

JUVENILE LIFE WITH(OUT) PAROLE

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*Beginning in the late twentieth century, the Supreme Court gradually restricted the range of punishments that could be imposed on children convicted of crimes. The seminal cases *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* banned the imposition of mandatory life without parole sentences on children who were under eighteen at the time of an offense and held that those juveniles must be given a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Some courts have extended the logic of these cases to invalidate life with parole sentences based on extremely long parole ineligibility periods, but no court has held that the practical unavailability of release within the current parole system makes any life sentence—regardless of its parole ineligibility period—functionally equivalent to life without parole.*

*Building on recent scholarship about the constitutional role of parole release in juvenile sentencing, this Note points out that the *Graham* trilogy creates a substantive Eighth Amendment right for juveniles to be released upon a showing of maturity and rehabilitation, not merely a right to be considered for release. This Note exposes the failure of state parole systems to vindicate this right by systematically refusing to grant parole to juveniles. Because release on parole is a statistical improbability for juveniles sentenced to life with parole, this Note concludes that those sentences are actually unconstitutional sentences of de facto juvenile life without parole.*

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INTRODUCTION

On May 6, 1980, William Thomas, Jr. was a troubled, drug-addicted seventeen-year-old. Drunk and high on meth, Thomas and his cousin, William Mancuso, picked up two other teenagers and drove to a wooded area of Egg Harbor Township, New Jersey.¹ There, the two teens were murdered with a tire iron.² About a year later when Mancuso was questioned by police, he told them Thomas had been the initial aggressor.³ By then Thomas was in the army, stationed in Germany.⁴ He was arrested and returned to New Jersey on June 12, 1981.⁵ In 1982, after pleading no contest to the murders, Thomas was sentenced to two concurrent life terms with the possibility of parole.⁶ His sentencing judge declined to impose any minimum period of parole ineligibility, acknowledging that Thomas had already taken “the first step to rehabilitation” by entering his plea.⁷

Starting in 1988 with *Thompson v. Oklahoma*,⁸ a promise to protect juveniles like William Thomas, Jr. from extreme punishment began to develop in the Supreme Court. In a crescendo of Eighth Amendment decisions, the Court limited the punishments that may be imposed on children, beginning with a categorical ban on the death penalty and culminating in a prohibition on nearly all juvenile life without parole sentences.⁹ Underlying these decisions was the incapable scientific consensus that children are fundamentally different from adults in ways that make children less culpable, and thus less

¹ Thomas v. N.J. State Parole Bd., No. A-2943-13T4, 2015 WL 4602545, at *1 (N.J. Super. Ct. App. Div. Aug. 3, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (recounting that Thomas’s sentencing judge “failed to impose any minimum parole eligibility and elected not to impose consecutive terms because of [Thomas’s] age, his lack of any prior arrests, his pursuit of a productive career, and his admission of guilt which is generally recognized as the first step to rehabilitation”).

⁸ 487 U.S. 815.

⁹ See *infra* Part I (reviewing the Court’s treatment of adults under the Eighth Amendment).

deserving of the state's harshest punishments.¹⁰ Through its Eighth Amendment decisions, the Court declared that the Constitution owed something special to those who were children at the time of their offenses—a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹¹

Today, Mr. Thomas is a fifty-nine-year-old man. After over thirty years of weekly therapy sessions, more than twenty self-improvement programs, rabbinical counseling, completion of his GED, ten psychological evaluations reporting that he presents a low risk of recidivism, and an astonishing infraction-free record,¹² Mr. Thomas is the poster child for the rehabilitation and maturation of a juvenile offender. But on December 28, 2022, as he had every night for four decades, Mr. Thomas went to bed in his cell at East Jersey State Prison.¹³

Like the vast majority of juveniles sentenced to life with the possibility of parole, it looked like Mr. Thomas would die in prison a changed man—remorseful, sober, educated, and a model inmate by all accounts. Because of the actions he allegedly¹⁴ took as a drug-addled child, the New Jersey State Parole Board denied his release seven times: in 1995, 2001, 2005, 2010, 2015, 2017, and 2019.¹⁵ The Board considered his release for the last time on December 29, 2022, nearly thirty years after his first parole hearing.¹⁶ He was paroled just a few months shy of his sixtieth birthday.¹⁷

This Note is about the unconstitutional conversion of juvenile life *with* parole sentences to life *without* parole sentences. It is about the extinguishing of the meaningful opportunity for release promised by the Supreme Court's juvenile sentencing jurisprudence. It is about children like Mr. Thomas who are condemned slowly, parole hearing by parole hearing, to spend their whole lives in prison. Part I reviews the Court's Eighth Amendment decisions in both adult and juvenile

¹⁰ *Id.*

¹¹ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹² *Thomas*, 2015 WL 4602545, at *2.

¹³ *Offender Details*, STATE OF N.J. DEP'T OF CORR., https://www20.state.nj.us/DOC_Inmate/inmatefinder?i=I (last visited Jan. 16, 2023) (accept the terms and conditions; locate the box labeled “SBI Number” and type 000066380B; then click submit).

¹⁴ At sentencing, Judge Porreca expressed doubt about whether Mr. Thomas had in fact committed the murders: “No one, and I repeat, no one, knows the truth of each defendant's actual participation, no one, that is, except the two defendants, and their observations and memories were dulled, and their actions affected to some extent by the drugs and alcohol consumed that night.” *State v. Thomas*, No. 80-12-01541-I, 2020 WL 13555583, at *7 (N.J. Super. Ct. Law Div. Aug. 3, 2020) (quoting Sentencing Transcripts of William J. Thomas (Feb. 19, 1982)).

¹⁵ *Id.* at *1.

¹⁶ Information on file with author.

¹⁷ *Id.*

sentencing cases. Building on recent scholarship about the constitutional role parole plays in juvenile sentencing, Part II argues that these cases create a constitutional right for youthful offenders to be released upon a showing of maturity and rehabilitation. Part III reveals how far states have strayed from this right and concludes that sentences of life with parole imposed on juveniles are actually unconstitutional sentences of de facto life without parole.

I

THE EIGHTH AMENDMENT CASES

The Eighth Amendment's prohibition on cruel and unusual punishment extends not only to "barbaric" forms of punishment, but also to punishments that are "excessive" because they are disproportionate to the severity of the crime committed.¹⁸ Two major themes emerge from the Supreme Court's reviews of excessive sentences: Death sentences are constitutionally different from terms of imprisonment, and children are constitutionally different from adults. For adult offenders, the death penalty demands serious constitutional scrutiny, whereas sentences of imprisonment—even extraordinarily lengthy terms—warrant almost none. For children, however, this constitutional gap between death and lifelong incarceration has been almost entirely eliminated. This Part will briefly review the Court's treatment of adults under the Eighth Amendment and then detail the evolution of its juvenile sentencing jurisprudence from the late 1980s to the present day.

A. *Adults and the Eighth Amendment*

When the Court decided *Furman v. Georgia* in 1972, the death penalty in the United States took a four-year hiatus.¹⁹ A deeply fractured 5-4 majority declared that the administration of capital punishment in the states at the time was unconstitutional.²⁰ Though the holding spawned five separate concurrences, the decision has come to stand for the notion that death sentences may not be arbitrarily or discriminatorily imposed.²¹ In his concurrence, Justice Stewart appeared to rest his view on the uniqueness of death: "The penalty of

¹⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁹ 408 U.S. 238.

²⁰ *Id.* at 239-40.

²¹ See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151 (2009) ("When the Supreme Court struck down capital punishment as it then existed in 1972 in *Furman v. Georgia*, its central concern was avoiding arbitrary and capricious death sentences.").

death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.”²² Since *Furman*, the Supreme Court’s Eighth Amendment jurisprudence has continued to insist that “death is different”—that there is an important constitutional distinction between death sentences and lengthy term-of-years sentences, including sentences of life without parole (LWOP).²³

The Court resurrected executions in 1976 in *Gregg v. Georgia*.²⁴ The Court found support for the death penalty in three of the four traditional justifications for punishment: retribution, deterrence, and incapacitation.²⁵ It held that as long as a state had statutes and procedures to avoid the capriciousness that had rendered the death penalty unconstitutional in *Furman*, the Eighth Amendment would not categorically prohibit sentences of death.²⁶

A year later in *Coker v. Georgia*,²⁷ the Court considered whether a death sentence was disproportionate to the crime of rape. The *Coker* Court tied its constitutional analysis directly to penological goals: An Eighth Amendment violation may be found where the punishment “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”²⁸ Addressing only the second criterion, the Court held that the death penalty could not be imposed for rape: “Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.”²⁹

²² *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

²³ See generally Barkow, *supra* note 21 (discussing the Court’s dramatically different approaches to reviewing capital versus noncapital sentences).

²⁴ 428 U.S. 153.

²⁵ *Id.* at 183 & n.28. Incapacitation was relegated to a footnote, suggesting retribution and deterrence are the primary motivations for upholding the death sentence. For obvious reasons, the fourth possible justification, rehabilitation, is not thought to be among the goals of execution.

²⁶ *Id.* at 206–07 (“Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.”).

²⁷ 433 U.S. 584 (1977).

²⁸ *Id.* at 592.

²⁹ *Id.* at 598–99 (“[T]he death sentence imposed on Coker is a disproportionate punishment for rape.”).

Subsequent death penalty cases have focused more on the first test—whether the punishment furthers penological goals, especially retribution and deterrence.³⁰ It was this line of inquiry that led the Court to categorically ban capital punishment for people with intellectual disabilities in *Atkins v. Virginia*.³¹ The Court examined whether “evolving standards of decency” compelled reconsideration of the punishment which had until then enjoyed the Court’s blessing.³² Finding that a consensus against executing people with intellectual disabilities had developed among remaining death penalty states, the Court declared that retributive and deterrent goals would not be furthered by executing this class of defendants.³³

Unlike death penalty cases, challenges to the proportionality of lengthy prison terms for adults have never been resolved categorically.³⁴ With few exceptions, in terms-of-years cases the Court has been unsympathetic to disproportionality arguments.³⁵ The only successful Eighth Amendment challenge by an adult to the length of his sentence in the modern era is the 1983 case, *Solem v. Helm*.³⁶ South Dakota had sentenced Jerry Helm to LWOP for issuing a fraudulent check worth \$100 as a repeat nonviolent offender, a sentence which the Court declared unconstitutionally disproportionate to his offense.³⁷

But *Solem* appears to be an outlier. In more recent decades, the Court has continually upheld extreme sentences for minor, nonviolent

³⁰ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982) (disposing of deterrence as a justification for executing a defendant convicted of unintentional felony murder and noting that retributive goals are underserved by the defendant’s lessened culpability); *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002) (“[T]here is a serious question as to whether either justification that we have recognized as a basis for the death penalty [(retribution or deterrence)] applies to mentally [disabled] offenders.”). “[I]n several post-*Coker* categorical-ban cases the Court has stressed the diminished culpability of offenders Culpability is clearly a retributive concept; so if that factor has replaced or is a proxy for the *Coker* offense disproportionality sub-test, the latter is strongly grounded in retributive principles.” Richard S. Frase, *Punishment Purposes and Eighth Amendment Disproportionality*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 101, 108 (Meghan J. Ryan & William W. Berry III eds., 2020).

³¹ 536 U.S. 304 (2002).

³² See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (sanctioning the execution of intellectually disabled people).

³³ *Atkins*, 536 U.S. at 318–21.

³⁴ Frase, *supra* note 30, at 109 (“Eighth Amendment challenges to severe prison sentences were always assessed on the specific facts of the case, not categorically.”).

³⁵ See Barkow, *supra* note 21, at 1178 (“[T]he Court has found a death sentence to be ‘excessive’ in a multitude of situations but it almost never strikes down a sentence outside the capital context.”).

³⁶ 463 U.S. 277.

³⁷ *Id.* at 281–82, 303.

offenses—typically those imposed under state recidivist statutes.³⁸ And in contrast to its death penalty cases, the Court has appeared to accept any furtherance of a penological purpose to save a prison sentence from disproportionality.³⁹ In fact, the Court’s oversight of non-capital punishment is so lacking as compared to its death penalty jurisprudence that it has been called “virtually nonexistent.”⁴⁰ Thus, “[d]eath is different’ has been a bedrock principle of Eighth Amendment jurisprudence” since *Furman v. Georgia*.⁴¹

B. Juvenile Sentencing Cases

Just as the Supreme Court has embraced a “death is different” mantra, its “children are different” doctrine began to emerge in the late twentieth century. The Court first restricted the range of punishments that may be imposed on children in 1988 with *Thompson v. Oklahoma*,⁴² stressing “broad agreement on the proposition that adolescents as a class are less mature and responsible than adults” and therefore less culpable.⁴³ An Oklahoma jury had determined that William Wayne Thompson, just fifteen when he participated in a murder, should face the death penalty for his crime.⁴⁴ Thompson, with his older brother and two other adult men, had participated in the abduction and killing of his sister’s abusive husband, Charles Keene.⁴⁵ Keene had been beaten, stabbed, shot, and thrown into a river.⁴⁶ After losing in the Oklahoma Court of Criminal Appeals, Thompson was saved from execution by a plurality of the Supreme Court who vacated his sentence, holding that the death penalty could not be constitutionally applied to children who were under sixteen at the time of

³⁸ See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a sentence of life with the possibility of parole for three thefts worth \$80, \$28.36, and \$120.75); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding a sentence of LWOP for cocaine possession); *Ewing v. California*, 538 U.S. 11 (2003) (upholding a sentence of twenty-five-years-to-life for stealing three golf clubs); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding two consecutive terms of twenty-five-years-to-life for shoplifting videotapes).

³⁹ See cases cited *supra* note 38. “The Court’s acceptance of all traditional punishment purposes thus seems to imply that an unconstitutional penalty must be grossly disproportionate relative to all such purposes.” Frase, *supra* note 30, at 110.

⁴⁰ Barkow, *supra* note 21, at 1147.

⁴¹ Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 459 (2012).

⁴² 487 U.S. 815.

⁴³ *Id.* at 834–35.

⁴⁴ *Id.* at 818.

⁴⁵ Brief of the Respondent State of Oklahoma at 13–16, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169), 1987 WL 881437, at *7–8.

⁴⁶ *Id.* at 20–25.

their offense.⁴⁷ But the Court's ruling meant that children aged sixteen or seventeen were still eligible for execution.

Nearly two decades passed before the Court returned to the question of the juvenile death penalty. In that time, twenty-two young people were executed for crimes they committed at sixteen or seventeen.⁴⁸ In its 2005 decision in *Roper v. Simmons*,⁴⁹ the Court vacated a seventeen-year-old's death sentence and extended *Thompson* to all children under the age of eighteen.⁵⁰ Christopher Simmons had been convicted of first-degree murder after he and a fifteen-year-old friend broke into the home of Shirley Crook, bound her, wrapped her face in duct tape, and threw her off a bridge.⁵¹ She drowned in the water below.⁵² It was a gruesome crime. Even so, the Court refused to place Simmons, a child, in the same moral category as an adult.⁵³

Citing scientific and sociological studies presented by Simmons and amici curiae, the 5-4 majority explained that children are different in three major ways.⁵⁴ First, they are naturally more impetuous, less mature, and less responsible than adults.⁵⁵ Second, children have less control over their environments and are therefore more vulnerable than adults to external negative influences.⁵⁶ Third, a child's character lacks the permanence of that of an adult; it is "more transitory, less fixed," and children are therefore more likely to reform.⁵⁷ The accepted justifications for the death penalty—retribution and deterrence—are thus inadequate to support the execution of children.⁵⁸ Their youthfulness must be treated as a mitigating factor, the Court

⁴⁷ *Thompson*, 487 U.S. at 838 ("[T]he Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.").

⁴⁸ *Executions of Juveniles in the U.S. 1976–2005*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/juveniles/executions-of-juveniles-since-1976> [<https://perma.cc/JVQ9-JM7L>] (providing a list of juvenile offenders executed between 1976 and 2005). The youngest at the time of execution was Steven Roach, aged seventeen at the time of his offense and twenty-three when he was killed by lethal injection in the state of Virginia. *Id.*

⁴⁹ 543 U.S. 551. *Roper* overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁵⁰ *Roper*, 543 U.S. at 578–79.

⁵¹ *Id.* at 556–57.

⁵² *Id.*

⁵³ *Id.* at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. . . . [I]t would be misguided to equate the failings of a minor with those of an adult . . .").

⁵⁴ *Id.* at 569–70.

⁵⁵ *Id.* at 569.

⁵⁶ *Id.*

⁵⁷ *Id.* at 570.

⁵⁸ *Id.* at 571–72 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.").

said, because “[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”⁵⁹ Put differently, the proper expectation for the vast majority of juveniles, even those who commit heinous offenses, is that they will mature and reform as they enter adulthood.

By taking the death penalty off the table, *Roper* ignited a revolutionary period in juvenile sentencing at the Supreme Court. Five years later, the Court decided *Graham v. Florida*.⁶⁰ For an attempted robbery and a subsequent armed burglary committed when he was between sixteen and seventeen years old, Terrence Graham was sentenced to LWOP.⁶¹ The trial judge imposed this sentence notwithstanding the considerably milder recommendations from both the Florida Department of Corrections and the state prosecutor.⁶²

The *Graham* Court overturned the sentence, reaffirming the three scientific findings that established the lesser culpability of juveniles: their immaturity, their susceptibility to outside pressures, and the impermanence of their characters.⁶³ The Court used these characteristics to chip away at the penological justifications for juvenile LWOP. Retribution could not justify a juvenile LWOP sentence because at “the heart of the retribution rationale” is the offender’s culpability.⁶⁴ Their immaturity renders childhood offenders “less likely to take a possible punishment into consideration,”⁶⁵ thereby defeating a deterrence rationale. And neither incapacitation nor rehabilitation support sending a juvenile to prison for life because to do so would be to determine that the child would be “forever . . . a danger to society” and “forswear[] altogether the rehabilitative ideal.”⁶⁶ The Court also reinforced its earlier conclusion that the “irreparably corrupt[]” juvenile offender is a rarity.⁶⁷

Although Florida had laws in place at the time to assure the consideration of a defendant’s age at sentencing, those laws had failed to protect Graham from what the Court recognized was an unconstitu-

⁵⁹ *Id.* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

⁶⁰ 560 U.S. 48 (2010).

⁶¹ *Id.* at 57.

⁶² The Department of Corrections recommended a four-year term of incarceration; the prosecutor recommended forty-five years. *Id.* at 56, 76.

⁶³ *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

⁶⁴ *Id.* at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

⁶⁵ *Id.* at 72.

⁶⁶ *Id.* at 72–74.

⁶⁷ *Id.* at 68 (quoting *Roper*, 543 U.S. at 569).

tional sentence.⁶⁸ This procedural failure compelled the Court to set forth a categorical rule it had refused to announce for adults⁶⁹: Life without parole for a nonhomicide offense is per se unconstitutional for juveniles.⁷⁰

In a “remarkable”⁷¹ departure from the Eighth Amendment analyses which had insisted on the fundamental uniqueness of death, the *Graham* Court had narrowed the gap between death and terms of life imprisonment for juveniles⁷²:

It is true that a death sentence is “unique in its severity and irrevocability”; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable.⁷³

To constitutionalize these harsh sentences, the state “must . . . give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁷⁴ As Professor Martin Guggenheim observes, *Graham*’s extraordinary conclusion is “that the Constitution was violated not because a child was *denied* something an adult possessed, but because a child is *entitled* to something an adult is not.”⁷⁵ Whereas cases dealing with the constitutional rights of children up to this point had invariably denied that children had any right to better treatment than adults,⁷⁶ now the Court was poised to recognize affirmative constitutional rights that belong only to children. In *Graham*, it was the right to be treated as a child during sentencing.

⁶⁸ *Id.* at 76 (“The provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue. Nothing in Florida’s laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant’s crimes demonstrate an ‘irretrievably depraved character.’”).

⁶⁹ *See supra* Section I.A.

⁷⁰ *Graham*, 560 U.S. at 79.

⁷¹ Guggenheim, *supra* note 41, at 463 (noting “how casually the majority broke the ‘death is different’ barrier”).

⁷² *See Graham*, 560 U.S. at 103 (Thomas, J., dissenting) (“Today’s decision eviscerates [the] distinction [between capital and noncapital sentences].”).

⁷³ *Id.* at 69–70 (majority opinion) (citations omitted).

⁷⁴ *Id.* at 75.

⁷⁵ Guggenheim, *supra* note 41, at 488.

⁷⁶ *See id.* at 474–89. “[N]ever did the Court *require* that states treat children differently from adults; nor did it ever strike down a law or practice advanced by the state that treated children indistinguishably from adults on the ground that children have the right to be treated differently.” *Id.* at 486.

Just two years later, the Court considered the LWOP sentences of two fourteen-year-olds convicted of murder in *Miller v. Alabama*.⁷⁷ Declining to limit *Graham*'s rationale to nonhomicide offenses, the Court concluded that states could not mandate LWOP sentences for juvenile offenders, even those convicted of homicide.⁷⁸ It embraced the *Roper* and *Graham* reasoning that the diminished culpability of youths renders penological justifications too weak to sustain such harsh punishments⁷⁹ and observed that "the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."⁸⁰ The Court again remarked how "uncommon" it would be to find the permanently and irredeemably corrupt child for whom a sentence of life imprisonment would be appropriate.⁸¹ And it reiterated *Graham*'s demand that juveniles be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.⁸² But *Miller* stopped short of a per se ban on LWOP sentences for homicide offenses committed by juveniles, leaving room for the permanent incarceration of children who at sentencing are deemed permanently incorrigible.

In 2016, the Court decided *Montgomery v. Louisiana*,⁸³ holding that *Miller* must be applied retroactively because it had announced a substantive rule of constitutional law.⁸⁴ The majority reaffirmed the exceptionality of the child who "exhibits such irretrievable depravity that rehabilitation is impossible"⁸⁵ and clarified that the general procedure required by *Miller* is "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors."⁸⁶ It also gave states a choice: In the face of a *Miller* violation, a state may conduct a hearing to resentence the juvenile offender, or it may grant them parole eligibility.⁸⁷ Parole eligibility provides a constitutional escape hatch, the Court said, so long as it "ensures that juveniles whose crimes reflected only transient immaturity—and who have

⁷⁷ 567 U.S. 460 (2012).

⁷⁸ *Id.* at 473.

⁷⁹ *Id.* at 472 ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

⁸⁰ *Id.* at 472 n.5.

⁸¹ *Id.* at 479.

⁸² *Id.*

⁸³ 577 U.S. 190.

⁸⁴ *Id.* at 208–09.

⁸⁵ *Id.* at 208.

⁸⁶ *Id.* at 210 (quoting *Miller v. Alabama*, 567 U.S. 460 (2012)).

⁸⁷ *Id.* at 212.

since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”⁸⁸

Most recently, the Court decided *Jones v. Mississippi*,⁸⁹ a case which asked whether sentencing judges must make an on-the-record, separate factual finding of permanent incorrigibility before sentencing a child to LWOP for homicide. The Court held that all a sentencer must do at the outset is “consider” the offender’s youth and, as long as the sentencer had a choice to impose a lesser sentence, the discretionary lifelong imprisonment of a child would not violate *Miller* or *Montgomery*.⁹⁰ *Jones* undoubtedly dilutes the powerful constitutional protections of the earlier cases by lowering the bar for the procedures required under *Miller*. But as Professor Alexandra Harrington points out, the *Jones* Court “explicitly said that it leaves *Miller* and *Montgomery* intact.”⁹¹ Some scholars are justifiably skeptical,⁹² but this Note offers a way to make sense of the Court’s claim that it did not overrule these cases. If a finding of incorrigibility is not a prerequisite for sentencing a juvenile to LWOP after *Jones*, then the most powerful parts of *Miller* and *Montgomery* may be their “back end” sentencing protections.⁹³

More importantly, by declining to require an on-the-record finding of permanent incorrigibility, *Jones* addressed only the procedures for handing down juvenile LWOP sentences. *Jones* did not reach the constitutionality of sentences of life *with* parole—which by their definition mean that the sentencer did not find irreparable corruption. Thus, though it strikes a blow to the constitutional rights of juveniles at initial sentencing, *Jones* does not foreclose the argument that a failure to parole reformed juvenile offenders violates the Eighth Amendment rights announced in *Graham*, *Miller*, and *Montgomery*. Part II argues that the cases leading to *Jones* must be understood to

⁸⁸ *Id.*

⁸⁹ 141 S. Ct. 1307 (2021).

⁹⁰ *Id.* at 1321.

⁹¹ Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1176 (2021); see also *Jones*, 141 S. Ct. at 1321 (“Today’s decision does not overrule *Miller* or *Montgomery*.”).

⁹² See, e.g., Cara H. Drinan, *Jones v. Mississippi and the Court’s Quiet Burial of the Miller Trilogy*, 19 OHIO ST. J. CRIM. L. 181 (2021) (arguing that the Court undermined its credibility by breaking from *Miller*’s precedent); David M. Shapiro & Monet Gonnerman, *To the States: Reflections on Jones v. Mississippi*, 135 HARV. L. REV. F. 67 (2021) (outlining the Court’s decision in *Jones* and lamenting that “there is reason for despair over the federal Eighth Amendment”).

⁹³ As Professor Harrington observed, *Jones* “did not address parole or back-end review of sentences but rather focused on the front-end sentencing decision.” Harrington, *supra* note 91, at 1176.

amount to a substantive constitutional right of juvenile offenders to be released upon a showing of maturity and rehabilitation.

II

A SUBSTANTIVE RIGHT TO BE RELEASED

Taken together, *Graham*, *Miller*, and *Montgomery* did more than categorically ban certain punishments for juveniles accused of certain crimes. Building on recent scholarship on the constitutionalizing function of parole in juvenile sentencing,⁹⁴ this Part explains how these cases revealed a constitutional right for juvenile offenders to be released from incarceration upon a showing of maturity and rehabilitation.⁹⁵ Section II.A explores how the Court's understanding of penological goals places a constitutional limit on juvenile sentences. Section II.B identifies the minimum standards that a release mechanism must meet to comport with the Eighth Amendment and shows how the right to release is essential to understanding the Court's juvenile sentencing doctrine. Part III then examines the implications of this right on sentences of life with parole for juveniles within our current system and the bleak reality facing parole-eligible juvenile lifers today.

At the outset, it is worth acknowledging that the Supreme Court has refused to find a constitutional right to be paroled in the adult context: Adult offenders have no right to be released prior to the end of their maximum sentence.⁹⁶ But children, as noted, have a constitutional right to be treated differently than adults in sentencing after *Graham* and *Miller*.⁹⁷ Shortly after *Graham* was decided, Professor Guggenheim argued that the case would come to be understood to prohibit the automatic imposition of adult sentences on children⁹⁸:

⁹⁴ See *id.* at 1204 (“Only release from prison upon demonstration of subsequent maturity and reform would satisfy the Court’s promise that parole can cure the unconstitutionality of a life sentence.”).

⁹⁵ There is a growing understanding that the science on adolescent brain development that underpinned the Court’s juvenile sentencing cases is broadly applicable to young people in their early-to-mid-twenties and does not become irrelevant upon their eighteenth birthday. See, e.g., Francis X. Shen et al., *Justice for Emerging Adults After Jones: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment Miller Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. REV. ONLINE 30 (2022). This Note does not endorse arbitrary cutoffs at the age of eighteen or suggest that only minors deserve to be protected from extreme sentences. The argument herein is limited to minors because of the Supreme Court’s decision to draw its constitutional lines at eighteen.

⁹⁶ See, e.g., *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (“There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”); see also *Rummel v. Estelle*, 445 U.S. 263, 280 (1980) (noting a petitioner’s “inability to enforce any ‘right’ to parole”).

⁹⁷ See *supra* Section I.B.

⁹⁸ See Guggenheim, *supra* note 41 and accompanying text.

States are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults. *Graham*'s recognition that it will commonly be inappropriate to be retributive to juveniles, combined with its conclusion that deterrence will rarely be an equally appropriate penological goal for juveniles as for adults, is just as true for the harshest sentences courts can impose as for lesser sentences. . . . As a result, the Constitution forbids . . . automatically imposing a mandatory adult-like sentence on a child.⁹⁹

A few months after Guggenheim's prediction, the Court decided *Miller* and confirmed that *Graham* demanded such a result, at least for sentences of LWOP: "[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."¹⁰⁰ Section II.A explains why this underlying principle—the right to be treated differently from adults—should likewise be understood to prohibit states from treating children identically to adults in the context of parole. It will show how *Graham*, *Miller*, and *Montgomery* stand for a right which children have but adults do not: the right to be granted release upon a showing of maturity and rehabilitation.

A. *Penological Justifications as Limits on Juvenile Sentences*

The furtherance of any penological goal would ordinarily save a lengthy prison term from judicial reversal under the Eighth Amendment.¹⁰¹ When it comes to children, however, the only penological goal served by incarceration is rehabilitation.¹⁰² The Supreme Court has repeatedly rejected retribution and deterrence as justifications for incarcerating children because children by their nature are less culpable for their criminal activity.¹⁰³ Similarly, incapacitation cannot be used to justify a juvenile LWOP sentence because it "improperly denies the juvenile offender a chance to demonstrate growth and maturity."¹⁰⁴ The Court points to only one permissible purpose for the incarceration of a juvenile: rehabilitation.¹⁰⁵ Only the exceedingly rare condition of permanent incorrigibility—an inability to rehabilitate—justifies the lifelong incarceration of the child.¹⁰⁶ This

⁹⁹ *Id.* at 490–91.

¹⁰⁰ *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

¹⁰¹ *See supra* Section I.A.

¹⁰² *See supra* Section I.B.

¹⁰³ *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 71–72 (2010); *Miller*, 567 U.S. at 472–73; *Montgomery v. Louisiana*, 577 U.S. 190, 207–09 (2016).

¹⁰⁴ *Graham*, 560 U.S. at 73.

¹⁰⁵ *Id.* at 73–74.

¹⁰⁶ *Id.* at 72–74.

places a constitutional limit on prison terms for juveniles: When a sentence extends beyond the youth's culpability and rehabilitation, it will be disproportionate in violation of the Eighth Amendment.¹⁰⁷ Avoiding the constitutional violation means honoring a child's unique Eighth Amendment right to be released when rehabilitation has occurred.

A plausible alternative reading of the *Graham* line of cases is that they merely confer an opportunity to be considered for release based on rehabilitation. This reading finds support in the Court's frequent references to "hope" and "opportunities" to avoid a lifetime in prison and its remark that states are "not required to guarantee eventual freedom"; instead, "[w]hat the State must do . . . is give defendants like *Graham* some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."¹⁰⁸ For juveniles convicted of a nonhomicide offense, the *Graham* Court refused to find that the Constitution "foreclose[d] the possibility that [they] will remain behind bars for life,"¹⁰⁹ emphasizing their belief that some children—irredeemable children—would deserve that fate. Even the dissenters in *Jones* denied that juvenile offenders like *Jones* were seeking "the certainty of release," arguing instead that they wish for the "opportunity, at some point in their lives, to show a parole board all they have done to rehabilitate themselves."¹¹⁰ Some scholars who have taken up the question of what constitutes *Graham*'s "meaningful opportunity" to obtain release conclude that although it might mean more than mere eligibility for parole, it does not go so far as to mandate release for any particular offenders.¹¹¹

But this reading fails to live up to the *Graham* majority's "preeminent conclusion" that the vast majority of juveniles are less culpable than adults.¹¹² It is the vast majority of children who cannot constitutionally be subjected to lifelong incarceration because it is the vast majority who are expected to rehabilitate.¹¹³ The Court's pronounce-

¹⁰⁷ See *supra* Part I.

¹⁰⁸ *Graham*, 560 U.S. at 75; see also *Montgomery*, 577 U.S. at 213 ("[P]risoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.").

¹⁰⁹ 560 U.S. at 75.

¹¹⁰ *Jones v. Mississippi*, 141 S. Ct. 1307, 1341 (2021) (Sotomayor, J., dissenting).

¹¹¹ See, e.g., Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 375–76, 380–83 (2014) (arguing that the "meaningful opportunity for release encompasses . . . a chance of release at a meaningful point in time, . . . a realistic likelihood of being released, and . . . procedures that allow an individual a meaningful opportunity to be heard").

¹¹² Guggenheim, *supra* note 41, at 491.

¹¹³ See *infra* Section III.A; see also Harrington, *supra* note 91, at 1203.

ments that a few rare children may constitutionally be deemed “permanently incorrigible”¹¹⁴ and not afforded release does not refute the right of those who do mature to be released. It simply means that like other constitutional rights, it is a qualified right. The Fourth Amendment confers a right not to be subjected to a warrantless search by the government unless, for example, exigent circumstances justify it.¹¹⁵ And the First Amendment protects the right to free speech unless, for example, the speech incites violence.¹¹⁶ Similarly, the Eighth Amendment requires that juvenile offenders be released unless they are irredeemable. Youthful offenders who do not or cannot mature or rehabilitate are, as the Court repeats, exceptional. Those who mature are the rule.¹¹⁷ This understanding was central to the Court’s evaluation of juvenile LWOP sentences: It declined to promise release to all juvenile offenders because of the possibility that a few might deserve a lifetime in prison, and therefore it “assume[d] that those who are not irredeemable are not deserving of incarceration for the rest of their lives.”¹¹⁸

When it narrowed the traditional distinction between death and lifelong imprisonment,¹¹⁹ the *Graham* Court also identified the unconstitutional traits of a life sentence imposed on the less culpable juvenile offender: “[T]he sentence . . . deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.”¹²⁰ The unconstitutional juvenile sentence results in a forfeiture of the child’s life, and it extinguishes their

¹¹⁴ It is not the position of this Note that any child can be properly deemed “irreparably corrupt” or “permanently incorrigible”; a belief that the possibility exists, however, is central to the Court’s jurisprudence in this area. The Court takes for granted that the legal system will occasionally encounter a child whose crimes reflect their permanent character and that such a child is deserving of permanent incarceration. All countries but the United States reject this concept—the United States stands alone in the world in incarcerating children for life with no opportunity for parole. *Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR., <https://jlc.org/issues/juvenile-life-without-parole> [<https://perma.cc/PMW5-SVK9>].

¹¹⁵ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”).

¹¹⁶ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”).

¹¹⁷ See *infra* Section III.A.

¹¹⁸ *Harrington*, *supra* note 91, at 1203–04 (“Reducing these cases to a hope of release would . . . ignore the Court’s underlying analysis.”).

¹¹⁹ See *supra* notes 71–73 and accompanying text.

¹²⁰ *Graham v. Florida*, 560 U.S. 48, 69–70 (2010) (citations omitted).

“hope of restoration” except by an opportunity for release too remote, too improbable to provide the mitigation of “harshness” that the Eighth Amendment requires. The Section that follows explains why the right to be released upon rehabilitation is essential to a coherent reading of this part of the Court’s jurisprudence.

B. *Constitutional Release Mechanisms*

When is a release mechanism capable of constitutionalizing sentences under the Eighth Amendment? The answer lies in the Court’s adult sentencing jurisprudence: If the mechanism provides a possibility for release that is too remote, it does not convert an otherwise unconstitutional sentence to a constitutional one. In *Solem v. Helm*,¹²¹ the Court considered Jerry Helm’s challenge to his LWOP sentence imposed under a South Dakota recidivist statute.¹²² His most recent offense was issuing a fraudulent check in the amount of one hundred dollars, and his prior felonies had been minor, nonviolent crimes.¹²³ The State argued that Helm’s sentence should be upheld in light of an earlier case, *Rummel v. Estelle*,¹²⁴ in which the Court affirmed a sentence of life with the possibility of parole for violating a Texas recidivist statute under circumstances similar to Helm’s.¹²⁵ In upholding Rummel’s sentence, the Supreme Court emphasized that he could be eligible for parole within twelve years.¹²⁶ Because Helm’s sentence, by contrast, did not allow for parole, the State instead argued that the possibility of Helm receiving executive clemency was equivalent to the possibility of parole that had constitutionalized Rummel’s life sentence.¹²⁷

Rejecting the State’s argument, the Court described the features of a parole system that provide a reliable possibility for release sufficient to overcome an Eighth Amendment challenge:

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. . . . Thus it is possible to predict, at least to some extent, when parole might be granted.¹²⁸

¹²¹ 463 U.S. 277 (1983).

¹²² *Id.* at 281.

¹²³ *Id.*

¹²⁴ 445 U.S. 263 (1980).

¹²⁵ *Id.* at 265–66.

¹²⁶ *Id.* at 280.

¹²⁷ *Solem*, 463 U.S. at 300.

¹²⁸ *Id.* at 300–01.

The *Solem* Court thus qualified its endorsement of parole as a constitutionalizing force. It is not the mere *existence* of a parole system that suffices to remedy disproportionate sentences, continued the Court, but the particulars of the parole system in question:

In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented [E]ven if Helm's sentence were commuted, he merely would be eligible to be considered for parole. Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*.¹²⁹

Finally, the Court concluded, “[r]ecognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.”¹³⁰

Thus, a parole system which provides only a remote, unreliable chance for release does not save an otherwise unconstitutional sentence under the Eighth Amendment.¹³¹ The role of the right identified in this Part, then, is to make the constitutionally required release mechanism more than just a bare possibility for juvenile lifers. Without this right, the Court's constitutional line-drawing between life with parole and LWOP sentences is incoherent. This also means that in light of the empirical fact that nearly all youthful offenders reform,¹³² a constitutionally compliant release mechanism would result in the release of nearly all juvenile offenders. Only the “irrevocably depraved” few would be denied the opportunity to experience “some years of life outside prison walls.”¹³³ Part III reveals the tragic reality that the opposite is true today—hardly anyone serving a lengthy parole-eligible prison sentence will be paroled. The result is that juveniles sentenced to life *with* the possibility of parole have instead received the functional equivalent of life *without* parole in violation of the Eighth Amendment.

¹²⁹ *Id.* at 301–03.

¹³⁰ *Id.* at 303.

¹³¹ Professor Sarah French Russell sets forth a version of this comparison of the *Solem* and *Rummel* cases to argue that the availability of release is relevant to Eighth Amendment analyses, and that “courts must look beyond the mere technical availability of a release mechanism.” Russell, *supra* note 111, at 382. In contrast to this Note, Professor Russell argues that this constitutional analysis compels a “realistic likelihood” of release for rehabilitated juveniles, not a certainty of release. *Id.* at 382–83.

¹³² See *infra* Section III.A.

¹³³ *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016).

III DE FACTO LIFE WITHOUT PAROLE

Life with parole is a constitutional sentence for juvenile offenders whose crimes reflect transient immaturity only if it fulfills the right to release discussed in Part II. It is this right which the Court says converts an unconstitutional sentence—juvenile LWOP—to a constitutional one. This Part exposes the failure of state parole systems to vindicate this right by systematically refusing to grant parole to juveniles. Because release on parole is only a remote probability for juveniles serving parole-eligible life sentences, this Note concludes that those sentences are actually unconstitutional sentences of de facto juvenile LWOP.

A. *Juvenile Rehabilitation and the Incurable Few*

As people convicted of crimes as children age, they become less and less likely to commit further offenses. The Supreme Court knew this, and relied on it, when it set out to bring juvenile sentences into compliance with the Eighth Amendment. *Roper*'s discussion of the reasons that a child's culpability is less than that of an adult—renewed again and again in each subsequent juvenile sentencing case—was drawn from several early 2000s social science papers. The Court leaned heavily on the work of collaborators Professor Laurence Steinberg, a leading authority on adolescent brain development, especially risk-taking and decisionmaking processes,¹³⁴ and Professor Elizabeth Scott, an expert on juvenile justice and adolescent decision-making.¹³⁵ Steinberg and Scott's 2003 work, *Less Guilty by Reason of Adolescence*, lays out the three reasons a child is less deserving of blame for their behavior than an adult: They are (1) less capable of reasoned decisionmaking, (2) more susceptible to coercive pressures, and (3) more capable of change—that is, their behaviors are less reflective of their enduring character.¹³⁶ These hallmarks of youth convinced the Court that children are constitutionally different from adults.¹³⁷ Summarizing all three in a single phrase, the Court worried

¹³⁴ Laurence Steinberg, TEMPLE UNIV., <https://liberalarts.temple.edu/academics/faculty/steinberg-laurence> [<https://perma.cc/5KC2-C3G2>].

¹³⁵ Elizabeth Scott, COLUM. L. SCH., <https://www.law.columbia.edu/faculty/elizabeth-scott> [<https://perma.cc/DZ32-Q56Y>].

¹³⁶ Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011–15 (2003).

¹³⁷ See *supra* Section I.B. Steinberg and Scott's article was cited on three critical pages of the *Roper* opinion, 543 U.S. 551, 569–70, 573 (2005), where the core of the “children are different” doctrine took hold.

about harshly punishing children whose conduct merely reflects “transient immaturity,” and accepted the scientific consensus that the opposite—permanent depravity—is rare.¹³⁸

Not only do experts in adolescent brain development predict that youths will grow out of the vulnerabilities associated with risky or harmful conduct, but empirical data also corroborate these predictions. The “age-crime curve” refers to the observation that engagement in criminal acts increases in adolescence and young adulthood and then decreases significantly during adulthood.¹³⁹ It is now widely understood that “[f]or most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s.”¹⁴⁰ This is true not only for nonviolent or petty crimes, but for serious violent offenses as well.¹⁴¹ A study of nearly ten thousand juvenile offenders found that almost half were immediate desisters, meaning that their first crime would be their only crime.¹⁴² By their mid- to late-twenties, the vast majority—more than ninety percent—desist from crime completely.¹⁴³ And even those who persist in criminal behavior into their thirties show significant rates of desistance by their early forties.¹⁴⁴ The age-crime curve for all types of risky

¹³⁸ See *Roper*, 543 U.S. at 573 (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”); see also *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting the same phrase from *Roper*); *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (same); *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (same); *Jones v. Mississippi*, 141 S. Ct. 1307, 1315 (2021) (same).

¹³⁹ See, e.g., *From Youth Justice Involvement to Young Adult Offending*, NAT'L INST. OF JUST. (Mar. 10, 2014), <https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending> [<https://perma.cc/AZ5N-ZC5H>] (“This bell-shaped age trend, called the age-crime curve, is universal in Western populations.”).

¹⁴⁰ Michael Tonry, *Sentencing in America: 1975–2025*, 42 CRIME & JUST. 141, 182 (2013) (arguing against incapacitation as a justification for long sentences because, *inter alia*, “[c]onfining people after they would have desisted from crime is in any case inefficient”).

¹⁴¹ See Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 515 (2013) (“[A]lthough the overall crime rate in the United States dropped between 1990 and 2010, the relationship between age and crime remained the same and was virtually identical across three very different types of offences (robbery, burglary and rape).”).

¹⁴² Maynard L. Erickson, *Delinquency in a Birth Cohort: A New Direction in Criminological Research*, 64 J. CRIM. L. & CRIMINOLOGY 362, 364 (1973). The ACLU of New Jersey surfaced this finding in an amicus brief for a defendant seeking relief under *Miller* and its New Jersey state equivalents. Brief of the ACLU of N.J. as Amicus Curiae Supporting Appellant at 41, *State v. Comer*, 266 A.3d 374 (N.J. 2022) (No. 084516).

¹⁴³ See Steinberg, *supra* note 141, at 516 (“[N]umerous reviews had been published showing that more than 90% of all juvenile offenders desist from crime by their mid-20s and that the prediction of future violence from adolescent criminal behaviour, even serious criminal behaviour, is unreliable and prone to error.”) (footnote omitted).

¹⁴⁴ Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 991 (1987) (“[T]hose offenders who are still actively involved in crime at age 30 have survived the more typical early termination of criminal careers, and so are more likely to

behavior is thus an inverted U-shape, where participation peaks in adolescence or the early-twenties and then drops off sharply and continuously with maturity.¹⁴⁵

Studies that follow real people convicted of crimes as juveniles and eventually released from prison continue to illustrate the high incidence of rehabilitation. A seven-year study by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention followed 1,354 juvenile offenders convicted of serious felonies—murder, sex offenses, aggravated assault, and felony drug crimes.¹⁴⁶ The researchers found that “the vast majority of serious juvenile offenders desisted from antisocial activity by the time they were in their early twenties. Less than 10 percent of the sample could be characterized as chronic offenders.”¹⁴⁷ In Philadelphia, Professors Tarika Daftary-Kapur and Tina Zottoli followed 174 juvenile lifers who were resentenced and released in the wake of the *Miller* and *Montgomery* rulings.¹⁴⁸ Of this group, six (3.45%) were rearrested and just two were convicted, yielding a reconviction rate of just 1.14% after an average of twenty-one months outside of prison.¹⁴⁹ Since the decision in *Montgomery* requiring retroactive application of *Miller*, Michigan has

be the more persistent offenders. After their early 40s, however, their termination rates are quite high.”).

¹⁴⁵ See, e.g., Steinberg, *supra* note 141, at 515.

¹⁴⁶ LAURENCE STEINBERG, ELIZABETH CAUFFMAN & KATHRYN C. MONAHAN, DEP'T OF JUST., PSYCHOSOCIAL MATURITY AND DESISTANCE FROM CRIME IN A SAMPLE OF SERIOUS JUVENILE OFFENDERS 4 (2015).

¹⁴⁷ *Id.* at 6. “Most juvenile offending is, in fact, limited to adolescence. . . . [T]he process of maturing out of crime is linked to the process of maturing more generally, including the development of impulse control and future orientation.” *Id.* at 1.

¹⁴⁸ Tarika Daftary-Kapur & Tina Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience 1–2* (Montclair State Univ., Working Paper, 2020) (suggesting through anecdotal evidence that the juvenile lifers released since *Montgomery* not only fail to reoffend, but actively participate in crime reduction and mentorship initiatives in their communities); see Brief for Def. Ass'n of Phila. as Amicus Curiae Supporting Appellants, *Scott v. Pa. Bd. Prob. & Parole* at 27, 2022 WL 12022819 (Pa. Oct. 22, 2021) (No. 16 WAP 2021) (collecting interviews with paroled juvenile lifers). For example, at seventeen, John Pace received a sentence of LWOP. *Id.* at Ex. D. He spent thirty-one years in prison before he was resentenced and released in 2017. *Id.* He now works at the Youth Sentencing & Reentry Project as their reentry coordinator and as a program associate at Temple University. *Id.* Another student, Stacey Torrance, was just fourteen years old—a middle schooler—when he was sentenced to LWOP for second-degree murder. *Id.* at Ex. E. Like John Pace, he spent three decades in prison until he was resentenced and released in the wake of *Miller* and *Montgomery*. *Id.* In the time since his incarceration ended, he started a nonprofit organization to provide free clothing to individuals reentering the community, and he volunteers with at least five community service organizations aimed at reducing harsh sentences and improving reentry outcomes. *Id.* Similarly, Tamika Bell was a ninth grader when she received a sentence of LWOP. *Id.* at Ex. C. After her 2018 release, she began mentoring incarcerated young people as part of the Youth Sentencing & Reentry Project. *Id.*

¹⁴⁹ Daftary-Kapur & Zottoli, *supra* note 148, at 10.

resentenced and released 142 juvenile lifers. As of August 2021, there had been only a single known arrest from that group.¹⁵⁰ Notwithstanding the empirical evidence, as Section III.B reveals, the current parole system fails to reflect the fact that the vast majority of juvenile offenders do mature, do rehabilitate, and do not reoffend.

B. *Parole in Practice and the Remoteness of Release*

If parole boards abide by the constitutional command to release rehabilitated juveniles, nothing other than the very rare failure of rehabilitation warrants the denial of a juvenile offender's application for release. Exploring whether parole systems honor this obligation requires us to consider the typical structure of parole proceedings and their outcomes. This Section reveals how parole procedures fail to fulfill the right to release revealed in Part II and uses parole grant rates from a handful of states to illustrate this failure.

1. *Parole Board Practices*

The procedures and statutes that govern parole differ considerably between states, even varying within the same state as laws and policies change,¹⁵¹ but a few general observations can be made. Parole boards are typically staffed by individuals with backgrounds in criminal justice—in 2015, seventy-five percent of state parole board chairs had previously been employed in corrections or as police officers, criminal lawyers, or probation officers.¹⁵² When an incarcerated person becomes eligible for parole, most states send an interviewer to meet with the parole applicant.¹⁵³ Some states schedule an in-person hearing before the board.¹⁵⁴ In their interview or at the hearing, the parole applicant may have the chance to reflect on the underlying offense, describe prison programs in which they are enrolled, and provide information about their external support system, including where

¹⁵⁰ Susan Samples, *Crime by 'Juvenile Lifers' After Prison 'Very Rare,' State Says*, WOOD-TV (Aug. 9, 2021), <https://www.woodtv.com/news/target-8/crime-by-juvenile-lifers-after-prison-very-rare-state-says> [<https://perma.cc/78KQ-9AQL>].

¹⁵¹ See generally Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, PRISON POL'Y INITIATIVE (Nov. 2018), <https://www.prisonpolicy.org/reports/longsentences.html> [<https://perma.cc/7ZYS-FMQL>] (studying different solutions governments can take to reverse the explosive growth of prison populations in recent decades).

¹⁵² KALEENA J. BURKES, EDWARD E. RHINE, JASON P. ROBEY & EBONY L. RUHLAND, ROBINA INST. OF CRIM. L. & CRIM. JUST., *RELEASING AUTHORITY CHAIRS: A COMPARATIVE SNAPSHOT ACROSS THREE DECADES* 11 (2015).

¹⁵³ Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/3P4J-FZL5>].

¹⁵⁴ *Id.*

they might live or work if they were released. Most parole boards are also statutorily required to consider input from prosecutors and victims of the underlying crime.¹⁵⁵

But prosecutors and crime victims are equipped with knowledge of the original offense and its impact, not the parole applicant's growth since then, their efforts to rehabilitate, or their conduct during incarceration. This means that the statutory requirements to hear their testimony inevitably emphasize the nature and seriousness of the original crime.¹⁵⁶ In a recent survey, parole board chairs were asked to rank a set of factors in order of most to least important to their decisionmaking.¹⁵⁷ Perhaps unsurprisingly, the nature and the severity of the underlying offense came in first and second place for most important.¹⁵⁸ Evidence of rehabilitation, like the inmate's disciplinary record, recidivism risk assessments, and prison program participation, landed somewhere in the middle.¹⁵⁹ In New Jersey, where Mr. Thomas fought for release for over thirty years, the board is statutorily required to grant parole upon an applicant's first eligibility date unless a preponderance of the evidence suggests the applicant will recidivate.¹⁶⁰ Despite this statutory mandate, a study of New Jersey parole decisions found that "the type of crime for which an inmate was incarcerated was the most influential factor in parole release decisions."¹⁶¹

Although for juveniles the constitutional task of a parole board is to release them as soon as they evidence rehabilitation,¹⁶² the incentives for individual board members can point aggressively in the other direction. Parole board members can find themselves legally, politically, and socially accountable for paroling an individual who subsequently reoffends or whose original offense was widely publicized.¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ "The vast majority of the nation's parole boards are required to hear victim input before making a decision. . . . In Alabama, it's almost unheard of for the board to grant parole over victim opposition." Beth Schwartzapel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8ea61_story.html [<https://perma.cc/PX8B-LZX7>].

¹⁵⁷ BURKES ET AL., *supra* note 152, at 24.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ N.J. STAT. ANN. § 30:4-123.53 (West 2021).

¹⁶¹ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 1, 3 (2007).

¹⁶² *See supra* Part II.

¹⁶³ The Virginia Parole Board, for example, voted to grant parole to Vincent Martin, a man convicted of killing a Richmond police officer in 1979, "noting that he exhibited good behavior over the years and became a leader in the corrections community." Whitney Evans, *Parole Board Criticized for Releasing Some Offenders*, VPM NPR NEWS (May 11, 2020, 6:17 AM), <https://vpm.org/news/articles/13314/parole-board-criticized-for-releasing->

Victims of crimes committed by individuals released on parole have sued parole boards for negligence in deciding to release the offender.¹⁶⁴ Though lawsuits are typically unsuccessful, some board members have nonetheless found themselves to be targets of public scrutiny or termination after unpopular release decisions.¹⁶⁵

2. Parole Release Rates

The fact that rehabilitative efforts play second fiddle to the nature of the crime in parole decisions suggests that the parole system is not fulfilling the rehabilitated juvenile's right to be released. Data from parole boards are further proof. Belying the overwhelming evidence that most juvenile offenders are not permanently incorrigible,¹⁶⁶ only a fraction of parole-eligible juvenile lifers receive parole. As a result, the Court's vision of parole as a guard against disproportionality bears scant resemblance to reality.

Several states' parole systems actually treat juvenile lifers more harshly than the general parole-eligible population. Missouri's overall parole grant rate was around 81% in 2015, but only 29% for juvenile lifers.¹⁶⁷ Similarly, Maryland grants parole at an overall rate of 40%, but the ACLU reports that "*no* individuals sentenced to life with parole as juveniles have been approved for release in 20 years."¹⁶⁸ Fourteen juvenile lifers came up for parole between August and

some-offenders [<https://perma.cc/R69R-DD8V>]. But after public pushback from state lawmakers and the law enforcement community, Martin's release was halted to allow an investigation by the Office of the State Inspector General into the board's handling of his case. *Id.* Though Martin was eventually released, "[t]he integrity of the Virginia Parole Board was questioned. . . . Lawmakers called for board members to resign, ostensibly for failing to provide proper notice of their actions, and a Republican candidate for state attorney general proposed abolishing parole for violent offenders." Reginald Dwayne Betts, *Opinion: If We Truly Believe in Redemption and Second Chances, Parole Should Be Celebrated*, WASH. POST (Apr. 4, 2021), <https://www.washingtonpost.com/opinions/2021/04/04/vincent-lamont-martin-parole-celebrate> [<https://perma.cc/9CP3-QSUN>].

¹⁶⁴ See, e.g., *Tarter v. State*, 503 N.E.2d 84 (N.Y. 1986) (consolidating lawsuits brought by victims shot and paralyzed by recently paroled individuals); *Grimm v. Ariz. Bd. of Pardons & Paroles*, 564 P.2d 1227 (Ariz. 1977) (allowing a wrongful death suit to go forward against Arizona's parole board for "grossly negligent or reckless" release of Mitchell Blazak, who subsequently killed John Grimm and permanently injured another man during a robbery).

¹⁶⁵ See *supra* note 163; Schwartzapfel, *supra* note 156 (recounting stories of former parole board members targeted by the press or terminated because of their release decisions in notorious cases). "In 2009, the Daily News ran a story headlined: 'Cop killers' pal: Parole Board's Thomas Grant keeps voting to turn 'em loose.'" *Id.* The following year, "the paper asked: 'Has state parole commissioner Thomas Grant ever met a cop killer he didn't want to put back on our streets?'" Grant was not reappointed after his first term." *Id.*

¹⁶⁶ See *supra* Section III.A.

¹⁶⁷ SARAH MEHTA, ACLU, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 46 (2016).

¹⁶⁸ *Id.*

December of 2015 in Massachusetts—none were paroled,¹⁶⁹ despite a statewide parole grant rate of 63%.¹⁷⁰

Some other states do not distinguish between adult and juvenile offenders in parole data, but what they report nonetheless suggests similarly dismal outcomes. In contrast to an overall parole grant rate of 56%, Georgia granted parole to only around 11% of individuals serving life sentences in 2015.¹⁷¹ Michigan has released, on average, just 8.2 individuals serving life sentences each year.¹⁷² Florida reviewed 1,419 parole applications in fiscal year 2019–20 and granted release to 41 individuals—a bleak 0.02%.¹⁷³ The parole board Mr. Thomas faced in New Jersey denies parole to lifers at their first hearings at a rate of 91.24%.¹⁷⁴ Upon denial, the parole board sets “future eligibility terms,” or FETs, which determine how long the incarcerated person must wait before they may make a new application to the parole board.¹⁷⁵ For the 91.24% of applicants denied between 2012 and 2019, the New Jersey parole board issued a FET greater than the prescribed presumptive term of less than three years¹⁷⁶ in 60% of cases.¹⁷⁷ More than 30% received a FET of ten years or more.¹⁷⁸

Some inferences about the treatment of individual juvenile lifers are difficult to draw from the available data. For instance, we do not know how long each juvenile lifer had been incarcerated before their parole application was denied. Even so, the numbers make a few things clear. First, under even the most charitable view of the data, parole boards are not paroling juveniles at rates consistent with the evidence that they reliably mature in large numbers. Second, there are colossal disparities in parole grant rates between individual states—29% in Missouri versus 0% in Maryland, as noted above—which are themselves suggestive of a constitutional problem. Finally, this Note does not claim that a parole system is necessarily unconstitutional when its release rates fall below some ideal number, or that the constitutional violation would be remedied if overall rates were higher; rather, these low and uneven release rates are evidence of broken

¹⁶⁹ *Id.* at 50.

¹⁷⁰ Renaud, *supra* note 151.

¹⁷¹ MEHTA, *supra* note 167, at 46–47.

¹⁷² *Id.* at 46.

¹⁷³ FLA. COMM’N ON OFFENDER REV., 2020 ANNUAL REPORT 6 (2020).

¹⁷⁴ N.J. OFF. OF THE PUB. DEF., PAROLE PROJECT, REVISED REPORT 17 (2021) (reporting on parole hearings held between 2012 and 2019 pursuant to an Open Public Records Act request).

¹⁷⁵ *Id.* at 8–12.

¹⁷⁶ N.J. ADMIN. CODE § 10A:71-3.21 (2022).

¹⁷⁷ N.J. OFF. OF THE PUB. DEF., *supra* note 174, at 17.

¹⁷⁸ *Id.*

processes which deny juvenile offenders their right to release after rehabilitation.

3. *The Consequences of Unfettered Parole Board Discretion*

Because the Eighth Amendment prohibition on disproportionate punishment “goes far beyond the manner of determining a defendant’s sentence,”¹⁷⁹ parole boards are no more empowered to issue unconstitutional sentences than sentencing judges. Some observers have rightly raised the alarm about discrepancies between judicial sentencing expectations and parole board practices. Members of the State Bar of Michigan, concerned with the state parole board’s pattern of refusal to parole inmates serving life, conducted a survey of sentencing judges in 2002.¹⁸⁰ Judges who had handed down a sentence of life with the possibility of parole in the 1970s and 80s expected their defendants to serve, on average, only 15.6 years.¹⁸¹ Instead, almost no lifers had been paroled.¹⁸² In the eyes of the parole board, this was the right result. The chair of Michigan’s parole board explained its policy in 1999: “It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that—life in prison.”¹⁸³ For many of the judges surveyed by the State Bar, this amounted to an inappropriate usurpation of their authority: According to one Wayne County judge, the parole board had “become the sentencer, in fact, instead of the judge who heard the case.”¹⁸⁴

The Washington Lawyers’ Committee for Civil Rights and Urban Affairs delivered a similar condemnation of local parole practices to the D.C. Council in 2018, noting that the parole commission had “become a driver of mass incarceration.”¹⁸⁵ The commission was repeatedly denying parole “based on the seriousness of the original offense, rather than on evidence of rehabilitation,” which “imposes [the parole commission] as a sort of ‘re-sentencing’ court, usurping control over sentencing from the sentencing judge and substituting its own judgment about how much time a prisoner should serve for a

¹⁷⁹ *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016).

¹⁸⁰ PRISONS & CORR. SECTION, STATE BAR OF MICH., WHAT SHOULD “PAROLABLE LIFE” MEAN? JUDGES RESPOND TO THE CONTROVERSY 2 (Mar. 2002).

¹⁸¹ *Id.* at 15.

¹⁸² *See id.* at 9.

¹⁸³ CITIZENS ALL. ON PRISONS & PUB. SPENDING, NO WAY OUT: MICHIGAN’S PAROLE BOARD REDEFINES THE MEANING OF “LIFE” 10 (2004), <https://static.prisonpolicy.org/scans/cappsmi/fullliferreport.pdf> [<https://perma.cc/PQ5A-3V47>].

¹⁸⁴ STATE BAR OF MICH., *supra* note 180, at 21.

¹⁸⁵ PHILIP FORNACI, ET AL., WASH. LAWS.’ COMM. FOR C.R. & URB. AFFS., RESTORING CONTROL OF PAROLE TO D.C. 3 (2018).

particular offense.”¹⁸⁶ Reports like these help to uncover the relocation of sentencing power from the judiciary to parole boards. And the concerns within these reports echo those of Mr. Thomas’s own sentencing judge who appeared to think he would be paroled “as soon as good behavior allowed.”¹⁸⁷

At least one federal court has essentially agreed with these concerns about state parole procedures and held that a state’s procedures were constitutionally deficient in light of *Graham* and *Miller*. After *Montgomery*, a group of juvenile offenders originally sentenced to LWOP in Missouri had been made eligible to apply for release on parole.¹⁸⁸ Each of their applications was denied after a hearing.¹⁸⁹ The plaintiffs sued the director of the Missouri Department of Corrections and members of the state board of probation and parole, alleging that the parole board’s policies and procedures deprived them of the meaningful opportunity for release promised by *Graham* and its progeny.¹⁹⁰ The plaintiffs had been prevented from viewing their own parole files in preparation for their hearings.¹⁹¹ They were permitted to present only one “delegate” to speak on their behalf, and the delegate was only permitted to address reentry plans, whereas the prosecutors and victims were permitted to “attend the hearings in any number and . . . speak for any length of time on any subject.”¹⁹² Finally, denials were reported on a simple form letter that did not offer any information about the reasons for rejection.¹⁹³ Affirming the district court’s order, the Eighth Circuit held that Missouri would have to remedy its unconstitutional parole process by implementing procedures that consider the unique characteristics of youth and “whether ‘the penological justifications for life without parole collapse in light of [them].’”¹⁹⁴

The court explained how each procedural inadequacy interfered with the parole applicant’s ability to demonstrate maturity and rehabilitation. First, denying the applicants access to their files meant that they were unable to address errors or highlight evidence relevant to

¹⁸⁶ *Id.* at 9.

¹⁸⁷ *State v. Thomas*, No. 80-12-01541-I, 2020 WL 13555583, at *7 (N.J. Super. Ct. Law Div. Aug. 3, 2020).

¹⁸⁸ *See* *Off. of the Prosecuting Att’y for St. Louis Cnty. v. Precythe*, 14 F.4th 808, 813 (8th Cir. 2021), *vacated sub nom. Brown v. Precythe*, 46 F.4th 879, 890 (8th Cir. 2022).

¹⁸⁹ *Off. of the Prosecuting Att’y*, 14 F.4th at 813.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 817–18 (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016)).

whether they had rehabilitated.¹⁹⁵ Second, limitations on the evidence an applicant could present via a delegate were improper because “[p]laintiffs and their representatives—not victims or prosecutors—are the ones most likely to have information about the constitutionally relevant factors of maturity and rehabilitation.”¹⁹⁶ And third, the minimal information provided to applicants regarding the reasons for a denial “obfuscate[d]” whether the board had adequately considered the mitigating qualities of youth.¹⁹⁷

But the decision ultimately failed to recognize an affirmative right to release upon a showing of rehabilitation,¹⁹⁸ resting instead on the right to the *opportunity* to demonstrate rehabilitation. In so doing, the Eighth Circuit inadvertently demonstrated why recognition of an affirmative right to release is constitutionally required: The decision seems to contemplate the possibility that these juvenile offenders will demonstrate their maturity and rehabilitation but nevertheless spend the rest of their lives in prison—an incoherent result for a class of offenders that the Supreme Court has said may only be subjected to lengthy incarceration to further rehabilitative goals.¹⁹⁹

Some argue that parole reforms would cure these defects that leave juveniles incarcerated long past their growth and rehabilitation, and they may be right. Professor Harrington, for example, proposes a statutory presumption in favor of release for juvenile offenders:

Such an expectation is necessary to counteract boards’ reluctance to grant release, particularly to individuals serving long sentences for serious crimes. In addition, a presumption of release gives the parole board a clear baseline from which to assess the case before them, rather than requiring the board to weigh a laundry list of factors in order to determine suitability for release.²⁰⁰

A statutory presumption of release, combined with high evidentiary standards for the state to rebut the presumption, could at least increase the number of juvenile offenders who receive parole.²⁰¹ But some states already employ similar presumptions—and parole boards work around them. New Jersey’s Parole Act of 1979, for example, requires the release of an inmate on their first parole eligibility date unless a preponderance of the evidence indicates “that the inmate has

¹⁹⁵ *Id.* at 818.

¹⁹⁶ *Id.* at 819.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 817–18 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)) (“As noted, ‘a State is not required to guarantee eventual freedom’ to juvenile offenders.”).

¹⁹⁹ See *supra* notes 102–06 and accompanying text.

²⁰⁰ Harrington, *supra* note 91, at 1210 (footnote omitted).

²⁰¹ Importantly, Harrington also argues for judicial review of parole denials in the face of this presumption. *Id.* at 1215–20.

failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole.”²⁰² Despite this presumption, only 8.76% of New Jersey inmates are released at their first hearing.²⁰³ The chair of the New Jersey State Parole Board once appeared to acknowledge the high degree of discretion the board exercises, even in the face of a clear statutory mandate: There is a “human factor,” he said, and board members make their decisions “based on all the evidence they have and the inmate’s remarks.”²⁰⁴

Ironically, as long as courts refuse to recognize that parole-eligible life sentences suffer from the same constitutional defects as LWOP sentences, juveniles sentenced to LWOP before *Miller* and *Montgomery* may actually be better positioned than juveniles serving parole-eligible life sentences. When *Montgomery* was decided, it gave around two thousand people sentenced to juvenile LWOP the retroactive right to a *Miller* hearing where their sentences would be reviewed in light of the mitigating features of youth.²⁰⁵ But in the same moment, another seven thousand juvenile offenders were serving parole-eligible life sentences, and no court thought they were entitled to anything.²⁰⁶ Take Michigan: There, at least 142 people originally sentenced to juvenile LWOP have been released pursuant to *Miller* hearings.²⁰⁷ As of January 2022, the Michigan Department of Corrections reported that only twenty-two people sentenced to juvenile LWOP remained in its prisons.²⁰⁸ By contrast, Safe & Just Michigan estimated that sixty-six parole-eligible juvenile lifers were still incarcerated in October 2021 having already served, on average, thirty-two years.²⁰⁹

²⁰² N.J. STAT. ANN. § 30:4-123.53(a) (West 2021).

²⁰³ N.J. OFF. OF THE PUB. DEF., *supra* note 174, at 17.

²⁰⁴ Colleen O’Dea, *Explainer: Inside Look at How Parole Really Works in New Jersey*, NJ SPOTLIGHT NEWS (Feb. 4, 2020), <https://www.njspotlightnews.org/2020/02/explainer-inside-look-at-how-parole-really-works-in-new-jersey> [<https://perma.cc/2654-NTHX>].

²⁰⁵ See THE SENT’G PROJECT, *YOUTH SENTENCED TO LIFE IMPRISONMENT 1* (2019), <https://www.sentencingproject.org/wp-content/uploads/2019/10/Youth-Sentenced-to-Life-Imprisonment.pdf> [<https://perma.cc/8DSX-RUPS>].

²⁰⁶ *Id.* “For the young people sentenced to life with the possibility of parole, and the young people serving de facto or virtual life sentences, their future is yet undecided, as the appropriateness of a ‘second look’ for these two classes of life-sentenced individuals has not been addressed directly.” *Id.* at 4.

²⁰⁷ Samples, *supra* note 150.

²⁰⁸ Rick Pluta, *Senate Bills Would End Juvenile Life Without Parole Sentences in Michigan*, WKAR NEWS (Jan. 21, 2022), <https://www.wkar.org/wkar-news/2022-01-21/senate-bills-would-end-juvenile-life-without-parole-sentences-in-michigan> [<https://perma.cc/2T99-99TG>].

²⁰⁹ Safe & Just Mich., *Juvenile Life with the Possibility of Parole* (Oct. 3, 2021), <https://www.safeandjustmi.org/2021/10/03/juvenile-life-with-the-possibility-of-parole> [<https://perma.cc/2T99-99TG>].

The unjustifiable—and presumably unintended—consequence of failing to recognize the right to release discussed in Part II is that juveniles sentenced to parole-eligible life terms may be subjected to longer periods of incarceration, and are entitled to less constitutional protection, than juveniles sentenced to LWOP. As the *Solem* Court explained, the parole system in *Rummel* only passed muster because one could actually expect to be released “[a]ssuming good behavior.”²¹⁰ When that does not happen—when juveniles are systematically denied parole despite rehabilitation—they are serving unconstitutional de facto sentences of life without parole.

C. A Judicial Path Forward

Thankfully, the *Graham* trilogy means we need not wait for piecemeal parole reform. Courts can declare the imposition of life with parole unconstitutional as applied to the majority of juvenile offenders—those whose crimes reflect transient immaturity. Several state courts have already found *Miller* protections triggered by lengthy term-of-years sentences on the basis that they amount to the functional equivalent of LWOP. In Illinois, Dimitri Buffer received a fifty-year sentence for a first-degree murder committed when he was sixteen.²¹¹ After *Miller* and *Montgomery*, Buffer appealed, arguing his sentence by its length amounted to the functional equivalent of life imprisonment.²¹² The Illinois Supreme Court agreed. Drawing from newly-enacted juvenile sentencing legislation which set a forty-year mandatory minimum for juveniles convicted of first-degree murder, the court held that any sentence longer than forty years was a de facto life sentence for juveniles.²¹³ Similarly, in *Bear Cloud v. State*, the Wyoming Supreme Court held that a sixteen-year-old’s aggregate forty-five-year sentence constituted the functional equivalent of LWOP and thus triggered *Miller* protections.²¹⁴ And the Iowa Supreme Court found that the likelihood of merely surviving a long

perma.cc/ZYK9-7Y2S] (“[B]ecause the *Miller* decision was only about LWOP, it did not apply to anyone with a parole-eligible life sentence or a ‘natural life’ term of years. . . . [M]any people who are de facto ‘sentenced to die in prison’ . . . have not benefitted from the recognition of [the] reduced culpability of juveniles.”).

²¹⁰ *Solem v. Helm*, 463 U.S. 277, 300 (1983).

²¹¹ *People v. Buffer*, 137 N.E.3d 763, 765 (Ill. 2019).

²¹² *Id.* at 766.

²¹³ *Id.* at 772 (“Practically, and ultimately, the prospect of geriatric release does not provide a juvenile with a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society.”).

²¹⁴ 334 P.3d 132, 142 (Wyo. 2014) (“[T]he aggregate sentences result in the functional equivalent of life without parole. To [hold] otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile ‘die in prison’”) (quoting *Miller v. Alabama*, 567 U.S. 460, 465 (2012)).

sentence did not provide the protection envisioned by *Graham*, holding that a mandatory 52.5-year period of parole ineligibility violated *Miller* in *State v. Null*.²¹⁵ To reach their conclusions, these courts considered the practical implications of a sentence rather than its formal label. In a parole system that fails to recognize the right to release upon rehabilitation, 52.5 years of parole ineligibility are constitutionally indistinguishable from 52.5 years of parole denials for a reformed juvenile offender. Both are de facto life terms.

As the *Graham* Court observed, a juvenile given the same life sentence as an adult “will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”²¹⁶ It is the real-world impact of the length of imprisonment as it would be experienced by a particular defendant that matters to the constitutional analysis, not the name given to the sentence: “In some cases . . . there will be a negligible difference between life without parole and other sentences of imprisonment.”²¹⁷ Merely labeling a sentence “life with the possibility of parole” does not preclude its functioning as the equivalent of LWOP.

As previously noted, the *Jones* decision does not foreclose holding juvenile life with parole sentences unconstitutional.²¹⁸ *Jones* does, however, show the vulnerability of the *Graham* line of cases at the federal level. A majority of the current Supreme Court is unlikely to embrace the principles articulated in *Graham*, *Miller*, and *Montgomery* in the way this Note suggests, but advocates can press for this reading in state courts. This is not a new strategy—state constitutions have long been seen as ripe frontiers for the expansion of individual rights beyond the floor set by the Federal Constitution.²¹⁹

²¹⁵ 836 N.W.2d 41 (Iowa 2013).

²¹⁶ *Graham v. Florida*, 560 U.S. 48, 70 (2010).

²¹⁷ *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991)).

²¹⁸ See *supra* notes 89–93 and accompanying text.

²¹⁹ See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (“[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”). This focus on state constitutions has enjoyed a resurgence since the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022). See Jordan Smith, *The Fight for Abortion Rights Turns to State Constitutions*, THE INTERCEPT (July 3, 2022, 6:00 AM), <https://theintercept.com/2022/07/03/abortion-rights-state-constitutions> [<https://perma.cc/D92H-9F7R>] (reviewing cases brought in state courts since the *Dobbs* ruling); Alicia Bannon & Amanda Powers, *Want Gender Equality? Don’t Overlook State Constitutions*, BRENNAN CTR. FOR JUST. (Aug. 30, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/want-gender-equality-dont-overlook-state-constitutions> [<https://perma.cc/J89J-TNZ9>] (noting that most state constitutions have gender equality provisions which “can be important sources of individual rights”).

New Jersey, for example, takes pride in the ways its state constitution “affords greater protection for individual rights than its federal counterpart.”²²⁰ Accordingly, using state constitutions to enshrine the right to release upon a showing of rehabilitation would protect those interpretations from being overruled federally,²²¹ and would direct state-level criminal practice where the vast majority of criminal cases are brought. As discussed above, in many states, the groundwork for this is already laid.²²²

This Note reveals the latent unconstitutionality of a thus far accepted practice. There are a variety of ways that this constitutional defect could be remedied, and while a full explication of them is beyond the scope of this Note, some initial suggestions are in order. As the Court explained in *Montgomery*, it would be left to states to determine precisely how to remedy the unconstitutionality of juvenile life with parole sentences: “When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States’ sovereign administration of their criminal justice systems.”²²³ As a modest starting point, juveniles sentenced to any life term, parole-eligible or not, should be entitled to *Miller* hearings.

Further, just as many states moved to provide parole eligibility to juveniles sentenced to LWOP after *Miller* and *Montgomery*, many would likely convert juvenile life with parole sentences to term-of-years sentences—and could do so as long as the new term did not amount to the functional equivalent of life. For this reason, nothing herein should be taken to suggest that parole reform is unnecessary: Juveniles resentenced from life to terms of years would retain their parole eligibility, and proposals like Harrington’s suggestion for a statutory presumption of release could narrow the gap between the reality of our parole systems and those envisioned by the Supreme Court.²²⁴ Additionally, or as an alternative to parole, states might adopt the recommendation of the Model Penal Code on Sentencing

²²⁰ *State v. Melvin*, 258 A.3d 1075, 1091 (N.J. 2021) (“The Federal Constitution provides the floor for constitutional protections . . .”); *see also* *State v. Zuber*, 152 A.3d 197, 206 (N.J. 2017) (“As in other contexts, the State Constitution can offer greater protection in [the Eighth Amendment] area than the Federal Constitution commands.”).

²²¹ Brennan, *supra* note 219, at 501 (“[T]he state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.”); *see also* *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945) (“[W]e will not review a judgment of a state court that rests on an adequate and independent ground in state law.”).

²²² *See supra* notes 211–15 and accompanying text.

²²³ *Montgomery v. Louisiana* 577 U.S. 190, 211 (2016).

²²⁴ *See supra* notes 200–01.

and provide judicial review for juvenile offenders after they have served ten years.²²⁵ Some advocates, like the ACLU of New Jersey, have supported a fifteen-year limit on juvenile incarceration based on the age-crime curve's indication that nearly all juveniles will have "aged out of criminality" by then.²²⁶

Even with a perfect release mechanism that assures the juvenile offender's freedom upon a showing of rehabilitation, a gap in time between the moment they reach sufficient maturity and the moment of their release is inevitable. This Note does not purport to solve that, nor to define a test for maturity. It does, however, insist that courts have the precedential and constitutional toolkit they need to end the practice of de facto LWOP sentences masquerading as life with parole sentences for the juvenile population. They can do it today.

CONCLUSION

When he faced the Parole Board in 2022, there was nothing left Mr. Thomas could do to demonstrate his growth and rehabilitation. But this time, he had a different reason to hope: The Supreme Court of New Jersey had recently held that people like Mr. Thomas had waited long enough for legislative action.²²⁷ In *State v. Comer*, the court declared that under the state constitution, juvenile offenders must be allowed to petition for judicial review of their sentences after serving twenty years.²²⁸ Nine days after the decision, on January 19, 2022, a three-judge panel of the Appellate Division granted Mr. Thomas's petition for such a hearing.²²⁹ The panel took notice that "[a]lthough [Mr. Thomas] was not sentenced to a lengthy period of parole ineligibility, his sentence has, as a practical matter, evolved into just that, despite the significant rehabilitated steps he has taken, his blemish-free record while incarcerated, and the positive psychological

²²⁵ MODEL PENAL CODE: SENTENCING § 6.11A(h) (AM. L. INST., Proposed Final Draft 2017); see also *id.* at cmt. h ("This provision recognizes that adolescents can generally be expected to change more rapidly in the immediate post-office years, and to a greater absolute degree, than older offenders.").

²²⁶ Brief of the ACLU of N.J. as Amicus Curiae Supporting Appellant at 44, *State v. Comer*, 266 A.3d 374 (N.J. 2022) (No. 084516).

²²⁷ In denying his application for a *Miller* hearing in August 2020, Superior Court Judge Donna Taylor expressed regret that her hands were tied: "Unfortunately, despite [the state supreme court's] urging of the Legislature to mandate a system to review lengthy juvenile sentences, at this time there is no such system in place for this court to review defendant's juvenile sentence . . ." *State v. Thomas*, No. 80-12-01541-I, 2020 WL 13555583, at *9 (N.J. Super. Ct. Law Div. Aug. 3, 2020).

²²⁸ 266 A.3d at 399 ("To save the statute from constitutional infirmity, we therefore hold under the State Constitution that juveniles may petition the court to review their sentence after 20 years.").

²²⁹ *State v. Thomas*, 269 A.3d 487, 506 (N.J. Super. Ct. App. Div. 2022).

evaluations he has received.”²³⁰ Unlike his unsuccessful parole hearings, this proceeding would have allowed Mr. Thomas to be represented by counsel, to present evidence, to examine witnesses and experts, and to cross-examine the State’s witnesses.²³¹ However, eleven months later and before this hearing could take place, the Parole Board granted Mr. Thomas’s application for release.²³²

In the end, Mr. Thomas was incarcerated from his teenage years until nearly age sixty, and the story may be far from over for other juvenile offenders serving de facto LWOP sentences. The mere opportunity to be heard at a special hearing does not cure the unconstitutionality of a de facto LWOP sentence inflicted on a rehabilitated juvenile offender. The *Montgomery* Court declared that “juveniles whose crimes reflected only transient immaturity—and who have since matured—*will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.*”²³³ The Court expected parole eligibility to protect children from disproportionate punishment. It hasn’t. A sentence which provides for the possibility of release in name, but which in practice results in the permanent incarceration of a child who demonstrates maturity and rehabilitation, is unconstitutional.

²³⁰ *Id.* at 508.

²³¹ *Id.* at 509.

²³² Information on file with author.

²³³ *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (emphasis added).