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Graham's Gatekeeper and Beyond

JUVENILE SENTENCING AND RELEASE REFORM IN THE WAKE OF GRAHAM AND MILLER

Megan Annitto[†]

INTRODUCTION

The justice system has always struggled with its approach to children who commit violent crimes or who are repeat offenders.¹ Beginning at the end of the twentieth century, state policies pulled more and more juveniles into the criminal justice system through stricter juvenile transfer laws.² States are now compelled to address the results of these policy decisions as they have come up against their limit, the Eighth Amendment, under *Florida v. Graham*³ and *Miller v. Alabama*.⁴ Because of juveniles' capacity for change, under *Graham*, states and the federal government must provide a "meaningful opportunity" for release to juveniles sentenced to life if they have not committed murder.⁵ And, under *Miller*, states must allow a

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¹ Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 487 (1987).

² Between 1992 and 1995, forty-one states enacted provisions increasing the ability to transfer juveniles to adult court. MELISSA SICKMUND, ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 1, 30 (1997), available at <https://www.ncjrs.gov/pdffiles/juvoff.pdf>. In 1985, 7200 juveniles were tried as adults. By 1994, the number had doubled and that year, 13,200 juveniles were tried as adults, contributing to the increase in life sentenced juveniles. ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON, THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 12 (2013), available at http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf [hereinafter THE SENTENCING PROJECT].

³ *Graham v. Florida*, 560 U.S. 48 (2010).

⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

⁵ *Graham*, 560 U.S. at 74.

judge to consider that possibility before issuing a life sentence to a juvenile who has committed homicide.⁶ Therefore, *Miller* requires that state sentencing schemes include an alternative sentence, the *Miller* alternative.

The rationale in both *Graham* and *Miller* may be a springboard to reform for all juvenile offenders who are subject to lengthy adult sentences for crimes.⁷ Furthermore, the Court's reasoning supports providing opportunities for reconsideration about procedures for adult offenders; currently, one out of nine inmates in the United States is currently serving a life sentence.⁸ In the meantime, as a result of *Graham* and *Miller*, lawmakers and courts must decide how and when to release juveniles who are tried and sentenced under adult sentencing schemes for serious offenses.⁹ Specifically, when release mechanisms are provided at some point down the road after sentencing, who should decide if they should be released? And in what way will age at the time of the offense combine with other factors as *Graham* and *Miller* contemplate?

This Article analyzes how states and the federal government should assign the decision-making function as they craft sentencing and offender release policies in light of *Graham* and *Miller*. Specifically, it focuses on the implications of choosing judicial or administrative parole decision makers as the gatekeepers of release at the back end of sentencing. It also examines the parallel role of modern risk assessment technology as states look to make informed policy choices. Actuarial risk assessment promises to have an impact on juvenile offenders in the adult system; for example, three of the states that house the highest numbers of juveniles serving life sentences are required by state law to use these tools in their parole release decisions.¹⁰

The ways that states and the federal government are required to amend laws that mete out life sentences to juveniles

⁶ *Miller*, 132 S. Ct. at 2469

⁷ See, e.g., *State v. Lyle*, No. 11-1339, 2014 WL 3537026, at *22-23 (Iowa July 18, 2014) (prohibiting the application of mandatory minimum adult sentencing statutes to juveniles under the state constitution).

⁸ See THE SENTENCING PROJECT, *supra* note 2, at 1; see also Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1249 (2011) (noting how "*Graham* may presage a broader recognition of a constitutional right to earned release from long prison terms in the United States").

⁹ *Graham*, 560 U.S. at 74. "It is for the State . . . to explore the means and mechanism for compliance" with providing a "meaningful opportunity to obtain release." *Id.*

¹⁰ See *infra* notes 271-73 and accompanying text discussing California, Louisiana, and Michigan's related laws.

in response to *Graham* and *Miller* differ depending upon whether or not the juvenile is convicted of a homicide offense. But both decisions are grounded in the principle that juveniles are less culpable for their illegal conduct and have a greater potential to change and rehabilitate as they develop into adults.¹¹ *Graham* requires that states provide juvenile offenders with a meaningful opportunity for “release based [up]on demonstrated maturity and rehabilitation” if a life sentence is imposed for a non-homicide offense.¹² And under *Miller*, life without parole cannot be imposed as a mandatory sentence on a juvenile.¹³ As a result, the legislature must provide the judge with another sentencing option. Access to parole initially appeared to be the most obvious pathway to review under *Graham*¹⁴ and the most likely alternative sentencing option under *Miller*. But nearly half the states and the federal government have largely dismantled or strictly limited the use of discretionary parole.¹⁵ Thus, in some states, new legislation has designated a process whereby the judiciary will fill *Graham*'s gatekeeping role through sentencing review procedures. Similarly, the opportunity to apply for future sentencing modification before a judge will provide the necessary alternative to comply with *Miller* in lieu of parole. Legislators may also choose to create a new method. The Court left the decision open to states and the federal government without dictating the substance or procedure for how this important gatekeeping role should function.

As a result, states have just begun experimenting and legislatures and courts across the country have taken up juvenile sentencing reform. Some courts and legislatures have already extended reform beyond the minimum requirements of *Graham* and *Miller*, abolishing juvenile life without parole sentences entirely¹⁶ or, in one state, even striking down

¹¹ *Miller*, 132 S. Ct. at 2460, 2465; *Graham*, 560 U.S. at 74-75, 77.

¹² *Graham*, 560 U.S. at 75.

¹³ *Miller*, 132 S. Ct. at 2469.

¹⁴ See Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1747 (2012) (describing parole as “the distinguishing factor in *Graham* between a constitutional and unconstitutional life sentence”); see also O’Hear, *supra* note 8, at 1248-49 (mentioning *Graham*'s role in the “comeback” of parole).

¹⁵ Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 627, 632 (Joan Petersilia & Kevin R. Reitz, eds. 2012). Only 24 states have parole boards that operate with nearly complete discretionary review for release. *Id.*

¹⁶ See, e.g., *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 284 (Mass. 2013). “Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether

mandatory minimum adult sentencing schemes as applied to juveniles.¹⁷ But early implementation also demonstrates that without a change in the overarching debate, the more popular tendency may be to choose policies that test the bare minimum of the Court's requirements. Concerns over public safety are, of course, appropriately at the forefront of this conversation. But some of the opposition to release reform is at odds with research that lengthy sentences do not increase public safety.¹⁸

How then to best mediate between the classic retributive principles that drive carceral policies more broadly,¹⁹ with the notion undergirding *Graham* and *Miller* that juvenile offenders are more capable of change and less morally culpable than adults for their criminal acts?²⁰ It is unclear whether the public cares about or agrees with these principles about juvenile offenders who commit serious crimes. After all, public sentiment swayed the dramatic policy shift during the 1990s that allowed for more juveniles to be tried as adults, subjecting them to adult sentences.²¹ The now infamous myth of the violent juvenile "super predator" gave rise to nationwide legislative decisions to sentence juveniles in adult courts in with rapid uniformity.²² Quite simply, that is how we got here, at least

imposition of this most severe punishment is warranted." *Id.* (internal citation omitted); Order Requiring Immediate Compliance with *Miller*, Hill v. Snyder, No. 10-14568 (E.D. Mich. Nov. 26, 2013), *available at* <http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf>, *appeal filed* Dec. 5, 2013 (requiring review for all juvenile offenders serving life without parole sentences after ten years).

¹⁷ State v. Lyle, No. 11-1339, 2014 WL 3537026, at *23 (Iowa July 18, 2014).

¹⁸ David Cole, *Turning the Corner on Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 27, 29-30 (2011).

¹⁹ See THE SENTENCING PROJECT, *supra* note 2, at 4 (noting that during the 1980s after the failures of rehabilitation programs, the corrections system came to be accepted as a retributive tool).

²⁰ *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (discussing diminished moral culpability of juvenile offenders and opportunity for reform); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (noting "a juvenile non-homicide offender's capacity for change and limited moral culpability").

²¹ Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT'G REP. 260, 260 (1999).

²² Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 908 (2010); Zimring, *supra* note 21, at 260; *see, e.g.*, Kate Abbey-Lambertz & Ashley Woods, *Michigan Juvenile Life Without Parole Mandatory Sentencing Ban Upheld By Judge*, HUFFINGTON POST (Aug. 14, 2013, 4:15 PM), http://www.huffingtonpost.com/2013/08/14/michigan-juvenile-life-without-parole-sentencing_n_3756853.html. Detroit Democratic Representative Leland, once in support of juvenile life sentences, stated, "We wanted to let thugs know that they can't hide behind their mother's apron . . . Now, 25 years later, I think locking youthful offenders up for life is ridiculous." Abbey-Lambertz & Woods, *supra* note 22 (quoting Leland on his change in position over the years).

in part; as more children were tried in adult courts, more received lengthy adult sentences, mandatory or otherwise.²³

And it is public sentiment that contributed to the near abolition of parole for some states and the federal government, its curtailment in others, and mandatory minimum sentencing.²⁴ The point is that historically, public opinion matters in the debate about offender release because it influences decision makers at the micro and macro levels.²⁵ Policies that consider release of offenders are fraught with controversy, even where some changes are required by the Court under *Graham* and *Miller*.²⁶ New policies in this area involve consideration of juveniles whose crimes often involve serious violence. Therefore, responses to *Graham* and *Miller* must balance public safety while recognizing the possibility of rehabilitation of young offenders as the Supreme Court requires.

This Article focuses primarily on the gatekeeping function of juvenile offender release laws. It primarily considers sentencing reform that addresses back end release decisions prompted by *Graham* and *Miller*. Part I provides a brief background on *Graham* and *Miller* and discusses the context and prevalence of juveniles serving life and lengthy adult sentences. It then outlines some of the existing court and legislative responses to date and compares their use of both administrative and judicial routes to compliance. Part II discusses the practical considerations that accompany both judicial and administrative options for assignment of the decision-making function in the context of juvenile release reform. Part III examines the way in which the use of risk assessment instruments interacts with the unique aspects of

²³ Zimring, *supra* note 21, at 260.

²⁴ JOAN PETERSILIA, REFORMING PROBATION AND PAROLE: IN THE 21ST CENTURY 111 (2002).

²⁵ See, e.g., Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 443 (2012) (noting fear of political backlash based upon the public's response to parole of certain offenders and its role in reducing the utilization of early release policies).

²⁶ See, e.g., Jonathan Oosting, *Schuette Appealing Federal Order on Juvenile Lifer Parole: 'A Victim Was Already Sentenced to Death'*, MLIVE (Dec. 2, 2013, 12:56 PM), http://www.mlive.com/politics/index.ssf/2013/12/schuette_to_appeal_order_on_ju.html (describing how Michigan Attorney General, Bill Schuette, "has fought against re-sentencing or parole hearings for juvenile lifers, and plans to continue to do so by filing an appeal with the U.S. Court of Appeals for the 6th Circuit"); see also Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, *supra* note 15, at 23, 25 (noting that the "forms of identity and routine action that have been framed around the problem of violent crime . . . [are] easily mobilized to check efforts at reform"). For examples of resistance surrounding the release of dying and elderly prisoners with lower level crimes, see Klingele, *supra* note 25, at 437; Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1592 (2012).

young offenders with serious criminal convictions. Part IV suggests that reform responses to *Graham* and *Miller* should carefully consider the assignment of the decision-making role. In doing so, responses should be cognizant the potential strengths and weaknesses associated with either avenue. If sentencing and release reform is implemented in the spirit of the decisions, *Graham* and *Miller* can be used as a catalyst and an opportunity to pioneer changes that reconsider current sentencing and parole practices more broadly while maintaining public safety and increasing the legitimacy of the process.

I. *GRAHAM AND MILLER*

A. *Life Sentences and Juveniles*

Terrance Graham was sixteen when he committed a burglary and attempted armed robbery and he was seventeen when he later violated his probation and received a life sentence.²⁷ Because Florida has abolished its parole system, his life sentence provided no opportunity for parole.²⁸ Subsequently, in *Graham*, the Supreme Court held that his life sentence for a non-homicide crime violated the Eighth Amendment because it did not provide him with an opportunity for release.²⁹ The Court held that none of the four theories of punishment—retribution, deterrence, incapacitation, and rehabilitation—justified his sentence.³⁰ As a result, juveniles who commit offenses other than murder must be provided with “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”³¹

In *Miller*, the Court prohibited the application of mandatory life sentences for juvenile offenders who commit murder and required individualized sentencing hearings.³² The petitioner in that case, Evan Miller, was fourteen years old at the time of his crime.³³ He was transferred to adult court, convicted of murder in the course of arson, and received the mandatory sentence, life in prison without parole.³⁴ Under *Miller*, states and the federal government must now choose an

²⁷ *Graham*, 560 U.S. at 57-58.

²⁸ *Id.*

²⁹ *Id.* at 53, 82.

³⁰ *Id.* at 51.

³¹ *Id.* at 75.

³² *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

³³ *Id.* at 2462.

³⁴ *Id.* at 2462-63.

appropriate sentencing structure to conform to the Court's requirements banning the mandatory imposition of a life sentence without parole.³⁵ A court may still impose a life sentence after individualized consideration of the juvenile, but it can no longer be a mandatory sentence and may only be imposed in rare instances.³⁶ There must be other sentencing options—a term of years, life with parole, or the opportunity for sentencing modification instead. Based upon the Court's reasoning, the imposition of a mandatory sentence that is the equivalent of a *de facto* life sentence should also fall under *Miller's* prohibition,³⁷ although the Court may have to resolve that issue explicitly.

As a result, states and the federal government must create alternative sentencing and release structures; courts and legislators are currently deciding what those alternatives should look like. Legislators have struggled to agree about the Court's requirements—namely, whether to pass laws that will merely test the bare minimum under the Court's recent holdings or whether to aspire to broader reform that is captured in the Court's rationale.

Most of the sentences imposing life without parole to non-homicide offenders have been limited to five states but a majority of states and the federal government all permitted such sentences to be imposed upon juvenile non-homicide offenders prior to *Graham*.³⁸ At the time the Court decided *Graham*, there were approximately 123 juveniles serving life without parole sentences for non-homicide crimes.³⁹ *Graham's* reach, however, is even more significant for two reasons. First, there are many juveniles serving lengthy sentences that are the equivalent to life sentences. Juvenile offenders receive sentences that require lengthy terms-of-years that can surpass the end of life—known as “de facto” life sentences;⁴⁰ *Graham*

³⁵ *Id.*

³⁶ *Id.* at 2460.

³⁷ See Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 324 (2013) (discussing that “a lengthy mandatory minimum sentence imposed on a juvenile may violate *Miller/Jackson's* injunction that the sentence take [into] account . . . youthfulness”).

³⁸ Brief for Petitioner at 27, *Graham v. Florida*, 560 U.S. 48 (2009) (No. 08-7412), 2009 WL 2159655, at *63. Thirty-six states and the District of Columbia have sentencing structures permitting the sentence. *Id.*

³⁹ *Graham*, 560 U.S. at 62.

⁴⁰ THE SENTENCING PROJECT, *supra* note 2, at 5 n.10.

should apply there, as well. But there is no centralized data about how many juveniles are serving *de facto* life sentences.⁴¹

Second, there are numerous juveniles serving life *with* parole, and *Graham* and *Miller* raise new questions about whether parole actually provides meaningful opportunities for release under some of those state systems. It is estimated that there are nearly 8000 people serving parole eligible life sentences for crimes they committed as juveniles,⁴² some of which are for non-homicide crimes. Of inmates in general who are serving parole eligible life sentences, thirty-six percent of them have been convicted for non-homicide crimes.⁴³ All states except for Alaska allow for life sentences with the possibility of parole, and statistics suggest that the possibility of parole may be quite dim;⁴⁴ certainly, less than meaningful. In California, for example, a Stanford University study demonstrated that lifers in general have an 18% chance of being released.⁴⁵ In some years, the number was as low as zero. In the same vein, offenders who are serving parole [] eligible life sentences are “increasingly less likely to be released” than they were in earlier decades.⁴⁶

Graham and *Miller* raise new questions about whether parole actually provides meaningful opportunities for release given the reality of many state systems. This analysis uses *Graham* and *Miller* as a departure point to consider reform more broadly.

B. Implementation of *Graham* and *Miller*

Some states passed legislation related to *Graham* and *Miller* more quickly than others and the responses have varied. But there has not been much discussion analyzing whether parole boards or judges are the best gatekeepers to provide for a meaningful review under *Graham* and alternatives to life without parole under *Miller*. In Florida, where Terrance

⁴¹ *Id.* (noting that “[d]ata on the extensive use of these ‘virtual life’ sentences has not yet been systematically collected but would likely show that sentences spanning many decades, easily exceeding an average lifespan, are increasingly common”).

⁴² *Id.*

⁴³ *Id.* at 7. Nearly 14% of those offenses are sexual assault or rape and 14% are either aggravated assault, robbery or kidnapping. *Id.* Another 4% are for property offenses and 2% are for drugs, while the remaining 2% are other crimes. *Id.*

⁴⁴ THE SENTENCING PROJECT, *supra* note 2, at 3; Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110 (Charles J. Ogletree, Jr. & Austin Sara eds., 2012).

⁴⁵ ROBERT WEISBERG ET AL., STANFORD L. SCH., STANFORD CRIMINAL JUSTICE CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASES FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 4 (2011).

⁴⁶ THE SENTENCING PROJECT, *supra* note 2, at 14.

Graham's case originated, for example, the legislature proposed bills with a variety of approaches before finally agreeing in 2014 to judicial review through sentencing modification. In 2010, in the early aftermath of *Graham*, Florida legislators proposed bills that would have reinstated parole for these offenders.⁴⁷ After more than four years of disagreement, the legislature chose judicial resentencing for compliance with both *Graham* and *Miller*. Instead of reinstating parole, offenders will receive sentences that allow them to apply to the court for a second look sentencing hearing.⁴⁸ Other states with parole systems in place have elected to use the parole process with minor or significant changes for application to those convicted as juveniles.

1. Preliminary Questions

Much of the court attention through late 2014 focused on retroactivity of *Miller*,⁴⁹ compliance with *Graham*,⁵⁰ and application of *Graham* to *de facto* life sentences—lengthy sentences that amount to the equivalent or near equivalent of a life sentence.⁵¹ Scholarship discussing state compliance with *Graham* and *Miller* up to this point has thoroughly discussed questions about *Graham*'s application to virtual life sentences and *Miller*'s potential retroactive application.⁵² It has also

⁴⁷ H.B. 29, 2011 Leg., Reg. Sess. (Fla. 2010); see also Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 38 (2011).

⁴⁸ FLA. STAT. § 921.1402 (2014).

⁴⁹ See, e.g., *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (holding that *Miller* is retroactive); *State v. Null*, 836 N.W.2d 41, 76 (Iowa 2013) (applying *Miller* retroactively); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 276 (Mass. 2013) (holding that *Miller* is retroactive).

⁵⁰ See, e.g., *Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010) (resentencing defendant to allow for parole eligibility where defendant had received a mandatory sentence of life in prison without the possibility of parole for a non-homicide offense); *State v. Dyer*, 77 So. 3d 928, 933 (La. 2011) (resentencing defendant to allow for parole eligibility in place of life sentence without the possibility of parole in compliance with *Graham*); *State v. Macon*, 86 So. 3d 662, 665-66 (La. Ct. App. 2012), *superseded by statute*, LA. REV. STAT. ANN § 15:574.4(B) (resentencing defendant, who received life without the possibility of parole for rape, to allow for parole eligibility in compliance with *Graham*).

⁵¹ See, e.g., *Goins v. Smith*, 556 F. App'x 434, 439 (6th Cir. 2014) (holding that *Graham* does not clearly apply to *de facto* life sentences and noting that courts are split over the application of *Graham* as to lengthy terms-of-years sentences); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding that *Graham* applies to *de facto* life sentences); *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) (holding that *Graham* does not apply to *de facto* life sentences).

⁵² See, e.g., Cara H. Drinan, *Graham on the Ground*, 87. WASH. L. REV. 51, 53 (2012) (discussing issues before state courts upon implementation of *Graham*, including application to *de facto* life sentences); Mark T. Freeman, Comment, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 963-64 (2013) (discussing the questions

recognized the potential of both decisions to alter youth offender sentencing altogether,⁵³ and the implications for Eighth Amendment jurisprudence.⁵⁴ But on a more granular level, the process that will provide a meaningful vehicle for release under *Graham* or a meaningful alternative to life without the possibility of release under *Miller* remains an open question.⁵⁵

The Court did not expressly resolve the question about *de facto* life sentences and the dissent in *Graham* foreshadowed disagreement about the issue should it eventually reach the Court.⁵⁶ Most scholars and some courts that have considered the issue agree that it should apply to such sentences;⁵⁷ but other courts have held that it does not.⁵⁸ For example, in California, the state Supreme Court agreed that a term-of-years sentence which totaled 110 years contravened *Graham's* application of the Eighth Amendment.⁵⁹ It suggested that the legislature step in and clarify for courts that *Graham* applies.⁶⁰ Other courts, both federal and state, have also held that

presented by lengthy term-of-years sentences under *Graham*); Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 380 (2013) (arguing that *Miller* is retroactive); Krisztina Schlessel, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027, 1052-54 (2013) (reviewing court decisions and arguing that *Graham* applies to lengthy term-of-years sentences and proposing that the availability of parole or sentencing review hearings must be extended to all juvenile non-homicide offenders who are sentenced to term-of-years sentences).

⁵³ Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013) (advancing a Youth Discount method of sentencing, which is "a proportional reduction of adult sentence lengths based on the youth of the offender").

⁵⁴ Rachel E. Barkow, *Categorizing Graham*, 23 Fed. Sent'g Rep. 49, 49 (2010) (analyzing *Graham's* impact on Eighth Amendment jurisprudence going forward); Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-off Approaches to Eighth Amendment Proportionality Challenges*, 23 Fed. Sent'g Rep. 79 (2010).

⁵⁵ For the most thorough exploration of parole's sufficiency under *Graham*, see generally Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, (2014) (providing an in depth discussion about the potential limitations of current state parole practices to comply with *Graham*).

⁵⁶ "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Graham v. Florida*, 560 U.S. 48, 124 (2010) (Alito, J., dissenting).

⁵⁷ See, e.g., *Caballero*, 282 P.3d at 295; Drinan, *supra* note 52, at 72-75 (concluding that the "*Graham* Court's rationale precludes excessive term-of-years sentences").

⁵⁸ See, e.g., *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012), *cert. denied sub nom.* *Bunch v. Bobby*, 133 S. Ct. 1996 (2013); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011).

⁵⁹ *Caballero*, 282 P.3d at 293, 295.

⁶⁰ *Id.* at 296 n.5.

lengthy sentences that are the functional equivalent of life invoke *Graham* and are prohibited.⁶¹

In contrast, appellate courts in Florida have held otherwise; for example, one court held there was no Eighth Amendment violation under *Graham* where a thirteen-year-old received sentences totaling 90 years in the aggregate for two separate cases.⁶² Florida courts have been the source of the highest number of judicial decisions in the debate,⁶³ likely because the state has many juveniles with life and lengthy terms-of-years sentences.⁶⁴ The Sixth Circuit Court of Appeals and some state courts have held that *Graham* does not apply to lengthy term-of-years sentences so long as there is a chance that the offender will be released before his death or where the juvenile received aggregate sentences.⁶⁵ The decisions have generated criticism for their failure to comply with both the letter and the spirit of the Court's holding in *Graham*.⁶⁶ Finally, under *Miller*, retroactivity remains unresolved in courts until the Supreme Court resolves the issue.⁶⁷ Legislatures also

⁶¹ See, e.g., *id.* at 295; *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012).

⁶² *Walle v. State*, 99 So. 3d 967, 968, 973 (Fla. Dist. Ct. App. 2012).

⁶³ See, e.g., *Guzman v. State*, 110 So. 3d 480, 481, 483 (Fla. Dist. Ct. App., 2013) (holding that *Graham* did not apply where juvenile received a sixty year sentence because the sentence was neither a life sentence nor its equivalent); see also Schlessel, *supra* note 52 (discussing existing case law debating *Graham*'s applicability to lengthy term of years sentences and de facto life sentences, many of which are in Florida).

⁶⁴ Cf. *Graham v. Florida*, 560 U.S. 48, 64 (2010) (explaining that the majority of life sentenced juveniles with non-homicide offenses, "77 in total, are serving sentences imposed in Florida").

⁶⁵ See *Bunch v. Smith*, 685 F.3d 546, 547, 551 (6th Cir. 2012), *cert. denied sub nom.* *Bunch v. Bobby*, 133 S. Ct. 1996 (2013) (holding that *Graham* does not clearly establish that "consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole" and noting that courts are split on the issue); *State v. Kasic*, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011), *aff'd*, No. 2 Ca-CR 2013-0307-PR, 2013 WL 6823267 (Ariz. Ct. App. Dec. 23, 2013) (holding that *Graham* was not applicable where a seventeen-year-old received an aggregate sentence of nearly 140 years for separate crimes that occurred within one year); *Walle*, 99 So. 3d at 973 (holding that *Graham* did not apply where a thirteen-year-old received sentences totaling ninety years in the aggregate for two separate cases); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011).

⁶⁶ Schlessel, *supra* note 52, at 1057.

⁶⁷ See, e.g., *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013) (holding that *Miller* applies retroactively); *State v. Tate*, 130 So. 3d 829, 841 (La. 2013) (holding that *Miller* is not retroactive), *cert. denied sub nom.* *Tate v. Louisiana*, 134 S. Ct. 2663 (2014); *State v. Toca*, 141 So. 3d 265, 266 (La. 2014) (holding the *Miller* does not apply retroactively), *cert. granted*, No. 14-6381 (U.S. Dec. 12, 2014) (No. 14-6381); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E. 3d 270, 281 (Mass 2013) (holding that *Miller* applies retroactively); *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014) (holding the *Miller* applies retroactively).

disagree about whether to afford relief to those already sentenced absent additional instruction by the Supreme Court.

Setting aside retroactivity, legislators and courts have generally chosen two main courses of action as to *Miller*. First, in some states, life without parole remains a sentencing option as *Miller* permits, and the judge may now issue a parole eligible life or other term-of-years sentence instead.⁶⁸ For example, in Pennsylvania, home to the highest number of juveniles sentenced to life without parole, the legislation will not apply retroactively until the Supreme Court expressly resolves the question. Going forward, a juvenile convicted of homicide will either be sentenced to life without parole or a life sentence requiring him to serve at least thirty-five years before he is parole eligible if he is over fifteen.⁶⁹ Second, in some instances, states have banned life without parole altogether as a sentencing option for juveniles; instead, juveniles must become parole eligible or eligible for sentencing review after serving a certain term of years.⁷⁰ Therefore, particularly in states which have banned life without parole for juveniles, all juvenile offenders who receive long sentences will now be included in the same resentencing or back end review process; but typically, homicide offenders must first serve more time before becoming eligible for review.⁷¹

State courts and legislators must also assign a point at which someone who is sentenced to life, for a crime he committed as a juvenile, should be eligible for release review.⁷² Some of the new laws provide juvenile offenders with an opportunity for release consideration at certain fixed points during a lengthy incarceration.⁷³ For now, that decision is up to the states.⁷⁴ There are a range of opinions about how much time

⁶⁸ See, e.g., S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012); S.B. 39, 2013 Leg. Assemb., 88th Sess. (S.D. 2013); S.B. 228, 2013 Leg. Gen. Sess. (Utah 2013).

⁶⁹ S.B. 850, 2012 Leg., Reg. Sess. (Pa. 2012).

⁷⁰ See, e.g., H.B. 2116, 2014 Leg. Sess. (Haw. 2014); S.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013); H.B. 4210, 2014 Leg. Sess. (W. Va. 2014); H.B. 23, 62d Leg., Gen. Sess. (Wyo. 2013); see also *Diatchenko*, 1 N.E.3d at 282-86 (Mass. 2013).

⁷¹ See, e.g., DEL. CODE ANN. tit. 11, § 4204A(d)(1), § 4204A(d)(2); H.B. 5221, 2014 Leg. Sess. (Conn. 2014) (creating a second look sentencing provision for all juvenile offenders instead of parole); H.B. 4210, 2014 Leg. Sess. (W. Va. 2014) (juveniles will come up for parole after fifteen years).

⁷² *Graham v. Florida*, 560 U.S. 48, 75-76 (2010). The American Bar Association suggests that all “[y]outhful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.” AM. BAR ASS’N, RECOMMENDATION 105C, at 1 (Feb. 11, 2008), available at http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_105c.authcheckdam.pdf.

⁷³ See *infra* Subsection I.B.2-3.

⁷⁴ *Graham*, 560 U.S. at 75 (“What the State must do, however, is give defendants like *Graham* some meaningful opportunity to obtain release based on

a juvenile must first serve before release review; one court has held that review must be available after ten years,⁷⁵ elsewhere, a juvenile convicted of murder must first serve up to forty years.⁷⁶

It is up to courts and legislators not only to decide *when* review will be available, but also who should be responsible for making the release decision ultimately and upon what basis it will be made. Some states have chosen parole boards and, in other states, the judiciary will review applications for release instead of a parole board. State approaches to the latter two questions are considered next.

2. Administrative Remedy

In oral argument during *Graham*, Justices Alito and Roberts inquired about what kind of sentencing or release procedure would be necessary should the Court determine that life without parole was not a permissible sentence.⁷⁷ *Graham's* counsel responded with a request for some “meaningful opportunity” to demonstrate that he has reformed and can now live in society.⁷⁸ This response appears to have inspired the standard the Court chose. The Court explained that when juveniles commit non-homicide crimes, “if it imposes a sentence of life [the government] must provide him or her with some realistic opportunity to obtain release before the end of that term.”⁷⁹

demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.”).

⁷⁵ Although the Federal District Court order was stayed, thus far it is the shortest time frame put forth by a court or legislature. Order Requiring Immediate Compliance with *Miller*, Hill v. Snyder, No. 10-14568 (E.D. Mich, Nov. 26, 2013), available at <http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf> (requiring review for all juvenile offenders serving life without parole sentences after ten years).

⁷⁶ See e.g., TEX. PENAL CODE ANN. § 12.31 (West) & TEX. GOV'T CODE ANN. § 508.145(b) (requiring forty years in prison prior to parole review for juvenile homicide offenders); see also La. REV. STAT. § 15:574.4(E)(1) (2014) (requiring juvenile homicide offenders who do not receive mandatory life to serve thirty-five years before parole eligibility).

⁷⁷ Transcript of Oral Argument at 2, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), available at http://www.oyez.org/cases/2000-2009/2009/2009_08_7412 (click “*Graham v. Florida*—Oral Argument” then “Full Transcript Text”).

⁷⁸ *Id.* Terrance Graham's counsel responded to judicial inquiry, stating: “All that would have to be required is a meaningful opportunity to the adolescent offender to demonstrate that he has in fact changed, reformed, and is now fit to live in society. It—that's all. That's all we are asking for. We are not asking that it be automatic right to get back out.” *Id.*

⁷⁹ *Graham*, 560 U.S. at 82.

a. Compliance through Current Parole Process

Some states have determined that compliance with *Graham* will be satisfied so long as defendants who commit juvenile offenses become parole eligible at some point.⁸⁰ The first few courts to consider *Graham* resentencing cases did not require any substantive or procedural change to the existing state parole process for those offenders.⁸¹ In Pennsylvania, the legislature has determined that *Graham* and *Miller* will be satisfied through potential opportunities for parole.⁸²

For example, shortly after the Court issued its ruling in *Graham*, the Iowa Supreme Court considered the case of Julio Bonilla, who was sentenced to a mandatory life without the possibility of parole for a kidnapping that he committed when he was sixteen.⁸³ Because Bonilla was a juvenile at the time of the offense, his sentence fell squarely within *Graham*'s prohibition.⁸⁴ The court ordered that if Bonilla was eligible for parole consideration, the sentence would comply with *Graham*.⁸⁵ Shortly thereafter, the legislature amended the statute so that defendants who receive a life sentence for committing non-homicide offenses before they are eighteen must first serve twenty-five years of the life sentence before they become eligible for annual parole review.⁸⁶

The Iowa code states the criteria that the parole board should consider upon its review of a parole release application.⁸⁷ These include common factors such as the defendant's criminal and social history, behavior and attitude in prison, and physical and mental examinations.⁸⁸ The board

⁸⁰ See *Bonilla v. State*, 791 N.W.2d 697, 700 (Iowa 2010); *State v. Dyer*, 77 So. 3d 928, 930 (La. 2011); *State v. Macon*, 86 So. 3d 662, 665-66 (La. Ct. App. 2012), *superseded by statute*, LA. REV. STAT. ANN § 15:574.4(B).

⁸¹ *Bonilla*, 791 N.W.2d at 700-01; *Macon*, 86 So. 3d at 665-66.

⁸² 18 PA. CONS. STAT. § 1102.1 (West).

⁸³ *Bonilla*, 791 N.W.2d at 698-99.

⁸⁴ *Id.* at 700-01.

⁸⁵ *Id.* (citing IOWA CODE § 906.5 (2014)).

⁸⁶ IOWA CODE § 902.1(2)(a) (2011), *invalidated by State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *State v. Hoeck*, 838 N.W.2d 680 (Iowa Ct. App. 2013). The relevant code provision in place at the time of the court's decision did not provide for a minimum amount of time that a defendant in Bonilla's situation must first serve before parole consideration.

⁸⁷ IOWA CODE § 906.5(3) (2013) (stating that the parole "board shall consider all pertinent information regarding the person, including the circumstances of the person's offense, any presentence report which is available, the previous social history and criminal record of the person, the person's conduct, work, and attitude in prison, and the reports of physical and mental examinations that have been made").

⁸⁸ *Id.* The Iowa Code does not state whether the parole board must give reasons for its denial or whether counsel may be present or appointed.

is not required to perform an in-person interview or a hearing under its current statute.⁸⁹ When the board chooses to interview applicants, evidence demonstrates that applicants are more likely to be released.⁹⁰ However, the appellate court has upheld the board's ability to use its discretion about whether to conduct personal interviews of applicants.⁹¹

In 2012, the Louisiana Supreme Court, consistent with Iowa, also determined that the current system of parole review satisfies *Graham*. It held that the release decision "falls within the exclusive purview of the Board of Parole, charged with the duty of ordering parole."⁹² In the court's view, a prisoner's access to consideration by the parole board satisfies *Graham*.⁹³ The court did not add any additional procedural requirements or protections nor did it address release criteria for juvenile offenders.⁹⁴

At the time of the court's decision in Louisiana, an inmate sentenced to life for a non-homicide crime he committed as a juvenile would be eligible for parole after turning forty-five and serving twenty years of the sentence.⁹⁵ Soon thereafter, the legislature passed a law increasing the time a person must serve before he becomes parole eligible; juvenile defendants convicted of non-homicide crimes who receive life sentences must serve at least thirty years of the sentence before they will become eligible for parole.⁹⁶ Those who commit first or second-degree murder must serve thirty-five years unless they receive life without the possibility of parole.⁹⁷

The new law includes factors for consideration that mirror the criteria for parole applicants generally in Louisiana.⁹⁸ The offender must also meet certain criteria establishing that he is at low risk of reoffending "pursuant to a validated risk

⁸⁹ *Taylor v. State*, 752 N.W.2d 24, 26 (Iowa Ct. App. 2008) (describing a legislative amendment in 1995 such that the board is required only to perform case file reviews instead of personal interviews and upholding its retroactive application to inmates).

⁹⁰ *Id.* at 29-30.

⁹¹ *Id.* at 30.

⁹² *State v. Dyer*, 77 So. 3d 928, 931 (La. 2011).

⁹³ *Id.*

⁹⁴ *Id.* at 930. However, it held that access to the parole board cannot be dependent upon a commutation by the governor under *Graham*. *Id.*

⁹⁵ *Id.*

⁹⁶ LA. REV. STAT. § 15:574.4(D)(1) (2014).

⁹⁷ *Id.* § 15:574.4(E)(1). The court has not yet had the occasion to determine whether the additional ten year requirement conflicts with its previous holding in *State v. Dyer* about the parole scheme's compliance with *Graham*.

⁹⁸ For example, the inmate must receive his G.E.D., complete a substance abuse treatment program, if applicable, and 100 hours of prerelease programming, as well as, completing a separate reentry program. *Id.* § 15:574.4(E)(1).

assessment instrument.”⁹⁹ It contains one unique provision requiring that an expert in adolescent brain development and behavior will prepare a report for consideration in the parole decision.¹⁰⁰ Generally, the applicant must receive the votes of all members of a three person panel in order to gain release.¹⁰¹

Similarly, Nebraska passed a law that includes a list of factors for consideration when juveniles are sentenced to life and later considered for parole.¹⁰² At a minimum, the parole board must consider factors such as rehabilitation, maturity, and age at the time of offense.¹⁰³

b. Mandating Reform to Parole Process for Graham Compliance

In contrast, other decision makers have found that current parole procedures must be amended in order to provide a meaningful opportunity for review. One federal court in Michigan and some legislatures have added procedural safeguards and substantive criteria for juvenile sentence and release review.¹⁰⁴

California passed two separate laws initiating juvenile offender release reform, ultimately granting the release decision to the parole board. California’s Youth Offender Parole Hearings law, known as S.B. 260, passed in 2013 and modified the criteria as applied to eligible juvenile offenders.¹⁰⁵ In its wake, a handful of other states have either proposed or passed similar legislation.¹⁰⁶ California’s law acknowledges that its intent is to “create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.”¹⁰⁷ It implicitly suggests that its current system was not sufficiently meaningful. In addition, it is more expansive than a minimal reading of *Graham* or *Miller* requires.

⁹⁹ *Id.* § 15:574.4(E)(1)(f).

¹⁰⁰ *Id.* § 15:574.4(D)(2).

¹⁰¹ *Id.* § 15:574.2(C).

¹⁰² NEB. REV. STAT. § 83-1,110.04 (2013).

¹⁰³ *Id.*

¹⁰⁴ *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Nov. 26, 2013), available at http://www.aclumich.org/sites/default/files/ACLU_JuvenileLife_OriginalRuling.pdf; Order Requiring Immediate Compliance with *Miller*, *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013), available at <http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf>.

¹⁰⁵ S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

¹⁰⁶ See, e.g., H.B. 4210, 2014 Leg., Reg. Sess. (W. Va. 2014).

¹⁰⁷ S.B. 260, 2013 Leg., Reg. Sess. § 1 (Cal. 2013).

First, in California, eligibility includes life-sentenced juvenile offenders, as well as those who received a lengthy term-of-years.¹⁰⁸ Almost all youth convicted are eligible for relief, with some exceptions;¹⁰⁹ and a separate law addresses those serving life without the possibility of parole.¹¹⁰ S.B. 260 addresses the parole process and is applicable to juveniles serving parole eligible life sentences and other lengthy terms, including determinate sentences.¹¹¹

Second, California's law providing for parole release does not limit application to non-homicide offenders, thus, extending beyond the minimum requirements of *Graham*. In California alone, it is estimated that over 2,000 juveniles are serving life sentences that include the possibility of parole. In addition, many are serving lengthy determinate sentences for offenses they committed as juveniles.¹¹² It is estimated that approximately 5,000 offenders who are currently housed in California's prisons are eligible for relief under S.B. 260.¹¹³

California's law is explicit about its goal to provide a parole eligibility mechanism whereby a juvenile offender may show that he or she "has been rehabilitated and gained maturity."¹¹⁴ The law includes the Supreme Court's language from *Graham* and *Miller* to provide standards that apply to all lengthy sentences imposed upon juveniles. It requires that parole board commissioners "shall give great weight to the diminished culpability of minors as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" of the prisoner.¹¹⁵ It requires a licensed psychologist to administer a risk assessment instrument and the instrument itself must take into account diminished culpability of youth and subsequent growth and maturity.¹¹⁶

Finally, California's S.B. 260 provides a specific time line for parole eligibility and requires the Department of Corrections to notify juveniles prior to their review eligibility

¹⁰⁸ *Id.* § 4(b).

¹⁰⁹ *Id.* § 4(h). The statute does not apply, for example, to offenders sentenced as juveniles under Jessica's law or sentenced under the three strikes law. *Id.*

¹¹⁰ CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2013); S.B. 9, 2012 Leg., Reg. Sess. (Cal. 2012).

¹¹¹ S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

¹¹² Elizabeth Calvin, Human Rights Watch, *Juvenile Life Without Parole: Resentencing and Policy Update Presentation at the National Juvenile Defender Center Leadership Summit* (Nov. 1, 2013) (notes on file with author).

¹¹³ *Id.*

¹¹⁴ S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

¹¹⁵ CAL. PENAL CODE § 4801(c) (West 2014).

¹¹⁶ *Id.* § 3051(f).

date. For most convictions, juvenile will be eligible to seek parole if his or her sentence is more than fifteen years, with a few exceptions related to offenses. But the point at which he or she may do so will vary.¹¹⁷

Some aspects of current parole policies will inevitably lead to court involvement related to *Graham* and *Miller* compliance. For example, Michigan houses the second largest number of juveniles serving mandatory sentences of life without parole. In *Hill v. Snyder*, the federal plaintiffs are inmates in Michigan who were sentenced to life without parole for homicide convictions they received as juveniles; they challenged the constitutionality of the state statute denying them access to parole.¹¹⁸ Although the plaintiffs were sentenced for homicide, they argued that they, too, have a right to a meaningful opportunity for release, using the rationale from *Graham*. In addition, after the *Miller* decision, they argued that the parole scheme in its current form violates both *Graham* and *Miller* because parole can be denied for any reason;¹¹⁹ close inspection of the parole process in Michigan provides insights into the merits of the plaintiffs' arguments.

In response, the *Hill* court specifically ordered the state to “[c]reate an administrative structure” to determine parole eligibility for prisoners sentenced to life without parole for crimes committed as juveniles.¹²⁰ The order provided that the new process must be “fair[and] meaningful[.]”¹²¹ The court ordered that five specific items must be present within the new state structure. First, it ordered that the state must begin parole review for any relevant offenders who have completed ten years of their sentences. Second, it stated that this structure must include the provision of public hearings for “each of the eligible prisoners making application for consideration.”¹²² Third, the order requires the parole board to explain its decisions if it denies parole and would bar the

¹¹⁷ S.B. 260, 2013 Leg., Reg. Sess. § 4(b)(1) (Cal. 2013). Those who receive determinate sentences will be eligible after serving 15 or 20 years of the sentence, depending upon the length of the sentence. Those who are serving sentences that are 25 years to life will be eligible to seek parole after 25 years. *Id.*

¹¹⁸ *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *3 (E.D. Mich, Nov. 26, 2013).

¹¹⁹ *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *3 (E.D. Mich, Nov. 26, 2013).

¹²⁰ Order Requiring Immediate Compliance with *Miller*, *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013), available at <http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf>.

¹²¹ *Id.* at 2.

¹²² *Id.*

board's use of "no interest" orders.¹²³ "No interest" orders are brief orders denying parole after interviews without explanation. Fourth, the court directed that, under the new structure, no one may veto a decision to grant parole, including the sentencing judge.¹²⁴ Finally, it required access to rehabilitative programming.¹²⁵ The state appealed the order and the Sixth Circuit granted a stay pending appeal.¹²⁶

The court has ordered Michigan to allow all juvenile lifers a parole hearing after ten years.¹²⁷ That part of the order is consistent with the aspirations of the ABA and American Law Institute, both of which propose reform that allows post sentencing review for all juveniles.¹²⁸ But in light of the current parole process, all of these changes would be significant if the order is upheld. For example, Michigan does not provide public hearings automatically to parole applicants who are serving life sentences. Instead, one board member makes this decision based upon the risk assessment score.¹²⁹ The interviewer may then grant or deny a parole hearing and the sentencing judge may object to the decision to grant a hearing.¹³⁰

In contrast, the *Hill* order significantly alters the current process by providing for the automatic right to the public hearing and prohibiting veto, something the current state law permits at two different stages.¹³¹ In practical terms, judicial objection is frequent in Michigan, where judges are elected. Between 2007 and 2012, the parole board scheduled 171 public hearings for parole applicants serving life sentences in non-drug related cases; in nearly a quarter of those cases,

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Order at 4-5, *Maxey v. Snyder*, No. 13-2661 (6th Cir. Dec. 23, 2013), available at http://www.michigan.gov/documents/ag/Hill_v_Snyder_6th_Cir_Order_443146_7.pdf.

¹²⁷ Order Requiring Immediate Compliance with *Miller*, *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013), available at <http://www.aclumich.org/sites/default/files/file/HillOrderRequiringParoleProcess.pdf>.

¹²⁸ AM. BAR ASS'N., *supra* note 72, at 16; MODEL PENAL CODE: SENTENCING § 6.11A(h) (Tentative Draft No. 2, 2011) (stating that juvenile offenders should be eligible for a second look sentencing hearing after ten years).

¹²⁹ MICH. COMP. LAWS § 791.235 (2012).

¹³⁰ *Id.* § 791.234. "Parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing." *Id.*

¹³¹ *Collins v. Dir., Dep't of Corr.*, 395 N.W.2d 77, 79 (Mich. Ct. App. 1986) (discussing and upholding the Michigan statute allowing for a veto by the sentencing judge or her successor). "The Legislature may create a parole system primarily within the executive branch of government which . . . is subject to a judicial veto, without being in violation of the constitutional provisions relating to separation of powers." *Id.*

judges exercised their veto power.¹³² The majority of the judicial objections were based upon the applicant's initial offense.¹³³ In over a quarter of the judicial hearing vetoes, judges did not provide a reason and most of the objections came from judges who had succeeded the original sentencing judge.¹³⁴

Once an offender serving a life sentence in Michigan advances in the process to a public hearing, he must receive the vote of a majority of the 10-member board in order to be released.¹³⁵ The prosecutor may then appeal a parole board's release decision to the sentencing judge.¹³⁶ Therefore, the removal of veto power under the *Hill* order by any other entity, including the judge, is significant at this stage, as well.¹³⁷

Compliance with the *Hill* order would mean that access to a hearing would no longer be contingent upon the screening by one board member, nor the lack of opposition by the sentencing judge or his successor. While the order does not address the substance of the release decision, as of 2008, Michigan's parole system uses a computerized risk assessment tool.¹³⁸

Significantly, applicants are afforded more rights in and after a parole hearing than they are after only a screening interview.¹³⁹ For example, when an applicant is denied the opportunity to proceed to a full hearing, the Michigan Court of Appeals has upheld the parole board's use of "no interest"

¹³² See CITIZENS ALLIANCE ON PRISONS & PUB. SPENDING, PROPOSAL TO AMEND PROCESS FOR JUDICIAL OBJECTIONS TO LIFER PAROLES 1 (Aug. 2012), available at <http://house.michigan.gov/sessiondocs/2013-2014/testimony/Committee232-2-21-2013-1.pdf>.

¹³³ *Id.*

¹³⁴ *Id.* Normally, in Michigan, once a judge intervenes to object to a public hearing for a person serving life, the applicant must then wait five years for reconsideration by the parole board. *Id.*

¹³⁵ *In re Elias*, 811 N.W.2d 541, 543 (Mich. Ct. App. 2011) (citing *The Parole Consideration Process*, MICHIGAN DEPARTMENT OF CORRECTIONS (2014), <http://www.michigan.gov/corrections/0,4551,7-119-1384-22909--,00.html>).

¹³⁶ MICH. COMP. LAWS § 791.234(11) (2010). This law became effective in 1992 after the legislature overhauled the parole system in place at the time.

¹³⁷ This has added significance considering that an inmate is not appointed counsel when the state appeals the decision to grant release to the court. *In re Hill*, 827 N.W.2d 407, 417 (Mich. Ct. App. 2012). "As applied in this case, Hill did not have a constitutionally protected liberty interest when the Board granted him parole such that he was entitled to appointed counsel during the pendency of the prosecutor's appeal." *Id.*

¹³⁸ See, e.g., *In re Elias*, 811 N.W.2d 541, 548, 551 (Mich. Ct. App. 2011).

¹³⁹ Compare *In re Glover*, 614 N.W.2d 714, 715 (Mich. Ct. App. 2000) (affirming Parole Board denial of parole when supported by written explanation of its reasons), with MICH. COMP. LAWS § 791.235(12) (2012) (providing that "when the parole board makes a final determination not to release a prisoner, the prisoner shall be provided with a written explanation of the reason for denial and, if appropriate, specific recommendations for corrective action the prisoner may take to facilitate release"), and *Gilmore v. Parole Bd.*, 635 N.W.2d 345, 347 (Mich. Ct. App. 2001) (denying the right to an appeal or written explanation when a parole hearing is denied after a parole interview).

orders.¹⁴⁰ It specifically held that parole applicants serving life sentences are not entitled to explanations at that stage of the parole process¹⁴¹—the *Hill* order contravenes that practice.¹⁴² The applicant is not entitled to appointment of counsel,¹⁴³ however, and the *Hill* order does not contemplate the provision of counsel to affected parole applicants.

3. Use of Judicial Remedy

New laws allowing for sentencing modification, rather than parole access, are particularly relevant for states and the federal government whose sentencing laws have abolished or seriously curtailed parole.¹⁴⁴ To date, a few states—including Florida and Delaware—have adopted sentencing modifications post *Graham* and *Miller*.¹⁴⁵ It is likely that the Federal Government will follow suit given its abolition of parole. The Model Penal Code's proposed draft revisions also utilize sentencing modification, rather than parole, where lengthy sentences are imposed.¹⁴⁶ Of note, Oregon is the only state that had a limited second look provision in place prior to *Graham* but it is not available to serious offenders such as those under *Graham* and *Miller*.¹⁴⁷

¹⁴⁰ *Gilmore*, 635 N.W.2d at 347 (“Common in these appeals are the questions whether . . . an inmate serving a parolable life sentence is entitled to a written explanation for the Parole Board’s decision of ‘no interest’ in taking further action after the prisoner’s statutorily mandated interview . . . and whether the Parole Board’s decision of ‘no interest’ is reviewable by the circuit court. We answer both questions in the negative.” (internal citation omitted)).

¹⁴¹ *Id.*

¹⁴² Furthermore, the Michigan courts have held that the decisions to deny a public hearing after a parole board interview are not appealable by the applicant because they are not the same as “final orders” denying parole at the hearing stage. *Id.* at 351. Therefore, as a result of the Order, juvenile lifers would not be precluded from an appeal because they would no longer be denied before a public hearing occurs.

¹⁴³ MICH. COMP. LAWS § 791.235(6).

¹⁴⁴ Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196, 1221 (2005) (including a list of state practices and noting that only a “minority of existing state guidelines systems retain parole release discretion for all felons sentenced to prison, and several other states retain it for certain crimes”).

¹⁴⁵ CAL. PENAL CODE § 1170(d)(2)(A)(i)(B) (West 2013); DEL. CODE ANN. tit. 11, § 4204 (2013); FLA. STAT. § 921.1402 (2014).

¹⁴⁶ MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2011).

¹⁴⁷ OR. REV. STAT. § 420A.203 (2011). Juveniles who are tried as adults in Oregon most frequently are charged with crimes that fall under Oregon’s “Measure 11” law which makes them ineligible for Oregon’s Second Look provision. See JASON ZIEDENBERG ET AL., CAMPAIGN FOR YOUTH JUSTICE AND THE PARTNERSHIP FOR SAFETY AND JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON’S YOUTH 26 (2011), available at <http://www.campaignforyouthjustice.org/>

In both Delaware and Florida, the legislatures had previously abolished parole pursuant to the truth in sentencing movement,¹⁴⁸ so sentencing modification was a more likely choice. While Delaware is not a big player in terms of the number of juveniles serving lengthy sentences as compared to other states, Florida is among the top five states for the number of juveniles serving life sentences.¹⁴⁹

Delaware was one of the first states to pass legislation addressing *Graham* and *Miller*; and it was the first law to place the judiciary exclusively in the gatekeeping role for post sentencing release reform for juvenile offenders. Delaware banned juvenile life without parole entirely and applied the ban retroactively. The legislation allows resentencing to anyone already serving a life sentence for a conviction obtained as a juvenile. Under Delaware's new laws, juveniles who were sentenced to life without parole for non-homicide crimes may petition Superior Court for a sentencing modification after twenty years.¹⁵⁰ Juveniles who were convicted of homicide and previously sentenced to life without parole may petition for resentencing after thirty-five years.¹⁵¹ The inmate, if denied, is eligible to reapply after an additional five years.¹⁵²

The legislation itself, however, did not lay out procedural rules and substantive criteria; rather, it granted the court the authority to promulgate the appropriate rules for filing and litigation for sentencing modification.¹⁵³ The Delaware Superior Court rules, promulgated in early 2014, provide for the appointment of counsel "only in the exercise of discretion and for good cause shown."¹⁵⁴ Next, they establish a presumption that there will be no hearing.¹⁵⁵ The rules permit the judge to request more information about "the mitigating factors of the [offender's] youth at the time of the offense,"

documents/Misguided_Measures_July_2011.pdf. There is surprisingly little commentary or case law discussing its implementation.

¹⁴⁸ PETERSILIA, *supra* note 24, at 139 (describing "truth in sentencing" reform and the Crime Control Act of 1984 which abolished parole release at the federal level and led states to follow suit).

¹⁴⁹ See *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole>.

¹⁵⁰ DEL. CODE ANN. tit. 11, § 4204A(d)(1) (2013).

¹⁵¹ *Id.* § 4204A(d)(2).

¹⁵² *Id.* § 4204A(d)(3). However, the judge may extend that time if she "finds there to be no reasonable likelihood that the interests of justice will require another hearing within [five] years." *Id.*

¹⁵³ *Id.* § 4204A(d)(5).

¹⁵⁴ DEL. SUPER. CT. R. CRIM. P. 35A(c).

¹⁵⁵ DEL. SUPER. CT. R. CRIM. P. 35A(d)(1).

rehabilitation, and initial sentencing, but do not require court consideration of any particular characteristics.¹⁵⁶ The court may also ask that the Department of Corrections provide a certification that the offender “will not constitute a substantial risk to the community” or himself.¹⁵⁷

The court also issued a formal Case Management Plan for resentencing hearings for juvenile offenders who were previously sentenced that does provide these rights.¹⁵⁸ Unlike the Court's rules for prospective cases, the Court's Case Management Plan requires the assignment of counsel and appears to presume there will be resentencing hearings.¹⁵⁹ Furthermore, the Delaware Sentencing Accountability Commission later included substantive criteria in the judicial bench book, drawing from *Miller*.¹⁶⁰ In the first year of implementation with retroactive cases, the courts have followed general sentencing norms. The Public Defender's Office worked to identify cases to ensure eligible applicants were represented and judges have held resentencing hearings where they have explained their decisions on the record.¹⁶¹ Courts have followed the Case Management Plan issued by the court for retroactive cases.¹⁶² The administration of those cases can provide a framework for future cases administered under the new sentencing laws.

Unlike Delaware, Florida's law does not provide relief for homicide offenders who have already been sentenced absent the future ruling on retroactivity by the U.S. Supreme Court. But going forward, most offenders will have access to sentencing modification, leaving only a small category of offenders sentenced for juvenile crimes without the possibility for release. Florida's law includes a comprehensive list of required factors that courts must consider for release, including whether the individual “demonstrates maturity and rehabilitation,” successful completion of programs while incarcerated, remorse, and risk level, including evidence put

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ As a result, the Court adopted the SUPERIOR COURT OF THE STATE OF DEL., CRIMINAL CASE MANAGEMENT PLAN FOR RESENTENCING PROCEEDINGS UNDER 79 DEL. LAWS. C. 37 (2013) AND 11 DEL. C. § 4209A (on file with author).

¹⁵⁹ *Id.*

¹⁶⁰ DEL. SENTENCING ACCOUNTABILITY COMM'N, BENCHBOOK 2014, at 1, 136-37 (2014) (including factors such as family and home environment, familial and peer pressure, and mental health).

¹⁶¹ Interview with Lisa Minutola, Chief of Legal Services, Delaware Public Defender's Office (Oct. 22, 2014) (notes on file with author).

¹⁶² *Id.*

forward by the defendant.¹⁶³ The list also includes backward looking factors that typically would have been considered at sentencing such as whether there was minimal participation in the crime and, in some instances, victim impact statements from the original sentencing.¹⁶⁴ By requiring consideration of rehabilitation and remorse, it strikes a balanced framework. Procedurally, it requires appointment of counsel and a written explanation of any decision denying release to the offender who applies for the sentencing modification.¹⁶⁵

Most juvenile offenders who receive sentences longer than fifteen years may apply to a judge for resentencing after a certain period of time, depending on the length of the initial sentence.¹⁶⁶ In addition, most juveniles who receive life sentences may apply for sentencing modification after serving twenty-five years.¹⁶⁷ In effect, the law eliminates life without parole for most offenders who have not committed a serious felony and degree murder. If the court denies release, they may apply five or ten years later, depending on their underlying conviction.¹⁶⁸

The judicial role under California's S.B. 9 is more limited and specific than it is under the Florida framework. S.B. 9 works in tandem with the parole process. It utilizes a judicial route toward review for certain categories of offenders who received sentences of life without parole for homicide crimes that they committed when they were younger than eighteen.¹⁶⁹ S.B. 9 is different from the other models because the judge decides only whether or not the offender can become parole eligible, shifting the release decision back to the parole board under S.B. 260.¹⁷⁰

S.B. 9 focusses on juvenile homicide offenders who received life sentences without the possibility of parole. An eligible defendant must meet one of the following four criteria: the defendant had an adult co-defendant; no violent juvenile adjudications before conviction; received the sentence for felony murder; or must have pursued a path toward rehabilitation

¹⁶³ FLA. STAT. § 921.1402(6)(a), (b), (e), (g).

¹⁶⁴ *Id.* § 921.1402(6)(c), (d).

¹⁶⁵ *Id.* § 921.1402 (2014).

¹⁶⁶ *Id.* § 921.1402(2)(b)-(d).

¹⁶⁷ *Id.* § 921.1402(2)(d).

¹⁶⁸ For example, some offenders must wait ten years to reapply and others must wait five years depending on their initial sentence.

¹⁶⁹ CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2014).

¹⁷⁰ The law provides that the judge can resentence anew and technically, the current sentencing laws would only permit life with parole eligibility for this class of offenders.

while in prison.¹⁷¹ The court will hold a sentencing modification hearing and may resentence the offender so that he is parole eligible.¹⁷² California law also provides specific guidance about criteria the court should consider. These factors include the extent of adult supervision during childhood; cognitive or mental limitations; whether the defendant has availed himself of rehabilitative or educational opportunities to the extent they were available to him during incarceration; and maintenance of family or community ties.¹⁷³ If the court considers criteria other than the ones listed in the statute, it must state those factors and provide an explanation on the record.¹⁷⁴

The law also includes a specific timetable for review.¹⁷⁵ In California, an eligible offender serving a life without parole sentence may apply to the court for judicial review after serving fifteen years,¹⁷⁶ and then, if the application is granted, become parole eligible after twenty-five years.

II. IDENTIFYING THE GATEKEEPER

Graham and *Miller* ultimately present an opportunity for innovation as states and the federal government grapple with the form, reach, and method of juvenile sentencing reform.¹⁷⁷ It is questionable whether funneling juvenile offenders who receive life sentences or the equivalent into current state parole systems can provide a meaningful opportunity to obtain release.¹⁷⁸ Without reform, there is a strong case that most parole systems in their current form, with

¹⁷¹ CAL. PENAL CODE § 1170(d)(2)(B)(i)-(iv).

¹⁷² *Id.* § 1170(d)(2)(E).

¹⁷³ *Id.* § 1170(d)(2)(F)(iv)-(viii) (listing the factors that the court should consider when deciding a motion for resentencing by a defendant).

¹⁷⁴ “In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.” *Id.* § 1170(I).

¹⁷⁵ *Id.* §§ 1170(d)(2)(A)(i), (d)(2)(H).

¹⁷⁶ *Id.* § 1170(2)(A)(i). If denied, the offender may then petition twice more: four years later and once more the following year. *Id.* § 1170(2)(H).

¹⁷⁷ For example, Professor Martin Guggenheim argues that *Graham* prohibits current sentencing practices as applied to juveniles in many states. See Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 489 (2012). “What is impermissible after *Graham*, however, is a legislature's choice to impose an automatic sentence on children that is the same sentence it imposes on adults for the same crime.” *Id.*

¹⁷⁸ See, e.g., Bierschbach, *supra* note 14, at 1752; Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 421-28 (2014) (discussing procedural limitations of current state parole practices and the potential Eighth Amendment violations they pose for juvenile offenders seeking meaningful review).

only the most “anemic” protections in place,¹⁷⁹ do not.¹⁸⁰ Many states and the federal government do not have a parole board in place because they have moved to a determinate sentencing model;¹⁸¹ as a result, some have chosen judicial sentencing modification procedures, known as “second look” sentencing, instead of parole. Sentencing modification is also consistent with the American Law Institute’s Model Penal Code proposal on sentencing provisions, which advocates abolishing parole entirely.¹⁸² The differences between these two potentially viable paths invite discussion and exploration about what pioneering methods would be satisfactory or even exemplary.

A. *Parole Board Decisions and Reform*

At least one scholar has noted that parole is “making a comeback,” noting its potential role under *Graham* as one example of that.¹⁸³ As predicted, some states have chosen this route. At the same time, the institutional shortcomings that led to the decreased use of parole for release beginning in the 1980s raise serious questions about its use as the cure all for *Graham*.¹⁸⁴ *Graham* raises the question—does the Eighth Amendment require something more meaningful?

The “enormous variations” in state parole “policy and practice” make it “difficult, perhaps impossible, to define a common American approach to parole at the turn of the [twenty-first] century.”¹⁸⁵ Parole programs and processes are less scrutinized and, in turn, less understood than other components of corrections.¹⁸⁶ But they do have general common

¹⁷⁹ See Bierschbach, *supra* note 14, at 1752.

¹⁸⁰ See *id.*; Russell, *supra* note 178, at 421-28. Despite these compelling arguments, the first wave of court decisions have determined that parole eligibility is sufficient. See, e.g., *Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010); *State v. Dyer*, 77 So. 3d 928, 933 (La. 2011); *State v. Macon*, 86 So. 3d 662, 665-66 (La. Ct. App. 2012), *superseded by statute*, LA. REV. STAT. ANN § 15:574.4(B).

¹⁸¹ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 66-67 tbl. 3.1 (2003).

¹⁸² MODEL PENAL CODE: SENTENCING § 6.06(4)-(5) (Tentative Draft No. 2, 2011).

¹⁸³ See O’Hear, *supra* note 8, at 1248-49.

¹⁸⁴ Bierschbach, *supra* note 14, at 1752; Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 421-28. Professor Russell’s analysis of parole in relation to *Graham* is the most comprehensive to date.

¹⁸⁵ JEREMY TRAVIS & SARAH LAWRENCE, URBAN INSTITUTE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA 25 (2002).

¹⁸⁶ Laura Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1307 (2007) (characterizing parole as a “component[] of hidden sentencing[,]” along with probation and post-release supervision that are “[l]argely concealed from the public

characteristics that are relevant to state and federal compliance with *Graham's* Eighth Amendment holding and to relevant, broader reform questions.¹⁸⁷

Historically, there are three common criticisms levelled against the substance of decision making by parole boards. One is that parole board members frequently lack relevant experience prior to appointment. They are typically comprised of governor appointees who serve fixed terms that vary in length. Next, many criticize their decision making for being arbitrary and based more upon personal intuition than data.¹⁸⁸ Given the appearance of arbitrariness, the decision-making process is often criticized for its lack of transparency.¹⁸⁹ And third, the fear that political and public influence has too much impact casts doubt about the soundness of the decisions.¹⁹⁰

Courts require only limited due process from state parole systems due to the diminished legal interests of inmates in the process.¹⁹¹ Professor Kevin Reitz writes that, while procedural protections at sentencing are second-string, the “procedural accoutrements of parole release are of the third-or fourth-string variety.”¹⁹² That description is a concise preview of the potential inadequacies of current parole systems for juvenile release reform.

States generally follow the Supreme Court's lead, holding that only minimum standards of due process apply.¹⁹³ As a result, they provide “only the most anemic procedural due process protections.”¹⁹⁴ For example, states are not required to

eye” and “have been ignored by both scholars and policy-makers”); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUSTICE 479, 493 (1999).

¹⁸⁷ See generally Russell, *supra* note 178.

¹⁸⁸ PETERSILIA, *supra* note 24, at 133-34 (2002) (describing criticism of parole practices and the exercise of discretion by parole board members).

¹⁸⁹ Appleman, *supra* note 186, at 1343-44.

¹⁹⁰ PETERSILIA, *supra* note 24, at 133-36.

¹⁹¹ See *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979) (holding that a state parole process which provides the inmate with the opportunity to be heard and which informs him of the reasons he is denied parole satisfies due process).

¹⁹² Kevin R. Reitz, *The “Traditional” Indeterminate Sentencing Model*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, *supra* note 15, at 283 (emphasis omitted).

¹⁹³ See, e.g., *In re Hill*, 827 N.W.2d 407, 413 (Mich. Ct. App. 2012) (quoting *Greenholtz*, 442 U.S. at 11) (“[T]he mere fact that a state has a parole process is insufficient to confer a protected liberty interest to a prisoner: ‘That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained.’”).

¹⁹⁴ Bierschbach, *supra* note 14, at 1752; see W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 903-04 (2009) (noting that “parole is . . . governed by an underdeveloped and confusing series of due process cases that is badly in need of review”).

provide attorney representation in the parole release process.¹⁹⁵ Some states deny the right to have an attorney present for the procedure at all or, at least, bar them from certain parts of it,¹⁹⁶ and only a small group of states provide appointed counsel.¹⁹⁷ In addition, even when the state law permits the prosecutor to appeal a parole board's decision to grant parole in court, an inmate still does not have a right to assigned counsel for the state's appeal.¹⁹⁸ And, in many states, parolees do not have the right to appear at hearings.¹⁹⁹ Finally, the standards used by parole boards lack any component that would afford "meaningful review" of parole board decisions as they currently exist.²⁰⁰

In summary, arbitrary decision making and the lack of procedural norms raise questions about the quality of decisions and contributed to the waning use of parole boards by states.²⁰¹ Use of parole eventually fell into disfavor as the public demanded truth in sentencing and grew to mistrust the parole process.²⁰² Many states have limited the decision-making role of parole boards so that the length of a prisoner's sentence is more frequently determined at the front end of sentencing.²⁰³ This approach embraces finality at sentencing.²⁰⁴ The criticisms levelled over time raise questions about whether the current

¹⁹⁵ *Greenholtz*, 442 U.S. at 16-18. (stating the basic minimum requirements for parole release).

¹⁹⁶ *See, e.g.*, N.M. CODE R. § 22.510.2.8(A)(3) (2001); *In re McCarthy*, 164 P.3d 1283, 1288 (Wash. 2007) (holding that even though a statute requiring review hearings for sex offenders created a limited liberty interest, "due process requires that offenders have minimum procedural protections[, but that u]nder *Greenholtz*, these protections do not include the right to counsel"); Russell, *supra* note 178, at 402-03.

¹⁹⁷ Russell, *supra* note 178, at 402-03.

¹⁹⁸ *See, e.g.*, *In re Hill*, 827 N.W.2d 407, 417 (Mich. Ct. App. 2012).

¹⁹⁹ *See* Russell, *supra* note 178, at 434 (reporting survey results about parole board presence by inmates by video or in person). For examples of states that allow the applicant to appear at parole hearings, see ARIZ. REV. STAT. § 31-411(B) (2012); CAL PENAL CODE § 3041.5(a)(2) (2010); IND. CODE § 11-13-3-3(i)(3) (2012); MO. REV. STAT. § 217.690(2) (2005); TEX. GOV'T CODE § 508.141(c) (2013); *see also* Erin Lange Ramamurthy, Comment, *The Iron Curtain: Alabama's Practice of Excluding Inmates from Parole Release Hearings and Its Flawed Underpinnings*, 103 J. CRIM. L. & CRIMINOLOGY 1201, 1202-03 (2013) (citing author's personal correspondence with parole board personnel). The Alabama Board of Pardons and Paroles' regular practice excludes parole applicants from appearing at their parole hearings because they are conducted off site. Lange, *supra* note 199, at 1203. The comment argues that the practice is a due process violation. *Id.* at 1204

²⁰⁰ Reitz, *supra* note 192, at 285.

²⁰¹ Petersilia, *supra* note 24, at 124; Rhine, *supra* note 15, at 630-31 (discussing the rapid dismantling of parole systems by many states and accompanying criticisms).

²⁰² PETERSILIA, *supra* note 24, at 139 (describing "truth in sentencing" reform).

²⁰³ "Legislatures nationwide embraced determinate sentencing laws that called for prison sentences for most offenses and required very lengthy prison terms for all serious offenses and for all repeat offenders." Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 162 (2014).

²⁰⁴ *Id.* at 165.

parole processes in many states meet *Graham's* application of the Eighth Amendment.²⁰⁵ But they do not foreclose the chance that they could with different criteria and procedures in place.

B. *Sentencing Modification and Juvenile Sentencing Reform*

As the field develops, sentencing modification may prove itself to be more favorable to legislators than the current debate contemplates. For example, just recently, in Florida, where *Graham* arose, legislators chose judicial sentencing modification instead of reinstatement of parole in their compliance legislation.²⁰⁶ Florida tends to impose harsh sentences on its juvenile offenders, currently housing the highest number of juvenile offenders to which *Graham* is directly applicable. And it quickly generated numerous cases about juvenile offenders serving lengthy term-of-years sentences.²⁰⁷ Additionally, it houses the second largest number of offenders serving life sentences in the country, many of whom are juveniles.²⁰⁸

The American Law Institute acknowledges that a resentencing or “second look” model for release creates “new *institutional* arrangements for prison-release decisions that have not been tested in practice.”²⁰⁹ Scholars alike have noted the potential utility of second look sentencing in place of parole, along with the potential drawbacks.²¹⁰ The Code’s proposed sentencing revision uses a determinate sentencing structure. It includes sentencing modification both for juveniles and adults serving lengthy sentences.²¹¹ Assigning this function to the judiciary, as opposed to parole boards, is consistent with the Code’s general philosophy that sentencing is purely a “judicial function;” it acknowledges that the release decision is more closely related to sentencing than it is to correctional decision

²⁰⁵ See generally Russell, *supra* note 178 (exploring whether state parole processes meet *Graham's* application of the Eighth Amendment).

²⁰⁶ FLA. STAT. § 921.1402 (2014).

²⁰⁷ See, e.g., *Guzman v. State*, 110 So. 3d 480, 481 (Fla. Dist. Ct. App. 2013) (holding that *Graham* did not apply where juvenile received a sixty year sentence because it did not qualify as a life sentence or a *de facto* one); see also Schlessel, *supra* note 52, at 1038-57.

²⁰⁸ THE SENTENCING PROJECT, *supra* note 2, at 6.

²⁰⁹ MODEL PENAL CODE: SENTENCING § 305.6 cmt. a (Tentative Draft No. 2, 2011).

²¹⁰ See, e.g., Margaret Colgate Love & Cecelia Klingele, *First Thoughts about “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 861 (2011) (describing questions raised such as potential conflicts with indeterminacy and whether it may “even encourage judges to impose longer sentences in the first instance”).

²¹¹ MODEL PENAL CODE: SENTENCING § 6.06(4)-(5) (Tentative Draft No. 2, 2011).

making.²¹² But as the Code draft notes, as of 2011 when it was written, “[n]o provision closely similar to [the proposed sentencing modification] exists in any American jurisdiction.”²¹³ That is, until now.

To some extent, therefore, an approach like Florida’s creates uncharted waters for judges. That reality argues in favor of requiring a right to counsel and related procedural formalities and for providing clear guidance for consideration by the judiciary. Judges issue sentencing decisions as a primary function, but they do so at a fixed point in time that occurs shortly after conviction—not twenty or thirty years later. In large part, their decisions are based upon the seriousness of the crime and are within a range that is often prescribed by the legislature.²¹⁴ As Professor Douglas Berman discusses, in reality, the judicial role in the evaluation of offender characteristics is often limited by current sentencing philosophies and mandatory minimums.²¹⁵ When they are able to consider age, it seems to work against the juveniles. For example, the Supreme Court “treated youthfulness as a categorical mitigating factor, [but] many trial judges treat it as an aggravating factor when they sentence juvenile murderers.”²¹⁶ *Graham’s* focus on lessened culpability, redemption, and rehabilitation seems to contrast with that data.

In states where sentencing remains indeterminate, inmate release is primarily left to parole boards and judicial review is not the traditional method for release decisions that are made post-sentencing.²¹⁷ Moreover, some sentencing

²¹² *Id.* § 305.6 cmt. d.

²¹³ *Id.* § 305.6 cmt. a.

²¹⁴ See, e.g., Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 281 (2005). For example, the Sentencing Reform Act of 1984 states that, among other reasons, sentences should be crafted to reflect the seriousness of the crime and promote just punishment for the crime. 18 U.S.C. § 3553(a)(2) (2012). Similarly, while states employ differing models, the MODEL PENAL CODE: SENTENCING describes the relative shares of discretion over prison terms held by sentencing courts, parole boards, and corrections officials under the indeterminate sentencing structure advocated in the original Model Penal Code, demonstrating the lower portion given to the judiciary. MODEL PENAL CODE: SENTENCING § 6.06 cmt. a (Tentative Draft No. 2, 2011).

²¹⁵ Berman, *supra* note 214, at 281. “The new sentencing philosophies and goals reflected in the Federal Sentencing Guidelines and mandatory sentencing statutes have emphasized offense conduct at sentencing and have limited judges’ opportunity to consider offender characteristics.” *Id.*

²¹⁶ Feld, *supra* note 53, at 130.

²¹⁷ MODEL PENAL CODE: SENTENCING § 305.6 cmt. d (Tentative Draft No. 2, 2011) (noting that in most states, the judicial authority to reconsider a sentence expires within months after sentencing); cf. Reginald A. Wilkinson et. al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L.

structures give prosecutors significant power over sentencing and release which serves to decrease judicial authority to consider individual characteristics as the norm.²¹⁸

Next, it is often suggested that the judiciary may be more insulated from public criticism than the highly politicized process of parole administration.²¹⁹ On the other hand, judicial selection still occurs through elections in many states.²²⁰ Elected judges are less insulated from the political repercussions of their decisions.²²¹ In addition, even in jurisdictions without judicial elections, judicial reappointment and retention can be threatened by decisions that are politically unpopular.²²² These pressures could make a judge standing alone reticent to exercise the authority to release despite a meritorious application, particularly with a highly discretionary standard. The use of judicial panels and appellate review of the decisions can provide accountability and offset some of the potential weaknesses.²²³

Third, sentencing proceedings typically afford more procedural rights²²⁴ than parole release proceedings; although sentencing rights still remain “notoriously inadequate.”²²⁵ Where

REV. 609, 618 (2004) (discussing the judicial role in reentry in the context of drug courts and noting that in general “[c]ourts have traditionally played a marginal role in the process of offender reentry”).

²¹⁸ Douglas Berman, *Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 430 (2010) (discussing the power of prosecutors as “first look” sentencers particularly under mandatory minimum schemes); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1340 (2005) (noting that “increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors while limiting the power of judges”).

²¹⁹ See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 498 (2010) (proposing that judicial gatekeeping in early release programs is desirable because there is less political pressure on judges than parole boards).

²²⁰ For a complete list of judicial selection methods, see AM. BAR ASS'N., FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES 1, available at http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf.

²²¹ MODEL PENAL CODE: SENTENCING, § 305.6 cmt. d (Tentative Draft No. 2, 2011) (noting the reality that “judges in some jurisdictions are more politically vulnerable than in others”); see also *supra* note 220.

²²² See, e.g., MODEL PENAL CODE: SENTENCING § 305.6 cmt. d (Tentative Draft No. 2, 2011).

²²³ For example, the MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2011) suggests discretionary appellate review and issuance of guidelines by a sentencing authority.

²²⁴ Reitz, *supra* note 192, at 283; see also MODEL PENAL CODE: SENTENCING, § 305.6 cmt. a (Tentative Draft No. 2, 2011).

²²⁵ MODEL PENAL CODE: SENTENCING app. B (Tentative Draft No. 2, 2011); see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 548 (1993); see also Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 57 (2011) (critiquing lack of constitutional rights at sentencing and noting that “courts have

states choose sentencing modification proceedings for juvenile offender review for release, it is more likely that the minimum rights typically afforded at sentencing will be present.²²⁶ But it may not be automatic. If states strip these features from the process in the juvenile release context, it will minimize the perceived benefits of judicial sentencing modification. In Delaware, the legislation did not address the inclusion of these rights.²²⁷ Upon consideration of retroactive cases, however, it appears that courts have proceeded by adhering to sentencing norms at least in cases.

Fourth, judicial sentencing modification places the decision making primarily within one institution.²²⁸ An approach favoring judicial authority over sentencing-related decisions would view this as the most principled path.²²⁹ At the same time, there are compelling arguments that a release process benefits when there is institutional balance. For example, Professor Richard Bierschbach notes that the parole board serves as an institutional balance in the incarceration process at the back-end of sentencing.²³⁰ He analogizes it to *Apprendi's* role in balancing between the jury and the judiciary in sentencing on the front-end but also acknowledges its deficiencies.²³¹ On the other hand, he acknowledges that in its current form, the ability of the parole board to provide more fairness and accountability may be more of an aspiration than a reality. Moreover, it is important to note that in some states, the judge can override the parole board anyway,²³² diminishing the efficacy of the balance.

There is a second point related to the balance of power that is unique to the juvenile context: judges often make the decision to transfer a juvenile into adult court which is also relevant here in two ways.²³³ First, juvenile transfer plays a

repeatedly permitted the consideration of a number of constitutionally doubtful sentencing factors”).

²²⁶ See, e.g., Drinan, *supra* note 52, at 55.

²²⁷ See *supra* notes 150-56 and accompanying text (explaining Delaware's statute and related rules).

²²⁸ However, it is important to note that “the modern administration of criminal justice systems can often exacerbate the power imbalance that makes prosecutors the only significant sentencing actor in many non-capital cases.” Berman, *supra* note 218, at 433.

²²⁹ MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2011).

²³⁰ See Bierschbach, *supra* note 14, at 1780-81. The parole board, Professor Bierschbach posits, “injects an additional check into the sentencing process by fragmenting authority among different institutional actors.” *Id.* at 1780.

²³¹ *Id.*

²³² See, e.g., MICH. COMP. LAWS § 791.234(11) (2010).

²³³ Feld, *supra* note 1, at 472.

critical role in cases where juveniles are sentenced as adults.²³⁴ Judicial waiver is the most widely used mechanism of transfer.²³⁵ Under a typical state transfer statute, a judge is authorized to waive juvenile court jurisdiction, although sometimes, the prosecutor decides where the case will be filed unless the legislature has specifically excluded the crime from juvenile court jurisdiction.²³⁶ Usually, the judge holds a hearing on the youth's amenability to rehabilitation through the juvenile delinquency system and the threat he may pose to public safety.²³⁷ The transfer decision point is arguably even more critical to sentencing than any other decision that follows it.²³⁸ Therefore, the judiciary would be responsible for the decision at all three critical stages: transfer, sentencing, and modification.

Juvenile transfer is criticized for providing too much discretion to judges and for lacking standards.²³⁹ Professor Barry Feld has described the judicial transfer decision as an "individualized sentencing decision" and describes criticisms that the process leads to discriminatory and inconsistent application.²⁴⁰ In most jurisdictions, it is exceedingly rare to overturn a transfer decision. With the discretion comes the danger for bias and unpredictability. Therefore, sentencing modification procedures that lack sufficient substantive guidance or standards leaves the process open to the same criticisms traditionally leveled at the transfer hearing stage.

Based upon the philosophical and practical strengths and weaknesses inherent in either method of review, judicial versus administrative, new laws addressing juvenile sentencing reform should include substantive decision-making standards and include procedural requirements that will foster transparency and consistency. Under either format of review, an assessment of the risk posed by the former juvenile offender will occur and,

²³⁴ "A waiver decision is also a sentencing decision which represents a choice between the punitive dispositions of adult criminal courts and the nominally rehabilitative dispositions of the juvenile court." *Id.*

²³⁵ *Id.* at 488. Depending on the format of the state statute, judges and sometimes, prosecutors are empowered to make the transfer decision unless the legislature has made transfer to adult court automatic for the crime at issue. *Id.*

²³⁶ *Id.*; *id.* n.75.

²³⁷ *Id.* at 488.

²³⁸ *See, e.g., id.* at 489-90 & n.80.

²³⁹ *Id.* at 489 (describing criticisms by proponents of just deserts in sentencing which include the contention that there is no "valid or reliable clinical basis upon which juvenile court judges can make accurate amenability or dangerousness determinations and that the standardless discretion afforded to judges results in inconsistent and discriminatory application").

²⁴⁰ *Id.*

therefore, states should ensure that the decision maker is armed with reliable tools with which to make the decision.

III. GATEKEEPING AND RISK ASSESSMENT

A. *The Rise of Validated Risk Assessment in Corrections*

The difficulty in assessing or predicting risk of dangerousness has always been an integral part of the discussion of sentencing, parole, and incarceration, regardless of the tools or lack of tools informing the judgment.²⁴¹ Now, actuarial risk assessment instruments are emerging as a potentially powerful tool in carceral and criminal justice policy.²⁴² The Code's proposal considers the use of credible risk assessment tools as necessary for ethical and plausibility reasons.²⁴³ The mainstream use of this type of risk assessment instruments is fairly new. Their use is both welcome and controversial.²⁴⁴ Some states now require their use by law

²⁴¹ See JAMES Q. WILSON, *CRIME AND PUBLIC POLICY* 279 (1983) ("The entire criminal justice system is shot through at every stage (bail, probation, sentencing, and parole) with efforts at prediction, and necessarily so . . ."); Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 *YALE L.J.* 1408, 1410 (1979) (discussing the lack of valid predictive instruments during that time period and noting the prevalence of critics who "contend that predictions of criminal behavior are not accurate enough to use as a basis for a decision about a matter as important as liberty").

²⁴² Christopher Slobogin, *Risk Assessment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS*, *supra* note 15, at 196-97 [hereinafter *Risk Assessment*] (discussing the increasing role of formal risk assessment at sentencing); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 *FED. SENT'G REP.* 194, 195 (2004) (noting that expanded use of risk assessment instruments is receiving attention in literature and practice); Pari McGarraugh, Note, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at Parole*, 97 *MINN. L. REV.* 1079, 1080 (2013) (describing the "continued and accelerated use of risk assessment instruments" as inevitable); PAMELA CASEY ET AL., *NAT'L CENTER FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING 1* (2011), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Sentencing%20Probation/RNA%20Guide%20Final.ashx> (discussing the increased use of validated risk and needs assessment instruments as a valuable tool in criminal justice decision making); Joseph Walker, *State Parole Boards Use Software to Decide Which Inmates to Release*, *WALL ST. J.*, Oct. 11, 2013, <http://online.wsj.com/news/articles/SB10001424052702304626104579121251595240852> (discussing the growing trend and that, as a result, "[o]fficials accustomed to relying heavily on experience and intuition when making parole rulings now find they also must take computerized inmate assessments and personality tests into account").

²⁴³ MODEL PENAL CODE: SENTENCING § 6.06(d) (Tentative Draft No. 2, 2011).

²⁴⁴ See, e.g., Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 *SAN DIEGO L. REV.* 1127, 1154 (2011) [hereinafter *Prevention*] (discussing reasons why probability estimates involved with risk assessment can be flawed); Slobogin, *Risk Assessment*, *supra* note 242, at 203-09 (discussing constitutional issues associated with actuarial risk assessment,

either at sentencing or for parole release decision making.²⁴⁵ This includes three of the state's housing the highest numbers of juveniles sentenced to life, California, Louisiana, and Michigan. The instruments have been incorporated in various forms across jurisdictions at bail hearings, sentencing, parole release, and to determine levels of parole supervision.²⁴⁶ Some objections to their use are dependent upon the setting and whether there is an opportunity to inspect them.²⁴⁷ Their emergence means that they already play a significant role in release decision making in the post-*Graham* and *Miller* era. *Graham* reasons that juveniles have a greater capacity for change and therefore, that it is difficult to impose an appropriate sentence at one fixed point during childhood;²⁴⁸ as a result, decision makers are tasked with assessment of risk at some later fixed point.

The debate about actuarial risk assessment tools will continue for some time and a complete discussion about their strengths and weaknesses is beyond the scope of this Article. Therefore, this analysis focuses on the most pressing preliminary points about risk assessment tools and their role in back end release in the juvenile sentencing reform context. Given the increasing use of these tools in criminal justice, actuarial risk assessment is relevant whether states choose "second look" sentencing or parole review for juveniles who are sentenced as adults.

Risk assessment in the context of juvenile offenders is not new. In the past, there has been discussion about the potential judicial use of risk assessment instruments at transfer hearings to determine whether juveniles should be tried adult court.²⁴⁹ But their use in that context did not take

along with methodological and evidentiary concerns); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 151 (2005) (pointing out that "risk assessment methods[] have improved immensely over the past few decades"); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014) (critiquing the use of risk assessment instruments at sentencing based upon constitutional and policy grounds).

²⁴⁵ See, e.g., TENN. CODE ANN. § 41-1-412(a) (2014) (requiring the use of validated risk assessment instruments at sentencing); Walker, *supra* note 242 (describing that at least fifteen states have required their use by corrections decisions in some capacity).

²⁴⁶ CASEY ET AL., *supra* note 242, at 1.

²⁴⁷ See generally McGarraugh, *supra* note 242 (discussing why the use of risk assessment instruments is favorable at sentencing by courts but problematic in the parole release setting); MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a

²⁴⁸ *Graham v. Florida*, 560 U.S. 48, 74, 77 (2010).

²⁴⁹ See, e.g., Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 997 (1995) (discussing

root. Their use and application to this unique juvenile offender population that has or will age into adulthood while imprisoned for long sentences creates new questions.

Generally, risk assessment techniques are divided into three larger categories: “[U]nstructured clinical assessment, actuarial assessment, and structured professional judgment.”²⁵⁰ Research has shown that actuarial risk assessment and structured professional judgment are superior and less arbitrary than individual clinical assessment.²⁵¹ Such tools contribute consistency and predictability, removing arbitrariness from the decision-making process.²⁵² They produce “an objective estimate of violence risk” based upon statistical relationships between individual risk factors and criminal behavior.²⁵³ Actuarial risk assessment instruments themselves are also divided into three groups: those that are based upon static factors, those based upon dynamic factors, and a “third generation” type that is based upon both static and dynamic factors along with professional judgment.²⁵⁴ Static factors are those that cannot change, such as age at first arrest and employment history before incarceration.²⁵⁵ Dynamic factors consider behavior that can change over time and are “situational in nature.”²⁵⁶ Dynamic factors can include attitude and educational attainment. This Article focuses on the third

recommendations in the early 1990s for the use of objective “risk assessment” instruments during juvenile transfer hearings). Professor Feld noted that, at that time, the issue was left unresolved. *Id.* For a discussion of best practices related to risk assessment in the juvenile justice system, see GINA M. VINCENT ET AL, NAT’L YOUTH SCREENING & ASSESSMENT PROJECT, RISK ASSESSMENT IN JUVENILE JUSTICE: A GUIDEBOOK FOR IMPLEMENTATION 7 (2012), available at <http://www.nysap.us/Risk%20Guidebook.pdf> (explaining that the majority of research around risk assessment in juvenile justice has been done in the context of probation).

²⁵⁰ Slobogin, *Risk Assessment*, *supra* note 242, at 198.

²⁵¹ *Id.* at 200 (stating that more recent studies involving actuarial risk assessment and structured professional judgment “tend to produce much lower false positive rates” than unstructured evaluation); Austin, *supra* note 242, at 196 (discussing the increased accuracy of actuarial risk assessment tools); Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178, 180 (2006) (concluding that predictions using clinical assessment “have not been found to be accurate,” and that actuarial risk assessment “has been found to outperform human judgments” in “virtually all decision-making situations”).

²⁵² John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 408-09 (2006).

²⁵³ *Id.* at 405-06.

²⁵⁴ See D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 7-8 (2006); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 603 (2009).

²⁵⁵ Austin, *supra* note 242, at 196-97.

²⁵⁶ *Id.* at 196.

generation category that uses static and dynamic factors, and is considered more accurate than other tools.²⁵⁷

Two of the most widely adopted risk assessment tools in the criminal justice setting are Correctional Offender Management Profiling for Alternative Sanctions (Compass) and Level of Service Inventory-Revised (LSI-R).²⁵⁸ For example, Michigan and California parole boards use Compass.²⁵⁹ Compass, and other computerized tools like it, analyze up to one hundred factors about an offender to determine risk level.²⁶⁰ Factors considered in risk assessment include both static and dynamic factors about the offender.²⁶¹ Longitudinal studies about offenders identify attributes associated with risk of recidivism to form the basis of the factors.²⁶² These factors then create a numeric risk score.²⁶³ One advantage is that the use of validated actuarial instruments allows for the consideration of a broad range of variables in a systematic manner.

Their successful implementation relies heavily on the design, the type of information that is entered into the tool, and the training of those who administer it.²⁶⁴ Their influence is also largely dependent upon the user to determine the relevant threshold of acceptable risk.²⁶⁵ For example, the tool provides a generally suggested range that should guide a decision maker, but the decision-making entity must assign that cut off score and exercise discretion. The tools do not, therefore, fully supplant human judgment.

Nearly every state uses a risk assessment tool for at least one point of decision in corrections.²⁶⁶ The majority of parole boards now use some type of risk assessment instrument according to a national survey from 2008.²⁶⁷

²⁵⁷ Warren, *supra* note 254, at 603.

²⁵⁸ James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, 70 FED. PROBATION 58, 60 (2006).

²⁵⁹ See *In re Elias*, 811 N.W.2d 541, 548 (Mich. Ct. App. 2011) (discussing the use of COMPAS by the Michigan parole board).

²⁶⁰ *Id.*; see also Walker, *supra* note 242 (quoting one of the creators of COMPAS about its design).

²⁶¹ Shelley L. Brown et al., *The Dynamic Prediction of Criminal Recidivism: A Three-Wave Prospective Study*, 33 LAW & HUM. BEHAV. 25, 25 (2008).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ McGarraugh, *supra* note 242, at 1093.

²⁶⁵ *Id.* at 1094. "Risk instruments themselves do not necessarily resolve downstream policy choices of determining meaningful cutoffs in risk scores." *Id.*

²⁶⁶ Memorandum from the Vera Institute of Justice, Center on Sentencing and Corrections, to the Delaware Justice Reinvestment Task Force 4 (Oct. 12, 2011), available at http://ltgov.delaware.gov/taskforces/djrtf/DJRTF_Risk_Assessment_Memo.pdf.

²⁶⁷ SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RESEARCH ON YOUTH & SOC. POL'Y, FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES 1,

Actuarial risk assessment has also been incorporated into various stages of judicial decision-making.²⁶⁸ Moreover, a survey of chief judges in state courts administered by the National Center for State Courts revealed that the judiciary views the incorporation of risk assessment tools as desirable and among the most important sentencing reform priorities.²⁶⁹ Finally, the Model Penal Code's draft sentencing provisions employ a determinate sentencing model and suggest that validated risk assessment instruments should be used at the sentencing stage, as well.²⁷⁰

The use of actuarial risk assessment instruments by parole boards and judges has direct applicability to the current discussions about juvenile sentencing reform under *Graham* and *Miller*. Some state laws require the parole board to use them, including three of the states that house the largest numbers of juvenile lifers. For example, California's Board of Parole uses actuarial risk assessment tools and is now required to use them for juvenile offender release decisions.²⁷¹ Louisiana similarly requires the use of a validated risk assessment instrument in its *Graham* compliance legislation.²⁷² In

(2008), available at <http://paroleboard.arkansas.gov/Resources/Documents/Publications/2008APASurvey.pdf> (reporting that a national survey found that 87% of parole releasing authorities reported using a risk assessment tool). It should be noted, however, that the survey did not specify whether these are the newer form of actuarial software programs. *Id.* It has been reported that the types of tools that states use vary from manual checklists to computerized actuarial programs. See Tammy Meredith, et al., *Developing and Implementing Automated Risk Assessments in Parole*, 9 JUST. RES. & POL'Y 1, 1 (2007). California and New York have both adopted Compas. See CAL. DEPT OF CORR. & REHAB., CAL. RISK ASSESSMENT FACT SHEET, available at http://www.cdcr.ca.gov/rehabilitation/docs/FS_COMPAS_Final_4-15-09.pdf; Walker, *supra* note 242.

²⁶⁸ CASEY ET AL., *supra* note 242, at 1; Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 Fed. Sent'g Rep. 153, 157 (2010) (noting that as of 2010, there were at least ten states where sentencing judges use risk assessment instruments); McGarraugh, *supra* note 242, at 1090.

²⁶⁹ Warren, *supra* note 254, at 587 (noting that a recent survey conducted by the National Center for State Courts found that state chief justices believed that among the two most important sentencing reform objectives are promotion of public safety and reduced recidivism through expanded use of evidence-based practices, and offender risk and needs assessment tools); see, e.g., Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1408 (2008) (discussing why risk assessment is an appropriate and desirable tool for those involved in sentencing).

²⁷⁰ MODEL PENAL CODE: SENTENCING § 6B.09(2) (Tentative Draft No. 2, 2011). Because the revised code advances the use of a determinative sentencing scheme, there would not be an occasion for a parole releasing authority to do so. *Id.*

²⁷¹ S.B. 260, 2013 Leg. Reg. Sess. (Cal. 2013).

²⁷² LA. REV. STAT. § 15:574.2(C)(2)(f) (2012) (requiring that the offender obtains a score indicating low risk through a validated risk assessment instrument).

Michigan, the Parole Board policies already required use of validated risk assessment instruments in parole decisions.²⁷³

Thus far, state reforms using “second look” sentencing modification, placing judges in the decision-making role, have not formally required the use of risk assessment instruments in the legislation. Florida’s legislation permits its use among the suggested factors for court consideration without requiring it;²⁷⁴ In Delaware, the court rules promulgated in relation to *Miller* permit the judge to request that the Department of Corrections specifically certify that the offender does not pose a substantial risk to the community.²⁷⁵ However, the Delaware statute and rules are silent as to the basis for the Department certification and the court’s subsequent decision.²⁷⁶

While the use of actuarial risk assessment is viewed as potentially beneficial, there are legitimate questions about the current capacity for use with this population. To ensure accuracy, best practices dictate that jurisdictions must ensure that the instruments are valid and tested based upon the populations to which they will be applied.²⁷⁷ This point has particular application where, as here, a small subset of prisoners is concerned; the number of inmates who are incarcerated in their teens and go on to serve lengthy sentences in prison in any given community is statistically small. Additionally, research has shown that such instruments have typically been developed using a white male population and for one widely used instrument, the males were Canadian.²⁷⁸ Therefore, despite some of the advantages, there are limitations, including many untested aspects of these assessments in practice.²⁷⁹ Nevertheless, the limitations can be minimized by ensuring the chosen instrument is reliable and valid and ensuring that it is administered properly.²⁸⁰

In short, risk assessment instruments are problematic when they are used “on populations for which they were not

²⁷³ See *In re Elias*, 811 N.W.2d 541, 548 (Mich. Ct. App. 2011) (discussing the Michigan parole process in detail and its policy to use the COMPAS risk assessment tool).

²⁷⁴ FLA. STAT. § 921.1402 (2014).

²⁷⁵ DEL. SUPER. CT. R. CRIM. P. 35A (d)(1).

²⁷⁶ *Id.*

²⁷⁷ Gottfredson & Moriarty, *supra* note 251, at 185 (stating that “samples . . . must be representative of the population on which the device is intended to be used”); McGarraugh, *supra* note 242, at 1093.

²⁷⁸ Slobogin, *Risk Assessment*, *supra* note 242, at 207-08.

²⁷⁹ Slobogin, *Prevention*, *supra* note 244, at 1154 (discussing common criticisms of actuarial risk assessment instruments).

²⁸⁰ Austin, *supra* note 242, at 196-97.

designed.”²⁸¹ There are no instruments in use that have currently been tested upon this unique population. Risk assessment instruments can benefit criminal justice decision making in significant ways.²⁸² But states may find themselves in a “catch twenty-two” where they are required by law to use actuarial risk assessment instruments on a population for which there is not yet an appropriate instrument.²⁸³

Next, literature suggests that when actuarial risk assessment instruments are used in criminal justice, the person assessed should have counsel and an opportunity to examine the instrument’s application, for example, at a hearing.²⁸⁴ Under current law, offenders in many states do not receive a public parole hearing.²⁸⁵ In addition, only a few states provide for the appointment of counsel at parole hearings.²⁸⁶

Finally, depending on the jurisdiction, the factors used to assess risk level include commonly considered characteristics, such as whether the offender is married, age at arrest, past employment, education, and assessment of the applicant’s attitude.²⁸⁷ The application of those factors to this juvenile population is misplaced. The next two subsections consider certain factors used in risk assessment decisions that deserve close attention considering their effect on the risk scores of juvenile offenders serving lengthy sentences.

B. Age and Risk Assessment

Under *Graham* and *Miller*, the youth of the offender is viewed as a factor suggesting a greater likelihood of redemption.²⁸⁸ Yet, in parole release risk assessment, age generally works to increase the potential risk scores of those who offend at a young age. For example, age at the time of offense typically elevates the level of risk associated with that

²⁸¹ Gottfredson & Moriarty, *supra* note 251, at 190; *see also* Slobogin, *Risk Assessment*, *supra* note 242, at 208.

²⁸² *See, e.g.*, MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (Tentative Draft No. 2, 2011) (stating that social science research supports the conclusion that actuarial risk assessment instruments are superior to clinical judgments overall).

²⁸³ Even before California implemented juvenile release reform, its previous actuarial instrument received criticism for its lack of empirical support. Slobogin, *Risk Assessment*, *supra* note 242, at 208.

²⁸⁴ *See* MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (Tentative Draft No. 2, 2011); McGarraugh, *supra* note 242, at 1106.

²⁸⁵ Russell, *supra* note 178, at 421.

²⁸⁶ *Id.*

²⁸⁷ Slobogin, *Risk Assessment*, *supra* note 242, at 198-99 (discussing commonly used risk assessment tools and the factors that they include to measure level of risk).

²⁸⁸ *Miller v. Alabama*, 132 S. Ct. 2455, 2464-65 (2012).

offender.²⁸⁹ On the one hand, the offender's youth makes him less blameworthy and less culpable for his actions because he has a greater potential for change;²⁹⁰ on the other hand, data driven risk assessment instruments are based upon empirical evidence suggesting that early onset of criminal or delinquent activity correlates with a greater likelihood of future criminal behavior.²⁹¹ As a result, the age at arrest is a common consideration in risk assessment and is usually among static factors that are considered to make release decisions. In that way, a minor's young age at the time of the crime underlying the conviction increases his risk level.

Age is considered in a variety of ways during the parole review process. Age can fall in both the dynamic and static categories of factors. In the static category of factors, some states consider the age at the time of the triggering offense,²⁹² and others take into account the age at first arrest.²⁹³ For example, applicants would receive increased points in their risk scores based upon youth at first arrest or youth at the time of arrest for the current conviction.²⁹⁴ In a survey of parole releasing authorities, administrators were asked to rate on a scale of one to five, with five being the most impactful, how much certain factors impacted their decision.²⁹⁵ While crime severity and crime type were most influential in this survey, the consideration of "age . . . at time of the crime" was also ranked high in impact.²⁹⁶ The current age of the offender is a

²⁸⁹ See, e.g., Slobogin, *Risk Assessment*, *supra* note 242, at 198 (discussing the Violence Risk Appraisal Guide (VRAG) and its inclusion of age at the time of the triggering offense as a risk factor).

²⁹⁰ *Miller*, 132 S. Ct. at 2464.

²⁹¹ Austin, *supra* note 242, at 197 tbl.5 (listing risk factors that predict recidivism, including early age at first arrest).

²⁹² See, e.g., Slobogin, *Risk Assessment*, *supra* note 242, at 198 (discussing the Violence Risk Appraisal Guide (VRAG) and its inclusion of age at the time of the triggering offense as a risk factor).

²⁹³ Austin, *supra* note 242, at 197 tbl.5 (listing risk factors that predict recidivism, including early age at first arrest); see, e.g., SHARON LANSING, NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY: EXAMINING THE RECIDIVISM SCALE'S EFFECTIVENESS AND PREDICTIVE ACCURACY 2 (2012) (including age at first arrest among New York's COMPAS based considerations).

²⁹⁴ For example, in Nevada, an applicant's risk score increases two points if the current conviction occurred before the person was nineteen. See Nevada Department of Corrections Risk Assessment Form [hereinafter Risk Assessment Form] (on file with author).

²⁹⁵ KINNEVY & CAPLAN, *supra* note 267, at 18-19.

²⁹⁶ *Id.* at 18-19. While that survey did not delineate in what way it impacted the decision maker, age at arrest generally was included as a heightened risk factor. For example, review of available state instruments that include age at the time of the offense demonstrates that commission of the crime at a younger age weighs against the release of the offender. See, e.g., Risk Assessment Form, *supra* note 294.

dynamic factor which appears to be a standard consideration among release decision makers; that is because, generally, the risk that a prisoner will reoffend diminishes over time. Therefore, the risk score associated with an inmate's current age decreases over time.

Because age at first arrest and age at the time of the current offense are both static factors, they will continue to weigh against the prior juvenile offender's application for release. To illustrate how this plays out in practice, consider Nevada's risk scoring process. Of Nevada's prisoners serving parole eligible life sentences, twelve percent of them committed their crimes as juveniles.²⁹⁷ That is the highest percentage of any state.²⁹⁸ In Nevada, an offender's risk score increases by two points if he committed the crime for which he is incarcerated when he was under age nineteen.²⁹⁹ In comparison, he may receive a one point risk reduction if he completes an employment or education program that is certified by the state department of corrections.³⁰⁰ Therefore, program completion does not fully mitigate the impact of his early age of arrest.

C. *Other Risk Assessment Factors and Their Impact on Juvenile Offenders*

Next, it is common for risk assessment to consider former employment history and even marital status.³⁰¹ Like age, these factors will weigh against the risk score for a juvenile offender who will be unlikely to demonstrate a significant work history or marital relationship. Using Nevada again as an example, a male who is arrested as a teenager with no employment history, and some history of alcohol or drug abuse, will score a six in the static factors in Nevada's risk assessment form thus placing him as a mid-level risk.³⁰² This is regardless of his crime and the number of years that he has served his sentence. One criticism in risk assessment is a "heavy reliance on static variables to the exclusion, oftentimes, of dynamic variables."³⁰³ Tools or methods that leave out

²⁹⁷ THE SENTENCING PROJECT, *supra* note 2, at 12.

²⁹⁸ *Id.*

²⁹⁹ Risk Assessment Form, *supra* note 294.

³⁰⁰ *Id.*

³⁰¹ Slobogin, *Risk Assessment*, *supra* note 242, at 198-99.

³⁰² Risk Assessment Form, *supra* note 294.

³⁰³ Gottfredson & Moriarty, *supra* note 251, at 191.

dynamic factors alter the process for this class of offenders given the way that the static factors typically put them in a high risk category. However, variables that reliably predict risk cannot be disregarded; demanding more attention to the question is warranted.³⁰⁴

On the whole, there is a disconnect between the life of a juvenile and some traditional risk factors. States should reconsider the ways in which they will calculate risk for juveniles serving lengthy sentences to acknowledge the differences between a person who became incarcerated as an adult versus as a child.³⁰⁵ *Graham* and *Miller* require a decision maker to clearly assign weight to the role of age in release consideration and they need guidance about how to do it. “A parole board’s job is to implement policy, not create it, but without clear policy guidance, board decisions will themselves effectively establish state policy.”³⁰⁶ If not properly guided, the system of review runs the risk of perpetuating the status quo which does not adhere to the underlying premise in *Graham*—namely that commission of crime at a young age does not leave one without the possibility of rehabilitation.

IV. JUVENILE OFFENDER RELEASE DECISION MAKING

Whether the judiciary or administrative parole board functions as the official gatekeeper for eventual release, the process should provide clear guidance about the substance of decisions and procedural norms. The process should include the careful consideration of implementation of actuarial risk assessment instruments, procedural requirements that will facilitate transparency and quality of decisions, and clarity about the rationale and basis for the development of offender release policies. Finally, opportunities for review should not be waivable in bargaining at the plea stage. A right to review for release is consistent with the recognition that the actions of juveniles “are less likely to be evidence of ‘irretrievably depraved character’” than are the actions of adults.³⁰⁷

³⁰⁴ See also Slobogin, *Risk Assessment*, *supra* note 242, at 204-05 (discussing additional constitutional and philosophical issues associated with the consideration of a range of risk factors such as age, gender, employment, and education status).

³⁰⁵ Cf. *id.* at 205-06 (noting that official use of age, marital status, and employment “may disproportionately taint” young, single, unemployed males “in the eyes of parole officers who make risk assessments, police officers who make arrests, and the public at large”).

³⁰⁶ W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL’Y REV. 395, 405 (2011).

³⁰⁷ *Graham*, 560 U.S. at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

A. *Substantive Criteria*

Laws should provide clear criteria for decision makers about how to account for the hallmarks of youth to inform the gatekeeping function. *Miller* provides a prescriptive list of factors that courts can consider during the individual sentencing hearings. But it is less clear how to account for age on the back end of release decision making. Early results in California are instructive because it has provided for retroactive consideration of most juvenile offenders with lengthy sentences. Therefore, it mirrors what is to come in future decades. Results there suggest that the effect of the specific criteria and rationale focused on development in the legislation, in tandem with a politically favorable environment, has been impactful.³⁰⁸ In the first group of offenders that the parole board considered between the effective date of S.B. 260 and February 2014, twelve out of twenty-one applicants were granted a parole release date.³⁰⁹ These results stand in stark contrast when compared to the annual rates of decisions granting parole release to life sentenced offenders in California in prior years—which in some years was as low as zero percent. A lawsuit against the state that required a reduction of California’s prison population³¹⁰ created a climate less hostile to new release policies. But some people involved with reform on the ground acknowledge that the lawsuit and court order to reduce the prison population alone would not have led to the same result for juvenile offenders; the instruction in the legislation that decision makers must give great weight to the age of the offender provided specific and necessary guidance to the parole board.³¹¹ Other state legislatures have employed similar criteria and rationales in their juvenile sentencing reform proposals, both for parole release and judicial sentencing modification.³¹²

In contrast to these examples, Iowa’s legislation made no changes to the release decision making criteria for parole boards when they consider release of those who were committed as

³⁰⁸ Interview with Elizabeth Calvin, Human Rights Watch (Feb. 18, 2014) (notes on file with author).

³⁰⁹ *Id.*

³¹⁰ *Brown v. Plata*, 131 S. Ct. 1910 (2011).

³¹¹ Interview with Elizabeth Calvin, *supra* note 308.

³¹² *See, e.g.*, FLA. STAT. § 921.1402(6)(a), (b), (e), (g); H.B. 2116, 2014 Leg. Sess. (Haw. 2014); H.B. 4210, 2014 Leg., Reg. Sess. (W. Va. 2014).

juveniles.³¹³ Similarly, Louisiana's changes were minimal and did not provide specific requirements about the administration of the required risk assessment instrument by the parole board.

³¹⁴ Reform should tailor the factors used for release consideration. For example, the use of traditional indicators such as employment history, marital status, and educational achievement prior to incarceration have less meaning and erect artificial barriers when they are applied to a person who would not have had an opportunity to participate in those social institutions before incarceration purely because of young age.

Next, parole boards often report basing release decisions upon the triggering offense.³¹⁵ One state study found that the nature of the underlying offense was the primary reason that judges gave when they exercised their judicial veto of parole.³¹⁶ The triggering offense will always be in the foreground; but if it is used as the exclusive reason to deny parole or sentencing modification, then there is no opportunity for "demonstrated maturity and rehabilitation."³¹⁷ The severity of the offense will already have been considered, rightly so, at sentencing.

Finally, implementation of validated risk assessment instruments should be carefully considered to improve fairness and quality of decision making. Their use may allow for policy and decision makers to better address the public's concerns about safety by informing the release decision. For example, California's law not only provides criteria for the parole board but specifically addresses substance and procedure related to risk assessment instruments.³¹⁸ This is not the case in Michigan or Louisiana. Its juvenile sentencing legislation is cognizant of validated risk assessment use in two ways.³¹⁹ First, it requires that it must be administered by a licensed psychologist. Second, the Act requires that the assessment instrument take into account "hallmark features of youth and any subsequent growth and increased maturity of the prisoner."³²⁰ Florida's new law requires the judge to consider the results of "any mental health

³¹³ IOWA CODE § 902.1(2)(a) (2011), *invalidated by* State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (revising the number of years a defendant must serve before becoming parole eligible); IOWA CODE § 906.5(3) (stating the relevant factors for consideration) (2013).

³¹⁴ See *infra* notes 96-101 and accompanying text.

³¹⁵ See Ball, *supra* note 306, at 397-98.

³¹⁶ CITIZENS ALLIANCE, *supra* note 132, at 1.

³¹⁷ Graham v. Florida, 560 U.S. 48, 76 (2010).

³¹⁸ CAL. PENAL CODE § 4801 (West 2014).

³¹⁹ California's parole release system uses the Compas tool which has not yet been tested upon this subset of offenders. CAL. DEP'T OF CORR. & REHAB., *supra* note 267.

³²⁰ CAL. PENAL CODE § 4801(c).

assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.”³²¹ The judge is not guaranteed to receive a risk assessment for decision-making purposes.

Use of a formal risk assessment by the judiciary is consistent with the Model Penal Code’s proposed sentencing provisions.³²² Judges are in a unique procedural posture when they are called to make a risk assessment decades after the initial sentencing has occurred. Reviewing release fitness many years after the original crime is a task which judges have not traditionally been called upon to perform. Finally, if they are utilized, actuarial risk assessment instruments should be implemented in ways that maximize their accuracy and predictability for this population.³²³

B. Procedure

Along with clear substantive criteria, meaningful review for all lengthy sentences courts impose upon juvenile offenders must include procedural due process.³²⁴ This includes the provision of counsel, some form of a public hearing with a recorded decision, and a notification process to those who become eligible. Finally, the right to a second look hearing should not be waivable.

As a preliminary point, these minimal procedural requirements do not necessarily impact release decision making on their own. Consider California’s parole system more broadly: it is one of the few states where offenders receive appointment of counsel, public hearings, access to all non-confidential documents, an explanation for the reasons of parole denial, and a transcript of the hearing proceedings.³²⁵ Yet, release rates in California have historically been quite low, fluctuating between 0% in some years to a high of 20%.³²⁶ Between 1999 and 2002, the parole board held 12,000 release or “suitability” hearings; out of those 12,000, the board found only 140 applicants suitable for release.³²⁷ Of those 140 applicants, then-Governor Gray Davis allowed two to be released on parole.³²⁸ In 2009, the parole board

³²¹ FLA. STAT. § 921.1402 (2014) (emphasis added).

³²² MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a

³²³ Slobogin, *Risk Assessment*, *supra* note 242, at 207-08 (discussing some of the ways that methodological and evidentiary concerns about the use of actuarial risk assessment can be mitigated).

³²⁴ See Russell, *supra* note 178, at 421-28 (arguing that current state parole processes do not provide a meaningful opportunity for release under Graham).

³²⁵ WEISBERG ET AL., *supra* note 45, at 8.

³²⁶ *Id.* at 4.

³²⁷ Ball, *supra* note 194, at 918.

³²⁸ *Id.*

voted to release 8% of life sentenced offenders who were eligible for a hearing.³²⁹ In 2013, the parole board voted to grant parole release in about 14% of life sentenced offenders.³³⁰ That is the highest percentage granted in recent years. Furthermore, the deferential review standard and lack of required due process rights makes the decisions nearly impossible to reverse.³³¹ Therefore, procedural transparency alone cannot ensure predictability or fairness. Yet, the effect of substantive guidelines will be thwarted without any accompanying procedural checks.

Public hearings would serve to increase transparency and arguably address some of the mistrust in back end release decisions that have hindered the process in the past.³³² Second, counsel is better equipped than offenders to ensure that a review opportunity is meaningful by assisting in the compilation of the applicant's case, providing additional expert information, and counseling the applicant about the process. In Delaware, for example, early implementation of its retroactive *Miller* statute has led to resentencing hearings that included clinical expert testimony coordinated by special teams created to work in preparation of the cases.³³³ As a result, the court had a well-developed record to consider and the courts have granted some applications for release.³³⁴ In some instances, prosecutors and defenders were able to work out agreements in advance of the hearing procedure.³³⁵ In the judicial context, the presence of counsel better ensures the party's case is correctly and fairly represented.³³⁶ But it also avoids ethical pressures on judges who must protect the pro se party's rights while also seeking to

³²⁹ CAL. DEP'T OF CORR. & REHAB., BOARD OF PAROLE HEARINGS, LIFER SCHEDULER AND TRACKING SYSTEM FOR 2009, available at http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2009.pdf (reporting that there were 6225 hearings and the board voted to grant parole in 541 cases).

³³⁰ CAL. DEP'T OF CORR. & REHAB., BOARD OF PAROLE HEARINGS, LIFER SCHEDULER AND TRACKING SYSTEM FOR 2013, available at http://www.cdcr.ca.gov/BOPH/docs/LSTS_Workload_CY2013.pdf (reporting that there were 4171 hearings and the board voted to grant parole in 590 cases).

³³¹ Ball, *supra* note 194, at 920, 958.

³³² Cf. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 445 (2008) (discussing the importance of transparency and legitimacy in the criminal justice system).

³³³ Interview with Lisa Minutola, *supra* note 161.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Cf. Dan Gustafson et al., *Pro Se Litigation and the Costs of Access to Justice*, 39 WM. MITCHELL L. REV. 32, 38 (2012) ("Viewed as a whole, the judges' responses [to a judicial survey] suggest that both substantive and procedural problems are common in *pro se* cases.").

be impartial.³³⁷ In addition, representation cuts back on administrative stressors on the court that are often caused when parties are not represented.³³⁸

Next, recorded decisions—whether judicial or administrative—can contribute to better decision making. Research has shown that requiring explanations of decisions can diminish some forms of cognitive bias.³³⁹ In the judicial realm, where use of judicial second look provisions creates a process without analogue, it is arguably even more important to foster access to related decisions. Consider one court in Wyoming: in its decision following a resentencing hearing for a juvenile offender under *Miller*, the court stated “while it is easy for the appellate courts to list these factors and make a cookie cutter approach to this, it’s never as easy to apply them to the actual facts of this case.”³⁴⁰ Access among judges could promote information sharing as courts venture into this newly created territory.³⁴¹ In addition, recorded decision making in criminal justice can have a positive impact on the public’s perception of legitimacy.³⁴² Professor Cecelia Klingele argues that compassionate release policies for aging and dying inmates have faltered because of public backlash and misunderstanding about the substance and methods of release procedures.³⁴³ Therefore, recorded decisions are equally desirable when the

³³⁷ “The evolving bench-bar debate over legal, procedural, and professional dynamics in [pro se] cases highlights the ethical and political perils confronting judges who work files with self-represented parties.” Honorable Annette J. Scieszinski, *Not on My Watch: One Judge’s Mantra to Ensure Access to Justice*, 61 DRAKE L. REV. 817, 825 (2013).

³³⁸ Gustafson et al., *supra* note 336, at 37.

³³⁹ Michael M. O’Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 475 (2009) (discussing in the sentencing context how “an explanation requirement has been found, in and of itself, to diminish some forms of cognitive bias[,]” and the desirability of such requirement to diminish decisions that are overly reliant on the federal sentencing guidelines); *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 26-28 (2007) (describing the benefits of explanations that form the basis of judicial decision making).

³⁴⁰ *Bear Cloud v. State*, 334 P.3d 132, 136 (Wyo. 2014).

³⁴¹ For a related discussion in the parole context, *see, e.g., In re Elias*, 811 N.W.2d 541, 543 (Mich. Ct. App. 2011). (“There is scant published caselaw analyzing the multipart mechanics of Michigan’s current parole process. Consequently, circuit courts lack useful precedent when called upon to review the propriety of a parole decision. We take this opportunity to explain the elements culminating in a parole decision and offer guidance to circuit courts confronted with a parole-decision challenge.”).

³⁴² Norris, *supra* note 26, at 1610 (advocating recorded decision making in another context on the theory that “transparency through logically explained and publicly available decisions may make earned release systems more acceptable to the public and, thus, more sustainable”); O’Hear, *supra* note 339, at 475-76; *see also* Klingele, *supra* note 219, at 497-98.

³⁴³ Klingele, *supra* note 25, at 452-53 (noting, among other points, that “[e]arly release failed in large part because of the allegation that release decisions were ‘secret’ and that they thwarted judicially-imposed sentences”).

applicant's request is granted. Finally, the benefits of actuarial risk assessment instruments are more fully realized when procedural safeguards accompany their use.³⁴⁴

Once a review procedure is created, it should not be subject to plea bargaining. Consider Oregon, one of the only jurisdictions with an existing pre-*Graham* second looking sentencing procedure for juvenile offenders. Pressure at the plea bargaining stage to waive the right to review arguably minimized its utility. There, the second look provision does not apply to juveniles sentenced to crimes among the most serious.³⁴⁵ Oregon's law requires mandatory minimums for crimes ranging from second degree assault to homicide,³⁴⁶ precluding those individuals from relief under the second look law. Most juveniles sentenced as adults, therefore, were not eligible for relief; but even for those who were, the second look measure was underutilized in part because of waiver during plea agreements.³⁴⁷ When the legislature assigns a right to judicial second look hearings, pressure to waive or postpone the initial release review could ultimately render the provisions meaningless.

C. *Rationale and Public Legitimacy*

The rationale underlying policy choices in juvenile sentencing reform should be clearly stated and connected to implementation with an eye toward increasing public legitimacy and acceptance of less severe sentencing practices. This is true for two reasons. First, in the absence of informed discourse, juvenile justice policies are vulnerable to "distorted debates, retributive tendencies and curtailing of children's procedural and substantive rights in the guise of safety and justice."³⁴⁸ The disconnect between perception and reality exacerbates the

³⁴⁴ MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (Tentative Draft No. 2, 2011) (noting that the proposed revisions to the Code limit the use of validated risk assessment instruments to sentencing where there is an opportunity to inspect them and a constitutional right to counsel).

³⁴⁵ ZIEDENBERG ET AL., *supra* note 147, at 6, 60 (2011) (describing that only youth convicted of crimes that do not fall under Measure 11 are eligible for Second Look hearings). Oregon's Measure 11 law requires mandatory minimums for crimes ranging from second degree assault to homicide.

³⁴⁶ *Id.* at 6, 60; OR. REV. STAT. § 137.707 (2011).

³⁴⁷ ZIEDENBERG ET AL., *supra* note 147, at 60. ("The question of whether prosecutors are using the leverage of the charging and plea process to take away a young person's opportunity for a Second Look is an issue of concern worthy of more study.")

³⁴⁸ DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY 124 (2009) (discussing how distorted realities impact the decision to charge young children with crimes rather than handle the problem outside of the criminal justice system).

challenges for implementation of juvenile sentencing and release reform, as distortions have in the past.³⁴⁹ Juvenile justice policy has a long history of guidance by moral panic rather than by design.³⁵⁰ Transfer of juveniles to adult court is one powerful example of that.³⁵¹

Second, historically the legal system tends to forgo responsibility or hope of changing behavior of juveniles like Terrance Graham. The public's misperception about violent crime and juveniles³⁵² has, in part, served to abdicate a sense of collective moral responsibility.³⁵³ Through isolation or illumination of the least sympathetic aspects of the juvenile, society is able to ignore the aspects of a juvenile's life that invoke "a desire to help," which "serves to reinforce the severity of public attitudes" to punish young offenders.³⁵⁴ In contrast, *Graham* and *Miller* provide theoretical justifications for reexamining application of the most severe punishments, as well as, mandatory and lengthy sentences to juveniles. On a deeper level, the premise contained within them, that juvenile offenders may be less blameworthy than adults, challenges the ability of the public to collectively forgo a sense of moral responsibility.³⁵⁵ Therefore, it will be difficult to push against that reality and implement change if the rationale for new policies is not transparent to the public.³⁵⁶ Social psychology research provides support for the principle that the public is more willing to accept outcomes and accept legitimacy of

³⁴⁹ Cf. Feld, *supra* note 249, at 982 (describing the influence of mass media coverage of juvenile crime and its influence the legislative process).

³⁵⁰ CIPRIANI, *supra* note 348, at 115-18; Susan Ruddick, *Abnormal, the "New Normal," and Destabilizing Discourses of Rights*, 18 PUB. CULTURE 53, 56 (2006).

³⁵¹ Feld, *supra* note 249, at 966.

³⁵² See CIPRIANI, *supra* note 348, at 115-18 (noting that since the late 1970s, there has been a disconnect between "the successive moral panics over youth crime and the actual levels of youth crime" in the United Kingdom and the United States); Lina Guzman et al., *How Children Are Doing: The Mismatch Between Public Perception and Statistical Reality*, CHILD TRENDS RESEARCH BRIEF 1, 4 (2003) (illustrating that despite ten years of falling rates of crime among youth and the lowest rates in twenty-five years, a national poll revealed that sixty-six percent of adults believed that it had increased).

³⁵³ Cf. CIPRIANI, *supra* note 348, at 13.

³⁵⁴ Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY. L. REV. 659, 674 (1970).

³⁵⁵ CIPRIANI, *supra* note 348, at 15 (acknowledging that criminal law is "an anodyne for the collective social conscience: if the criminal is morally responsible, then the public is not, and any underlying collective moral responsibility remains out of sight").

³⁵⁶ Cf. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (noting that issues of process dominate the public's view of legitimacy of the courts, police, and social regulatory actions). "Studies again suggest that the public is very sensitive to the manner in which authorities exercise their authority—that is, to issues of procedural justice." *Id.*

decisions if they view the process as one that is fair.³⁵⁷ Relatedly, “[w]hen the public is unwilling to give authorities the discretion to make judgments, the actions of legal authorities are constrained.”³⁵⁸ Moreover, transparency is recognized as a means to improve public perception of legitimacy at various points of the criminal justice process.³⁵⁹

Pennsylvania, Michigan, California, and Florida—all of which have significant numbers of offenders directly affected by *Graham* and *Miller*—provide examples of the significant practical obstacles toward release reform. Pennsylvania has the highest number of juvenile lifers and passed laws that test the bare minimum of the Court’s requirements. Michigan has the second highest number of juveniles serving mandatory life sentences.³⁶⁰ It is estimated that it will cost the state \$370 million to incarcerate the more than 300 offenders who are serving mandatory life sentences they received as juveniles.³⁶¹ But cost alone does not mitigate concern for public safety nor does it address moral objections.³⁶² For example, Michigan’s elected Attorney General remains staunchly opposed to the review release plan laid out in the federal court litigation.³⁶³ Moreover, the legislature opposes retroactive reconsideration of its juveniles sentenced to mandatory life sentences.³⁶⁴

³⁵⁷ *Id.* at 292.

³⁵⁸ *Id.*

³⁵⁹ *Cf.* O’Hear, *supra* note 332, at 445 (arguing that increased transparency in the plea bargaining setting could improve its perceived legitimacy); Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 568 (1994).

³⁶⁰ *See* Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole, 1 (2009), available at <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole>.

³⁶¹ *Study: Teen Life Terms Costly*, THE DETROIT NEWS, Sept. 14, 2004, available at 2004 WLNR 23096649.

³⁶² Michael Tonry, *Making Peace, Not a Desert*, 10 CRIMINOLOGY & PUB. POL’Y 637, 637-38 (2011) (cost is not a primary concern for those who favor harsher sentencing policies).

³⁶³ *See* Steve Carmody, *Michigan Attorney General Appeals Order for Parole Hearings for Teen Offenders Serving Life in Jail*, MICHIGAN RADIO (Dec. 2, 2013, 2:20 PM), <http://michiganradio.org/post/michigan-attorney-general-appeals-order-parole-hearings-teen-offenders-serving-life-jail>.

³⁶⁴ S.B. 319, 2014 Mich. Legis. Serv., P.A. 22. This legislation does not apply the new standard retroactively to the 350-360 current prisoners in this category. *Id.* Instead, it includes a trigger provision so that it would be retroactive only if the Supreme Court rules that is must apply retroactively. *Id.*; *see also* David Eggert, *Michigan House OKs Sentencing Rules for Young Killers*, DAILY TRIBUNE (Feb. 5, 2014), <http://www.dailytribune.com/government-and-politics/20140205/michigan-house-oks-sentencing-rules-for-young-killers> (describing the divisions by party lines about whether to pass legislation that would allow retroactive application for current inmates); Jonathan Oosting, *Michigan Juvenile Lifers: House OKs ‘Retroactivity*

And yet, there is reason to believe in a public willingness to consider well-reasoned policies that are “smart on crime.”³⁶⁵ In California, obstacles gradually gave way to implementation of reform that goes beyond the minimal requirements of *Graham* and *Miller*. This was a result of a confluence of factors, including community education and clarity about the underlying policy and its purpose.³⁶⁶ It took six years and substantial advocacy by proponents to achieve the passage of the first piece of the reform. The legislation met with resistance for several years; but eventually, its provisions, which balance safety concerns and require offenders to earn their release, gained support.³⁶⁷ This balanced approach coincided with government pressures to reduce the prison population and eventually led to support from unexpected sources on both sides of the aisle.³⁶⁸ In California’s second piece of reform, the *Graham* rationale is included to direct the parole board commissioners to give “great weight to diminished culpability of juveniles.”³⁶⁹ People who favor more punitive sentencing policies are swayed by moral justifications rather than cost issues.³⁷⁰ Therefore, the force of *Graham*’s moral argument about redemption and principled criteria for earning release may speak more directly to those with moral objections to release.

Research demonstrates that victim input is often one of the most impactful sources of information, aside from official records of the inmate and the crime, in parole release decision making.³⁷¹ It is also a politically powerful voice that lawmakers and prosecutors frequently cite in their opposition to release policies that they perceive as going beyond the Court’s minimum requirements.³⁷² Therefore, it follows that proponents of reform

Trigger’ *Leaving Most Convicts Behind Bars*, MLIVE MEDIA GROUP (Feb. 5, 2014), http://www.mlive.com/politics/index.ssf/2014/02/michigan_juvenile_lifers_house.html.

³⁶⁵ Joan Petersilia & Kevin R. Reitz, *Sentencing and Corrections: Overlapping and Inseparable Subjects*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, *supra* note 15, at 3.

³⁶⁶ Calvin Presentation, *supra* note 112.

³⁶⁷ Paige St. John, *Political Lines Drawn on Life Sentences for Teen Killers*, L.A. TIMES (Sept. 21, 2012, 4:24 PM), <http://latimesblogs.latimes.com/california-politics/2012/09/politics-life-sentences-teen-killers.html> (describing opposition from Assembly Republican leader Connie Conway who described Senate Bill 9 as “unnecessary”).

³⁶⁸ See Newt Gingrich & Pat Nolan, *Giving Teen Offenders Chance at Parole is Just*, SAN DIEGO UNION TRIBUNE, (Sept. 20, 2012 6:00 PM), <http://www.utsandiego.com/news/2012/sep/20/giving-teen-offenders-chance-at-parole-is-just/all/>.

³⁶⁹ CAL PENAL CODE § 4801(c) (West 2014).

³⁷⁰ Tonry, *supra* note 362, at 637.

³⁷¹ KINNEVY & CAPLAN, *supra* note 267, at 18. “The top three sources of input considered by [releasing authorities] in their decision release process are from the victim, the offender’s family and the district attorney.” *Id.* at 2.

³⁷² Press Release, State of Michigan Attorney General Bill Schuette, Schuette Announces He Will Appeal Federal Court Ruling Opening Door for Parole for Teenage

found the process of working with victims and families significant to its passage and integrity, even in light of the state's financial and litigation considerations.³⁷³ Moreover, from a justice standpoint, victims are central to the process because "people value being treated with dignity and having their rights acknowledged."³⁷⁴

At the same time, California was under pressure to reduce its prison population based upon a consent decree in federal prison litigation.³⁷⁵ This pressure undoubtedly decreased public and political hostility toward passage of progressive juvenile release policies that go beyond the minimum requirements dictated by the Supreme Court. In fact, the Governor cited the state's passage of juvenile sentencing reform as evidence of the state's good faith efforts to comply with the court's order.³⁷⁶ While California was engaged in litigation specifically, many states face similar problems of overcrowding and cost. But cost and overcrowding alone will not win the support of the public and political constituencies.³⁷⁷ Reform must be carefully tailored and explicit about the moral rationale that supports the substance of reform.³⁷⁸

Murderers, (Dec. 2, 2013), available at <http://www.michigan.gov/ag/0,4534,7-164-46849-317347--,00.html>. "In every case where a juvenile is sentenced to life in prison, a victim was already sentenced to death—forever. The victim's family then grapples with the aftermath of post-traumatic stress, depression, unyielding grief and visits to a grave." *Id.*; see Clay Duda, *California's 'Second Chance' Bill Offers Hope for LWOP Sentenced Youth*, JUV. JUST. INFO. EXCHANGE (July 11, 2011), <http://jjie.org/californias-second-chance-bill-offers-hope-for-lwop-sentenced-youth> (noting opposition from the California District Attorneys Association which stated that Senate Bill 9 is disrespectful to victims).

³⁷³ Interview with Elizabeth Calvin, *supra* note 308; see also Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 458 (noting that political will to make broad scale changes to carceral policy will only occur "if people believe that they are fair to victims, offenders, and the larger community").

³⁷⁴ Tyler, *supra* note 356, at 299.

³⁷⁵ See *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding the lower court's decision requiring the state of California to reduce its prison population down to 137.5% of its design capacity).

³⁷⁶ Jesse Wegman, Op-Ed., *Once Again, California Eases Harsh Sentencing Laws*, N.Y. TIMES (Sept. 25, 2013), <http://takingnote.blogs.nytimes.com/2013/09/25/once-again-california-eases-harsh-sentencing-laws>. On the day that Gov. Brown signed S.B. 260, the state filed for an extension to the order requiring the Governor to reduce the state's prison population. *Id.* The state cited SB 260, along with two other laws, "as 'historic reforms' that show California is serious about fixing its criminal justice system once and for all." *Id.*

³⁷⁷ Editorial, *California's Continuing Prison Crisis*, N.Y. TIMES, Aug. 10, 2013, <http://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html> (describing the overwhelming support for restricting the use of three strikes laws in 2012). "It wasn't just about saving money; exit polls showed that nearly three-quarters of those who supported the proposition said they felt the law was too harsh." *Id.*

³⁷⁸ See Klingele, *supra* note 373, at 452-53 (noting that in the early release context laws must be transparent and "rely on explicitly-stated criteria that the public deems fair").

Policies allowing for offender release when their sentences permit longer commitments have suffered for a variety of reasons, one of which is a lack of theoretical justification.³⁷⁹ *Graham* and *Miller* focus on the redemptive qualities of youth and possibility for rehabilitation, providing underpinnings of a sound theoretical basis for reform.³⁸⁰ But the decisions are not self-actualizing. For successful implementation, states should be overt in incorporating that reasoning into new laws and decisions.

CONCLUSION

Implementation of *Graham* and *Miller* requires states to wisely consider the assignment of the decision maker, to provide clear guidance through release criteria, and to provide accompanying procedural rights to ensure faithfulness to those criteria. The role of actuarial risk assessment tools will inevitably increase as criminal justice decision making incorporates those instruments. Their role, if properly implemented, may increase not only the quality of release decision making but also the perceived legitimacy of decision making by the public.³⁸¹ But they work best in tandem with procedural characteristics that foster fair and transparent application. Finally, release criteria and rehabilitation opportunities should be tailored to the population appropriately. Attention to these factors will better arm the chosen gatekeeper to make well informed decisions that embrace public safety while also promoting a process that is both rational and fair. The true promise of the Supreme Court decisions in *Graham* and *Miller* depends upon how states choose to implement the Court's holdings and the underlying principles that accompany them; upon whether the Supreme Court ultimately sanctions the choices that legislators and lower courts make when those choices fall short of the Court's redemptive aspirations;³⁸² and upon how broadly the reasoning in *Graham* and *Miller* that children are more capable of change influences juvenile sentencing reform as a whole.

³⁷⁹ See O'Hear, *supra* note 8, at 1249-50.

³⁸⁰ "The Court's rationale in *Roper* and *Graham* treats youth as a mitigating factor and supports a rehabilitative response to juvenile crime." Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 25 (2012).

³⁸¹ See O'Hear, *supra* note 8, at 1251 n.21.

³⁸² See Robert Smith & G. Ben Cohen, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 92 (2010) ("*Graham's* most significant role may be in its recognition of redemption as an Eighth Amendment constitutional principle, rejecting a legislative determination that entire classes of individuals were irredeemable.").