2013) (explaining the decline of the rehabilitative ideal in the 1970s and arguing that current reform measures should reaffirm rehabilitation).

[12] *See e.g.*, Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (mentioning rehabilitation only in passing, and dismissively).

[13] Casebooks and treatises by and large treat rehabilitation as at best a failure in practice and at worst a failed ideal. *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY,

punishment literature and the literature on *Graham* has not yet come to grips with the full implication of the *Graham* decision because it has incompletely understood the meanings of "rehabilitation."[14]

This Article gives an overview of the Supreme Court's engagement with the "rehabilitative ideal" in *Graham* as well as two other recent cases. In the first part, I sketch three broad models of that ideal: *rehabilitation as treatment*, *rehabilitation as training,* and *rehabilitation as reform*. The first, "rehabilitation as treatment," is, in its most familiar variant, the most ambitious. It suggests nothing less than a complete overhaul of both the theory and practice of criminal justice by redefining crime as a "sickness" and punishment as a "cure."[15] It is this version that has suffered the greatest decline over the past half century even though it did (at one point) strongly influence Supreme Court doctrine.[16] The second model, rehabilitation as training, is less ambitious, and for perhaps that reason, has endured as a part of sentencing.[17] It too, however, has been the object of vigorous critique. The third model, rehabilitation as reform, has been prominent in philosophical discussions of punishment and less on display in legal doctrine and practice.[18] But it is this model that may best explain the use of rehabilitative theory in *Graham*.[19]

The second and third parts of the Article move from rehabilitative theory to legal practice. In two cases decided in 2011, *Tapia v. United States*[20] and *Pepper v. United States*,[21] the Supreme Court has considered the use of rehabilitation in

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CASES AND MATERIALS ON CRIMINAL LAW 37 (6th ed. 2012) ("The conventional wisdom is that past efforts to rehabilitate convicted offenders were mostly unsuccessful."); *id.* at 38 ("Even assuming that rehabilitative measures work, can you think of any moral objection to rehabilitation as a justification for imposing punishment?").

[14] For early efforts to grasp the meaning of *Graham* which I am indebted to, see generally Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012) and Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75 (2010).

[15] *See infra* Part II.A.

[16] *See, e.g.*, Williams v. New York, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

[17] *See infra* Part II.B.

[18] *See infra* Part II.C.

[19] *See infra* Part IV.C.

[20] 131 S. Ct. 2382 (2011).

[21] 131 S. Ct. 1229 (2011).

sentencing under the Sentencing Reform Act.[22] The cases point in superficially opposite directions (*Tapia* opposes rehabilitation as a factor to be used in extending a prison term;[23] *Pepper* allows consideration of rehabilitation in resentencing[24]), but both testify to the Court's wrestling with the role (both positive and negative) that rehabilitation should have in sentencing. These cases are important, but have been almost universally ignored in the literature on sentencing.[25] Ultimately, they are testament to the prevailing *anti*-rehabilitative trend in both legislative and judicial fora.

The third part of the Article is devoted almost wholly to *Graham*, the first Supreme Court case in decades to rely heavily on the rehabilitative theory of punishment in its reasoning. It is no exaggeration to say that without depending on rehabilitation, the Court could not have concluded the way it did in *Graham*. Rehabilitation is in many ways the key to the *Graham* opinion, but Justice Kennedy's opinion is frustratingly unclear as to what he means by rehabilitation or the rehabilitative ideal.[26] While some elements of Kennedy's opinion imply rehabilitation as treatment, and his concern that juveniles in prison have access to vocational and education programs suggests rehabilitation as training, the best interpretation of rehabilitation in *Graham* is as a case that treats rehabilitation as requiring a kind of moral reform in the offender. Understanding better what kind of rehabilitation

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[22] *Tapia*, 131 S. Ct. at 2390; *Pepper*, 131 S. Ct. at 1247.

[23] *See Tapia*, 131 S. Ct. at 2391 ("Section 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation.").

[24] *See Pepper*, 131 S. Ct. at 1241 ("[A] district court may consider evidence of a defendant's rehabilitation since his prior sentencing . . . .").

[25] The main exception is Professor Douglas Berman's posts on Sentencing Law and Policy. *See, e.g.*, Douglas A. Berman, *The Interesting Issues Raised by* Tapia, *the New SCOTUS Federal Sentencing Case*, SENTENCING LAW & POLICY (Dec. 14, 2010, 5:43 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2010/12/the-interesting-issues-raised-by-tapia-the-new-scotus-federal-sentencing-case.html (asserting that "*Tapia* could be the sentencing sleeper of the current SCOTUS term"); Douglas A. Berman, Pepper *Providing a Bit of Spice to SCOTUS Sentencing Docket*, SENTENCING LAW & POLICY (Aug. 26, 2010, 9:47 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2010/08/pepper-providing-a-bit-of-spice-to-scotus-sentencing-docket.html (quoting a discussion of the case in Marcia Coyle, *Brief of the Week: Conflict Over Rehabilitation and Sentencing*, NAT'L L.J. (Aug. 25, 2010), *available at* http://www.nationalawjournal.com/id=1202470986116?s/return=20141114140207).

[26] *See infra* Part IV.A–B (highlighting *Graham*'s discussion of rehabilitation and describing its two models of rehabilitation).

Kennedy was after in *Graham* helps us better understand how to apply *Graham* in future cases and shows us the limitations of that decision. *Graham*'s model of rehabilitation as reform is in many ways a conservative vision (in several senses of that word), but not one without potential to change sentencing in ways small and large.[27]

II. THREE MODELS OF REHABILITATION

Rehabilitation has a long history as a part of punishment theory, but my purpose here is not to recount that history. Others have done it ably, charting rehabilitation's rise in the mid-twentieth century and its rapid decline into near irrelevance.[28] Early rehabilitationists had high hopes that punishment and prison could change into something different than they were, but those hopes swiftly came crashing down: empiricists questioned whether rehabilitation could ever work (offenders sent to prison seemed not to benefit from vocational and educational programs: when released from prison, they fell back into a life of crime) and theorists attacked what they saw as rehabilitation's unappealing presuppositions (that prisoners were not evil, but merely "sick" and needed to be held indefinitely so they could be "cured" by the state). By the 1980s, if not sooner, many were wondering how we could have *ever* thought prison could be a place for rehabilitation

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[27] *See infra* Part IV.C (applying this theory to the length of punishments, prison conditions, and adults).

[28] *See generally* ALLEN, *supra* note 10; KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9–37 (1998) (describing the history of federal criminal sentencing); Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387 (2006) (locating the Supreme Court's *United States v. Booker* decision on sentencing guidelines within the history of sentencing reform); Meghan J. Ryan, *Science and the New Rehabilitation*, 2 VA. J. CRIM. L. (forthcoming 2015), *available at* http://ssrn.com/abstract=2019368; Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991). A very brief version of the story figures importantly in Justice Roberts's dissent in *Miller*. *See* Miller v. Alabama, 132 S. Ct. 2455, 2478 (2012) ("In this case, there is little doubt about the direction of society's evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980's, outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes.").

rather than purely a place for suffering and punishment.[29] In broad outline, the shape of the story should be familiar and parts of the history will inevitably creep into my analysis.

What I want to do here is to isolate three models of the rehabilitative ideal which have had particular influence over the last one hundred or so years in American law. In order to understand why the rehabilitative ideal was in decline, we need to be straight that the rehabilitative ideal was not a single thing; it was plural. Moreover, some of the rehabilitative models were more modest than others and each model came in different varieties as well, which also ran from the modest to the ambitious. The models are not completely discrete, of course, and at points they can blend into one another. Indeed, in some respects, the models are not mutually exclusive: one can believe that several kinds of rehabilitation can go on at once and that the state should be interested in all of them. Nonetheless, I believe they are separate enough to be called different "models" because, in rough outline, they have distinguishing features and characteristics.

I start with the model that, in the minds of many, was almost thoroughly discredited in theory and that never really took hold in practice. At the same time, traces of its influence continue to this day.[30]

A. REHABILITATION AS TREATMENT

At its most extreme, the rehabilitative ideal was not merely to supplement or revise punishment, it was to *replace* punishment with something else, something more humane. "Crime" and "punishment" were crude, primitive ideas[31] and had "no place in the scientific vocabulary."[32] The more rational and enlightened perspective was to treat crime as an illness that needed to be treated. Jailers and judges were out; doctors and therapists were

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[29] *See Miller*, 132 S. Ct. at 2478 (explaining how by that time, legislatures began reducing or eliminating the possibility of parole).

[30] *See infra* Part III.B (discussing *Pepper* and its relation to certain tenets of rehabilitation as treatment).

[31] *See* Cesare Beccaria, *On Crimes and Punishments*, *in* THEORIES OF PUNISHMENT 118–21 (Stanley E. Grupp ed., 1971).

[32] Karl Menninger, *Therapy, Not Punishment*, *in* PUNISHMENT AND THE DEATH PENALTY 47 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995).

in.[33] They had the necessary expertise to guide a person away from his criminal, antisocial behavior and to reenter society: they could diagnosis the causes of the illness and recommend a course of action.[34] "The management of such [penal] institutions must be scientific," one rehabilitation as treatment theorist wrote, "and the care of their inmates must be scientific, since a grave crime is always a manifestation of the pathological condition of the individual."[35]

On the therapeutic version of rehabilitation, crime was most of all a signal to the criminological experts that a person needed not punishment, but treatment—in the way that a rash or a cold might be a signal to doctors that care and attention were needed.[36] How much treatment, and for how long, was up to the expert. When treatment was completed, the "prisoner, like the doctor's other patients, should emerge . . . a different person, differently equipped, differently functioning, and headed in a different direction from when he began the treatment."[37] At the limit, if the offender could not successfully reenter society, experts would be able to treat him in a clinical setting to allow him a comfortable and protective (if forever confined) existence.[38]

The therapeutic ideal of rehabilitation seemed to many to be naively optimistic in its assumptions[39]: that the causes of crime

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[33] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 163 (1967) (analogizing criminal offenders to patients).

[34] *See, e.g.*, Henry Weihofen, *Punishment and Treatment: Rehabilitation*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 255–56 ("Human behavior is the product of antecedent causes. These causes can be identified, and it is the function of the scientist to discover and describe them. Knowledge of the antecedents of human behavior is essential for scientific control of that behavior."); Herbert Morris, *Persons and Punishment*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 82–84, 87 (discussing rehabilitation as treatment).

[35] Enrico Ferri, *The Positive School of Criminology: Remedies*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 236.

[36] Karl Menninger, *The Crime of Punishment: Love Against Hate*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 246 ("I would say that according to the prev[a]lent understanding of the words, crime is *not* a disease. Neither is it an illness, although I think it *should* be! It *should* be treated, and it could be; but it mostly isn't. . . .").

[37] *Id.* at 246–47.

[38] *Id.* at 252.

[39] *See, e.g.*, Shepard v. Taylor, 556 F.2d 648, 650 (2d Cir. 1977) ("The instant controversy arises out of the recent tendency to reject the so-called 'rehabilitative ideal' as a relic of an earlier, more optimistic, era and to return to traditional criteria of retribution and deterrence in punishing juvenile offenders.").

could be diagnosed, that a cure could be administered, and that we could do away with "punitiveness" of punishment. We are much less sanguine now.[40] But philosophers and policy-makers responding to rehabilitation as treatment at the time (and they were legion) saw something much more sinister; they did not object to rehabilitation as treatment as impractical. They rejected the ideal of rehabilitation as treatment altogether *qua* ideal.[41] They saw a worldview that treated human beings less as agents and more as patients who could be hospitalized or imprisoned and "treated" indefinitely, not for the safety of society, but supposedly "for their own good."

In addition, there was something dehumanizing about being told that your crime was not a free act but instead a sickness. Not only was this factually incorrect (criminals had not "come down" with anything[42]), it was dangerous. Novels such as *Clockwork Orange* and *One Flew Over the Cuckoo's Nest* described the frightful implications of a society run by experts where one's freedom depended on convincing doctors and nurses that you had been successfully "cured."[43] There was something simpler and clearer, if not more ennobling, about saying that one was being punished because one deserved it (it was a matter of justice) or that society needed to lock you up to protect itself.[44] These theories did not carry with them the implication that you were somehow diseased or sick and in need of a doctor's care. They

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[40] See the analysis of the optimism of early rehabilitative theories in ALLEN, *supra* note 10, at 12–14. At the same time, there is a good case to be made that pockets of the criminal justice system still adhere to some version of the rehabilitation as treatment ideal: drug treatment programs, for instance, or those dealing with mentally ill inmates, might have as their goal the care and rehabilitation of offenders. The point in the main text is simply that it is not the case that the paradigm for the criminal justice system *as a whole* is rehabilitation as treatment.

[41] For powerful philosophical criticism about the assumptions and prescriptions of rehabilitation as treatment, see, *inter alia*, Richard Wasserstrom, *Punishment v. Rehabilitation*, *in* PUNISHMENT AND THE DEATH PENALTY, *supra* note 32, at 52; C.S. Lewis, *The Humanitarian Theory of Punishment*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 301; Morris, *supra* note 34, at 76.

[42] *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 90 (1973) ("Many convicted criminals . . . . are not driven by, or 'acting out,' neurotic or psychotic impulses. Instead, they have coldly and deliberately figured the odds . . . .").

[43] *See generally* ANTHONY BURGESS, CLOCKWORK ORANGE (1962); KEN KESEY, ONE FLEW OVER THE CUCKOO'S NEST (1962). For a more philosophical version of this worry, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

[44] Lewis, *supra* note 41, at 307–08.

treated you as a person: rehabilitation as treatment, by contrast, was "not a response to a person who is at fault. We respond to an individual, not because of what he has done, but because of some condition from which he is suffering."[45] But a person who has done wrong might not be sick; he may have *chosen* his wrong, and treating him as a sick person is insulting, dehumanizing—a denial of his status as a free, choosing, being.

However aggressively rehabilitation as treatment was attacked in theory—and it seems clear that in the minds of most people that it has been thoroughly defeated—it left its mark on Supreme Court doctrine. In the 1949 case *Williams v. New York*, the Supreme Court not only agreed with, but seemed to embrace the idea that punishment had to be tailored to the criminal offender, or "individualized."[46] The idea was straight from the literature on rehabilitation as treatment[47]: the effective diagnosis is one that treats the person and his disease; there could be no "one size fits all" prescription, because each person's need and propensity for rehabilitation differed.[48] The statute at issue in the case, the Court said, "emphasize[d] a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."[49] "The belief no longer prevails," the Court announced, as if ringing out an older, less enlightened era, "that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[50]

Moreover, for rehabilitation as treatment, the prescription should be made by an expert, using all the relevant information the expert could gather, taking into consideration "not only static

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[45] Morris, *supra* note 34, at 83.

[46] *See* Williams v. New York, 337 U.S. 241, 247 (1949) (recognizing "modern concepts individualizing punishment"); *see also* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 8 (1979) (explaining that the judge should make a decision that is "best both for the individual inmate and for the community"); United States v. Grayson, 438 U.S. 41, 49 (1978) (approving *Williams*'s reasoning). I am indebted to Berman's account of these cases in the discussion that follows. *See* Berman, *supra* note 28, at 388–93.

[47] *See* Weihofen, *supra* note 34, at 257 ("A rehabilitative approach is necessarily an individual approach.").

[48] *See id.* ("Not every person whose conduct is deemed criminal is in need of rehabilitation.").

[49] *Williams*, 337 U.S. at 247.

[50] *Id.*

and presently observable factors, but dynamic and historical factors, and factors of environmental interaction and change."[51] The expert would look "into the future for correction, re-education, and prevention."[52] For the Supreme Court, the experts were sentencing judges and parole officers,[53] and in *Williams*, the Court maintained that the judge had to have access to a full sentencing report (which would include, but would not be limited to, information about the crime for which the offender was being punished) in order to make a suitable recommendation as to punishment.[54] The report would include "information about the convicted person's past life, health, habits, conduct, and mental and moral propensities."[55]

The Court underlined that the reason why the judge needed this information was so that he could recommend a punishment that would best serve to rehabilitate and reform him. "[A] strong motivating force" for individualizing punishment, the Court wrote, "has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."[56] In a footnote, the Court favorably cited a prominent rehabilitation as treatment proponent[57] and declared in the text of

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[51] Menninger, *supra* note 32, at 46.

[52] *Id.*

[53] In the pure rehabilitation as treatment model, judges would eventually surrender the sentencing role entirely to experts. *See id.* at 47 ("Intelligent judges all over the country are increasingly surrendering the onerous responsibility of deciding in advance what a man's conduct will be in a prison and how rapidly his wicked impulses will evaporate there."); STITH & CABRANES, *supra* note 28, at 20 ("Advocates of the rehabilitative ideal would have preferred less judicial authority over sentences and even greater authority conferred on parole officials."). Judges with full information (e.g., what was contained in a pre-sentencing report) were a second-best option. *See* Menninger, *supra* note 36, at 244 ("The consistent use of a diagnostic clinic would enable trained workers to lay what they can learn about an offender before the judge who would know best how to implement the recommendation."); Sheldon Glueck, *Principles of a Rational Penal Code*, *in* THEORIES OF PUNISHMENT, *supra* note 31, at 279 (asserting that rehabilitation must be based upon a complete scientific understanding of each offender).

[54] *Williams*, 337 U.S. at 249–50.

[55] *Id.* at 245.

[56] *Id.* at 249.

[57] *See id.* at 248 n.13 ("It should be obvious that a proper [sentencing] . . . involves a study of each case upon an individual basis. . . . Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society—or is he obviously amenable to reformation?" (quoting JOSEPH N. ULMAN, *The Trial Judge's Dilemma: A Judges's View*, *in* PROBATION

the opinion that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[58] In order to serve the goals of rehabilitation and reform by individually tailoring sentences, judges needed to have the freedom to range beyond facts about the offense.[59] The Supreme Court in *Williams* was signing on, at least in part, to the rehabilitation as treatment program.[60] It would reaffirm its support again over the years.[61]

The fact that *Williams* tied individualization in sentencing to rehabilitative goals is important, because individualization is not intrinsically tied to rehabilitation. Individual tailoring can be backward-looking and retributive or forward-looking and rehabilitative. If the judge is looking at details about the offender (details which may even be beyond the crime of which he was convicted) to find out what he *deserves* as his punishment, then the judge's individualizing is backward-looking: he is trying to fit the offender to the right amount of deserved retributive punishment. The Court has used this model in recent cases, including one involving juvenile sentencing.[62]

But if the judge is using those same details to determine how much rehabilitation the offender needs—as well as his fitness for rehabilitation—the judge's individualizing is forward-looking. He is trying to fit the offender to the right kind of "cure," given the

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AND CRIMINAL JUSTICE 113 (Sheldon Glueck ed.,1933))).

[58] *Id.* at 248.

[59] *See* United States v. Grayson, 438 U.S. 46, 46 (1978) (addressing the need for "informed judgments" concerning an offender's potential for rehabilitation). It seems somewhat ironic that the Court in *Williams* was affirming a *death* sentence, justified along rehabilitative lines. But it may be that some are beyond rehabilitation, and so deserve death. It may also be that death *could* induce some to reform, at least in the short time that they have left.

[60] *See* TAMASAK WICHARAYA, SIMPLE THEORY, HARD REALITY: THE IMPACT OF SENTENCING REFORMS ON COURTS, PRISONS, AND CRIME 30 (1995) ("Penal policy in the therapeutic state was even endorsed by the United States Supreme Court."); Berman, *supra* note 28, at 389 ("In 1949, the Supreme Court constitutionally approved [the rehabilitative] approach to sentencing in *Williams* . . . .").

[61] *See, e.g.*, Greenholtz v. Inmatex of the Neb. Penal & Corr. Complex, 442 U.S. 1, 8 (1979); *Grayson*, 438 U.S. at 49; *see also* Berman, *supra* note 28, at 391–93 (describing *Grayson* and *Greenholtz* in which the Supreme Court reaffirmed the connection between individualization and rehabilitation).

[62] *See* Miller v. Alabama, 132 S. Ct. 2455, 2467–69 (2012).

offender's situation. It was with this kind of ideal in mind that the *Williams* Court favorably cited rehabilitation as a goal of punishment. It is evident, too, in the Court's emphasis on the judge not just finding a just punishment, but also an "enlightened" one, and helps explain why the judge needed information that went beyond the information supplied by the guilty verdict.[63]

Individual tailoring for rehabilitation lies somewhere on a continuum between individualization for retribution (individualization that is backward-looking) and the rehabilitation as treatment model's ideal, which is fully indefinite sentences and not merely indeterminate ones.[64] On the rehabilitation as treatment model, it is not enough to simply make a prospective judgment about someone's ability to be cured, but an ongoing one. The sentence must be continually reevaluated, and "the convicted offender would be detained indefinitely pending a decision as to whether and how and when to reintroduce him successfully into society."[65] Those who are cured can be released; for those who do not respond to treatment, we must provide for their "indefinitely continued confinement."[66] The experts in the rehabilitation as treatment model could not be tied to any guidelines or other limitations as to how long sentences could be.

B. REHABILITATION AS TRAINING

The more aggressive proponents of rehabilitation as treatment wanted a paradigm shift in how we thought of crime and punishment, a shift that the Supreme Court at least partially endorsed in *Williams* and its progeny.[67] At the limit, the shift led

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[63] *Williams*, 337 U.S. at 250–51.

[64] By indefinite sentencing, I mean to indicate an in-principle indefinite sentence; an indeterminate sentence can be confined within a specific range, or be subject to a maximum. *See* Glueck, *supra* note 53, at 291 ("The present 'indeterminate sentence' is indeterminate only within maximum-minimum limits or embraces variations of this principle."); United States v. Watts, 519 U.S. 148, 165 (1997) (Stevens, J., dissenting) (asserting that *Williams* was a case that "dealt with the exercise of the sentencing judge's discretion within the range authorized by law, rather than with rules defining the range within which discretion may be exercised").

[65] Menninger, *supra* note 32, at 44; *see also* Ferri, *supra* note 35, at 236 ("We maintain that congenital or pathological criminals cannot be locked up for a definite term in any institution, but should remain there until they are adapted for the normal life of society.").

[66] Menninger, *supra* note 32, at 45.

[67] *See supra* Part II.A (discussing the theory of rehabilitation as treatment).

many to wonder whether rehabilitation as treatment was a theory of punishment at all, and instead was a theory of what to put *in place* of punishment.[68]

But rehabilitation has over the years also taken on a more humdrum connotation, which is far from the radical ambition of rehabilitation as treatment. What I will call "rehabilitation as training" emphasized not a cure for crime, but rather piecemeal efforts at the betterment of inmates through vocational training and education or by drug treatment. The goal was not that the inmate be totally healed of his criminological tendencies (whatever that would mean), but that he become more fit to reenter society as a productive and contributing member. He would be prepared to find a job upon release, or be able to enter and maintain a stable relationship, or simply be more equipped to cope with day-to-day life. For juvenile offenders, such programs could include "trade training in metal and woodwork . . . summer camp with work and recreational programs which keep the boys out of doors . . . [and] agriculture and stock raising."[69] More typically, it could include high school or college classes, or vocational skills training.

Sentences on the rehabilitation as training view, like those made according to the rehabilitation as treatment view, still would need to be individualized, to an extent. We would need to discover what training programs would be appropriate for the offender, and this required having a particularized knowledge of his background and his capacities. The rehabilitation as training model, in short, kept the focus on individualized punishment for the benefit of the offender but shifted the *form* of rehabilitation from therapy and treatment to training. The training might be expected to make the defendant a productive member of society, or at least get him to stop committing crimes (or, preferably both).[70] It did not involve

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[68] *See* WAYNE R. LAFAVE, CRIMINAL LAW 28 (5th ed. 2010) ("It is perhaps not entirely correct to call this treatment 'punishment,' as the emphasis is away from making him suffer and in the direction of making his life better and more pleasant.").

[69] United States v. Won Cho, 730 F.2d 1260, 1275 (9th Cir. 1984) ("In enacting the Youth Corrections Act of 1950, Congress envisioned a rehabilitative program that included 'trade training in metal and woodwork . . . summer camp with work and recreational programs which keep the boys out of doors . . . [and] agriculture and stock raising.'" (quoting H.R. REP. NO. 81-2979 (1950), *reprinted in* 1950 U.S.C.C.S. 3983, 3987)).

[70] United States v. Williams, 739 F.3d 1064, 1065–66 (7th Cir. 2014) (observing that rehabilitation "often has rather utopian overtones—easing the defendant's transition to community life, making him a productive, law-abiding member of society. . . . A more

treating him as a patient in any sustained way: even the person in drug treatment was not "sick," but just needed help getting on his feet.[71]

Nearly all versions of rehabilitation as training had their wings clipped in the second half of the twentieth century. In a hugely influential essay,[72] Robert Martinson surveyed over 200 studies regarding the effects of various training programs in prison.[73] What he found was that, in the phrase that was to become famous, "nothing work[ed]": *no* training program seemed to be effective in decreasing recidivism rates.[74] "With few and isolated exceptions," Martinson wrote, "the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[75] If the goal of training was to get inmates to be able to deal successfully in the real world, then the failure to prevent recidivism was a serious indictment of rehabilitation as training.[76] It meant that time in training programs was doing nothing to curb the behavior that got offenders in trouble in the first place.[77] Prison with rehabilitation thrown in was not making anyone better and prison might have even been making them *worse*.[78]

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modest conception of rehabilitation, however, is that a defendant is rehabilitated when he ceases committing crimes, at least crimes of the gravity of the crime for which he was convicted, whether or not he becomes a productive member of society.").

[71] This assumption provides the background for the *Tapia* decision. *See infra* Part III.A; *see also* Powell v. Texas 392 U.S. 514, 535 (1968) (rejecting the idea of alcoholism as a "disease").

[72] There is considerable debate over whether the influence of this essay is justified and whether the essay truly did conclude what people said it did; that it *did* have an influence, and that its influence contributed to the decline of the rehabilitative ideal, is nearly undisputed. *See* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 201 n.16 (discussing the influence of Martinson's work and reactions to it).

[73] Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 24–25 (1974) (explaining the methodology of his survey).

[74] *Id.* at 48; *see also* ALLEN, *supra* note 10, at 57 (describing the influence of Martinson's conclusion).

[75] Martinson, *supra* note 73, at 25 (emphasis omitted).

[76] *See id.* at 49 (explaining that the author's findings offer "very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation").

[77] *See id.* at 47 (noting that rehabilitation and treatment to alter behavior less than deterrence mechanisms).

[78] *But see* United States v. Hopkins, 531 F.2d 576, 584 n.51 (D.C. Cir. 1976) ("The conclusions of those who have critically examined programs implemented during the rise of the era of the 'rehabilitative ideal' with regard to their efficacy in reducing recidivism and tendency to be used to justify substantial encroachments on liberty should be carefully considered in our rethinking of the intended goals of our system of criminal justice.

Whether this was because prisoners could not or did not want to rehabilitate, the programs were incapable of rehabilitating them, or the prison environment itself was in tension with the idea of rehabilitation—or all three—was unclear.[79]

The model of rehabilitation as training subsequently became even more modest. It did not hold out that the purpose of punishment was training, as in: we send people to prison so that they can enroll in vocational and educational training. Instead, it became the idea that *if* offenders were going to be in prison anyway, then it could not hurt to also give them training. It might not help, either, but it was an acceptable alternative to doing nothing. The purpose of punishment may not be rehabilitation (as the rehabilitation-as-treatment people believed, and as some of the more optimistic rehabilitation-as-training advocates proposed), but it could be a place where some rehabilitation might occur. The fact that rehabilitation does not work all that well should not be a deterrent to having rehabilitation at all. As the Court put it in *Greenholtz*, "The fact that anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago need not lead states to abandon hopes for those objectives."[80] Maybe rehabilitation programs worked a little, even if they did not work "spectacularly."[81]

In his classic opinion in *United States v. Bergman*, Judge Marvin Frankel gave clear form to the emerging wisdom about rehabilitation as training. "[T]his Court," Frankel wrote, "shares the growing understanding that no one should ever be sent to prison *for rehabilitation*."[82] Nonetheless, "[i]f someone must be imprisoned—for other, valid reasons—we should seek to make rehabilitative resources available to him or her."[83] Rehabilitation could remain a goal and a resource for those already in prison, but

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Although one cannot help but be disillusioned by such failures, it is important not to give up all hope. These failures may be attributable, at least in part, to the dearth of resources committed to making rehabilitative programs in institutions work, and the often haphazard manner by which such programs are implemented.").

[79] For a sober-eyed assessment of rehabilitation as training's failure by a current inmate, see generally Jeremiah Bourgeoius, *The Irrelevance of Reform: Maturation in the Department of Corrections*, 11 OHIO ST. J. CRIM. L. 149 (2013).

[80] Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 13 (1979).

[81] *See* JOEL SAMAHA, CRIMINAL JUSTICE 500 (7th ed. 2006).

[82] 416 F. Supp. 496, 499 (S.D.N.Y. 1976).

[83] *Id.*

it could no longer be *the* goal of punishment,[84] a position that would later be codified.[85]

C. REHABILITATION AS MORAL REFORM

There is a third model of rehabilitation that is important to point out, and its ambitions lie somewhere in between rehabilitation as treatment and rehabilitation as training. Rehabilitation as reform, as I shall call it, can be helpfully compared and contrasted with rehabilitation as treatment. Like rehabilitation as treatment, rehabilitation as reform emphasizes not just making the offender a more productive member of society, but fundamentally changing him. Unlike rehabilitation as treatment, however, this change is not along the lines of a medical paradigm where the offender is sick and needs to be cured. Rather, the offender needs to be morally educated: he needs to learn that what he has done was wrong, and to (at least) feel remorse over it. The offender is not supposed to just "fit in," he is supposed to become almost a different person, a "reformed" person through a process of moral reflection. The idea of rehabilitation as reform has not figured much in recent jurisprudence (the exception to this, I will argue, is *Graham*), although it has recently enjoyed a renewed vogue in moral and political theory.[86]

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[84] *See id.* ("[T]he goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement."); *see also Greenholtz*, 442 U.S. at 13–14 ("The objective of rehabilitating convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress. But it will not contribute to these desirable objectives to invite or encourage a continuing state of adversary relations between society and the inmate.").

[85] *See* 28 U.S.C. § 994(k) (2006) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

[86] For good recent statements, see Zachary Hoskins, *Punishment, Contempt, and the Prospect of Moral Reform*, 32 CRIM. J. ETHICS 1, 9–10 (2013) (explaining what it means to reform a person); Steven Sverdlik, *Punishment and Reform* 5 (Jan.1, 2012) (unpublished manuscript), *available at* http://digitalrepository.smu.edu/hum_sci_philosophy_research/1 (explaining that reform and rehabilitation are not identical goals, because rehabilitation assumes that criminals are mentally ill and in need of therapy); *see also* WALTER MOBERLY, THE ETHICS OF PUNISHMENT 261 (1968) (noting that the goal of reform is to create in prisoners "some sense of moral responsibility"); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFAIRS 208, 232–33 (1984) (discussing the interaction of moral education theory with sentencing policy); ANTONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 5 (2001) (contrasting rehabilitation, which seeks to

The idea of rehabilitation as moral reform is in fact a very old idea, and possibly the oldest association between punishment and rehabilitation.[87] It is at least as old as the penitentiary, where convicts were meant to go and, in solitude, reflect on their wrongs and show penance for them.[88] We punish with the hope that this will induce the offender to reflect and become a morally better person; but of course punishment is neither necessary nor sufficient for a person to reform. You can be punished but not reform, and you can reform without being punished.[89] Reform does not happen by punishing, rather, it is what punishing is supposed to spur.

It is not obvious how this reform was supposed to happen. Perhaps being punished was enough to induce in the offender feelings of remorse and repentance.[90] Perhaps it was through being isolated from outside, corrupting influences that prisoners could finally have a chance to reform.[91] Or perhaps it was a little of both. As de Beaumont and de Toqeuveville explained in their survey of American prisons:

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improve a person's skills, capacities, and opportunities, with reform of their dispositions or motives); Herbert Morris, *A Paternalistic Theory of Punishment*, *in* WHY PUNISH? HOW MUCH? 179 (Michael Tonry ed., 2011) (contrasting a paternalistic theory of punishment, which focuses on doing good to wrongdoers, with rehabilitative theories).

I am also extremely indebted, in my exposition of the reform ideal, to an amicus brief in the *Tapia* case. *See generally* Brief Amicus Curiae by Invitation of the Court, Tapia v. United States, 131 S. Ct. 2382 (2011) (No. 10-5400), 2011 WL 882592.

[87] It is arguably present in Plato's work. *See* Plato, *Punishment as Cure*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 37 (Gertrude Ezorsky ed., 1972) ("[A] just penalty disciplines us and makes us more just and cures us from evil."); J.E. McTaggart, *Hegel's Theory of Punishment*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra*, at 41 (noting that Hegel's theory is that punishment may cause a wrongdoer to truly repent of his sin).

[88] See the discussion by Stith and Cabranes of the "civic ideal of reformation through punishment," in STITH & CABRANES, *supra* note 28, at 15 ("Associated most prominently with the Pennsylvania Quaker physician Benjamin Rush and his friend Benjamin Franklin, the ideal of personal reformation was at the heart of the movement to transform existing penal institutions into more humane institutions of treatment and reform."). *See also* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 85 (1971) (describing how isolation caused convicts to consider the error of their ways).

[89] On this, see my *Commentary*: *What is the point of prison?* (St. Louis Public Radio, June 5, 2014).

[90] This was emphasized by McTaggart, *supra* note 87, at 51: "[t]he aim of punishment is . . . to produce repentance."

[91] ROTHMAN, *supra* note 88, at 71.

> Thrown into solitude [the prisoner] reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for any thing better, it is in solitude, where remorse will come to assail him. . . . Can there be a combination more powerful for reformation than that of a prison which hands over the prisoner to all the trials of solitude, leads him through reflection to remorse, through religion to hope . . . ?[92]

For rehabilitation as reform, other people, such as judges and jailors cannot themselves directly cause moral reform. Doctors and experts cannot do it, nor can vocational counselors or psychologists, although perhaps they can help at the margins. Training may be a good way to show reformation, but it is possible to be well-trained but not morally reformed. You could be an excellent worker or student, but a bad person. Only your own efforts, the hard work of reflection, can lead you to remorse, repentance, and hope.

The model of rehabilitation as reform in its expectation of what the prisoner was supposed to achieve rivals rehabilitation as treatment in its ambition. Your time in prison was meant to help *cure* you, not in the sense that you were sick and now you are well, but in the sense that you were morally corrupt and now you are morally pure (or more pure). In some more aggressive versions, the very purpose of punishment is that it can induce this reform: we punish you so that you will reform yourself. In a less ambitious version, rehabilitation as moral reform requires that prison should not hinder the goal of moral reform (where punishment might be justified on other grounds).[93] At a minimum, prison should not be a place where you came out brutalized and degraded.[94]

In either its more or less ambitious versions, however, the goal of moral reform is fundamentally incompatible with rehabilitation as treatment. The therapeutic model dispenses with remorse and

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[92] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 22, 51 (Francis Lieber trans., Carey, Lea & Blanchard 1833).

[93] *See* Hoskins, *supra* note 86, at 11 (arguing that punishment should not undermine prospects for reform).

[94] Morris, *supra* note 86, at 158.

regret (should we feel guilty for having a cold or for having gout?) and places the prisoner in the hands of a doctor. Moral reform, by contrast, requires that the offender accept his responsibility and strive to atone for it; he undergoes a kind of "secular penance."[95] In this respect, moral reform is often tied to retributivism, but it is, I believe, distinct from it. Retribution at its core says that people deserve to be punished.[96] It says nothing about whether those who are punished believe that they are responsible or that they should show remorse for what they have done.[97] Moral reform, by contrast, requires these things, and indeed may require that punishment should cease after moral reform has been achieved.[98]

This model—although very old—had new life given to it in the *Graham* decision. Both in rhetoric and in substance, the Court held out prison as a place where moral reform might happen or at least not frustrate the possibility for moral reform.[99] But first we need to set the context for the rise of rehabilitation in *Graham*—in the Court's conflicted yet ultimately skeptical view of the rehabilitative ideal in almost all of its forms.

III. THE REHABILITATIVE IDEAL IN PRACTICE I: STATUTORY INTERPRETATION

I have already mentioned how rehabilitation in some of its guises has appeared in older federal and Supreme Court cases.

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[95] R.A. Duff, *Penance, Punishment, and the Limits of Community*, *in* WHY PUNISH? HOW MUCH?, *supra* note 86, at 179.

[96] *See, e.g.*, MICHAEL MOORE, PLACING BLAME 153 (1997).

[97] Characterizing punishment as a "reformative enterprise," Duff, *supra* note 95, at 179, seems fundamentally different than viewing it as a way of giving out "just deserts." At best, it may be a condition of punishment being "reformative" that it is only given to those who deserve it. See also my discussion of this point in Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 610 (2013).

[98] *Contra* DUFF, *supra* note 86, at 116–18. It may be thought that so-called shaming punishments might induce a type of moral reform; I am not sure this is correct. At least, it is an open question whether shaming serves more to degrade the offender than to inspire him to reform himself. It is, however, also an open question whether *prison* is all in all less degrading than shaming punishments. For my reflections on this, see Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 622 (2006).

[99] *See* Graham v. Florida, 560 U.S. 48, 75 (2010) (holding that the state must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

But discussions about the meaning of rehabilitation have played a significant role in two recent cases besides *Graham*, although the focus in these cases was on the Sentencing Reform Act (SRA) and its interpretation and use of rehabilitation.[100] Nonetheless, in *Tapia v. United States*[101] and *Pepper v. United States*[102] (both decided in 2011), the Supreme Court made more general, almost philosophical, statements about the meaning of rehabilitation. Interestingly, statements in the two cases seem to be directly at odds with one another (*Tapia* seems anti- the rehabilitative ideal; *Pepper* pro-). Whether the competing statements can be reconciled in terms of a larger principle is the focus of the last section of this Part.

The two cases also form an important backdrop for my reading of *Graham*, despite the fact that they were decided after *Graham*. Indeed, they form a bridge between the history of the rehabilitative ideal and its present reality. Parts of that ideal continue to be in play in the Court's jurisprudence, but mostly the Court is acting against a background of pronounced hostility to rehabilitation: a hostility that was codified in the SRA, but that the Court also seems to share.[103] How *Graham* could emphasize the ideal of rehabilitation in this context is addressed in the next Part.

A. THE REJECTION OF REHABILITATION: *TAPIA*

Tapia concerned the sentencing of Alexander Tapia, who was convicted by a jury for bringing illegal immigrants into the United States for financial gain.[104] At sentencing, the judge gave Tapia fifty-one months in prison, but was ambiguous as to the reasons *why* she was being sentenced to that particular term. According to the sentencing judge, the sentence for Tapia had "to be sufficient to provide[ ] needed correctional treatment, and here I think the

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[100] For background on the SRA, see STITH & CABRANES, *supra* note 28, at 38–77.

[101] 131 S. Ct. 2382 (2011).

[102] 131 S. Ct. 1229 (2011).

[103] *See, e.g.*, *Tapia*, 131 S. Ct. at 2391 (describing legislative history, the SRA, and attributing Congress's skepticism over the effectiveness of rehabilitation in prison to "decades of experience with indeterminate sentencing").

[104] *Id.* at 2383.

needed correctional treatment is the 500 Hour Drug Program."[105] The judge went on:

> Here I have to say that one of the factors that—I am going to impose a 51-month sentence, . . . and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.[106]

Stated differently, the sentencing judge seemed to be indicating that one of the main reasons (if not the main reason) that Tapia was being given fifty-one months was so that she would be eligible for drug treatment.[107] If drug treatment had not been possible, or not available, Tapia would have gotten a lesser sentence.[108] The Court found that the trial judge had erred in extending Tapia's sentence so that she could receive drug treatment, and remanded her case to the Ninth Circuit to determine whether Tapia's failure to object to her punishment at sentencing meant she was without any remedy.[109]

Read narrowly, *Tapia* is an opinion about statutory construction; in particular, whether § 3582(a) of the Sentencing Reform Act (SRA) made a punishment permissible that was imposed, in part or in whole, for the sake of a prisoner's rehabilitation. That section, in relevant part, provided that the court, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term" should recognize "that imprisonment is not an appropriate means of promoting correction and rehabilitation."[110] Justice Kagan, writing for the Court, interpreted this to mean that a sentencing judge could not impose *or* increase a convicted person's sentence in order to advance the goal of rehabilitation.[111] Much like Judge Frankel's position in

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[105] *Id.* at 2385 (quotation omitted).

[106] *Id.* (quotation omitted).

[107] Justices Sotomayor and Alito, in concurrence, disagreed with this assessment. *See id.* at 2393–94 (Sotomayor, J., concurring) (asserting that the District Court did not elongate Tapia's term "beyond that necessary for deterrence").

[108] *See id.* at 2385 (linking the sentence to Tapia's need for drug treatment).

[109] *Id.* at 2392–93.

[110] 18 U.S.C. § 3582(a) (2006).

[111] *Tapia*, 131 S. Ct. 2391.

the *Bergman* case, the SRA allowed consideration of rehabilitation once a punishment of imprisonment had been determined on other grounds, but not in the formulation of the length of imprisonment or even whether imprisonment was appropriate.[112] Rehabilitation might be appropriate in choosing a punishment other than imprisonment, that is, in rejecting prison as an option.[113] It could not be the basis of choosing imprisonment over other alternatives or (more importantly for the *Tapia* case) deciding on a longer term of imprisonment.

But the Court sweeps more broadly in construing the SRA, construing it as wholly rejecting almost *any* except the most modest version of the rehabilitative ideal. Again, the Court is only interpreting a statute, not giving its own independent judgment of rehabilitation, but the emphasis on the SRA's repudiation of rehabilitation is instructive. Quoting from and relying on its decision in *Mistretta*, the Court noted that sentencing prior to the SRA was "premised on a faith in rehabilitation."[114] That faith required that judges and other correctional officers be permitted to base "their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation."[115]

A prisoner was to stay in prison until he had shown that he could safely reenter society, that is, that he had been rehabilitated. Accordingly, release "often coincided with 'the successful completion of certain vocational, educational, and counseling programs within the prisons."[116] But this model "fell into disfavor," not only because it resulted in sentencing disparities, but more fundamentally, because many began to doubt that prison and prison programs could reliably rehabilitate offenders (and that officials could tell when prisoners had been successfully rehabilitated).[117]

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[112] *See* United States v. Mogel, 956 F.2d 1555, 1563 (11th Cir. 1992) ("Rehabilitative considerations have been declared irrelevant for purposes of deciding whether or not to impose a prison sentence and, if so, what prison sentence to impose."), *cert denied*, 506 U.S. 857 (1992).

[113] Indeed, the statute could be read as positively *encouraging* options other than prison if one had rehabilitation in mind as a goal.

[114] *Tapia*, 131 S. Ct. at 2386.

[115] *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 363 (1989)).

[116] *Id.* at 2386–87 (quoting S. REP. NO. 98-225, at 40 (1983)).

[117] *Id.* at 2387.

In other words, according to the *Tapia* Court, the SRA effectively repudiated *Williams*, at least when it came to imprisoning offenders, and by doing so pushed courts to move beyond rehabilitation as treatment (and its reliance on expert judgment and indeterminate sentencing) and even rehabilitation as training (at least on any strong version of that model).[118] Determinate sentencing, and not individualized sentences, was now the order of the day: judges were constrained in picking and choosing punishment based on facts about the offender, and about his capacity for rehabilitation. Rehabilitative training and treatment could go on in prison but it could not be treated as a goal of punishment; they were things that could occur only *after* an appropriate punishment had been fixed.[119] Even then, there was little guarantee that any "vocational, educational, and counseling programs"[120] within prison would be successful. If Congress wanted courts to be able to mandate rehabilitation as training in prison, the Court noted, it would have given them the power to *impose* training or drug treatment on offenders in prison, but it notably did not give them that power.[121] Courts can only "recommend" training and treatment for offenders who are to be imprisoned,[122] and Justice Kagan, in an aside, encouraged them to do so.[123] But they cannot require it.[124]

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[118] *See, e.g.*, United States v. Grant, 664 F.3d 276, 280–81 (9th Cir. 2011) ("The Court read the statute as a broad rejection of imprisonment as a means of promoting rehabilitation.").

[119] *See Tapia*, 131 S. Ct. at 2389–90.

[120] *Id.* at 2386 (quoting S. REP. NO. 98-225, at 40 (1983)).

[121] *See id.* at 2390 ("If Congress . . . meant to allow courts to base prison terms on offenders' rehabilitative needs, it would have given courts the capacity to ensure that offenders participate in prison correctional programs.").

[122] *See id.* ("A sentencing court can *recommend* that the [Bureau of Prisons] place an offender in a particular facility or program.").

[123] *Id.* at 2392 ("So the sentencing court here did nothing wrong—and probably something very right—in trying to get Tapia into an effective drug treatment program.").

[124] *Id.* at 2393. After *Tapia* was decided, a circuit split quickly developed on its meaning regarding a revocation of supervised release. *See* Douglas A. Berman, *Quick Circuit Split on* Tapia*'s Impact for Supervised Release*, SENT'G L. & POL'Y (July 20, 2011, 11:39 AM), *available at* http://www.sentencing.typepad.com/sentencing_law_and_policy/2011/07/quick-circuit-split-on-tapias-impact-for-revocation-of-supervised-release.html (discussing the split between the First and Fifth Circuits on this issue).

B. *PEPPER* AND THE REAFFIRMATION OF THE IDEAL

Surprisingly, in the same term as *Tapia*, the Court reaffirmed its holding in *Williams* in terms that were almost as sweeping as *Tapia*'s rejection of the rehabilitative ideal. *Pepper v. United States* involved a unique set of facts: Jason Pepper had pled guilty to a conspiracy to distribute more than 500 grams of methamphetamine.[125] He was sentenced to a twenty-four month term in prison, an almost seventy-five percent departure from the normal sentencing range, and five years of supervised release.[126] The Government appealed the sentence,[127] and two years after the original sentencing decision, Pepper's original sentence was reversed and remanded by the Eighth Circuit for resentencing.[128] In the meantime, Pepper served his twenty-four month prison term and began a period of supervised release.[129] At his resentencing hearing in 2006, Pepper and several witnesses testified that he had, *inter alia*, completed a 500 hour drug program,[130] no longer was abusing drugs, had enrolled in college (and was getting straight As), had a part-time job, and had reconciled with his family.[131]

The district court again sentenced Pepper to twenty-four months, relying on Pepper's post-sentencing rehabilitation and explaining "it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing guidelines to send [Pepper] back to prison."[132] The government appealed and Pepper's sentence was once more reversed and remanded to the district court.[133] In its ruling, the Eighth Circuit explained that the district court had abused its discretion in considering post-sentencing rehabilitation as a sentencing factor, both because it was not "relevant" and "would create unwarranted sentencing disparities and inject blatant inequities into the

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125 131 S. Ct. 1229, 1236 (2011).

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 Interestingly, this seems to be the same program that was at issue in *Tapia*. Tapia v. United States, 131 S. Ct. 2382, 2385 (2011).

131 *Pepper*, 131 S. Ct. at 1236–37.

132 *Id.* at 1237 (quotation omitted).

133 *Id.*

sentencing process."[134] At Pepper's second resentencing hearing in 2008 (and third sentencing hearing overall), Pepper and others again testified to Pepper's continuing rehabilitation (he was still attending school and still working, but also had recently married).[135] This time, the district court rejected Pepper's request for a downward variance, and Pepper was sentenced to sixty-five months.[136] After losing at the Court of Appeals, Pepper appealed to the Supreme Court.[137] He won.[138]

The Court defended the right of judges at sentencing to consider *all* factors in sentencing, even evidence that was not available to the original sentencing judge.[139] In favoring broad discretion, the Court found its most germane precedent in *Williams*, the case in which the Court had most blatantly adopted aspects of the rehabilitative ideal. "We have emphasized," the *Pepper* Court said, quoting *Williams*, that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."[140]

The language the *Pepper* Court quoted from *Williams* is the language that the rehabilitation as treatment model bequeathed to the Court: experts and judges need to have full information and wide latitude when sentencing, because the idea behind sentencing is not to give a "one size fits all" punishment but to tailor or "individualize" a punishment based on the particularities of each offender.[141] As the Court also quoted from *Williams*, "the punishment should fit the offender and not merely the crime."[142] The best sentence is the right prescription based on an individualized diagnosis that will lead to the offender's rehabilitation.[143] Indeed, *Pepper* goes even further than *Williams*

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[134] *Id.* at 1237–38 (quoting 486 F.3d 408, 413 (8th Cir. 2007)).

[135] *Id.* at 1238.

[136] *Id.*

[137] *Id.* at 1239.

[138] *See id.*

[139] *Id.* at 1241–43.

[140] *Id.* at 1240 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

[141] *See supra* Part II.A.

[142] *Pepper*, 131 S. Ct. at 1240 (quoting *Williams*, 337 U.S. at 247).

[143] *See Williams*, 337 U.S. at 247 ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.").

did, emphasizing the need to consider evidence of the offender's character not only *before* but even well *after* the moment of conviction.[144]

Of course, the *Pepper* Court does not say that individualized punishments are intrinsically related to rehabilitation as treatment; then again, neither did the *Williams* Court. But recall that rehabilitation as training also required that sentences be individually tailored. In this regard it is revealing what additional facts the district court in Pepper's resentencing thought especially relevant, viz., the fact that he was attending college, held a steady job, and had reconciled in his family.[145] In short, Pepper had *rehabilitated* himself, not in the sense that he was sick and getting better (the rehabilitation as treatment model) but in the sense that he was well on his way to becoming a fit and productive member of society (the rehabilitation as training model).

The inference is almost impossible to miss: Pepper was getting a lower sentence because he was getting rehabilitated *outside* of prison and so would need fewer years of rehabilitation *inside* prison. The *Pepper* Court held as much.[146] Evidence of Pepper's rehabilitation prior to his sentencing was relevant because it was "highly relevant to several" of the statutorily mandated factors judges were to consider at sentencing, including the purpose of "provid[ing] the defendant with needed educational or vocational training."[147] Sentences should be individualized, *Pepper* held, and one of the things that matters to individualization is whether the offender needs (or in Pepper's case, *doesn't* need) rehabilitation. Rehabilitation, in short, is a sentencing factor.

C. RECONCILING *TAPIA* AND *PEPPER*

Can the two cases—decided in the same Supreme Court Term—be reconciled? At a high enough level of abstraction, *Tapia* and *Pepper* go in strikingly different directions. *Tapia* repudiates *Williams*; *Pepper* embraces it. As far as the interpretation of the SRA, *Tapia* seems to have the better story. Indeed, Justice Alito

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[144] *Pepper*, 131 S. Ct. at 1241–42.

[145] *Id.* at 1242.

[146] *Id.* at 1242–43.

[147] *Id.* at 1242 (quoting 18 U.S.C. § 3553(a)(2)(D) (2006)).

picked out the majority's reliance on *Williams* in *Pepper* for special ridicule. "Anyone familiar with the history of criminal sentencing in this country cannot fail to see the irony in the Court's praise for the sentencing scheme exemplified by *Williams*," Alito wrote.[148] But, he continued, "[b]y the time of the enactment of the Sentencing Reform Act in 1984, this scheme had fallen into widespread disrepute."[149] He rejected the Court's opinion in *Pepper* as an ill-advised "paean" to the "old regime."[150]

More substantively, the two decisions are at odds as to whether rehabilitation is a sentencing factor. *Tapia* reads the SRA and particular provisions of it as positively removing rehabilitation as a factor for judges to consider.[151] *Pepper* favors judges considering an offender's past rehabilitation as relevant to whether he needs further rehabilitation.[152] Trying to find a distinction between the two uses of rehabilitation seems formalistic. We could say that *Tapia* is about using rehabilitation to *increase* a sentence, whereas *Pepper* is about using rehabilitation to *decrease* a sentence. But then both are still ways of using rehabilitation as a sentencing factor. If prison is not an appropriate means for promoting rehabilitation *at all* (as the statute at issue in *Tapia* suggests), then it should not have been a relevant factor in Pepper's case. But it seems obvious that rehabilitation *was* a driving factor in at least one of Pepper's sentencing decisions: *because* Pepper was already rehabilitated, he needed less rehabilitation in prison.[153] If *Tapia* is correct about rehabilitation as a sentencing factor, then *Pepper* seems wrongly decided and vice versa.[154]

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[148] *Id.* at 1256 (Alito, J., concurring in part and dissenting in part) (citing *Williams*, 337 U.S. at 241).

[149] *Id.* at 1256–57.

[150] *Id.* at 1257.

[151] *See supra* notes 114–24 and accompanying text.

[152] *See supra* notes 147–48 and accompanying text.

[153] *See supra* notes 146–48 and accompanying text.

[154] If we extend the logic of *Pepper* further, its tension with *Tapia* becomes even more manifest. Suppose Pepper had done bad things prior to his conviction (he had lost his job, or gotten a divorce, or flunked out of school), then presumably these facts would be relevant, but relevant because they showed *the need for further rehabilitation.* If Pepper's good acts are relevant to decreasing his sentence because he has already been rehabilitated, then his bad acts would seem to be relevant for the same reason: because they show the need for more rehabilitation.

But there may be a way we can give more substance to the seeming formalism. Suppose we take *Tapia*'s rule *not* to be the blanket one that rehabilitation cannot be used as a factor when sentencing someone to prison; suppose, instead, we take it to be that, because prison is bad for rehabilitation, it should not be used to put someone in prison in the first place, or to lengthen his sentence once there. That is, if prison is bad for rehabilitation, then judges should never factor in someone's need for rehabilitation when considering whether to *increase* his term in prison.

By the same token, if prison is bad for rehabilitation, then judges should factor in someone's need for rehabilitation when considering whether to *decrease* his term in prison (or not to sentence him to prison at all). In short, the SRA doesn't dictate that judges should never consider someone's need for rehabilitation. It dictates that judges should consider someone's need for rehabilitation only when it means that they should get *less time* in prison. The principle that emerges of out of the cases then is: prison is bad for rehabilitation. Under this principle, both *Tapia* and *Pepper* were correctly decided because they both did not use rehabilitation as a factor that might *increase* prison time, *Tapia* because it rejected a longer sentence and *Pepper* because it licensed a lower sentence.

Viewed in this light, *Pepper* is as anti-rehabilitative as *Tapia*. Both opinions are aware that rehabilitation programs are available in prison. But such programs are only relevant, *if they are relevant at all*, if prison time is going to be imposed anyway. If punishment is to be imposed, it is probably a good thing to commend them. The model at play here is mostly rehabilitation as training but in the modest way Judge Frankel endorsed it.[155] Judges should be aware that rehabilitative programs are there for prisoners, but they should not operate under the idea that prison is being imposed *for* rehabilitation—whether by itself or in conjunction with educational, vocational, or treatment programs. At best, rehabilitation is something that should be pursued *outside*

[155] For a reading of *Tapia* along these lines see William Peacock, *Prison is for Punishment, Not Rehabilitation?*, FINDLAW: U.S. FOURTH CIRCUIT (Oct. 31, 2012, 3:04 PM), http://blogs.findlaw.com/fourth_circuit/2012/10/prison-is-for-punishment-not-rehabilitation.html.

of prison (including while supervised by the criminal justice system), but never *in* prison.[156]

IV. THE REHABILITATIVE IDEAL IN PRACTICE II: THE CONSTITUTION

Graham was a constitutional decision and not a statutory one, and it was decided before both *Tapia* and *Pepper*. Nonetheless, its emphasis on rehabilitation is striking. Both *Tapia* and *Pepper* show an awareness of the doubt; which predates those cases, about rehabilitation that resulted in Congress passing the SRA.[157] And when set against other constitutional cases discussing punishment, *Graham*'s focus on rehabilitation is an outlier. In *Roper v. Simmons*, decided before *Graham* and which *Graham* most closely resembles, the focus was on retribution and deterrence, and whether the death penalty was a proportional punishment for children who are found guilty of murder.[158] It barely mentioned rehabilitation, which, given *Graham*, seems odd.[159] Death forecloses rehabilitation at least as much as life without parole does (if not more).[160] Why was rehabilitation so important in *Graham*, and equally as important, *what did* Graham mean by rehabilitation?

A. *GRAHAM*'S REHABILITATIVE HOLDING

The early response to *Graham* understandably focused on its extension of the "evolving standards of decency" test beyond the death penalty to sentences to life without parole.[161] Whether the

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[156] Thanks to Eric Miller for helping me to see this point more clearly.

[157] *See* Mistretta v. United States, 488 U.S. 361, 365 (1989) ("Serious disparities in sentences, however, were common. Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases." (citing NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 24–43 (1974))).

[158] Roper v. Simmons, 543 U.S. 551, 564 (2005).

[159] *Id.* at 568–75.

[160] *But see* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1282 (2013) (arguing that a death sentence is not incompatible with rehabilitation); Flanders, *supra* note 97, at 612–15 (same). Perhaps the *Roper* Court thought it went without saying that death cannot rehabilitate. But in *Graham*, that fact alone—*that a punishment may foreclose rehabilitation*—does real work in showing that the punishment is unconstitutional. My question is: why was that work not done on *Roper*, or at least hinted at?

[161] *See supra* note 2 and accompanying text.

Court's reasoning will be extended to other sentences and other groups (besides juveniles) still remains to be seen, and is the focus of much good work in the area.[162] But *Graham*'s more lasting impact may be its renewed emphasis on rehabilitation. Indeed, the fact that life in prison without parole foreclosed "the rehabilitative ideal" (as the Court put it)[163] is central to its holding. Indeed, it is perhaps the *theme* of the opinion, as well as the basis of some of its more rhetorically moving passages.

Consider in this regard how the *Graham* Court treats incapacitation as one of the legitimate goals of punishment, which shows how rehabilitation emerges as a theme in the opinion.[164] Even here, prior to the Court's explicit discussion of rehabilitation as a purpose of punishment, rehabilitation creeps in. Incapacitation is a valid rationale for punishment, Justice Kennedy writes, but not here, because "[t]o justify life without parole . . . for juveniles" requires a judgment that the juvenile will be a danger to society forever, which is to say, a judgment that the juvenile is incorrigible.[165] Kennedy goes on to say that a judgment of incorrigibility will be very difficult to make.[166] It will be hard to decide whether a juvenile's crime is the result of "transient immaturity" or the result of "irreparable corruption."[167]

So far, Kennedy's point is relatively modest, and for that reason also vulnerable. The fact that it may be hard to find those who are irreparably corrupt does not mean that *no* juveniles might be irreparably corrupt, and that a legislature might rationally target those who are. At least at this point, the argument only suggests stricter standards or closer analysis for deciding who gets life without parole, a point emphasized by Chief Justice Roberts in his concurring opinion.[168] We do not need a categorical ban on life without parole, just a more carefully targeted limit. Some

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[162] *See, e.g.*, Steiker & Steiker, *supra* note 3, at 79–80.

[163] Graham v. Florida, 560 U.S. 48, 74 (2010).

[164] Lynn Branham (in conversation) has stressed how rehabilitation plays multiple roles in *Graham*: as part of its proportionality analysis, as part of its analysis of the purposes of punishment, and in its discussion of a case-by-case approach to sentencing. I agree. My analysis here (as the text says) is illustrative, not exhaustive.

[165] *Graham*, 560 U.S. at 72.

[166] *Id.* at 72–73.

[167] *Id.* at 73 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

[168] *Id.* at 86 (Roberts, C.J., concurring in the judgment).

juveniles may really be incorrigible, and so we might want to incapacitate *them*.

But what Kennedy says next in his opinion rules this out. For, he writes, "[e]ven if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset."[169] That is to say, even if incapacitation is fully warranted (and so a rational and just punishment), the state cannot engage in it by imprisoning juveniles in life without parole. Why? The answer, which becomes clearer in the Court's explicit discussion of rehabilitation, is that the state cannot foreclose the possibility *at the outset* that the offender could be rehabilitated. Incapacitation is not an acceptable rationale for punishment because it rules out the offender ever changing for the better. In short, rehabilitation as a purpose of punishment trumps incapacitation, *even when incapacitation is fully justified.*

Rehabilitation is the last purpose of punishment Kennedy discusses, although (as we just saw) it shapes the discussion of the purposes of punishment that went before it.[170] Again, as with incapacitation, a sentence to life without parole passes a judgment on the juvenile and his "value and place in society," viz., that he is "incorrigible" and can never "reenter the community."[171] It is cruel to say to a juvenile offender that he is "irredeemable"[172] and that he will never mature enough or be rehabilitated enough to earn release. As the Court eloquently puts it later in the opinion, "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[173] This, the Court says, is cruel and unusual.[174] The Constitution requires giving juveniles the opportunity to show that they can be rehabilitated, "some meaningful opportunity to

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[169] *Id.* at 73.

[170] Rehabilitation figures in the proportionality analysis, too: life without parole is disproportionate to the juvenile's offense precisely because it expresses a judgment of incorrigibility. *See id.* (reasoning that a judgment of incorrigibility at the outset is "disproportionate").

[171] *Id.* at 74.

[172] *Id.* at 75.

[173] *Id.* at 79.

[174] *See id.* at 81–82.

obtain release based on demonstrated maturity and rehabilitation."[175]

B. *GRAHAM*'S TWO MODELS OF REHABILITATION

Graham's rhetoric is sweeping, which we might expect from Justice Kennedy. But what does the rhetoric mean?[176] What in particular does Kennedy mean by not giving up on the "rehabilitative ideal"? Two models of rehabilitation seem to be working in *Graham*, with one ultimately more important than the other. *Graham* occasionally alludes to, and twice makes explicit, the ideal of rehabilitation as training. But the rhetoric and the overall thrust of *Graham* fit more comfortably within the ideal of rehabilitation as moral reform.

The initial reference *Graham* makes to the model of rehabilitation as training comes in its discussion of the rehabilitative purpose of punishment. The Court cites an amicus brief noting that those sentenced to life without parole "are often denied access to vocational training and other rehabilitative services."[177] Juveniles, the Court adds, "are most in need" of these services.[178] A little later, the Court hits the point again: "it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[179] In other words, life without parole means not only no hope of release, but a *denial* of opportunities for rehabilitation in the form of vocational and educational programs. When these passages are combined with the idea that juveniles must be able to have a "meaningful opportunity" to obtain release, the rehabilitation as training model's influence is patent: prison is a place where juveniles, if they work at it and have the right kind of support, can become fit and productive members of society and so can be released into society. Denying them these services "reinforce[s]" the judgment that the juvenile is irredeemable, what Kennedy calls a "perverse consequence."[180]

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[175] *Id.* at 75.

[176] For a philosophical look at Kennedy's rhetoric of hope, see Ristroph, *supra* note 14, at 75.

[177] *Graham*, 560 U.S. at 74.

[178] *Id.*

[179] *Id.* at 79.

[180] *Id.*

But if the rehabilitation as training model were the only model the Court had in mind, then the Court's opinion, I believe, would have a very different shape and tenor. It would not just mention that programs should not be closed off to juveniles, but it would positively *require* that those programs be available to them. After all, it would be cruel to say that juveniles should be given the hope of release while denying them the tools they need to achieve that release (in this way, as the Court says in a striking passage, the prison system becomes "complicit" in the denial of opportunity[181]). But the Court does not entirely go this way. Instead, it explicitly leaves it open to "the State, in the first instance, to explore the means and mechanisms for compliance" with the Court's instruction that juveniles must be given a "meaningful opportunity" to obtain release.[182] "It is for legislatures," the Court says, "to determine what rehabilitative techniques are appropriate and effective."[183]

Note three things about the Court's phrasing here. First, it is a matter for the *state*, in particular the *legislature*, and not the Court, to find ways to comply with the Court's mandate. In other words, there is no particular form or type of specifically rehabilitative "opportunity" that is required. Second, and more revealingly, the state need in the end only *explore* means and mechanisms for compliance. It need not, that is, actually *implement* any of these means and mechanisms, at least not yet. Indeed, one could imagine that legislatures might determine, and even *reasonably* determine, that "nothing works," so that no rehabilitative programs are offered.[184] Third, and most important, what the Court is referring to is not means and mechanisms of rehabilitation, at least not directly: the Court is referring to *means and mechanisms of release*.[185] This is not the language of a Court that is requiring states adopt the model of rehabilitation as

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[181] *See id.* ("In some prisons, moreover, the system itself becomes complicit in the lack of development.").

[182] *Id.* at 75.

[183] *Id.* at 73–74.

[184] Again, Kennedy's opinion is careful (almost too careful): he rejects the idea that life in prison without parole for juveniles might lock them out from rehabilitative programs. This is bad, Kennedy says. *Id.* at 74. But nothing in his opinion holds that states have an obligation, in the first place, to institute those programs.

[185] *See id.* at 75.

training. It implies at most that the inmate must have at least an opportunity to prove he has matured; this is his "opportunity," not the opportunity for educational and vocational programs per se. In fact, the Court's language here may just be a long way around to saying that the longest permissible sentence for juveniles is life in prison with the possibility of parole.[186]

If this is all *Graham* requires, then we might worry about the gap between *Graham*'s rehabilitative rhetoric and its remedy; the rhetoric of rehabilitation as training is mostly hortatory. States post-*Graham* will have to give juveniles like Graham an opportunity, eventually, for release. But they do not have to make it any more possible in reality for juveniles to rehabilitate themselves and so win release. "Meaningful opportunity for release" becomes more about the preconditions of *release* than conditions of confinement, and the implementation of *Graham* becomes (merely) about specifying those conditions.[187] All the same, states *may* make rehabilitative programs available to juveniles, but this is not required of them.[188] What is required is the possibility of release, not rehabilitation and not even the possibility of rehabilitation.

Is the rhetoric of rehabilitation in *Graham* empty then? Not entirely, and not if we keep in mind that rehabilitation as training is only one possible mode of the rehabilitative ideal. There is a second strain in the Court's opinion, one that does not focus so much on rehabilitative programs that the state has to offer, than on the possibility of the offender himself undertaking *his own* moral reform. Recall that in the model of rehabilitation as moral reform that reform is not so much the result of prison vocational or

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[186] Thus *Graham* does not lead in any straightforward way to creating a "right to rehabilitation." *See* Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381, 385–86 n.33 (2012) (collecting citations on the "right to rehabilitative treatment" (quoting Pena v. N.Y. State Div. for Youth, 419 F. Supp. 203, 204 (S.D.N.Y. 1976))); *see also* Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 13 (2011) ("[Graham] empowered the States to formulate appropriate and effective rehabilitative techniques.").

[187] *See* Drinan, *supra* note 14, at 78–82; Sarah French Russell, *Review for Release: Juvenile Offenders State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 375–77 (2014) (exploring what the phrase "meaningful opportunity" means).

[188] In the language of the *Tapia* opinion, *Graham* seems to say that probably a lot of good can come from rehabilitation as training, but there is no constitutional mandate for it.

educational programs; instead, the reform comes about from the individual's own reflection and remorse. What the state has to do is hold out hope for the maturation and moral reform, even if (and perhaps *especially* if) it cannot compel it.

Justice Kennedy's rhetoric echoes the principles of the older reform model of rehabilitation almost precisely. The state does not have to give Graham access to any rehabilitative programs (although it should not deny them to him when he is in prison). Rather, the goal is ultimately Graham's rehabilitation of himself. In one passage, Justice Kennedy writes that "[m]aturity"—not prison, not training—"can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."[189] And, in an especially vivid paragraph, Kennedy writes that with a sentence of life without parole, Terrance Graham has no meaningful opportunity to obtain release "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes."[190] Training programs may help Graham at the margins become a more productive member of society, but it is only his own reflection and remorse that can lead to his atonement.

What the rehabilitation as reform model positively prohibits are punishments that say to the offender he *cannot* reform. If punishment is to aim at reform, it cannot at the same time make the "expressive judgment"[191] that a person will never reform and be able to reenter society. In other words, if the intent behind punishment is that the person reform, the punishment cannot simultaneously convey the judgment that the person *cannot* reform. But this judgment is what (by Kennedy's light) juvenile life without parole expresses: that the juvenile is incorrigible.[192] Indeed, it is this disqualifying aspect of life without parole that is the basis of the opinion's most eloquent passage: "[l]ife in prison

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[189] *Graham*, 560 U.S. at 79.

[190] *Id.*

[191] *Id.* at 74.

[192] *See id.* at 79 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.").

without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[193] Note what disqualifies the punishment *in the first instance*: the judgment that the punishment makes, viz., that the offender is without hope of reform. The punishment is not wrong for what it *does* to the offender, but for what it *says* to him, at the outset, about his possibility for moral reform.[194]

This rhetoric matches precisely the rhetoric of rehabilitation as moral reform. As Jean Hampton puts it in her article on punishment as moral education, the state "must never regard any one it punishes as hopeless, insofar as it is assuming that each of these persons still has the ability to choose to be moral."[195] Or consider also Antony Duff's statement of the moral reform view as one which believes that "we can never have *morally* adequate grounds—nothing could count as morally adequate grounds—for treating a person as being beyond redemption."[196] Because life without parole regards juveniles as "hopeless" and treats them as "beyond redemption," it is prohibited as a punishment. It is one thing if a punishment denies juveniles training. It is quite another thing if it denies juveniles hope and "impl[ies] that those subject to [life without parole] are to be permanently and irrevocably expelled from ordinary community with their fellow citizens."[197]

Thus, *Graham*'s basic rehabilitative holding: the state cannot discourage a person from reforming by how it sentences. And if the state does not discourage reform, reform may happen, perhaps just by dint of juveniles growing older and maturing. "Maturity" is another key word in *Graham*, and it too fits with the model of rehabilitation as moral reform.[198] The state cannot make you "mature"; it is a process one undergoes, more or less actively, by slowly taking responsibility for oneself. In fact, too much

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[193] *Id.*

[194] Of course, there may be other things that may also suggest a person cannot reform, such as lack of decent prison conditions as well as inadequate opportunities for rehabilitative training. The point now, however, is that the Court treats the message sent by life in prison without parole as the clearest and most salient expression of a person's inability to reform.

[195] Hampton, *supra* note 86, at 231.

[196] R.A. DUFF, TRIALS AND PUNISHMENTS 266 (1986).

[197] Duff, *supra* note 95, at 185.

[198] *Graham*, 560 U.S. at 73.

interference can end up hindering one's moral growth. At the same time, the state cannot *announce* that you will simply never reform, which it does (Justice Kennedy says) by saying you can never be released.[199]

Now we may have a worry about the logic of this argument. According to the model of rehabilitation as reform, nothing stops reform from happening in prison (through reflection and maturity) and indeed, one might be reformed in prison and yet never be released.[200] Moral reform, in other words, is a good in itself, even if it does not have release as its eventual reward. Indeed, if offenders reform only for the sake of being released, we may wonder whether this might corrupt their efforts at moral reform not only by encouraging the pretense of reform when none has occurred, but more generally by giving offenders the wrong incentives to reform: offenders should show remorse because they are remorseful, not because they want to get out of jail.[201]

On purely moral reform grounds, there does not seem to be any disjunct between remaining in prison and being reformed (nor for that matter, need there be any disjunct between being sentenced to death and being morally reformed[202]). You can live in jail and die in jail, and meanwhile undergo an amazing moral transformation.[203] You may be sentenced to death, and show contrition prior to your execution, and be a morally changed person. All this seems possible, and so raises the question of whether offenders *need* the possibility of release for moral reform to be possible.

But what is important in *Graham* may be less about release per se and more about the message that the impossibility of release sends: the state saying that it will never release you seems to

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[199] *See id.* at 72 (reasoning that this sends a message that a "juvenile is incorrigible").

[200] *See supra* notes 86–88 and accompanying text.

[201] *See* Hampton, *supra* note 86, at 234 (noting the difficulty in determining whether an apparently repentant criminal is truly repentant or is faking repentance).

[202] *See supra* note 160 (reasoning that the death penalty is not incompatible with rehabilitation).

[203] In addition, you may acquire all sorts of vocational skills—that is, you may be fully successful at realizing the ideal of rehabilitation as training—yet only be able to use those skills *in prison*.

entail that you *will not* and *cannot* be reformed.[204] By the same token, saying that the state must give you a chance of being released strongly suggests that you *can* be morally reformed. What is important is that the state give you hope rather than a firm guarantee of release.[205] Some juveniles may not, in fact, ever be released and so their hopes will remain just that; but they cannot be denied hope at the outset.[206] Indeed, *the judgment at the outset* is the main wrong of sentencing an offender to life without parole and constitutive of that judgment is disallowing an meaningful opportunity for release.[207] The real wrong is not that offenders will not be able to reform themselves if they spend their lives in prison (it is possible that they could). The real wrong is that the state, by saying some offenders are unfit to join the community *ever* is making a rather strong statement that those offenders can *never* reform. The rehabilitative holding in *Graham* is not that the state must rehabilitate, but it cannot rule out the possibility of rehabilitation taking place.

That this is a rather constrained vision of rehabilitation can be shown by the fact that rehabilitation as moral reform is compatible with the "prison is bad for rehabilitation" principle of *Tapia* and *Pepper*. *Tapia* and *Pepper* could be reconciled because they both said that one could never sentence someone to *more* prison time because that person needed more rehabilitation.[208] Prison just could not (reliably) be counted on to rehabilitate people. Note, though, Justice Kennedy does not require that prison rehabilitate juveniles.[209] Rehabilitation programs in prison are nice, but not required by the Constitution.[210] Nor does prison in general have to be a place where people usually get better. Nothing in *Graham* entails that prison is good for rehabilitation, and that juveniles

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[204] *See Graham*, 560 U.S. at 75 (asserting that the Eighth Amendment "forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society").

[205] Note that the state does not necessarily deny hope by failing to provide rehabilitative programs.

[206] *See Graham*, 560 U.S. at 75 (recognizing that a juvenile convicted of a non-homicide crime may never be released, consistent with the Eighth Amendment).

[207] *Id.*

[208] *Id.*

[209] *See id.* (requiring only a "meaningful opportunity to obtain release").

[210] *See id.* at 73–74 (noting that determining whether programs are effective and appropriate is the province of the legislatures).

should be incarcerated because incarceration will rehabilitate them. *Graham* is not a departure from *Tapia* and *Pepper* in the end; it accepts their skepticism about the desirability of prison as a place for rehabilitation. It only says that a sentence to prison cannot be one that denies any hope that they will reform. Whether the odds of reform are high or (more probably) low is in a way beside the point. The state cannot by its sentencing *rule out* moral reform and release; this the model of rehabilitation as reform forbids. The rest, which is a lot (almost everything), is on the offender.[211]

C. APPLYING *GRAHAM* AND REHABILITATION AS MORAL REFORM

Miller v. Alabama, the follow-up case to *Graham* that required individualized sentencing for juveniles convicted of homicide, did not extend *Graham* very far. It did not strike down life without parole for juveniles altogether, as perhaps the logic of *Graham* dictated.[212] If states cannot make the judgment "at the outset" that juveniles convicted of gruesome and terrible nonhomicide crimes are "incorrigible" and "beyond redemption," how does this change for homicide crimes? Instead, *Graham* focused on the possible disproportion between the culpability of juvenile murderers and life in prison without parole.

In this regard, *Miller* is a case about the individualization of punishments in the (old) retrospective, retributive sense, and not in the prospective, rehabilitative sense.[213] Youth is relevant in figuring out what the offender deserves for what he or she *did*, not because it may be relevant in predicting what he or she might *become*.[214] Justice Kagan in *Miller* says almost nothing about the possible future rehabilitation of offenders. She is not worried about expressing the judgment that some juveniles will be beyond redemption, because some of them will be; that is, some of them

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[211] Pushed to its limit, the logic of *Graham* leads to a kind of paradox. *Graham* says that the possibility of reform in prison must be left open. At the same time, prison is a place where reform is very difficult. I return to this paradox in my conclusion.

[212] Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).

[213] Perhaps not surprisingly, both *Tapia* and *Miller* were written by Justice Kagan. *Tapia* is hostile to extending punishment for rehabilitation; *Miller* hardly makes use of rehabilitation, mentioning it only in passing. *See Miller*, 132 S. Ct. at 2468 (briefly noting that "mandatory punishment disregards the possibility of rehabilitation").

[214] *Id.*

will really deserve to be in prison for the rest of their lives, and die in prison.[215] She is worried, rather, that the state be certain that those who are sentenced to die in prison will be the right ones.[216]

Does *Graham* then lack any bite, any promise for real change? *Miller* suggests that it may and that even extending *Graham* to categorically prohibit life in prison without parole for juveniles convicted of homicide is not in the cards.[217] Those juveniles who kill may indeed be fairly judged to be incorrigible *at the outset*, and be *denied* hope, although this will require an individualized finding. Nonetheless, we might speculate on some areas where *Graham* might have some influence even if (or because) rehabilitation means "rehabilitation as reform."

1. Shorter and Lesser Punishments. If *Miller* suggests that the rehabilitative ideal will not travel all the way upward to eliminate all punishments that impose life in prison without parole,[218] there is still a possibility that it might affect some lesser sentences, including non-prison sentences. These sentences would be ones in which a judgment was made that the offender would *never* reform, no matter the remorse he felt or the efforts at atonement he made. *Graham* said that life without the possibility of parole entailed this judgment,[219] but there may be other punishments that also imply incorrigibility. Based on *Graham*, these cases might also be candidates for cruel and unusual punishment, because they too would give up the rehabilitative ideal.

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[215] *See id.* at 2469 (recognizing that a sentencer might still sentence a juvenile to life in prison).

[216] Comparing *Graham* to *Miller* suggests a final way in which *Graham* subscribes to yet a third rehabilitative ideal, this time, rehabilitation as treatment. *Graham*'s ultimate prescription for juveniles is not only an individualized sentence: it is an indefinite sentence subject to proof of rehabilitation. Of course, the rehabilitation the Court in *Graham* is interested in is the moral reform of the offender (his maturity, his remorse, and his atonement from reflection), and to a lesser extent, proof that the juvenile can reenter society as a productive and contributing member. It is not proof that the offender has been "cured" of his antisocial "sickness," as the rehabilitation as treatment model held. Still, *Graham* says that it is only through rehabilitation that the juvenile offender can be released. Graham v. Florida, 560 U.S. 48, 79 (2010). Until then, he or she must remain in jail indefinitely and possibly until death.

[217] At least, in the short term. The logic of *Graham* on rehabilitation, I think, leads inevitably to the conclusion that *all* life without parole punishments for juveniles are unacceptable. That *Miller* does not embrace this conclusion shows that the Court is not ready to extend *Graham*'s logic.

[218] *See supra* notes 213–15 and accompanying text.

[219] *Graham*, 560 U.S. at 72.

One possible extension of *Graham* (which may hardly seem an extension at all) is to apply it to sentences that are de facto life sentences. *Graham* read very narrowly would apply only to sentences of life without parole and not to sentences of years (and Justice Alito cautioned that this is all *Graham* should have been taken to mean[220]). But what of a sentence of one hundred years without the possibility of parole to a sixteen year old–isn't that the functional equivalent of a life without parole sentence? Or, to put it in terms of moral reform: does not such a sentence also make the judgment that the person is beyond reform? A California court in 2012 was the first to rule that a sentence that allowed a sixteen year old a parole hearing only after 100 years was unconstitutional, finding that *Graham* applied to both "life without parole or equivalent de facto sentences."[221] Other courts have followed; some have found even shorter sentences to be de facto life without parole sentences.[222] How to fix exactly how long is too long, however, remains an area of contention among state courts.[223]

Another, related extension of *Graham* involves lifetime punishments that do not involve incarceration. Consider a juvenile sex offender who is required to register for the rest of his life, where no showing of rehabilitation could ever be sufficient to remove the registration requirement. If sex offender registration

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[220] *Id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.").

[221] People v. Caballero, 282 P.3d 291, 295 (Cal. 2012).

[222] *Compare* Floyd v. State, 87 So. 3d 45, 45–47 (Fla. Dist. Ct. App. 2012) (holding that an eighty-year sentence, with the first opportunity for release at age eighty-five amounted to a life sentence), *and* Adams v. State, No. 1D11-3225, 2012 WL 3193932, at *2 (Fla. Dist. Ct. App. Aug. 8, 2012) (holding that a sixty-year sentence with the first opportunity for release around age seventy-six amounted to a life sentence), *with* Bunch v. Smith, 685 F.3d 546, 552 (6th Cir. 2012) (declining to apply *Graham* to consecutive, fixed-term sentences); State v. Kasic, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (same); Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (same), *and* Angel v. Commonwealth, 704 S.E.2d 386, 401–02 (Va. 2011) (holding that a state statute permitting prisoners who are sixty or older and who have served at least ten years of their sentence to petition for conditional release provides the "meaningful opportunity for release" required by *Graham*).

[223] *See, e.g.*, People v. Lucero, No. 11CA 2030, 2013 WL 1459477, at *4 (Colo. App. Apr. 11, 2013) ("Defendant argues on appeal that, statistically, 'serving 20 years in prison takes 16 years off life expectancy,' thereby decreasing his natural life expectancy 'by about 32 years' before he becomes eligible for parole. According to his calculation, his life expectancy is only forty-two years, and therefore the point at which he obtains his first opportunity for parole exceeds that expectancy.").

is properly considered part of a punishment,[224] then could a lifetime registration requirement also give up on the "rehabilitative ideal"? A court in Ohio found that a lifetime registration requirement did exactly this, although it focused more on how registries might make it harder for people to find work, or to integrate into the community.[225] A clearer route might have been to note how the fact that the ban could never be lifted, no matter if there were proof of moral reform, was in fact a judgment that the offender would never reform, and that the state would always have to keep an eye on him. The problem with emphasizing the practical difficulties of reintegration is that it could plausibly be said that the original conviction was the problem, not the registration.[226] It is better to hold that the state could not rule out ex ante the possibility of moral reform by such a sentence, however difficult it might be in practice. In other words, the problem with the rehabilitation as reform reading of *Graham* is not so much the obstacles to rehabilitation but the judgment the state makes at the outset that moral reform can never happen. Such an analysis might be extended to other, permanent disabilities offenders might face even after they are released—bans that prevent ex-felons from voting for instance.[227]

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[224] *See, e.g.*, Doe v. State, 189 P.3d 999, 1007, 1014 (Alaska 2008) (reasoning that a sex offender registry was "punishment" for purposes of the ex post facto clause analysis under Alaska constitution).

[225] *See In re* C.P., 967 N.E.2d 729, 743 (Ohio 2012) ("Finally, as to the final penological goal—rehabilitation—we have already discussed the effect of forcing a juvenile to wear a statutorily imposed scarlet letter as he embarks on his adult life. 'Community notification may particularly hamper the rehabilitation of juvenile offenders because the public stigma and rejection they suffer will prevent them from developing normal social and interpersonal skills—the lack of those traits [has] been found to contribute to future sexual offenses.'" (quoting Michele L. Earl-Hubbard, The Child Sex Offender Registration Laws: *The Punishment, Property Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 855–56 (1996))).

[226] *See, e.g.*, *Doe*, 189 P.3d at 1011 (considering the argument that deleterious effects of registry are attributable not to registry, but to the conviction for sex offense).

[227] See Richardson v. Ramirez, 418 U.S. 54, 57 (1974), where the respondents raised the rehabilitative ideal as part of their argument:

> Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the *more modern view is that it is essential to the process of rehabilitating the ex-felon* that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term.

Id. (emphasis added).

2. Prison Conditions. Above, I said that *Graham* does not require that states provide rehabilitative training to juveniles; the most it requires is an opportunity for release.[228] There is a gap between the requirement of a "meaningful opportunity" for parole and any possible means to achieve that goal. This gap is problematic only if we think of rehabilitation as training; it is not as problematic if we think of rehabilitation as moral reform. Moral reform is in the end something the offender has to do on his own, by reflection and by atonement. Moral reform is nothing that a vocational or educational program can bring him to if he does not want to be brought to it. In terms of actual, positive requirements, *Graham* and the moral reform model may allow states to get off the hook to a significant degree.

What rehabilitation as moral reform may require is that prison conditions *not* be so degrading and dehumanizing that they also "send a message" that moral reform is impossible. *Graham*, in other words, may set a floor to what the state can and cannot do. What *Graham* prohibited was, at bottom, the "expressive judgment" by society that a juvenile was incorrigible.[229] This message is sent by a sentence of life in prison without parole: it says, no matter how much you change, you are still irredeemable in society's eyes.[230] But a life without parole sentence might not be the only way society might send such a message. Degrading or dehumanizing prison conditions might also express that judgment; they also might express to the offender that no matter how much he changes, society will nonetheless treat him as incorrigible and beyond redemption.[231] Bad conditions, too, can deprive an offender of hope just as certainly as a lifetime prison sentence may. Here, we can give a deeper meaning to Justice Kennedy's statement that the prison system "itself becomes complicit in the lack of [the offender's] development"[232]—not by depriving him of rehabilitative training, but by removing *any* possibility that prison is a place where he can be reformed, and where the judgment of

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[228] *See supra* Part IV.A.

[229] The message may be reinforced by a lack of rehabilitative programs for the offender; but the message is, in the first instance, conveyed by the punishment itself.

[230] Graham v. Florida, 560 U.S. 48, 74 (2010).

[231] *Id.*

[232] *Id.* at 79.

incorrigibility is "reinforced by the prison term."[233] As one moral reform theorist put it, a punishment cannot *aim* at "degrading or brutalizing a person" because this is "not conducive to moral awakening but only to bitterness and resentment."[234]

In this way, *Graham* may relate to litigation against cruel and unusual prison conditions, and not just to litigation against other cruel and unusual sentences.[235] Prisoners may not have a constitutional right to rehabilitation,[236] but they may have a right not to be prevented from ever achieving moral reform by conditions which treat them as incorrigible and "beyond repair."[237] As Alice Ristroph has written, this "negative" holding of *Graham* "could lead to greater scrutiny of solitary confinement, security classifications, and other dimensions of prison conditions that render a sentence more severe without necessarily extending its duration."[238] This is especially true if we treat rehabilitation as on a par with retribution as a purpose for punishment. For retribution, harsh conditions may be part of the punishment.[239] But rehabilitation as moral reform may put a constraint on *how* harsh conditions can be: they cannot be so harsh that they in effect judge the offender to be beyond reform, because they make it impossible that he could ever reform.[240]

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[233] *Id.*

[234] Morris, *supra* note 86, at 158; *see also* Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 604–05 (2006) ("[I]t is *indecent* to consign human beings to an environment where they are likely to be degraded . . . .").

[235] *See generally* LYNN S. BRANHAM, *Cruel and Unusual Punishment*, *in* CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 759 (9th ed. 2013).

[236] *See* Padgett v. Stein, 406 F. Supp. 287, 296 (M.D. Pa. 1975) ("The court rejects the contention that convicted prisoners have a constitutional right to receive meaningful rehabilitative treatment."); *see also* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 222 (9th ed. 2010) (noting the refusal of courts to recognize this as a constitutional right).

[237] *Graham*, 560 U.S. at 69 (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion)).

[238] Ristroph, *supra* note 14, at 77.

[239] *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (recognizing that certain conditions "are part of the penalty that criminal offenders must pay"). I do not think that this is the only—or the best—way of characterizing retributivism, as I detail in my article, Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010).

[240] *See* IAN CRAM, A VIRTUE LESS CLOISTERED: COURTS, SPEECH, AND CONSTITUTIONS 154 (2002) (describing conditions in overcrowded juvenile detention centers where children were "handcuffed to iron pipes for extensive periods" and concluding "[i]n short, the rehabilitative ideal was not realised in practice").

But we should be careful, given the Court's past jurisprudence in this area and what it will accept as appropriately "rehabilitative." In *Beard v. Banks*,[241] for example, the Court seemed to endorse (or at least refused to condemn) a prison plan of "rehabilitati[on] . . . through deprivation,"[242] in which misbehaving prisoners were deprived of magazines and other reading material.[243] "Any deprivation of something a prisoner desires," according to the broader theory, "gives him an added incentive to improve his behavior."[244] Such crude efforts at behavior control come close to being dehumanizing, to say nothing of their limited "rehabilitative" potential. And yet this is only the tip of the iceberg of harsh prison conditions which make surviving, let alone reforming, in prison barely possible.[245] Indeed, under the guise of rehabilitation, prison may become *harsher* rather than more humane.[246] In the abstract, the ideal of moral reform may prohibit this; practice may be something entirely different.[247]

3. Adults. In *Roper*, the Court emphasized how different juveniles were from adults: in terms of their brain development, their susceptibility to influence by others, and most ambiguously, their lack of a fully formed "character."[248] On the one hand, all of these things made juveniles less culpable for their crimes, a theme that also is present in *Graham*.[249] On the other hand, and this is a theme present in *Graham* but not in *Roper*, this state of "undevelopedness" might make juveniles more and not less capable of rehabilitation: they are not yet who they will be; they can mature, and by maturing, show that they are not inevitably what their crime might indicate them to be.[250] They are better

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241 548 U.S. 521 (2006).

242 *Id.* at 547 (Stevens, J., dissenting).

243 *Id.* at 526.

244 *Id.* at 546.

245 It also shows the dangers of leaving it to legislatures to determine what rehabilitative programs work, for nothing in *Graham* prevents legislatures from presenting "rehabilitation through deprivation" as one of the means or modes of realizing the "rehabilitative ideal."

246 *Cf.* Wolff v. McDonnell, 418 U.S. 539, 563 (1974) ("With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure.").

247 *See infra* Part V.

248 Roper v. Simmons, 543 U.S. 551, 570 (2005).

249 Graham v. Florida, 560 U.S. 48, 68–69 (2010).

250 *Id.*

than that, or rather who they *are* is not yet who they might *be* over time, and through rehabilitation. By comparison, adults are who they are and so may be more culpable and, by the same token, less capable of future rehabilitation. Adults are to be punished; children are to be rehabilitated.[251] Juveniles, in the language of *Graham*, have a greater "capacity for change."[252] Adults and children, from the standpoint of rehabilitation, are fundamentally different.[253]

But it is not clear that the contrast stands if we use the model of rehabilitation as moral reform, viz., that it will be easier for children to reform themselves, to reflect, and to show remorse for what they have done and harder for adults. Could not moral reform be equally possible for both of them? To be sure, it may be easier for some children and harder for some adults. But as a generalization, it seems wrong to judge children as *always* more capable of moral reform and adults as *always* less capable. Some kinds of sophisticated moral reform may even be impossible for children, that is, certain level of maturity may be necessary even to start the process of moral reflection.[254] Even a type of moral conversion seems possible for the most hardened of adults. More generally, contemporary moral reform theorists tend to insist that we should not treat *any* person "beyond civic redemption."[255] If this is right, the rehabilitation as a purpose of punishment cannot be limited to sentences that involve juveniles. Whether a punishment leaves open the possibility of moral reform should be a constraint on *all* punishments: we should not give up on anybody. Again, what this entails may be very limited, at least in terms of the sentences it

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[251] This seems to be a fundamental premise of the juvenile justice system. *See, e.g.*, Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH. L. REV. 5, 9 (2013) ("The juvenile justice system was created over a century ago. The goal was to provide children, who were understood to be different from adults, with an opportunity for rehabilitation, rather than punishment. When a juvenile commits what would be classified as a crime if committed by an adult, that conduct is labeled 'delinquent,' and the juvenile justice system responds." (footnotes omitted)); *see also In re* Gault, 387 U.S. 1, 15–16 (1967) (Black, J., concurring) (noting that the belief that a child is "essentially good" means that a child is to be "treated" and "rehabilitated" rather than punished (internal quotation marks omitted)).

[252] *Graham*, 560 U.S. at 74.

[253] *Id.* at 79.

[254] *Graham* seems to acknowledge this. *See id.* ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

[255] Duff, *supra* note 95, at 186.

applies to. It may only apply to life in prison without parole sentences for juveniles or adults, because only that particular sentence expresses the judgment that the person is irredeemable.[256]

V. CONCLUSION

Graham was decided long after the rehabilitative ideal had fallen out of favor. It had stopped, for the most part, acting as an ideal and became more of a side consideration to other, more "weighty" purposes of punishment such as retribution and deterrence. *Graham* does not, and cannot, by itself revive the rehabilitative ideal, and I have argued anyway that *Graham*'s version of rehabilitation is rather modest. It does not entail any positive obligation on the state's part to rehabilitate the offender; it does not mandate any vocational or educational programs. It was decided against a backdrop of legislative and judicial hostility to the idea of prison as a place for rehabilitation, and it does not directly repudiate that hostility. Rather, it only says that society cannot pass the judgment that people will not rehabilitate themselves in prison. It has to hold out the hope, at least for juveniles, that they will be able to reform themselves while they are in prison.

But *Graham* has, if only by the centrality of the concept of rehabilitation in its holding, put rehabilitation back on the agenda. It was, at the least, a relatively surprising development, although it remains to be seen what actual impact its emphasis on the hope of rehabilitation will have. There are some stirrings in the lower courts, but they are just that: stirrings. Nor has the decision led much in the way of sustained academic reflection on the "rehabilitative ideal."[257] Moreover, we should not, I think, dispense with skepticism about the two problems that led many to discard the rehabilitative ideal. Identifying rehabilitation as

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[256] *See* William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1112 (2010). For one court's rejection of *Graham*'s application to adults, see Commonwealth v. Batts, 66 A.3d 286, 291 (Pa. 2013) (children are different for purposes of sentencing in *Miller* and *Graham*).

[257] *But cf.* Ristroph, *supra* note 14, at 75–76 (analyzing *Graham*'s relation to the rehabilitative ideal).

reform is one thing, and a necessary step; but *endorsing* it is quite another thing.

First, we should consider whether rehabilitation as moral reform is a worthy ideal in itself. Should the state *aim* to have offenders pursue remorse, reflection, and atonement? Is this even a valid goal for a liberal state?[258] Or should the state only imprison with a view towards deterring criminals and protecting society?[259] Worries about manipulating offenders, to get them to believe the right things, plagued the model of rehabilitation as treatment. Similar worries might be raised about rehabilitation as moral reform, which displays an intense interest in molding the attitudes, emotions, and beliefs of the offender; in short, in shaping the offender's *soul*.[260] Moral reform is something we might take up *quo* members of a religious community or a family; it may be less appropriate as a goal that the *state* pursues.

Second, and perhaps more profoundly, we might still worry whether prison can work as a place for rehabilitation at all. Rehabilitation as reform removes the burden on the state to supply offenders with rehabilitative services; at least, it does not mandate them, although if they are present, the state cannot deny them to juveniles. I have suggested that rehabilitation as moral reform also should not condone brutalizing and degrading prison conditions: these, too, can express a judgment that an offender is "irredeemable." But is even this sufficient? *Tapia*, especially, displayed a profound skepticism—both legislative and judicial—that prison could be at all compatible with rehabilitation.[261] Prison was not to be used for rehabilitation, period. *Graham*, by contrast, seems to depend on the idea that at least rehabilitation is generally possible in prison. This is not inconsistent with thinking prison is not the best place for reform, but it is in some tension with it.

Suppose that we have good reason to doubt that even the best prison could be a place for rehabilitation as moral reform; suppose

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[258] I raised such a worry about Duff's philosophy of punishment in a review of one of his books. *See* Chad Flanders, Book Review, 113 ETHICS 149, 150 (2002) (reviewing DUFF, *supra* note 86).

[259] *See generally* Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309.

[260] *See, e.g.*, Duff, *supra* note 95, at 174 (contrasting liberal values with values that "[t]o put it crudely . . . have to do with the soul, with our inner spiritual or moral condition").

[261] *See supra* Part III.A.

we even thought that most of the time prison positively *hinders* a person's project of moral reform. We would then be simply repudiating the vision of those who founded the penitentiary, and who thought that confinement and meditation could be a path to moral development and maturity, and who thought more generally that prison and punishment could cause one to reform. If we depart with the vision of prison as a place for moral reform, then we might think that the best thing for juveniles (and for everybody) is to find ways to keep them out of prison altogether, except when this was necessary to protect society. Giving up on this might mean giving up on the hope of moral reform in prison. But if prison is a bad place for reform in general, that was a false hope anyway. Deciding whether to extend *Graham* means, first, deciding whether we should hold out that hope.