

MEANINGFUL OPPORTUNITY FOR RELEASE: PAROLE BOARD STANDARDS FOR JUVENILES UNDER *GRAHAM*, *MILLER*, AND THE EIGHTH AMENDMENT

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I. INTRODUCTION

Imagine being fourteen, and while hanging out with friends, they decide to rob a store.¹ You go along and stand outside, but curiosity gets the best of you and you enter the store.² You realize that one of your friends has brought a gun and is demanding money from the clerk.³ After the clerk refuses to

1. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 465–66 (2012) (extrapolating from the facts in Kuntrell Jackson’s case).

2. See *id.* at 465.

3. See *id.*

hand over the money, your friend shoots her and she dies.⁴ You are arrested, charged, tried as an adult, found guilty, and receive a life sentence with the possibility of parole after forty years.⁵ By the time you appear at your first parole hearing, you are fifty-four years old and have spent most of your life in prison.⁶ The parole board denies parole, and you spend the rest of your life in prison, all because you picked the wrong group of friends when you were fourteen.⁷ Although this story might sound improbable, every year around 200,000 juveniles are tried as adults across the country.⁸

Although the Supreme Court has stated that children under the age of eighteen cannot receive mandatory life sentences,⁹ juveniles are still serving both long term-of-year sentences and long periods before receiving their first parole hearing.¹⁰ Over the past twenty years, the Supreme Court has explained that children—defined as youths under eighteen—are different due to their lack of brain development and impulse control.¹¹ Therefore, under the Eighth Amendment, mandatory life sentences are disproportionate to the age of child offenders, and thus, juveniles deserve a meaningful opportunity for release.¹² Because mandatory life sentences are no longer allowed, states have changed how they sentence juveniles, but they often simply add parole to sentences in order to comply.¹³

While there is no longer a mandatory life sentence for juveniles, it is unclear what meaningful opportunity for release should look like.¹⁴ On paper, the requirements are being met with parole; however, parole boards often do not grant parole—even to juveniles convicted of nonhomicide crimes—and juveniles are serving de facto life sentences.¹⁵ These de facto life sentences

4. *See id.* at 466.

5. *See generally* Molly Oak, *Jury Finds Meechaiel Criner Guilty of Capital Murder for the Death of UT Student Haruka Weiser*, KVUE (Aug. 29, 2018, 11:46 AM), <https://kvue.com/article/news/local/jury-finds-meechaiel-criner-guilty-of-capital-murder-for-the-death-of-ut-student-haruka-weiser/269575419847> (stating the sentence for a seventeen-year-old who commits capital murder is a life sentence with the possibility of parole after forty years).

6. *See generally* ACLU, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES, 2 (2016), https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereport_onlinesingle.pdf.

7. *See id.* at 34 (noting the parole-grant rate in Texas is low and generally under 15% for felony-murder cases).

8. CAMPAIGN FOR YOUTH JUST., KEY FACTS: YOUTH IN THE JUSTICE SYSTEM, 3, <http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf> (last updated June 2016) [hereinafter KEY FACTS].

9. *See* *Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

10. *See generally* ACLU, *supra* note 6, at 49–50 (discussing parole and juvenile offenders).

11. *See* *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012).

12. *See id.* at 473–79.

13. *See generally* Beth Caldwell, *Miller v. Alabama as a Watershed Procedural Rule: The Case for Retroactivity*, 10 HARV. L. & POL'Y REV. S1, S5–S6 (2015).

14. *See* Lila Meadows, *Realizing “Meaningful” in Maryland: A Call for Reforming Maryland’s Parole System in Light of Graham, Miller, & Montgomery*, 48 U. BAL. L. F. 59, 60 (2018).

15. *See* Mark Freeman, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 963 (2013).

result, because often, parole is never granted and the juvenile remains in jail for life.¹⁶ Because the possibility of parole is in name only, these sentences do not provide a meaningful opportunity for release.¹⁷

Parole boards are in the best place to determine rehabilitation, but there needs to be clear guidelines on what boards and states must do to ensure that juveniles are actually receiving a meaningful opportunity for release. Little attention has been given to parole boards and the procedures necessary to give juveniles the opportunity for release.¹⁸ However, what is clear is that simply adding the possibility of parole to juveniles' sentences does not comply with the meaningful opportunity for release requirement the Court has established under the Eighth Amendment.¹⁹

In order to ensure “meaningful opportunity for release” is not simply a phrase, parole boards should implement four new requirements so that juveniles receive review within a meaningful amount of time and an actual opportunity for release. First, within one year of sentencing, juveniles should be notified that they have a different parole process. Second, all juveniles should receive their first parole hearing within thirty years of sentencing. Third, after the first hearing, parole boards should review these cases within ten years. Fourth, the parole board needs to develop a juvenile scoring system that emphasizes growth in maturity and rehabilitation. This system should include utilizing experts in brain development to evaluate the juvenile. These additions to the parole process will ensure that children are treated differently and are actually receiving a meaningful opportunity for release as afforded to them under the Constitution.

Part II of this Comment addresses the background regarding juvenile sentencing. This includes Supreme Court jurisprudence, beginning with *Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and concluding with *Montgomery v. Louisiana*.²⁰ It provides a general overview of state responses to *Miller v. Alabama*.²¹ Additionally, it covers general information and background about parole boards.²² Part III discusses how meaningful opportunity for release applies to parole boards. The four new constitutional requirements will be analyzed as to why they are the best option to ensure that juveniles are receiving meaningful opportunity for release. This section

16. See ACLU, *supra* note 6, at 34–36 (discussing length of sentences and parole-grant rates).

17. See generally *id.*

18. See Sarah Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 414 (2014).

19. See *id.*

20. See *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

21. *Miller*, 567 U.S. 460 at 514–15; see *infra* Part II (discussing the history of juvenile sentencing and the effect of *Miller* in state sentencing).

22. See *infra* Part II (providing background on the history of parole boards and how parole is determined).

sets new limits for parole which guarantee there is significant review for juveniles that is in line with the Eighth Amendment standards set by the Court. It also provides new sentencing guidelines regarding parole hearings as well as a new potential scoring matrix addition for juveniles in adult courts. Part IV discusses how those four requirements can be applied retroactively to cases under the holding in *Montgomery*. Parole boards are in the best place to determine rehabilitation, and the above guidelines will ensure that juveniles are receiving a meaningful opportunity for release.

II. BACKGROUND: HISTORICAL DEVELOPMENT

Legislatures are restricting juvenile life without parole due to the recent string of Supreme Court cases stating that children are different.²³ Currently, there are fifteen states that completely ban life without parole for juveniles.²⁴ In other states, like Texas, the legislatures added a parole eligibility portion that effectively changed the sentence.²⁵ Even though many states have changed, five states, including Louisiana, were responsible for two-thirds of all juvenile life without parole sentences.²⁶ Those states are still seeking life without parole options for some juveniles.²⁷ But the current trend is that states are issuing lengthy term-of-year sentences with parole options.²⁸

After the Court decided that *Miller v. Alabama* would apply retroactively, there was more reform to juvenile life without parole laws.²⁹ The Court did not effectively address what constitutes a life sentence, so there is a variety of nonmandatory sentencing that states consider.³⁰ A general trend is that most states offer parole eligibility for life sentences after ten to forty years.³¹ Most states offer parole eligibility between the twenty-five to thirty year range for either first-degree or capital murder.³² There are three states that offer parole at the forty-year mark:³³ Texas has a mandatory life sentence with a possibility of parole after forty years; Nebraska has a range from forty years to life but requires the parole board to review the case once

23. See generally John R. Mills, Anna Dorn & Amelia Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 541–47 (2016).

24. *Id.* at 552.

25. *Id.* at 552–54.

26. *Id.* at 563.

27. Sharon Cohen & Adam Geller, *AP Exclusive: Parole for Young Lifers Inconsistent Across the US*, AP NEWS (July 31, 2017), <https://www.apnews.com/a592b421f7604e2b88a170b5b438235f>.

28. See ACLU, *supra* note 6, at 18.

29. Cohen et al., *supra* note 27.

30. *Id.*

31. ACLU, *supra* note 6, at 160–61.

32. The Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 31, 2017, 2:30 PM), <https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/>.

33. ACLU, *supra* note 6, at 33.

a year and consider mitigating factors;³⁴ and Colorado also has a forty-year possibility but can release inmates early.³⁵ In Louisiana, however, juveniles sentenced to life prior to 2016 are eligible for parole after twenty-five years.³⁶ Even though there is a wide range of state responses, typically, parole review begins around thirty years.³⁷

A. Supreme Court Jurisprudence: Children Are Different Under the Eighth Amendment

Changes to juvenile sentencing all began after the Supreme Court banned the death penalty for juveniles.³⁸ Although *Roper v. Simmons* was a death penalty case, the Court established two key points that it later used in life without parole cases: it set the age of juveniles at eighteen and established the criteria that made some punishments for juveniles unconstitutional.³⁹

Although the Court had been dealing with juveniles and the death penalty in the years before *Roper v. Simmons*, it was *Roper* that shaped the Court's understanding of juveniles.⁴⁰ The first thing the Court looked at was the Eighth Amendment and the standards of decency that have evolved in society.⁴¹ In a prior case, the Court already determined that children under sixteen should not receive the death penalty.⁴² In order to determine standards of decency, the Court looked at data and held that there was a slow "trend toward abolition of the juvenile death penalty."⁴³ The Court stated: "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."⁴⁴

The Court noted the death penalty should only be used for the most serious crimes, and courts should allow defendants to present mitigating factors to show their crimes do not fall into that category;⁴⁵ however, there were three differences that showed juveniles as a class that "cannot with reliability be classified among the worst offenders."⁴⁶ First, children often lack maturity and have an underdeveloped sense of responsibility, which leads to reckless behavior.⁴⁷ Second, children are more susceptible to peer or

34. The Associated Press, *supra* note 32.

35. See ACLU, *supra* note 6, at 18.

36. The Associated Press, *supra* note 32.

37. *Id.*

38. See *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005).

39. See *id.*

40. See *id.*

41. *Id.* at 561–63.

42. *Id.* at 561.

43. *Id.* at 566.

44. *Id.* at 568.

45. *Id.*

46. *Id.* at 569.

47. *Id.*

outside pressures.⁴⁸ Third, a juvenile's character is less formed than an adult's character.⁴⁹ Thus, youth is a mitigating factor because there is a greater possibility of reform among youths than adults.⁵⁰ The Court concluded, based on this reasoning, that the Eighth Amendment prohibits the death penalty for offenders under eighteen.⁵¹

Next, the Court explained why it drew the line of culpability at eighteen.⁵² It noted that the qualities listed above do not disappear at eighteen.⁵³ Even so, society has drawn the line between child and adult at eighteen, and the Court merely followed that general trend.⁵⁴ The Court concluded, based on the diminished culpability of youths, neither retribution nor deterrence justified the harsh sentence.⁵⁵ Thus, the Court established that some sentences are disproportionate for juveniles.⁵⁶

1. Nonhomicide Offenders Under Graham—Life Without Parole Is Never an Option

In 2010, the Supreme Court extended its reasoning in *Roper* to life without parole sentences for nonhomicide crimes in *Graham v. Florida*.⁵⁷ Again, the Court looked to the Eighth Amendment under evolving standards of decency and proportionality.⁵⁸ Under proportionality, the Court considered whether the length of the sentence was excessive.⁵⁹ Previous precedent established that the Constitution only forbids sentences that are grossly disproportionate to the crime.⁶⁰ Additionally, the Eighth Amendment can apply categorically to classes of offenders based on national consensus.⁶¹ The Court stated that for the first time, it was considering a categorical challenge to a term-of-years sentence.⁶²

Under *Roper*, the Court had already established that juveniles as a class have less culpability and thus, “are less deserving of the most severe punishments.”⁶³ The Court held that juveniles sentenced to life without parole

48. *Id.*

49. *Id.* at 570.

50. *Id.*

51. *Id.* at 570–71.

52. *Id.* at 574.

53. *Id.*

54. *Id.* at 574–75.

55. *Id.* at 571.

56. *See id.*

57. *See Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

58. *Id.* at 58–59.

59. *Id.* at 59.

60. *Id.* at 60.

61. *Id.* at 61–62.

62. *Id.* at 61.

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

for nonhomicide crimes were rare across the country.⁶⁴ Along with the fact that “developments in . . . brain science continue[d] to show fundamental differences between juvenile and adult minds,”⁶⁵ the Court reiterated that for children, there is a higher possibility that deficiencies will be reformed.⁶⁶

Focusing on the class of crime, the Court recognized that killing, or the intent to kill, is more serious and irrevocable and deserves a more serious punishment than other crimes.⁶⁷ But even in the most serious nonhomicide crimes, life is normally repairable.⁶⁸ Life without parole is the most serious punishment besides the death penalty that the law imposes,⁶⁹ and it is especially harsh for juveniles because “on average [they will] serve more years and a greater percentage of [their lives] in prison than an adult offender.”⁷⁰ There is no hope of restoration, and in fact, the harshness of the sentence—remaining in prison for the rest of their lives—is a denial of hope.⁷¹ Moreover, a mandatory sentence lacks the penological justifications necessary to make a sanction proportional.⁷² The Court again held that retribution and deterrence could not justify the harsh sentence.⁷³ While rehabilitation was a legitimate goal, life without parole foreclosed that possibility, and the Court stated that juveniles have the most need for rehabilitation.⁷⁴

After doing the above analysis, the Court determined that states must provide “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”⁷⁵ The Court stated that this does not require release, but it prevents states from making the determination at the outset that the juvenile should never re-enter society by remaining behind bars.⁷⁶ In order to determine the boundaries of that approach, the Court clarified that meaningful opportunity for release is “a categorical rule [which] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform.”⁷⁷ Maturity can lead to rehabilitation—which can shape the juvenile into a responsible person—but if there is no hope for release, then there is little incentive to become responsible.⁷⁸ A meaningful opportunity for release

64. *Id.* at 65.

65. *Id.* at 68.

66. *Id.*

67. *Id.* at 69.

68. *Id.* The Court noted that even rape and robbery are different from murder in a moral sense. *Id.*

69. *Id.*

70. *Id.* at 71.

71. *Id.* at 69–70.

72. *Id.* at 71.

73. *Id.* at 71–72.

74. *Id.* at 74.

75. *Id.* at 75.

76. *Id.*

77. *Id.* at 79.

78. *Id.*

allows juveniles to show that they are fit to re-enter society.⁷⁹ The Court concluded that the Constitution prohibits life without parole for nonhomicide juvenile offenders, and accordingly, they should receive a meaningful opportunity for release.⁸⁰

2. *Homicide Offenders Under Miller—Life Without Parole Is a Limited Option*

Two years after deciding *Graham*, the Supreme Court decided whether states could impose mandatory juvenile life sentences for murder.⁸¹ In *Miller v. Alabama*, the Court heard two cases about murder committed by fourteen-year-olds.⁸² In both cases, even if the judge felt that there were factors showing the youths deserved a lesser sentence, the judge could not change the sentence because it was mandatory.⁸³

The Supreme Court used *Roper* and *Graham* to determine whether the sentencing was proportional and valid under the Eighth Amendment.⁸⁴ Under *Graham*, the Court adopted a categorical ban on life sentences without parole for nonhomicide offenses due to the disparity between the culpability of juveniles and the severity of the punishment.⁸⁵ It reemphasized that youths are less culpable because they are more rash and less able to assess consequences.⁸⁶ The Court determined that the factors established in *Roper* still applied because they were not crime specific.⁸⁷ However, the Court noted that, unlike in *Graham*, it was not issuing a categorical ban on life without parole.⁸⁸ Although uncommon, the Court left open the possibility of sentencing “the rare juvenile offender whose crime reflects irreparable corruption” to life.⁸⁹

The Court again held that the state “must provide some ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”⁹⁰ For all juveniles, age is relevant when imposing the harshest prison sentence because there is too great a risk of disproportionate punishment.⁹¹ The Court noted that only in rare occasions would the harshest penalty be appropriate, so while it was not a categorical ban, the Court

79. *Id.*

80. *Id.*

81. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

82. *Id.*

83. *Id.*

84. *Id.* at 469–70.

85. *Id.* at 470.

86. *Id.* at 472.

87. *Id.* at 473.

88. *Id.* at 479.

89. *Id.* at 479–80.

90. *Id.* at 479.

91. *Id.*

required states to take into account how children are different, regardless of the underlying crime.⁹²

B. State Responses to Life Without Parole

After the decision in *Miller*, states that were still issuing life sentences began changing their sentencing regimes and debating whether *Miller* should be retroactively applied.⁹³ The issue was whether *Miller* created a procedural rule⁹⁴—which is not retroactively applied—or a substantive rule—which is retroactive.⁹⁵ The Court explained the test for retroactivity in 1989 in *Teague v. Lane*.⁹⁶ Generally, new constitutional rules of criminal procedure are not retroactive.⁹⁷ The Court noted two exceptions, and one was when a rule prohibited a punishment for a class of defendants.⁹⁸ Some states found that the substantive principle that children are different,⁹⁹ along with the unconstitutional punishment of mandatory life without parole for juveniles, created a retroactive rule.¹⁰⁰

With this in mind, some states abolished all life without parole sentences, even though it was not required, because of the Eighth Amendment issue of proportionality.¹⁰¹ One group of states, focusing on the substantive rule, began applying the law retroactively.¹⁰² Four states passed legislation that made *Miller* retroactive,¹⁰³ and supreme courts in at least fourteen states—including Mississippi, Florida, and Texas—held that the rules should be applied retroactively.¹⁰⁴ Yet, around sixteen states held that *Miller* did not provide retroactive relief to juveniles.¹⁰⁵ The Louisiana Supreme Court held that “*Miller* sets forth a new rule of criminal constitutional procedure. . . .” and thus, under *Teague*, was not subject to

92. *Id.* at 479–80.

93. See Caldwell, *supra* note 13, at 55–56; Perry Moricarty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 934–35 (2015).

94. See Jason Silverstein, *Americans Are Still Serving Unconstitutional Sentences: A Mercy Doctrine Could Help*, OUTLINE (May 3, 2018, 2:16 PM), <https://theoutline.com/post/4397/mercy-doctrine-unconstitutional-sentences-abdul-lateef>.

95. See Elizabeth Scott, Thomas Grisso & Marsha Levick, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 691 (2015–2016).

96. *Teague v. Lane*, 489 U.S. 288, 315 (1989).

97. *Id.* at 310.

98. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (citing *Penry v. Lynaugh*, 792 U.S. 302, 330 (1989)).

99. Scott et al., *supra* note 95, at 691.

100. See Brooke Wheelwright, *Instilling Hope: Suggested Legislative Reform for Missouri Regarding Juvenile Sentencing Pursuant to Supreme Court Decisions in Miller and Montgomery*, 82 MO. L. REV. 267, 275–78 (2017) (explaining how the Missouri legislature responded to *Miller*).

101. Scott et al., *supra* note 95, at 691.

102. See Silverstein, *supra* note 94.

103. Mills et al., *supra* note 23, at 557.

104. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT’G PROJECT (JULY 23, 2019), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

105. See *id.*

retroactive application.¹⁰⁶ These diverging paths meant that the Supreme Court would eventually need to rule on whether *Miller* applied retroactively.¹⁰⁷

C. *Montgomery and Retroactivity*

In 2016, the Supreme Court decided the issue of *Miller*'s retroactivity in *Montgomery v. Louisiana*.¹⁰⁸ Henry Montgomery was seventeen when he killed a sheriff in Louisiana.¹⁰⁹ He received a mandatory sentence of life without parole and was unable to present mitigating evidence.¹¹⁰ Almost fifty years later, *Miller* was decided and required courts to consider a juvenile's diminished capacity before condemning them to die in prison.¹¹¹ Montgomery petitioned that his sentence was now illegal under the Eighth Amendment and should be corrected retroactively.¹¹²

The Supreme Court first had to determine if it had created a new constitutional rule that should be retroactively applied by both state and federal courts.¹¹³ Using the framework established in *Teague*, the Court looked to the first exception: that retroactive effect is given to substantive constitutional law, which includes prohibiting punishment for a class of defendants.¹¹⁴ The Court concluded that *Miller* was a substantive rule, which set forth a constitutional guarantee that certain punishments, including life without parole, are beyond a state's power to impose.¹¹⁵ That meant Montgomery's sentence was void because the law it was enacted under was void.¹¹⁶ The Court reexamined the line of cases that held "certain punishments [are] disproportionate when applied to juveniles."¹¹⁷ The Court reiterated that juveniles' characteristics mean they are less likely to be a danger to society forever.¹¹⁸ Although *Miller* left open the possibility of sentencing juveniles to life, it should be an uncommon penalty.¹¹⁹

Even though *Miller* was retroactive, states did not have to relitigate sentences.¹²⁰ A state could consider an offender for parole in order to remedy

106. *State v. Tate*, 130 So. 3d 829, 844 (La. 2013), *abrogated by* *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

107. *See generally* Moriearty, *supra* note 93.

108. *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

109. *Id.*

110. *Id.* at 726.

111. *Id.*

112. *Id.* at 726–27.

113. *Id.* at 727.

114. *Id.* at 728.

115. *Id.* at 729.

116. *Id.* at 731.

117. *Id.* at 732.

118. *Id.* at 733.

119. *Id.* at 733–34.

120. *Id.* at 736.

a *Miller* violation.¹²¹ Parole allows for juveniles who have matured to serve proportionate sentences without violating the Eighth Amendment.¹²² Extending parole would not be an onerous burden because if a prisoner showed the inability to reform, he could continue to serve a life sentence.¹²³

D. Parole Boards

Parole boards have been implemented in United States criminal justice systems since the 1900s.¹²⁴ Parole board members grant clemency and supervised release or parole for all the adult inmates in a state.¹²⁵ There have been many changes throughout the years, but parole is still utilized in sentencing and granting release.¹²⁶

Parole boards are political because of the way members are appointed.¹²⁷ Governors appoint most parole board members, as is the case in both Texas and Louisiana.¹²⁸ In Texas, the governor appoints seven members who hear all the cases from the adult prison system.¹²⁹ In Louisiana, the governor appoints seven members to the Board of Parole, and five of those members also serve on the Board of Pardons.¹³⁰ Additional officers and staff, often in particular geographic locations, help assist the board in gathering the information necessary to determine parole.¹³¹ Yet, appointment by the governor means that board members making decisions are subject to political

121. *Id.*

122. *Id.*

123. *Id.*

124. See generally PETER HOFFMAN, U.S. DEP'T OF JUST.: U.S. PAROLE COMMISSION, HISTORY OF THE FEDERAL PAROLE SYSTEM (May 2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf>.

125. See generally *History of Parole in Texas*, TEX. DEP'T OF CRIM. JUST., <https://www.tdcj.texas.gov/divisions/pd/history.html> (last visited Oct. 9, 2019).

126. See Beth Schwartzapfel, *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-1f71-11e5-84deb37ee8eaa61_story.html?noredirect=on&utm_term=.2308b81020de.

127. See *id.*

128. *Boards & Commissions*, DIVISION OF ADMIN.: ST. OF LA., <https://wwwcfprd.doa.louisiana.gov/boardsandcommissions/viewBoard.cfm?board=418> (last visited Oct. 9, 2019); see generally *History of Parole in Texas*, *supra* note 125.

129. *History of Parole in Texas*, *supra* note 125. Each receives a salary of \$112,750. *Government Salaries Explorer: Parole Board Member at Texas Department of Criminal Justice*, TEX. TRIB., <https://salaries.texastribune.org/state-comptroller-payroll/departments/texas-department-of-criminal-justice/positions/parole-board-member/> (last updated Mar. 8, 2019).

130. *Boards & Commissions*, *supra* note 128. Their salary is \$65,749. *Probation and Parole Officer Information*, LA. DEP'T OF CORRECTIONS, <https://doc.louisiana.gov/probation-and-parole-officer-information> (last visited Oct. 9, 2019).

131. See, e.g., *Parole in Texas: Answers to Common Questions*, TEX. BOARD OF PARDONS & PAROLES & TEX. DEP'T OF CRIM. JUST. PAROLE DIVISION 3–4 (2017), www.tdcj.texas.gov/bpp/publications/PIT_2017_Eng.pdf; *Probation Parole Overview*, LA. DEP'T OF PUB. SAFETY & CORRECTIONS, <https://doc.louisiana.gov/probation-parole-overview> (last visited Oct. 9, 2019).

pressure from both the governor and political parties when deciding when and who to release.¹³²

To determine parole, parole boards often use scoring matrices to evaluate if release is appropriate.¹³³ The matrix results in a risk factor that boards use to decide who is eligible for parole.¹³⁴ The matrix often includes age, education, disciplinary conduct, and offense type.¹³⁵ Some additional factors include level of remorse, mental and physical health, substance abuse, potential danger, and vocational skills.¹³⁶ The most influential factor tends to be the offense committed.¹³⁷ Most states do not have criteria on how to consider age other than the initial distinction of under sixteen or seventeen.¹³⁸ Some matrices generate a number score¹³⁹ but include H and L for high or low risk factor.¹⁴⁰ Most use a range between zero to three,¹⁴¹ but some include negative numbers to further reduce scores.¹⁴² Normally, the higher the score, the higher the risk, and it is less likely release will be granted.¹⁴³

Parole boards have the power to determine release, but they often do not grant parole because of public safety concerns.¹⁴⁴ Boards are cautious to release prisoners because if a released prisoner commits a crime, especially a violent one, it can result in the loss of a board member's job.¹⁴⁵ In Massachusetts, a released prisoner killed a police officer while out on parole, which resulted in fewer early releases for all other inmates.¹⁴⁶ While some caution is justified, juveniles who were granted parole in Louisiana during the 2015–2016 year had a one-year recidivism rate of 14.5%.¹⁴⁷ The Center

132. Schwartzapfel, *supra* note 126.

133. *Id.*

134. See, e.g., *Revised Parole Guidelines*, TEX. BOARD OF PARDONS & PAROLES, https://www.tdcj.texas.gov/bpp/parole_guidelines/parole_guidelines.html (last updated Jan. 22, 2019).

135. *Id.*

136. Courtney B. LaHaie, *A Model for Juvenile Parole Reform*, 11 CAL. LEGAL HIST. 475, 491 (2016), <https://www.cschs.org/wp-content/uploads/2014/09/Legal-Hist-v.-11-LaHaie-Juvenile-Parole-Reform.pdf>.

137. *Id.* at 492.

138. See, e.g., *Revised Parole Guidelines*, *supra* note 134; see also KEVIN C. FORD, COLORADO DIVISION OF CRIMINAL JUSTICE ANALYSIS OF COLORADO STATE BOARD OF PAROLE DECISIONS: FY 2017 REPORT, 76 (April 2018), <https://www.jrsa.org/pubs/sac-digest/vol-28/co-boardofparole-18.pdf>.

139. *Revised Parole Guidelines*, *supra* note 134.

140. Ford, *supra* note 138, at 29–30.

141. *Revised Parole Guidelines*, *supra* note 134.

142. See *id.*

143. Sarah Sloan, *Why Parole Eligibility Isn't Enough: What Roper, Graham, and Miller Mean for Juvenile Offenders and Parole*, 47 COLUM. HUM. RTS. L. REV. 243, 259 (2015).

144. See LA. BOARD OF PARDONS AND PAROLE, 2017 ANNUAL REPORT 3 (2017), <https://www.doc.la.gov/media/1/PardonParole%20Policies/2018/2017.pardon-parole.board.annual.report.pdf>.

145. Russell, *supra* note 18, at 397. In Massachusetts, the board released a prisoner who killed a police officer; thereafter, each received a resignation letter from the Governor's office. *Id.*

146. Melissa Bailey, *More Prisoners Die of Old Age Behind Bars*, KHN (Dec. 15, 2016), <https://khn.org/news/more-prisoners-die-of-old-age-behind-bars/>.

147. LA. OFF. OF JUV. JUST., LOUISIANA OFFICER OF JUVENILE JUSTICE: 2017 RECIDIVISM REPORT (Aug. 2017), <https://ojj.la.gov/wp-content/uploads/2018/01/Recidivism-Website-August-2017.pdf>.

for Disease Control found that prosecuting children as adults increases felony recidivism by 34%.¹⁴⁸ The increase in recidivism is partially because incarcerating nonviolent youths increases the likelihood they will recommit a crime.¹⁴⁹ Even though recidivism rates drop with age, older prisoners are less likely to be released, often because there is political backlash for releasing *potentially* violent offenders.¹⁵⁰ The result for juveniles who are sentenced as adults and sent to adult prisons is that their chances for release are often slim.¹⁵¹

Because parole boards have a tremendous amount of power, they have almost unlimited discretion in deciding cases.¹⁵² Due to the subjective and discretionary nature of release, the Supreme Court has noted it is difficult to evaluate boards.¹⁵³ Although their decisions are often not reviewable by anyone else, boards operate behind closed doors.¹⁵⁴ As a result, in some states, inmates are not able to see their own parole files.¹⁵⁵ Along with twenty-one other states, Texas and Louisiana parole boards keep parole files secret.¹⁵⁶ In some states, an inmate does not have the right to be at a hearing.¹⁵⁷ Moreover, if an inmate is allowed to speak with someone, the opportunity to speak might not be with the individuals on the board who actually make the decision.¹⁵⁸

While some parole boards meet to discuss cases, others simply pass files along until there are enough votes to either deny or release the inmate.¹⁵⁹ A Georgia parole board member noted that the board often heard one hundred cases a day, which meant it spent at most three minutes on each decision.¹⁶⁰ As a result, prisoners sometimes receive only cursory reasons for the denial and how long they must wait to be seen again.¹⁶¹ In general, there are no constitutional constraints on parole boards, which makes it hard for inmates to gain information about release.¹⁶² This immense power and lack of oversight has led to a lack of meaningful opportunity for release for juveniles.

148. LA. PARTNERSHIP FOR CHILD. & FAMILIES, LOUISIANA PLATFORM FOR CHILDREN REPORT 21 (2015), <http://www.louisianapartnership.org/resources/Documents/Platform%20for%20Children%20Full%20Report.pdf>.

149. *Id.*

150. Schwartzapfel, *supra* note 126.

151. Russell, *supra* note 18, at 396–97.

152. *Id.* at 396.

153. *Id.*

154. Schwartzapfel, *supra* note 126.

155. *See* Russell, *supra* note 18, at 405–06.

156. Schwartzapfel, *supra* note 126.

157. Megan Annitto, *Graham's Gatekeeper and Beyond: Juvenile Sentencing and Release in the Wake of Graham and Miller*, 80 BROOK. L. REV., 119, 146 (2014).

158. Russell, *supra* note 18, at 401.

159. Schwartzapfel, *supra* note 126.

160. *Id.*

161. *Id.*

162. *See* Russell, *supra* note 18, at 399.

III. MEANINGFUL OPPORTUNITY FOR RELEASE: PAROLE BOARDS AND PROPORTIONALITY

Even with some of the shortcomings of parole boards, they are the most realistic option for implementing meaningful opportunity for release because the parole boards are in the best position to see maturity and rehabilitation.¹⁶³ *Graham* and *Miller* both created constitutional limits on life sentences for juveniles, and because states are using parole boards to comply with those limits, parole boards need to meet certain requirements.¹⁶⁴ In the Louisiana Board of Pardons and Parole's *2017 Annual Report*, one of the training objectives was about meaningful parole opportunities for juveniles with life sentences; it is something that states are aware of and are trying to determine how to accomplish within the parole setting.¹⁶⁵ The proposed guidelines in this section would apply to anyone under the age of eighteen who is sentenced, regardless of the nature of the crime.¹⁶⁶ The new standards of notice, limits on length between parole hearings, and a scoring matrix will allow juveniles the opportunity to demonstrate—at multiple points—their growth in maturity and rehabilitation.

There are two ways to think about meaningful opportunity for release: being able to have an early release or having an opportunity to live a consequential life outside of prison.¹⁶⁷ Because juveniles should be allowed to show maturity and growth in character, release means an opportunity to live a life outside of prison.¹⁶⁸ The average life expectancy in the United States is the late seventies; however, incarceration shortens life expectancy.¹⁶⁹ In 2016, the average life expectancy in the United States was calculated at 78.7 years old.¹⁷⁰ But according to the Social Security benefits planner, the average sixty-five-year-old can expect to live up to 84.3.¹⁷¹ There is about a six-year difference between those numbers, and that range is what will be used in this Comment.

163. See Meadows, *supra* note 14, at 61.

164. See generally Russell, *supra* note 18.

165. LA. BOARD OF PARDONS AND PAROLE, *supra* note 144, at 13.

166. See generally Elizabeth C. Kingston, *Validating Montgomery's Recharacterization of Miller: An End to LWOP for Juveniles*, 38 U. LAVERNE L. REV. 23, 34 (2016).

167. LaHaie, *supra* note 136, at 494.

168. *Id.* at 496.

169. Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.

170. Meilan Solly, *United States Drops 21 Spots in Global Life Expectancy Rankings*, SMITHSONIAN (Oct. 19, 2018), <https://www.smithsonianmag.com/smart-news/united-states-drops-21-places-global-life-expectancy-rankings-180970585/>.

171. *Benefits Planner: Life Expectancy*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/lifeexpectancy.html> (last visited Oct. 9, 2019).

Realistically, *Graham* and *Miller* should apply to any juvenile sentence with the practical effect of a life sentence.¹⁷² But even if these cases only apply to actual life sentences, “[a]bsent a constitutional mandate imposing substantive conditions for release,” juveniles given the possibility of parole will often still serve the full life sentence.¹⁷³ The guidelines proposed in this Comment are the first practical step toward defining the constitutional conditions that parole boards should follow so that juveniles are guaranteed a meaningful opportunity for release.

A. Notice of Juvenile Difference Within One Year of Sentencing

In order for juveniles to have a meaningful opportunity to leave prison, they need to know what the parole board takes into consideration so they can present relevant information.¹⁷⁴ That means juveniles need to be notified about what the parole board is considering.¹⁷⁵ This will help juveniles predict their own likelihood of release based on their showing of rehabilitation.¹⁷⁶ Additionally, juveniles need hope that they will be released, and learning what determines their release will help instill that hope early on and guide them into making appropriate choices.¹⁷⁷

Notice of the parole board’s considerations is a new requirement that has not been discussed concerning parole, but it should function similarly to *Miranda* warnings in that the meaning conveyed is what is important.¹⁷⁸ The main information that needs to be conveyed is that the juvenile is being evaluated based on growth in maturity and rehabilitation.¹⁷⁹ The parole board has the most information about what it considers, so the notice should come from the board; however, notice could also come from the court itself. This requirement increases the transparency around how the parole board makes decisions concerning juveniles and what is needed to show growth—both of which aid in a meaningful opportunity for release.¹⁸⁰

172. See Krisztina Schlessel, *Graham’s Applicability to Term-of-Years Sentences and Mandate to Provide Meaningful Opportunity for Release*, 40 FLA. ST. U. L. REV. 1027, 1060 (2013).

173. Richard Bierschbach, *Proportionality and Parole Sentencing: Rhetoric and Reality*, 160 U. PA. L. REV. 1745, 1761 (2012).

174. See Meadows, *supra* note 14, at 68.

175. *Id.* at 61.

176. *Id.*

177. See generally Wheelwright, *supra* note 100 (discussing the encouragement of incarcerated juveniles to become responsible people through hope of eventual release).

178. See generally David Altman, *Fifth Amendment Coercion and Clarity: The Supreme Court Approves Altered Miranda Warnings*, 80 J. CRIM. L. & CRIMINOLOGY 1086 (1990).

179. See *Graham v. Florida*, 560 U.S. 48, 75 (2010) (noting that juveniles should be allowed to present information regarding growth).

180. See Meadows, *supra* note 14, at 61.

The one-year time limit is an arbitrary number, but juveniles lose hope within the early years of a sentence.¹⁸¹ Giving a one-year limit allows for the parole board or court to potentially review the juvenile's file and offer substantive guidance on how that particular individual could show growth.¹⁸² It also allows states to pick a different method—such as creating a standard, generic form similar to parole matrices—that can be available to all.¹⁸³ Although it still may seem like a long time frame, juveniles will most likely not lose hope or not potentially ruin their chances at release because they are receiving notice within a reasonable time.¹⁸⁴

B. First Parole Hearing Should Be No Later Than Thirty Years

In order to provide a meaningful opportunity for release, juveniles should receive their first parole hearing within thirty years of incarceration.¹⁸⁵ This thirty-year requirement is based on the general trend across the country and is consistent with “the evolving standards of decency” under Eighth Amendment precedent.¹⁸⁶ The Court in *Graham* determined that a national consensus was developing,¹⁸⁷ and a similar trend can be seen in current state sentencing.¹⁸⁸ Thirty years is roughly in the middle of state guidelines, which is why it was picked as the maximum limit.¹⁸⁹

Any time period must balance the juvenile's reform with the state's right to set penal policies.¹⁹⁰ This time frame allows for good character and behavior to be a material element in granting release without allowing states to create de facto life sentences.¹⁹¹ Psychological data suggests an earlier release because juveniles will have been in prison for longer than they were a free person,¹⁹² but the Constitution sets forth the minimum protections, not the ideal protections.¹⁹³ This maximum limit gives juveniles hope that they

181. See generally Wheelwright, *supra* note 100 (discussing the encouragement of incarcerated juveniles to become responsible people through hope of eventual release).

182. See generally Meadows, *supra* note 14 (discussing that juveniles should know how the board is evaluating them).

183. See, e.g., *Revised Parole Guidelines*, *supra* note 134.

184. See generally Jeffrey Wald, *An Unfinished Journey* Miller, Montgomery, and the Changing Face of Juvenile Sentencing Jurisprudence, *BENCH & B. MINN.* 23, 25 (2018) (discussing how constitutional requirements set minimum protections).

185. See Rebecca Lowry, *The Constitutionality of Lengthy Term-of-Years Sentences for Juvenile Non-Homicide Offenders*, 88 *ST. JOHN'S L. REV.* 881, 883 (2014).

186. *Graham v. Florida*, 560 U.S. 48, 60 (2010) (quoting *Estelle v. Gamble* 929 U.S. 97, 102 (1976)); see Stephanie Singer, *A Proposed Solution to the Resentencing of Juvenile Lifers in Pennsylvania Post Montgomery*, 10 *DREXEL L. REV.* 695, 710 (2018).

187. See *Graham*, 560 U.S. at 62–67.

188. *ACLU*, *supra* note 6, at 160–61.

189. See *The Associated Press*, *supra* note 32.

190. See *Russell*, *supra* note 18, at 406–12.

191. See *id.* at 406–08.

192. See *Wald*, *supra* note 184, at 25.

193. See *id.*

might actually be released before they die.¹⁹⁴ It also makes the sentence proportional because it allows juveniles to present evidence that they are fit to re-enter society.¹⁹⁵ The incentive of release encourages juveniles to make more responsible choices, which demonstrates rehabilitation.¹⁹⁶

Even with these new guidelines, juveniles could still end up being incarcerated for a period that is longer than they have been free people.¹⁹⁷ But much like how the line of cases to determine meaningful opportunity for release was slowly developed, this is the first step in ensuring that parole boards have guidelines.¹⁹⁸ Although some juveniles may be held long after the time they pose a risk to society, they are still provided a chance to show their growth.¹⁹⁹ Instead of a slim chance of release, there is hope of a life outside of prison.²⁰⁰ Additionally, having one standard will reduce the cost on the justice system while still ensuring that juveniles do not have an illusory possibility of parole.²⁰¹

C. Additional Review Within Every Ten Years

Although the first hearing is important for hope, one look is not enough to provide meaningful opportunity for release.²⁰² Currently, it is not clear how often cases are reviewed after the initial denial.²⁰³ Thus, another new and necessary requirement is how often the parole board must review the juvenile's case.²⁰⁴ The ten-year requirement provides flexibility to the parole board, and at the same time, ensures that the juvenile can show growth.²⁰⁵ The additional review allows the parole board to determine whether a juvenile has “an irredeemably corrupt character” without prohibiting the juvenile from showing continued development.²⁰⁶ If the parole board believes that the juvenile has not shown enough growth, the ten-year limit prevents the board from creating an illusory chance of parole after denying parole at the first hearing.²⁰⁷

194. Russell, *supra* note 18, at 407.

195. See *Graham v. Florida*, 560 U.S. 48 (2012) (discussing proportionality and rehabilitation).

196. See *id.* at 79.

197. See Russell, *supra* note 18, at 408.

198. See generally *id.* at 377 (discussing ways to ensure that juveniles receive meaningful parole hearings).

199. See *id.* at 411.

200. See *id.* at 408.

201. See generally Laura Cohen, Nicholas Kiriakatos & Patrick Kouyialis, *Making Miller Matter: Youth, Parole, and A Meaningful Opportunity for Release*, CRIM. JUST. 34, 35 (2018).

202. See generally ACLU, *supra* note 6 (discussing length of sentences and parole-grant rates).

203. *Id.* at 60–61.

204. *Id.* at 52–54.

205. See generally Russell, *supra* note 18, at 410.

206. See Singer, *supra* note 186, at 732.

207. See generally Cohen et al., *supra* note 201, at 35.

The ten-year requirement allows states the flexibility to set shorter review periods while allowing others to consider safety concerns.²⁰⁸ Nebraska requires its parole board to review the case every year after the first hearing.²⁰⁹ While this is the best-case scenario—and states would be able to continue this policy—most states do not have this requirement.²¹⁰ Because safety concerns are pivotal in parole boards granting release,²¹¹ there needs to be a balance between the needs of the state and the needs of the juvenile. Without a limit, the trend will continue that parole boards will not grant release to deserving juveniles.²¹² The ten-year limit is a way to ensure that the constitutional requirements are being met and allows states multiple opportunities to assess juveniles based on maturity and rehabilitation.²¹³

This new requirement assists in providing more meaningful opportunities for release than currently exist.²¹⁴ If the parole board chooses to reach the maximum limit every time, a juvenile who is sentenced at seventeen should have four reviews by the parole board: one at thirty years and three additional reviews based on life expectancy.²¹⁵ By having multiple reviews, the juvenile will be able to present evidence of rehabilitation to the board at different stages, which hopefully aids in release.²¹⁶ Although only some of the unfettered discretion of the board is limited,²¹⁷ it ensures that juveniles are being treated according to the constitutional standards established by the Supreme Court.²¹⁸

D. Juvenile Scoring: Emphasis on Growth in Maturity and Rehabilitation—Possible Scoring Matrix Addition

Because a growth requirement is not currently mandated in the adult parole system, juveniles sentenced to adult prisons need additional protections so that there is not a false hope of release.²¹⁹ Most parole boards currently use a factored approach; therefore, using additional, specific factors for juvenile cases should not be hard to implement.²²⁰ In developing a new scoring matrix, it is hard to know all of the factors a parole board actually

208. See Russell, *supra* note 18, at 396–97.

209. The Associated Press, *supra* note 32.

210. See generally *id.*

211. Russell, *supra* note 18, at 396–97.

212. See generally ACLU, *supra* note 6 (discussing length of sentences and parole grant rates).

213. See generally Cohen et al., *supra* note 201.

214. *Id.*

215. See generally *supra* Part III (discussing life expectancy).

216. See Meadows, *supra* note 14, at 61, 68.

217. See generally Schwartzapfel, *supra* note 126 (discussing lack of oversight in parole board decisions).

218. See *Miller v. Alabama*, 567 U.S. 460, 471–78 (2012) (discussing the constitutional standards that make children different).

219. See Cohen et al., *supra* note 201, at 35.

220. See *Revised Parole Guidelines*, *supra* note 134.

considers because of the wide latitude it has and the lack of scholarship about its decisions.²²¹ But in determining factors for parole boards, there is a presumption of immaturity based on the Supreme Court's own analysis.²²² The following factors are based on Supreme Court jurisprudence and the Texas Criminal Justice Coalition: age, family environment, trauma history, and capacity for rehabilitation.²²³

Age is the first factor that needs to be considered for juveniles because it correlates with a high likelihood of rehabilitation.²²⁴ The brain develops fully during a person's mid-twenties, and generally, this results in less risky behavior, which would increase rehabilitation.²²⁵ Additionally, because age was the entire reason the Supreme Court set separate standards for juveniles, it must be considered.²²⁶

The next factor is "growth in impulse control," which encompasses the maturity and rehabilitation that should be demonstrated with age.²²⁷ Most juveniles age out of crime once their brains fully develop.²²⁸ Juveniles are less culpable because of the development factors that limit their decision-making capabilities, reduce their ability to determine consequences, and create an undeveloped sense of responsibility that leads to recklessness.²²⁹ Even though these factors make them less culpable, juveniles are more likely to reform because their brains are more malleable, and thus, more responsive to positive rehabilitation efforts.²³⁰ So as juveniles gain more significant impulse control, they are more likely to desist from crime and should be able to demonstrate maturity, growth, and rehabilitation to the board.²³¹

While determining growth, the parole board should consider that juveniles in adult prison systems often have less opportunities available to them than juveniles in juvenile systems.²³² That means the board should look to positive behavior, such as participation in prison programs, job opportunities upon release, and infractions of prison rules.²³³ For infractions,

221. LaHaie, *supra* note 136, at 489.

222. Scott et al., *supra* note 95, at 678–79.

223. *Support a Meaningful Opportunity for Release for Youth Sentences to the Texas Department of Criminal Justice*, TEX. CRIM. JUST. COALITION, <https://www.texascjc.org/support-meaningful-opportunity-release-youth-sentenced-texas-department-criminal-justice-0> (last visited Oct. 9, 2019) [hereinafter *Meaningful Opportunity for Release*].

224. *See generally* LaHaie, *supra* note 136, at 498.

225. Scott et al., *supra* note 95, at 678–79.

226. *See Miller v. Alabama*, 567 U.S. 460, 473 (2012).

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

228. *See From Juvenile Delinquency to Young Adult Offending*, OFF. JUST. PROGRAMS: NAT'L INST. JUST. (Mar. 10, 2014) <https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx>.

229. Scott et al., *supra* note 95, at 679.

230. *Id.*

231. *Id.*

232. *See Determinate Sentencing for Juveniles*, TEX. DISTRICT & COUNTY ATT'YS ASS'N, <https://www.tdcaa.com/journal/determinate-sentencing-for-juveniles> (last visited Oct. 9, 2019).

233. Bierschbach, *supra* note 173, at 1750.

the board should look at the number of infractions and the number of years since the last infraction.²³⁴ That is because the longer juveniles are in prison, the less likely they are to receive disciplinary actions.²³⁵ Based on a survey conducted in 2010, 70% of inmates that had been in prison for thirty or more years had not had a disciplinary action for at least three years.²³⁶ Furthermore, because the juvenile brain is so malleable, positive reinforcement can help mold the brain and create lasting behavior changes that demonstrate growth.²³⁷

Additionally, when juveniles are in adult prisons, they are subjected to more abuse, which can affect their choices because they are trying to survive.²³⁸ “Research finds that inmates tend to act out in their early period of incarceration, but that this behavior often dissipates as they age and grow accustomed to their environment.”²³⁹ The fact that juveniles in adult prisons do face heightened abuse is something that parole boards cannot ignore when looking at growth in impulse control because some actions may be reactions to abuse instead of a calculated choice.²⁴⁰ Impulse control is related to the rehabilitation of the juvenile because it shows development and an understanding of risks and consequences, especially in a prison environment.²⁴¹

Next, the background factors of abuse, violence, and drugs are common among juveniles who commit crimes and should be considered.²⁴² Unfortunately, youths in adult prisons face a high risk of sexual abuse.²⁴³ Because of the threat of harm from adult prisoners, some juveniles are kept in solitary confinement, which can lead to depression and suicide.²⁴⁴ That means that the abuse factor may be based on abuse received in prison.²⁴⁵ Although none of these circumstances justify behavior, they can contribute to recklessness that is already present in developing brains.²⁴⁶ The last box (in the below matrix) in background circumstances is open-ended as “other circumstances.” Suicide is unfortunately becoming more common in prisons,

234. See generally Caldwell, *supra* note 13, at 275.

235. *Id.* at 222.

236. *Id.*

237. See Scott et al., *supra* note 95, at 678–79.

238. ASHLEY NELLIS, THE SENT’G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FOR A NATIONAL SURVEY, 21 (2012), <https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.

239. *Id.* at 23.

240. See *id.* at 26.

241. See generally Scott et al., *supra* note 95, at 679–80.

242. See generally *Meaningful Opportunity for Release*, *supra* note 223.

243. KEY FACTS, *supra* note 8.

244. *Id.*

245. See *id.*

246. Scott et al., *supra* note 95, at 678–79.

and mental health might be something the board wants to consider when determining parole.²⁴⁷

Because these are not the only factors that a parole board considers,²⁴⁸ they should be used in addition to the already existing adult matrix to ensure that juveniles are being given a meaningful opportunity for release. Additionally, public safety is still a concern, but the likelihood that juveniles will outgrow crime reduces the public safety argument often given for longer parole lengths.²⁴⁹ If inmates serve their whole sentence, then there is no supervision on release—they are just set free.²⁵⁰ If states are worried about prisoners being released, parole gives the state the possibility to monitor the individuals instead of releasing them with no conditions.²⁵¹ This goes in favor of granting parole earlier if the inmates meet the qualifications.²⁵² The new juvenile factors allow juveniles a chance to demonstrate the maturity and rehabilitation needed to be granted parole.²⁵³

The below matrix operates on a low-score scale because generally parole boards use a low-score scale, so higher scores mean release is less likely, and because the juvenile matrix is to be used in tandem with an existing matrix, it should have a similar scoring method. In the proposed matrix, age receives a score between zero and four. This is because fourteen-year-olds tend to be less mature than seventeen-year-olds.²⁵⁴ Background circumstances operate on a minus factor because these factors often aggravate a juvenile's poor decision making.²⁵⁵ Growth in impulse control has a wider range than most current parole matrices²⁵⁶ to allow the board to note smaller improvements in growth than a zero-to-four range would, which should allow for more hope for the juvenile and more positive reinforcement to change. A score of zero in growth in impulse control means that the juvenile has shown tremendous growth, while a score of ten is the worst score possible and demonstrates no growth. Because it is a low-score matrix, the lower the final score, the more likely a juvenile should be released. Additionally, on the bottom of the matrix, the board should write the reason for the score as well as concrete ways for the juvenile to improve. This should reflect some of the suggestions from the initial notice that the

247. See NELLIS, *supra* note 238, at 26.

248. See *supra* notes 134–137 and accompanying text (discussing matrix factors).

249. See Scott et al., *supra* note 95, at 679–80.

250. Schwartzapfel, *supra* note 126.

251. *Id.*

252. *Id.*

253. See *Miller v. Alabama*, 567 U.S. 460 (2012).

254. See generally Laurence Steinberg, *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, AM. PSYCHOL. ASS'N 590–91 (Oct. 2009), <https://pdfs.semanticscholar.org/af30/998c3ccdb44d44ea38299f66ae5a6f9d0fb8.pdf>.

255. See generally Scott et al., *supra* note 95, at 679.

256. See *supra* Part II.D (discussing state parole matrices).

juveniles received regarding how they can show rehabilitation, receive a lower score, and receive parole.

Age	Under 14	14	15	16	17	Score
	0	1	2	3	4	
Background Circumstances	Violence	Abuse (including sexual)	Drug Use	Other Circ.	No Circ.	Score
	-1	-1	-1	-1	0	
Growth in Impulse Control	No Growth	Moderate Growth	Significant Growth			Score
	10-9	8-4	3-0			
Reason for Score						
Ways to Improve						

1. Applying the Matrix to Cases

In order to understand the beneficial effects of the proposed matrix, it is helpful to apply it to already-decided cases. Terrance Graham's parents were drug addicts, and he began drinking alcohol and smoking cigarettes at the age of nine.²⁵⁷ At sixteen, he decided to rob a barbecue restaurant with some friends; the attempt was stopped by the owner, but one of Graham's friends hit the owner with a metal bar.²⁵⁸ Graham and his friend then fled without any money.²⁵⁹ Graham was charged with armed burglary along with assault and attempted armed robbery.²⁶⁰ He was released on probation after spending about six months in jail, but within six months of being released, he committed another armed robbery.²⁶¹ This time, he and his friend broke into a house, held the homeowner at gunpoint, ransacked the house, and barricaded the owner in the closet.²⁶² Later that night, after his friend got shot in another attempted robbery, Graham was involved in a high-speed chase.²⁶³ Graham was still thirty-four days away from being eighteen, so the judge sentenced him to life in prison.²⁶⁴

Using the new scoring matrix, Graham's juvenile score would be around an 8. He would receive a 3 because he was sixteen and a -1 for drug use—

257. *Graham v. Florida*, 560 U.S. 48, 53 (2010).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 54.

262. *Id.*

263. *Id.* at 54–55.

264. *Id.* at 55, 57.

putting him at a 2. Growth in impulse control is difficult to determine, but he has a lot of room to show that he has grown because he has the capacity to grow and the potential to make better choices even while incarcerated. A 6 puts him in the middle of moderate growth, which without having any information about experience in prison is a fair number that assumes some growth. His total score of 2 (3 for age and -1 for drug use) plus 6 is how he gets a final score of 8. This number seems to be good, but it would depend on the other adult factors that the board considers. It is low enough that it might be able to get him released earlier than if the factors were not considered at all.

Age	Background Circumstances	Growth in Impulse Control	Total
3	-1	6	8 (6-1+3)

In the first case discussed in *Miller*, which is the companion case from Arkansas, Kuntrell Jackson was robbing a store with two other boys.²⁶⁵ Jackson had remained outside for most of the robbery, but when he went in, one of the other boys shot the clerk.²⁶⁶ Even though Jackson was fourteen, Arkansas law allowed the prosecution to charge him as an adult.²⁶⁷ Because Jackson had prior theft cases, he was charged with capital felony murder and aggravated robbery, and he was sentenced to life.²⁶⁸ Jackson did not fire the bullet, and his age may have prevented him from seeing the risk and walking away.²⁶⁹ His mother and grandmother both previously shot other individuals, which meant he was exposed to violence in his immediate surroundings.²⁷⁰ All of these factors should have been taken into consideration regarding his culpability.²⁷¹

With the proposed matrix, Jackson could possibly receive a -1 as a juvenile score. He starts at 0 because he was fourteen at the time the crime was committed.²⁷² Under background circumstances he would get a -1 for violence because of his exposure to it in his family life.²⁷³ If he showed tremendous growth, the parole board could give him a 0 score. It is unlikely that would happen given the nature of parole boards, but even if he got a 4 for growth, this should increase his chances of getting released. He would then receive a total score of 3, which should be low enough to allow for release.

265. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

266. *Id.* at 465–66.

267. *Id.* at 466.

268. *Id.*

269. *Id.* at 478.

270. *Id.*

271. *Id.*

272. *See id.* at 466.

273. *See id.* at 478.

Age	Background Circumstances	Growth in Impulse Control	Total
0	-1	0 or 4	-1 (0-1+0) or 3 (0-1+4)

Evan Miller regularly used drugs and alcohol, attempted suicide four times (the first time at age six), was in and out of foster care because his parents used drugs and alcohol, and was abused by his stepfather.²⁷⁴ On the night of the murder, he was with a friend when his mother's drug dealer came over.²⁷⁵ Both boys went back to the dealer's trailer, used drugs, and drank alcohol.²⁷⁶ After the dealer passed out, Miller attempted to steal money, but the dealer awoke, and a fight ensued.²⁷⁷ Miller beat the dealer with a bat and then lit the trailer on fire.²⁷⁸ Again, the law allowed Miller to be tried as an adult, and he received the mandatory minimum of life without parole for murder in the course of arson.²⁷⁹ Although Miller did commit a particularly vicious murder, he was high and drunk.²⁸⁰ He was neglected, abused, and tried to kill himself in kindergarten, which the Court even said should have factored into punishment.²⁸¹ In Bryan Stevenson's book, *Just Mercy: A Story of Justice and Redemption*, Stevenson mentions that after Miller arrived at prison, he was attacked and stabbed nine times.²⁸²

Implementing the proposed matrix, Miller could end up with a score of -4. He gets a 0 for age because he was fourteen when he committed the crime. He gets a -4 for background factors: he faced abuse in prison (and he was also abused prior to incarceration), there were drugs present in his life and involved in the crime, he faced violence in prison, and he tried to kill himself in kindergarten which could be considered in the other circumstances category. If the board found substantial growth and gave him the lowest (and therefore the best) possible score of 0, he would receive a -4 as his total. Even if he received an 8 for growth, which is the high end of moderate and potentially more likely, he would still score a 4 overall. That should help him argue for release because it shows that he has grown and has shown improvement in impulse control, which will aid in his rehabilitation and reintegration into society.

274. *Id.* at 467.

275. *Id.* at 468.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 468-69.

280. *Id.* at 478.

281. *Id.* at 479.

282. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 266 (2015).

Age	Background Circumstances	Growth in Impulse Control	Total
0	-4	0 or 8	-4 (0+0-4) or 4 (0-4+8)

2. Parole Boards Should Receive Advice from Experts in Brain Development

Due to the Court's emphasis on brain development and the differences between juveniles and adult offenders,²⁸³ the parole board should receive advice from experts in brain development when determining growth.²⁸⁴ These experts can include social scientists, doctors, or psychologists.²⁸⁵ Experts in adolescent brain development can help because they understand general trends and can relate them to the particular offender.²⁸⁶ Forensic mental health experts can determine if decision making is different from adolescent norms.²⁸⁷

In Louisiana, the board already receives a written evaluation from someone who is an expert in adolescent brain development.²⁸⁸ By extending this requirement to all parole boards and requiring that they use that assessment to help determine the growth factor, this requirement will help ensure that parole boards are actively taking growth into consideration.²⁸⁹ Because board members often lack relevant experience and make arbitrary decisions,²⁹⁰ this condition simply helps limit some of the parole board's discretion.²⁹¹

Although this requirement has been mentioned, it has been neither discussed nor thoughtfully applied to meaningful opportunity for release.²⁹² If a board is required to note what the recommendations of the expert were and how the board used them in its evaluation, two things could happen. First, such a requirement might lessen some of the political pressure on the board, although that pressure might be transferred to the experts. Second, and more importantly, it might increase the transparency surrounding how the board is determining and evaluating growth. This will help substantiate that juveniles are being judged according to the Eighth Amendment requirements established by the Court.

283. *Miller*, 567 U.S. at 465; *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010).

284. *See generally* Cohen et al., *supra* note 201 (arguing parole board members should have expertise in brain development).

285. *Id.* at 35.

286. Scott et al., *supra* note 95, at 697.

287. *Id.*

288. LA. STAT. ANN. § 15:574.4(D)(2) (2014).

289. *See generally* Cohen et al., *supra* note 201.

290. Annitto, *supra* note 157, at 145.

291. *See generally* Sloan, *supra* note 143, at 260 (discussing discretionary power of the parole board).

292. *See generally* Cohen et al., *supra* note 201 (arguing parole board members should have expertise in brain development).

IV. RETROACTIVE APPLICATION OF THE NEW STANDARDS

In *Montgomery*, the Court ruled that states could use parole hearings as a way to adjust life sentences.²⁹³ However, there are many cases in which prosecutors are still seeking life without parole even though it should be reserved for the rare offender.²⁹⁴ In Louisiana alone, prosecutors are seeking life without parole for about one-third of cases that qualify under *Montgomery*.²⁹⁵ That means that of the 258 people who can retroactively seek new sentences, eighty-one still face life without parole.²⁹⁶ In fact, Montgomery “was denied parole in February 2018, because two committee members felt he had not done enough to deserve it.”²⁹⁷ The above guidelines will help clarify who should be released based on retroactive application.

The same basic factors would apply to retroactive cases, with additions due to the age of the cases. First, there might be a lack of data on some older inmates, especially if their initial sentencing was not preserved digitally.²⁹⁸ That could lead to confirmation bias when the board believes that the juvenile is one of the incorrigible offenders, even though that would not be the case had the records been preserved.²⁹⁹

Additionally, offenders with life sentences are often barred from programs that help with reintegration because their original sentences did not allow for parole.³⁰⁰ Because these offenders might not have had hope for release, they might have made choices that now negatively impact release—although when they initially acted, they did not consider the impact on release.³⁰¹ This is especially true for youths who would have faced more pressure to establish themselves as “tough” because they were going to be in prison forever.³⁰² When retroactively applying the new factors, the parole board should be aware that prisoners sentenced to life often do not have access to programs that would show rehabilitation, and the bleak outlook of dying in prison can lead to more disciplinary violations.³⁰³ Boards should recognize that these two components might make prisoners seem more

293. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

294. Silverstein, *supra* note 94.

295. Jody Keny Lavy, *Guest Column: Juveniles Consigned to Life Too Often*, *ADVOCATE* (Feb. 16, 2018, 6:00 PM), https://www.theadvocate.com/baton_rouge/opinion/article_71fad18-128f-11e8-8839-13e0058dfe68.html.

296. Silverstein, *supra* note 94.

297. *Id.*

298. Singer, *supra* note 186, at 733.

299. *See id.* at 735.

300. *Id.*

301. *See id.* at 736.

302. *See NELLIS*, *supra* note 238, at 21.

303. Singer, *supra* note 186, at 736.

high-risk than they are.³⁰⁴ However, releasing the older prisoners who show growth strengthens the principle that juveniles can be rehabilitated.³⁰⁵

As a reminder, Henry Montgomery was seventeen when he shot a police officer.³⁰⁶ By the time he had his case reviewed, he was seventy-one and already served fifty-five years.³⁰⁷ In recent years, he has coached boxing, silk screening, and served as a mentor to other prisoners.³⁰⁸ Even the Court noted that Montgomery had become a model member of the prison community and mentored other inmates.³⁰⁹ Although Montgomery was not initially given a chance to show that his crime did not reflect irreparable corruption, his hope for life outside of prison still might be restored.³¹⁰

Under the new juvenile matrix, Montgomery should have received a score that allowed for release. He would have received a 5 for age because he was seventeen at the time of the offense; probably a minus one for background (although it is not clear, most likely he meets at least one factor), and at most a 4 for growth in impulse control. This results in a total of 8. This number is higher because of his age and not from lack of growth. If he had received the highest (and worst) score for growth, 10, his total would have been 14. Although he was sentenced to life, the added fact that he was still helping others and mentoring should have weighed heavily in his favor and in the growth category. He may actually be one of the few offenders who could receive a 0 score in growth, which would lower his total to 4, which is basically the score he received for age. Montgomery's case is an example of why there needs to be clear guidelines for parole boards that help increase transparency and ensure juveniles are receiving a meaningful opportunity for release.³¹¹

Age	Background Circumstances	Growth in Impulse Control	Total
5	-1	4	8 (5-1+4)

V. CONCLUSION

Parole boards are in the best position to ensure that juveniles are provided a meaningful opportunity for release, but there needs to be clear guidelines on what boards and states must do to guarantee that juveniles are actually receiving a meaningful opportunity based on demonstrated rehabilitation. Juveniles in prison do mature into adults who are more capable

304. *See id.* at 735–36.

305. *See id.* at 737–38.

306. *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

307. *Lavy*, *supra* note 295.

308. *Id.*

309. *Montgomery*, 136 S. Ct. at 736.

310. *Id.* at 736–37.

311. *See generally Meadows*, *supra* note 14, at 61.

and responsible.³¹² The new constitutional requirements established in this Comment will help address the lack of transparency that surrounds parole boards, as well as guarantee that the opportunity for release is an actual possibility and not just an illusion.

The four new constitutional requirements work together to provide juveniles who have the possibility of parole a meaningful opportunity for release. First, juveniles will receive notice of their differentiated status so that they can make choices that facilitate in their release. Second, a thirty-year limit is set for first review resulting in an actual possibility of being released from prison. Third, additional reviews should occur at least every ten years. This provides juveniles with hope, and hope is what differentiates a life sentence from a possibility of parole.³¹³ Finally, boards need to consider growth in maturity and rehabilitation. This includes adding those factors into parole matrices, as well as receiving advice from experts. These four requirements work together to build a foundation that juveniles sentenced to adult prison are different and will receive a meaningful opportunity for release.

Imagine being fourteen, and after being sentenced to life in prison, you receive notice of how the parole board is going to determine maturity and rehabilitation. Then in thirty years, you come before the parole board and it evaluates growth and rehabilitation in addition to the adult parole factors. Even if you are not granted parole the first time, you know that you will be seen in, at most, another ten years. This is in stark contrast to the fourteen-year-old who simply ends up spending life in prison. The constitutional standards in this Comment must be implemented so that juveniles are receiving the constitutionally required meaningful opportunity for release because, as the Supreme Court emphasized: “children are different.”³¹⁴

312. STEVENSON, *supra* note 282, at 266.

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

314. *Montgomery*, 136 S. Ct. at 733.