

CREATING MEANINGFUL OPPORTUNITIES FOR RELEASE: *GRAHAM*, *MILLER* AND CALIFORNIA’S YOUTH OFFENDER PAROLE HEARINGS

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ABSTRACT

This article presents findings from a study on the implementation of California’s new Youth Offender Parole Hearing law, which aims to provide juvenile offenders with meaningful opportunities to obtain release from adult prison. It contributes to the debate surrounding how to apply the “meaningful opportunity to obtain release” standard that the Supreme Court deliberately left open to interpretation in *Graham v. Florida* and, to some extent, in *Miller v. Alabama*. The Supreme Court’s recent opinion in *Montgomery v. Louisiana* reinforces the idea that juveniles who demonstrate that they are capable of change are entitled to release. The data contained in this Article was obtained by reviewing the transcripts of the first 107 Youth Offender Parole Hearings; this sample represents all but two of the Youth Offender Parole Hearings that took place between January 2014 and June 2014. In the first six months of the law’s implementation, juvenile offenders were found suitable for parole at younger ages than the general population. Further, youth offenders appeared to have a more realistic chance of being released under the new law. This reform is, at the very least, an important step towards offering juvenile offenders more meaningful opportunities to earn their release from prison. At the same time, it does not go far enough. After discussing some limitations of the law, this Article concludes by recommending guidelines that would provide youth offenders more meaningful opportunities for release in parole hearings.

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I.

INTRODUCTION

Over the last decade, the Supreme Court has limited the imposition of extreme punishments for juveniles in a trilogy of Eighth Amendment cases: *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.¹ In response, states across the country are grappling with how to live up to the Court's newly established requirement that juvenile offenders sentenced to life in prison be provided with meaningful opportunities to obtain release.² In *Graham*, the Supreme Court purposefully left the definition of its new legal term of art—"meaningful opportunity to obtain release"—vague, explaining, "[it] is for the State, in the first instance, to explore the means and mechanisms for compliance."³ In his dissent, Justice Thomas predicted that this ambiguity "will no doubt embroil the Court for years," pointing out that the majority opinion did not specify what "such a 'meaningful' opportunity entail[s]," when it must occur, and what principles parole boards must consider.⁴

Predictably, the "meaningful opportunity to obtain release" standard has continued to be a topic of much debate in state legislatures and courts. New legislation has been proposed and, in several states, enacted to provide more robust definitions of this rather vague standard.⁵ At the same time, related issues are working their way through the courts. Just this year the Supreme Court decided that *Miller* applies retroactively.⁶ Other questions, such as whether extremely long sentences should be treated as life without parole ("LWOP"), have led to splits of authority on key issues.⁷ Due to these diverging

1. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In addition to these three cases that address the Eighth Amendment, the Supreme Court relied on its findings about adolescent development to determine that a child's age is relevant when deciding whether an individual is in custody for purposes of the *Miranda* rule. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring advisement of rights before an individual in custody is interrogated by police).

2. *Graham*, 560 U.S. at 75, requires states to "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

3. *Id.*

4. *Graham*, 560 U.S. at 123 (Thomas, J., dissenting).

5. See, e.g., H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014).

6. This decision shows the continued trajectory of the Supreme Court to limit lengthy sentences for juveniles. *Montgomery v. Louisiana*, No. 14-280 (U.S. Jan. 25, 2016).

7. For example, state courts have reached opposing conclusions regarding whether *de facto* life sentences trigger the meaningful opportunity for release requirement. Compare *People v. Caballero*, 282 P.3d 291 (Cal. 2012) (equating a 110 years to life sentence with life without parole

interpretations at the state level, the Supreme Court will likely address questions about the scope and substance of the “meaningful opportunity” for release requirement in the coming years, as Justice Thomas predicted.⁸

This Article contributes to the national debate by analyzing the preliminary results of a new California law, designed to create more meaningful opportunities for juvenile offenders to be released through parole hearings. California Senate Bill 260 (“S.B. 260”) was passed in 2013 and went into effect on January 1, 2014. It provides opportunities for most juveniles sentenced in adult court to obtain release after serving between fifteen and twenty-five years in custody.⁹ Informed by the Supreme Court’s decisions in *Graham* and *Miller*, the legislation created specialized Youth Offender Parole Hearings (“YOPHs”), in which the Board of Parole Hearings is required to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”¹⁰

California is at the forefront of a legislative trend to create specialized parole procedures for people who were sentenced to life—or to otherwise lengthy sentences—in adult court for crimes committed when they were under eighteen years old.¹¹ Following California’s lead, West Virginia, Massachusetts, and Connecticut have passed similar legislation.¹² Similar laws were also

(LWOP)), with *State v. Kasic*, 265 P.3d 410, 414–15 (Ariz. Ct. App. 2011) (holding that *Graham* does not apply to a 139.75 year sentence since it is not LWOP), and *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (concluding that a seventy year sentence that would allow a juvenile defendant to be released at the age of eighty-six does not violate the Constitution because *Graham* “does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant’s lifetime.”).

8. See, e.g., Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 27 (2012) (outlining various questions *Miller* left open to interpretation and arguing *Miller v. Alabama* was “riddled with uncertainties that will spawn more litigation.”); 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, 369 (2013) (“The issues that *Miller* did not reach have left an assortment of practical problems to be resolved by legislatures, courts, practitioners, and correctional administrators.”); Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CONN. PUB. INT. L.J. 143, 167–68 (2013) (reviewing state responses to *Miller v. Alabama* and predicting a categorical challenge to LWOP in the Supreme Court); James Donald Moorehead, *What Rough Beast Awaits? Graham, Miller, and the Supreme Court’s Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole*, 46 IND. L. REV. 671 (2013) (predicting the Supreme Court will find juvenile LWOP unconstitutional).

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

10. See CAL. PENAL CODE § 4801 (West 2014).

11. See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 391–93 (2014) (describing Senate Bill 260’s “special parole hearing procedures and criteria for eligible juveniles” and indicating that “[s]everal [other] states are considering legislation that provides special criteria and procedures for parole boards to use in juvenile cases”).

12. See, e.g., S.B. 796, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015) (abolishing mandatory LWOP for juveniles, requiring judges to consider hallmark features of youth and the differences between juvenile and adult offenders prior to sentencing on serious offenses, and establishing

considered in Hawaii and Vermont, although the state legislatures passed more modest bills that prohibit the imposition of LWOP for juveniles but disregard resentencing options for juveniles sentenced to life *with* the possibility of parole or its equivalent.¹³

This is a critical yet under-examined topic. As Richard A. Bierschbach explained in a 2012 law review article, “despite an ever-expanding literature [discussing *Graham*], the significance of parole to the decision remains almost entirely unexplored.”¹⁴ Since then, a small body of scholarship addressing parole and meaningful opportunities for release has emerged.¹⁵ As the first empirical study on the implementation of legislation designed to expand release opportunities in light of *Graham* and *Miller*, this Article contributes concrete data to what has been a theoretical debate about the new standard’s meaning. Analyzing parole practices designed for juvenile offenders is particularly important given that the Supreme Court recently noted in *Montgomery v. Louisiana* that “[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.”¹⁶

This Article presents the findings of a study that reviewed the parole suitability hearing transcripts of all but two YOPHs that were held during the first six months of S.B. 260’s implementation, from January through June of 2014.¹⁷ Based on the study’s findings, I discuss aspects of the law that seem to be providing more meaningful opportunities for youth offenders to earn their release from prison.¹⁸ I also address areas where S.B. 260 may be falling short of

parole eligibility, including youth-specific criteria, for youth offenders after they have served thirty years in prison); H.B. 4307, 188th Gen. Ct. (Mass. 2014) (abolishing mandatory LWOP for juveniles, defined as persons between the ages of fourteen and eighteen years old, requiring that access to rehabilitative programming not be limited for youth offenders “solely because of their crimes or the duration of their incarcerations, and establishing “a commission to study and determine the practicality of creating a developmental evaluation process for all cases of first degree murder committed by a juvenile” for use in “future parole decisions”); W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014) (abolishing LWOP for juveniles, establishing mitigating circumstances that must be considered prior to sentencing juveniles tried as adults, and establishing specialized parole criteria for juveniles sentenced as adults).

13. See *infra* Part I.A.

14. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1746 (2012).

15. See, e.g., Megan Anitto, *Graham’s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller*, 80 BROOK. L. REV. 119, 120 (2014) (“focus[ing] on the implications of choosing judicial or administrative parole decision makers as the gatekeepers of release at the back end of sentencing” of juveniles in adult court and examining the use of risk assessments in the parole process); Russell, *supra* note 11, at 375–76 (breaking down three distinct components that contribute to meaningful opportunity for release).

16. *Montgomery v. Louisiana*, No. 14-280, slip op. at 21 (U.S. Jan. 25, 2016).

17. California Department of Corrections was unable to provide two out of the 109 total transcripts, so this study reviewed a total of 107 transcripts.

18. A recent article by Marsha L. Levick & Robert G. Schwartz identifies three questions of particular relevance to this Article: (1) what principles should guide resentencing of juveniles sentenced to life without parole?; (2) how does *Miller* impact parole?; and (3) how can offenders

creating truly meaningful opportunities for release. Given that parole hearings are one of two ways states can respond to the *Graham* requirement for meaningful opportunities, this analysis is important and should inform future efforts to design parole procedures for juvenile offenders.¹⁹

In its first six months, S.B. 260 seems to have created more realistic opportunities for juvenile offenders to earn parole at younger ages. From January through June of 2014, “youth offenders,” defined in California as state prisoners under the age of eighteen at the time of their offenses, both qualified for parole hearings and were found suitable for parole at an average age nine years younger than other parole-eligible prisoners.²⁰ They were also more likely to be granted parole than their counterparts who committed crimes as adults.²¹ This suggests that the Board of Parole Hearings (“BPH”) may be moving in the direction of offering juvenile offenders more realistic opportunities for release within a timeframe that would allow them to establish meaningful lives after prison. Requiring parole decision-makers to consider the hallmark features of youth may be increasing the likelihood of young offenders being released on parole. However, it is too early to draw conclusions regarding its long-term impact.

This Article proceeds in four parts. Part II begins by discussing the foundations of this doctrine from *Graham* and *Miller*, including various states’ responses to the Supreme Court’s requirements. It focuses on three major questions that have arisen in related academic discourse: (1) who is entitled to meaningful opportunities for release?; (2) what makes an opportunity for release meaningful?; and (3) what mechanisms should be used to determine whether an individual should be released? Part III summarizes the empirical study, beginning with an overview of S.B. 260 and the youth-specific parole hearings it created. It describes my research methodology, presents the demographic information of the sample, and concludes with a summary of the study’s major findings.

Parts IV and V discuss the implications of the study’s results. Part IV explores three core components that are essential for any parole system purporting to establish meaningful opportunities for release should address. These core components are: (1) the age of release; (2) the likelihood of obtaining release; and (3) the need for more rehabilitative options for youth offenders in prison. I also discuss the strengths and weaknesses of California’s model, using data from the study and incorporating relevant examples from other states’ approaches.

Part V discusses the importance of developing specialized standards that require decision-makers to appropriately consider the hallmark features of youth,

earn release by proving they are rehabilitated when they do not have access to rehabilitative programming while incarcerated? Levick & Schwartz, *supra* note 8, at 369–70.

19. See Annitto, *supra* note 15 (arguing parole hearings and sentencing modification in court are two primary state responses to *Graham*’s meaningful opportunity for release requirement).

20. See *infra* Part II.C.ii.

21. See *infra* Part II.C.i.

and young offenders' diminished culpability. It explores the specific areas these standards should address in order to render opportunities for release meaningful, using examples from the study to illustrate potential obstacles. Specifically, I argue that (1) parole-eligibility standards must place more weight on rehabilitation than on the circumstances surrounding a crime; (2) prison behavior must be viewed in the context of adolescent development principles; and (3) risk assessments must emphasize growth and maturity while incorporating expertise about adolescence.

II.

THE LEGAL LANDSCAPE AFTER *GRAHAM*, *MILLER*, AND *MONTGOMERY*

When the Supreme Court ruled in *Graham v. Florida* that, pursuant to the Eighth Amendment's prohibition against cruel and unusual punishment, juveniles who have not committed homicide may not be sentenced to LWOP, it required the government to provide "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."²² *Graham*'s holding specifically applies to a discrete population of youth offenders—those under the age of eighteen who were not convicted of homicide and were sentenced to LWOP.²³

The defendant in the case, Terrance Graham, was sixteen years old when he was convicted of attempted armed robbery and armed burglary after he entered a restaurant wearing a mask.²⁴ His accomplice hit the restaurant's manager with a metal bar, causing a head injury that required stitches.²⁵ Although Graham was a juvenile at the time, he was charged as an adult²⁶ and, pursuant to a plea agreement, was sentenced to probation.²⁷ Shortly thereafter, he was found to be in violation of his probation for participating in a home invasion robbery.²⁸ At that point, the sentencing court imposed the maximum sentences for each of the

22. *Graham v. Florida*, 560 U.S. 48, 75 (2010). *Graham* held, "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82.

23. *Id.* Here, it is worth pointing out the distinction between a life sentence and a sentence of LWOP. With a life sentence, the prisoner technically has a possibility of being released on parole at some point in their lives. With LWOP, there is no such possibility. This distinction is complicated because some states, such as Pennsylvania and Florida, have eliminated parole. Thus, in these states, any life sentence is equivalent to LWOP.

24. *Id.* at 53.

25. *Id.*

26. *Id.* Although young people who are under the age of eighteen when they commit a crime are typically processed through juvenile delinquency courts, throughout the 1980s and 1990s "legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts." Patrick Griffin, Sean Addie, Benjamin Adams & Kathy Firestone, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 2011 JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, D.C.), Sept. 2011, at 1, www.ojjdp.gov/pubs/244476.pdf.

27. *Graham*, 560 U.S. at 54.

28. *Id.* at 55.

original armed burglary and armed robbery charges, resulting in a life sentence. In Florida, a life sentence equated to LWOP because the state had abolished parole.²⁹

While *Graham*'s specific holding limits the application of a "meaningful opportunity to obtain release" to an LWOP sentence for a non-homicide offense, the Court's reasoning implies that all juvenile offenders should be entitled to meaningful opportunities to be released from prison.³⁰ The Court recognized that adolescents are fundamentally different from adults. It reasoned that "because juveniles have lessened culpability they are less deserving of the most severe punishments."³¹ The Court went on to discuss several key characteristics of adolescence that diminish young people's culpability, including a "lack of maturity and an underdeveloped sense of responsibility," "susceptib[ility] to negative influences and outside pressures, including peer pressure," and "characters [that] are 'not as well formed'" as those of adults.³² It emphasized, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."³³ The "nature of juveniles"³⁴ is common to all adolescents, regardless of the sentence they receive or the crime they commit.³⁵

In 2012, the Supreme Court applied this reasoning to a broader segment of the population in *Miller v. Alabama*, moving past *Graham*'s limited application

29. *Id.* at 57.

30. See Shobha L. Mahadev, *Youth Matters: Roper, Graham, J.D.B., Miller and the New Juvenile Jurisprudence*, CHAMPION, March 2014, at 14, 15, www.nacdl.org/champion.aspx?id=32599 ("[T]aking the holding of *Miller*—and for that matter, any of the other cases or their holdings—as an island, without consideration of the Court's language and reasoning throughout these decisions, misses the point."); Alex Dutton, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller's Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & C.R. L. REV. 173 (2013).

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

32. *Id.* (citations omitted). For an in-depth discussion of adolescent brain development research that supports these findings, see ELIZABETH S. SCOTT & LAURENCE D. STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008).

33. *Graham*, 560 U.S., at 68 (quoting *Roper*, 543 U.S. at 570). See Laurence Steinberg, Elizabeth Cauffman & Kathryn C. Monahan, *Psychological Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, 2015 JUV. JUSTICE BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, D.C.), March 2015, at 1, www.ojjdp.gov/pubs/248391.pdf (presenting findings from a study that followed 1,300 juvenile offenders for seven years following their convictions, concluding that "[t]he vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transition to adulthood.").

34. *Graham*, 560 U.S., at 68.

35. *Id.* at 68–69. For a discussion of *Graham*'s inconsistency in distinguishing juveniles who have committed homicide from those who have not, see Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 104 (2013) ("[T]he severity of the crime alleged should be relevant only as appropriate, such as in assessing proportionality in sentencing, whereas the scope of the enhanced protection should be tethered to the transitory characteristics that make juveniles unique.").

to youth who had not committed homicide by reasoning that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.”³⁶ In *Miller*, the Court considered two companion cases, both involving fourteen-year-olds who were convicted of murder and sentenced to LWOP.³⁷ Based on its conclusion that the hallmark features of youth are not crime specific, the Court emphasized that even young people convicted of murder have diminished culpability in comparison to adult offenders.³⁸ Ultimately, the Court held in *Miller* that the Eighth Amendment prohibits sentencing a juvenile to LWOP under a mandatory sentencing scheme that does not allow the court to consider mitigating information about the defendant’s youth.³⁹

Like *Graham*, *Miller*’s reasoning contemplates the relationship between youth and criminal sentencing more broadly than its relatively narrow holding might imply. *Miller* reiterated *Graham*’s reasoning that “[a]n offender’s age’ ... ‘is relevant to the Eighth Amendment,’ and so ‘criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.’”⁴⁰ The opinion explains that the “foundational principle” of *Graham* and *Roper* is that the “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”⁴¹ According to the Supreme Court, the differences between juveniles and adults clearly are relevant to assessing which criminal punishments constitute cruel and unusual punishment under the Eighth Amendment.

Most recently, the Supreme Court held in *Montgomery v. Louisiana* that *Miller* applies retroactively because it created a new substantive rule.⁴² In *Montgomery*, the Court made clear that LWOP sentences for juveniles should be extremely rare. According to the Court, *Miller* “established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth,” such that LWOP sentences violate the Eighth Amendment “for a child whose crime reflects unfortunate yet transient immaturity.”⁴³ Thus, according to *Montgomery*, “*Miller* determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption.”⁴⁴

Further, *Graham*, *Miller*, and *Montgomery* set up a constitutional framework that requires young offenders—at least those whose most serious offense is not homicide, but arguably those convicted of homicide as well—to have

36. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

37. *Id.* at 2460.

38. *See id.* at 2463–65.

39. *Id.* at 2469.

40. *Id.* at 2466 (quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)).

41. *Id.*

42. *Montgomery v. Louisiana*, No. 14-280, slip op. at 20 (U.S. Jan. 25, 2016).

43. *Id.* at 16–17.

44. *Id.* at 17.

“meaningful opportunities” to earn their release from prison.⁴⁵ Under *Montgomery*, “[t]he opportunity for release [on parole] should be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.”⁴⁶ This “meaningful opportunity to obtain release” requirement has spawned debate in academic literature and in the courts regarding both its scope and substance.⁴⁷ This debate focuses on three major questions: (1) which juvenile offenders are entitled to meaningful opportunities for release; (2) what makes an opportunity meaningful; and (3) what mechanisms should be used to provide these opportunities. Courts and legislatures have been crafting new responses to these questions in recent years.

A. Who is Entitled to a Meaningful Opportunity for Release?

One central question in the debate concerns *which* juvenile offenders are entitled to meaningful opportunities for release.⁴⁸ Does the requirement apply only to those sentenced to LWOP, or does it extend to those sentenced to *de facto* LWOP sentences, such as determinate term-of-year sentences that exceed the defendant’s life expectancy? In an essay addressing several areas *Miller* left open for debate, Craig S. Lerner argues that *Miller* uses ambivalent language with respect to whether its holding applies only to “the harshest possible penalty” of LWOP or to “the most serious penalties,” which may “extend to long prison sentences.”⁴⁹ A predictable split of authority has arisen among the states with respect to this issue.

The California Supreme Court held that *Graham* prohibits *de facto* LWOP sentences, concluding that a 110-year sentence violated the Eighth Amendment because the juvenile offender in the case “would have no opportunity to ‘demonstrate growth and maturity’ to try to secure his release, in contravention of *Graham*’s dictate.”⁵⁰ In subsequent California cases, courts have used actuarial tables to estimate defendants’ life expectancies in order to assess whether a sentence equates to LWOP.⁵¹ The Iowa Supreme Court has interpreted

45. See *Graham*, 560 U.S. at 75.

46. *Montgomery*, No. 14-280 at 21.

47. See, e.g., *People v. Perez*, 214 Cal. App. 4th 49, 56 (2013) (“The issue of how long someone under the age of 18 may be sentenced to prison has been the subject of considerable judicial attention recently in the wake of *Miller*.”).

48. See Kelly Scavone, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439 (2014) (discussing conflicting state interpretations regarding *Graham*’s meaningful opportunity for release requirement).

49. Lerner, *supra* note 8, at 38 (quoting *Miller*, 132 S. Ct. at 2475) (emphasis added).

50. *People v. Caballero*, 282 P.3d 291, 295 (2012) (“*Miller* therefore made it clear that *Graham*’s ‘flat ban’ on life without parole sentences applies to all non-homicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.”).

51. See *In re Alatraste*, 220 Cal. App. 4th 1232, 1238 (2013), *review granted*, *In re Alatraste*,

Graham to prohibit even shorter determinate sentences, concluding that term-of-years sentences that would render juvenile defendants eligible for parole at the ages of sixty-nine and seventy-eight are *de facto* LWOP sentences under *Graham* and *Miller*.⁵²

Until the Florida Supreme Court resolved the issue in March of 2015, Florida courts were divided as to whether lengthy determinate sentences should be treated the same as LWOP sentences for purposes of applying *Graham* and *Miller*.⁵³ Some Florida appellate courts felt “compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole.”⁵⁴ Other courts disagreed with this interpretation, concluding that sentences that exceed a defendant’s life expectancy “are the functional equivalent of a life without parole sentence and will not provide . . . a meaningful opportunity to obtain release.”⁵⁵ In *Henry v. State* and *Gridline v. State*, the Florida Supreme Court concluded that sentences of ninety-years and seventy-years for juvenile offenders who had not committed homicide do “not provide a meaningful opportunity for future release” and are therefore “unconstitutional in light of *Graham*.”⁵⁶

In contrast, state courts in Georgia and Arizona, have concluded that *Graham* does not require meaningful opportunities for release for those

317 P.3d 1183 (Cal. 2014) (“The court must then fashion a sentence that gives the defendant a meaningful opportunity for release on parole during his or her lifetime, and must utilize actuarial skills to determine how long the defendant’s lifetime might be.”).

52. The Iowa Supreme Court also held that a sixty-year sentence of a juvenile offender, which would provide for parole eligibility when the offender was seventy-eight years old, violated *Miller* because the sentence was the “practical equivalent of life without parole.” *State v. Ragland*, 836 N.W.2d 107, 121–22 (Iowa 2013). *See also* *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (holding sentence that provided eligibility for release when the juvenile offender was sixty-nine years old constituted *de facto* LWOP sentence).

53. *Compare* *Henry v. State*, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012) (holding that a ninety-year sentence is distinguishable from LWOP and therefore does not violate *Graham*), *decision quashed*, No. SC12-578, 2015 WL 1239696 (Fla. Mar. 19, 2015), *and* *Mediate v. State*, 108 So. 3d 703 (Fla. Dist. Ct. App. 2013) (130 year sentence for non-homicide offenses does not amount to LWOP and therefore is not prohibited by *Graham*), *with* *Floyd v. State*, 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (concluding that an eighty year sentence that would render a juvenile eligible for release at the age of ninety-seven amounted to LWOP and violated *Graham*).

54. *Guzman v. State*, 110 So. 3d 480, 483 (Fla. Dist. Ct. App. 2013). *See also* *Rosario v. State*, 122 So. 3d 412, 416 (Fla. Dist. Ct. App. 2013) (certifying the following two questions to the Florida Supreme Court: “(1) Does *Graham v. Florida* apply to lengthy term-of-years sentences that amount to *de facto* life sentences?; (2) If so, at what point does a term-of-years sentence become a *de facto* life sentence?”).

55. *Floyd*, 87 So. 3d at 47 (“In reaching our decision, we are mindful of those cases, both in Florida and in other states, where the courts have deemed lengthy term-of-years sentences constitutional. We disagree with those courts, however, that a lengthy term-of-years sentence cannot constitute the functional equivalent of a life sentence without parole.” (citations omitted)).

56. *Gridline v. State*, No. SC12-1223, 2015 WL 1239504, at *1 (Mar. 19, 2015). *See also* *Henry*, 2015 WL 1239696, at *4 (finding that “*Graham* requires a juvenile non-homicide offender, such as *Henry*, to be afforded such an opportunity [for release] during his or her natural life,” and a ninety year sentence that would result in incarceration until the age of ninety-five “does not afford him this opportunity.”)

sentenced to *de facto* life sentences.⁵⁷ Louisiana's Supreme Court limited *Graham*'s application to LWOP cases, holding that a juvenile's seventy-year sentence for a non-homicide offense, which would render him eligible for parole at the age of eighty-six, does not amount to a *de facto* LWOP sentence.⁵⁸ The Louisiana court found, "*Graham*'s holding . . . applies only to sentences of life in prison without parole, and does not apply to a sentence of years without the possibility of parole."⁵⁹

In addition to the debate over whether *Graham* and *Miller* apply to determinate sentences that effectively amount to LWOP sentences, there is also a question as to whether juveniles sentenced to life *with* the possibility of parole are entitled to meaningful opportunities to obtain release. Life sentences may offer the possibility of release, but this opportunity may not rise to the level of being "meaningful." As Sarah French Russell argues, "[i]f the chance of release is not meaningful under a state's existing parole system, then a sentence of life with parole is equivalent to an LWOP sentence for Eighth Amendment purposes."⁶⁰

Taken together, the reasoning in *Graham* and *Miller* would seem to require a meaningful opportunity to obtain release for all juvenile offenders regardless of their sentence or offense. In other words, those sentenced to lengthy term-of-years sentences and to life *with* the possibility of parole should be entitled to the same opportunities for release as those sentenced to the more extreme sentence of LWOP. It would be illogical for the Court to create a legal standard that gives those sentenced to the more serious sentence of LWOP a more realistic chance of release than those sentenced to life with the possibility of parole.⁶¹ Furthermore, the Supreme Court seems to have anticipated that this requirement would apply to all life sentences. The *Graham* opinion specifically says that when a state "imposes a sentence of life it must provide . . . some realistic opportunity to obtain release before the end of that term."⁶² By referring to "a sentence of life" rather than "a sentence of life without parole," the reasoning implies that *Graham*'s holding may reach beyond those sentenced to LWOP.

57. See *Adams v. State*, 707 S.E.2d 358, 365 (Ga. 2011); *State v. Kasic*, 265 P.3d 410, 414–15 (Ariz. Ct. App. 2011) (finding *Graham* did not apply to a 140-year sentence of a seventeen-year old who did not commit homicide).

58. *State v. Brown*, 118 So. 3d 332 (La. 2013). However, Louisiana subsequently changed its law to provide juveniles convicted of offenses other than murder the opportunity for parole hearings after serving thirty years in prison. LA. REV. STAT. ANN. § 15:574.4(D)(1) (Westlaw through 2015 legislation). In addition, juveniles convicted of murder are now eligible for parole after serving thirty-five years in prison. § 15:574.4(E)(1).

59. *Brown*, 118 So. 3d at 332.

60. Russell, *supra* note 11, at 377.

61. See *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) ("We conclude that *Miller*'s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.").

62. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

Several states have passed or are considering legislation that goes beyond the minimal requirements of *Graham* and *Miller* by creating procedures that offer juvenile offenders a greater likelihood of release after serving fewer years in custody.⁶³ This emerging trend is remarkable because it departs sharply from the trend towards more punitive juvenile justice legislation that emerged in the 1990s in response to unrealized fears about an increasingly dangerous population of juvenile “superpredators.”⁶⁴ The Supreme Court set the tone for this changing approach to juvenile justice, and the foundational principles emphasized by the Court now seem to be shaping state legislation.⁶⁵

B. What Is a Meaningful Opportunity for Release?

The second major issue in the meaningful opportunity for release debate surrounds the substance of this new legal term of art. What does it mean to offer a “meaningful opportunity”? Further, what distinguishes a meaningful opportunity from a non-meaningful opportunity?

The Supreme Court deliberately left these questions open in *Graham*, explaining that “[it] is for the State, in the first instance, to explore the means and mechanisms for compliance.”⁶⁶ The Court was clear that release is not required.⁶⁷ Rather, the Eighth Amendment “forbid[s] States from making the

63. See, e.g., DEL. CODE ANN. tit. 11, § 4204A(d)(1)–(d)(2) (Supp. 2014) (providing for sentencing review of non-homicide juvenile offenders after they have served twenty years, and of homicide offenders after they have served thirty years); FLA. STAT. § 921.1402 (Westlaw through 2015 1st Reg. Sess. and Special Session A) (creating resentencing hearings for juvenile offenders sentenced to fifteen years or more after they have served fifteen, twenty, or twenty-five years, depending on length of the original sentence); W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014) (establishing parole eligibility for all juvenile offenders sentenced to over fifteen years when the individual has served fifteen years in custody).

64. The term “superpredator” was popularized by John Dilulio, who predicted an increase in youth violence because, “a new generation of street criminals is upon us—the youngest, biggest and baddest generation any society has ever known.” See Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, NY TIMES (Feb. 9, 2001), <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html>; Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1033 (2014) (discussing the “opposite directions” of punitive juvenile justice legislation since the mid-1990s and the Supreme Court’s “more humane jurisprudence”). I discuss the widespread fear of juvenile “superpredators” and its impact on Proposition 21, a California ballot initiative that made sweeping changes to California’s juvenile justice system, in another article. See Beth Caldwell & Ellen C. Caldwell, “Superpredators” and “Animals” – Images and California’s “Get Tough on Crime” Initiatives, 11 J. INST. JUST. & INT’L STUD. 61 (2011).

65. See Maurice Chammah, *A Boy Among Men*, THE MARSHALL PROJECT (Feb. 25, 2015, 7:15 AM), https://www.themarshallproject.org/2015/02/25/a-boy-among-men?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20150512-178 (discussing “growing efforts to repeal laws that send youth to adult prisons” based on developments in neuroscience and noting that legislation is being considered in New York, North Carolina, Wisconsin, and Texas that would “raise the age at which someone is automatically sentenced to an adult facility from 16 or 17 to 18.”).

66. *Graham*, 560 U.S. at 75.

67. *Id.* at 82 (“A State need not guarantee the offender eventual release, but if it imposes a

judgment at the outset that those offenders never will be fit to reenter society.”⁶⁸ On the other hand, the opinion states that executive clemency, which would provide a “remote possibility” of release, “does not mitigate the harshness of the sentence” of life without parole.⁶⁹ In sum, a meaningful opportunity requires more than a “remote possibility” of release; the opportunity must be “realistic.”⁷⁰

Predictably, states have interpreted this requirement differently: some have created narrow procedures that provide remote possibilities of release, while others have created more robust mechanisms to allow juvenile offenders to be re-sentenced or paroled.⁷¹

Most states have been (or will be) forced to change their sentencing laws to bring them in line with the minimum legal requirements of *Graham* and *Miller*.⁷² Under the narrowest reading of *Graham*, LWOP is unconstitutional for juvenile offenders who have not been convicted of homicide, but a life sentence is constitutional as long as there is some process to consider release at some (potentially distant) point in the future. Under a narrow reading of *Miller*, an LWOP sentence may be constitutional for a juvenile offender convicted of homicide if: (1) it is not imposed under a mandatory sentencing scheme; and (2) the sentencing court considers mitigating evidence relating to the offender’s youth.⁷³

In response to *Graham*, states that previously allowed LWOP for non-homicide offenders have been forced to eliminate this sentencing option.⁷⁴ Many states merely converted LWOP sentences to life sentences with the possibility of parole for juvenile non-homicide offenders.⁷⁵ The problem with this approach is that changing LWOP to a life sentence does not bring the law into compliance

sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”).

68. *Id.* at 75.

69. *Id.* at 70.

70. *See id.* at 70, 82.

71. *See* Annitto, *supra* note 15, at 131–43 (describing state responses to *Graham* and *Miller* that have focused on either administrative remedies like parole or judicial remedies like resentencing).

72. *See* JOSHUA ROVNER, THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 1 (June 2014), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf (reporting that although “*Miller* struck down laws in 28 states and the federal government that required mandatory, parole-ineligible life sentences for individuals whose homicide offenses occurred before the age of 18,” most of these twenty-eight states had not yet passed legislation to bring their state laws into compliance with *Miller* as of June 2014.).

73. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

74. *See, e.g.,* Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognizing Human Worth and Potential*, 24 ST. THOMAS L. REV. 310 (2012); Sally Terry Green, *Meaningful Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1 (2011).

75. *See* Russell, *supra* note 11, at 383–84.

with *Graham* unless the states also offer truly “meaningful opportunit[ies] to obtain release” to those offenders.

After *Miller*, states with *mandatory* LWOP sentencing schemes for juveniles who had committed homicide were forced to revise their laws.⁷⁶ Many of these states brought their laws in line with *Miller* by giving judges the option to choose between LWOP and an alternative sentence.⁷⁷ In these jurisdictions, LWOP is still an option; the only difference after *Miller* is that judges have the choice between LWOP and life with parole, or between LWOP and a lengthy term-of-years sentence.⁷⁸

Based on a narrow interpretation of the holdings of *Graham* and *Miller*, these legal reforms do create mere possibilities of release. However, they do not comport with the cases’ clear requirements that the opportunities afforded to youth offenders be both meaningful and realistic. By minimally shifting their sentencing schemes, these states ignore the fundamental principles underlying the Court’s recent jurisprudence on juveniles and the Eighth Amendment. Giving sentencing courts the discretion to choose whether to attach the possibility of parole to a life sentence does not adequately respond to the Eighth Amendment violations raised by imposing life sentences on juvenile offenders.

In contrast to the narrow approach described above, a number of states have passed legislation that goes further than what *Graham* and *Miller* explicitly require, by eliminating LWOP sentences for all juvenile offenders, including those convicted of homicide.⁷⁹ In addition to eliminating LWOP sentences for all juveniles, a growing number of states are creating specialized re-sentencing and parole procedures aimed at providing juvenile offenders more meaningful opportunities for release.⁸⁰ These more expansive reforms offer greater

76. *Miller*, 132 S. Ct. at 2468 (“We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”).

77. *See, e.g.*, H.B. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (creating alternative for sentencing courts judges to choose between LWOP or a life sentence with parole eligibility after twenty-eight years for juvenile offenders who have committed homicide); MICH. COMP. LAWS ANN. § 769.25(9) (West Supp. 2015) (creating the sentencing option of LWOP or a sentence between twenty-five and sixty years for juvenile homicide offenders); *see also* Russell, *supra* note 11, at 384–85 (discussing state responses to *Miller*).

78. *Id.*

79. Connecticut, Hawaii, Massachusetts, Texas, Vermont, West Virginia, and Wyoming abolished LWOP sentences for juvenile offenders after the *Miller* decision. *See* S.B. 796, Gen. Assemb., Reg. Sess. (Conn. 2015); H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014); H.B. 4307, 188th Gen. Ct. (Mass. 2014); TEX. PENAL CODE ANN. § 12.31(a) (West, Westlaw through 2015 Sess.); H. 62, 2015–16 Gen. Assemb., Reg. Sess. (Vt. 2015); W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014); H.B. 23, 62d Leg., Gen. Sess. (Wyo. 2013). They join the seven states (Alaska, Colorado, Kansas, Kentucky, Montana, New Mexico, and Oregon) that prohibited juvenile LWOP prior to the *Miller* decision. ROVNER, *supra* note 72, at 2.

80. For example, Delaware now allows all juveniles to be reconsidered for resentencing after they have served between twenty and thirty years, with twenty years being the eligibility timeline for non-homicide offenders and thirty years for juveniles convicted of first or second degree murder. DEL. CODE ANN. tit. 11, § 4204A(d)(1)–(d)(2) (Supp. 2014). Similarly, Florida provides

opportunities for incorporating the spirit of the Supreme Court's recent jurisprudence into sentencing and parole law and are more consistent with the Supreme Court's reasoning than the narrow, textual responses previously discussed.

C. What Mechanism Should Be Used to Determine Whether an Individual Qualifies for Release?

States have developed different procedures for complying with the Supreme Court's mandates in *Graham* and *Miller*. Some have put the decision-making power in the hands of judges by creating mechanisms that allow people to petition for resentencing in court.⁸¹ Others have vested this decision-making power with parole boards.⁸² California has done both; courts have the decision-making power over resentencing juveniles originally sentenced to LWOP, whereas BPH has decision-making authority over those juveniles sentenced to life sentences, or to any determinative sentence that exceeds fifteen years.⁸³

In addition to determining whether courts or parole boards should be responsible for deciding who qualifies for release, states must also decide whether to create special standards and procedures for decision-makers to follow in making these determinations. States have pursued different paths here as well. Some, like California, Florida, Massachusetts, Nebraska, and West Virginia, have created detailed standards that incorporate the Supreme Court's reasoning in *Graham* and *Miller* into the decision-making process.⁸⁴ For example, Florida's

juvenile offenders with resentencing opportunities after they have served between fifteen and twenty-five years, depending on their sentence. FLA. STAT. § 775.082(1)–(3), 921.1402 (Westlaw through 2015 1st Reg. Sess. and Special Session A). West Virginia established parole eligibility for all juvenile offenders once they have served fifteen years. W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014).

81. Florida and Delaware follow the resentencing model. *See* DEL. CODE ANN. tit. 11, § 4204A(d)(1)–(2); FLA. STAT. ANN. § 921.1402; Annitto, *supra* note 15, at 121 (“[I]n some states, new legislation has designated a process whereby the judiciary will fill *Graham*’s gatekeeping role through sentencing review procedures.”).

82. These states include Louisiana, Massachusetts, Nebraska, North Carolina, Texas, West Virginia, and Wyoming. LA. REV. STAT. ANN. 15:574.4(D)(1) (Westlaw through 2015 legislation); MASS. GEN. LAWS ANN. Ch. 119 § 72B (West Supp. 2015); NEB. REV. STAT. § 83-1,110.04 (2014); SB 635, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012); TEX. GOV’T CODE ANN. § 508.145(b) (West Supp. 2014); W. VA. CODE § 61-11-23(b); WYO. STAT. ANN. § 6-10-301 (2015).

83. CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2015) (describing the procedure for seeking resentencing in court for juveniles sentenced to LWOP); CAL. PENAL CODE § 3051(b) (West Supp. 2015) (describing parole hearings for juveniles sentenced to determinate sentences exceeding fifteen years or to life with the possibility of parole).

84. Nebraska requires the Board of Parole to consider the following in parole hearings for those who were under eighteen at the time of their offense:

- (a) The offender’s educational and court documents;
- (b) The offender’s participation in available rehabilitative and educational programs while incarcerated;
- (c) The offender’s age at the time of the offense;
- (d) The offender’s level of maturity;
- (e) The offender’s ability to appreciate the risks and consequences of his or her

statute orders judges to consider the following factors in determining whether a juvenile offender has been rehabilitated and is therefore “fit to reenter society”:

- (a) Whether the juvenile offender demonstrates maturity and rehabilitation;
- (b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing;
- (c) The opinion of the victim or the victim’s next of kin;
- (d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person;
- (e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense;
- (f) Whether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected his or her behavior;
- (g) Whether the juvenile offender has successfully obtained a general educational development certificate or completed another educational, technical, work, vocational, or self rehabilitation program, if such a program is available;
- (h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense;
- (i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.”⁸⁵

In contrast, other states handle these cases using their existing procedural frameworks.⁸⁶

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- conduct;
 - (f) The offender’s intellectual capacity;
 - (g) The offender’s level of participation in the offense;
 - (h) The offender’s efforts towards rehabilitation; and
 - (i) Any other mitigating factor or circumstance submitted by the offender.

NEB. REV. STAT. § 83-1,110.04(2) (2014). Massachusetts’s legislation created a Commission to “establish factors to analyze in determining the developmental progress of a juvenile offender.” *See* MASS. SESS. LAWS ch. 189 § 7 (West Supp. 2014). West Virginia requires the parole board to “take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.” W. VA. CODE ANN. § 62-12-13b(b) (LexisNexis 2014). Specifically the statute requires the board to consider:

- (1) a review of educational and court documents;
- (2) participation available rehabilitative and educational programs while in prison;
- (3) age at the time of the offense;
- (4) immaturity at the time of the offense;
- (5) home and community environment at the time of the offense;
- (6) efforts made toward rehabilitation;
- (7) evidence of remorse; and
- (8) any other factors or circumstances the board considers relevant.

Id.

85. FLA. STAT. ANN. § 921.1402(6).

86. For example, Colorado revised its law to create parole eligibility for all juvenile offenders

i. California's Specialized Parole and Resentencing Procedures

California was the first state to pass legislation creating specialized parole procedures designed to offer juvenile offenders meaningful opportunities for release from prison. In 2012, the state passed Senate Bill 9 (“S.B. 9”), which created a procedure for juveniles sentenced to life without parole to petition the courts for re-sentencing after serving twenty-five years in custody.⁸⁷ Following on the heels of S.B. 9, California passed S.B. 260 in 2013. This bill went much further than S.B. 9, transforming the state’s treatment of juvenile offenders by creating a specialized parole process for almost all juveniles who were sentenced to lengthy prison terms. It applies both to people sentenced to life and to those with long fixed term sentences.⁸⁸ Juvenile offenders become eligible for specialized YOPHs after they have served between fifteen and twenty-five years in prison, depending on the term of their original sentence.⁸⁹

S.B. 260 incorporates the Supreme Court’s findings about adolescent development and the resulting diminished culpability of young offenders.⁹⁰ It requires that BPH “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”⁹¹

This legislation was informed by the Supreme Court’s jurisprudence. The legislation began with the following recapitulation of some of the central themes in *Miller v. Alabama*:

The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama* [citations omitted], “only a relatively small proportion of adolescents” who engage in illegal activity “develop entrenched patterns of problem behavior,” and “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” including “parts of the brain involved in behavior control.”⁹²

after they have served forty years, but the legislation did not modify the parole process for these offenders. COLO. REV. STAT. § 18-1.3-401(4)(b)(I) (2015). Similarly, Hawaii’s legislation abolishing LWOP for juveniles does not specify any special parole procedures for this population. HAW. REV. STAT. ANN. § 706-656 (West, Westlaw through 2015 Act 243).

87. S.B. 9, 2012 Leg., Reg. Sess. (Cal. 2012); CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2015).

88. CAL. PENAL CODE § 3051(b) (West Supp. 2015).

89. *Id.*

90. See SCOTT & STEINBERG, *supra* note 32, for an overview of the adolescent brain development research that has informed the Court’s decisions.

91. CAL. PENAL CODE § 3051(b).

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

The bill used language and reasoning from *Graham* and *Miller* to craft a law that applies to a much broader population than the Supreme Court requires. It provides virtually all juveniles sentenced as adults—regardless of sentence or offense—the opportunity to obtain release after serving twenty-five years in prison; many are eligible after serving fifteen or twenty years.⁹³ Specifically, S.B. 260’s purpose is “to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.”⁹⁴

ii. Other Legislative Solutions

Nationwide, similar legislation has recently been proposed and enacted by several states. In March 2014, West Virginia passed legislation very similar to California’s S.B. 260.⁹⁵ The legislation was clearly informed by *Graham* and *Miller*. A previous version of the bill that was introduced in the Senate quotes several passages from *Miller* to highlight juveniles’ susceptibility to influence, as well as “developments in psychology and brain science [that] continue to show fundamental differences between juveniles and adult minds.”⁹⁶

West Virginia’s legislation, like California’s, embraces the spirit of *Graham* and *Miller*. In addition to abolishing LWOP for juveniles, it establishes parole eligibility for *all* juveniles after they have served fifteen years of incarceration.⁹⁷ It directs the parole board to consider “the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration.”⁹⁸

Similarly, in 2014, Massachusetts passed a bill that allows all young offenders convicted of murder to be eligible for parole after serving twenty to thirty years of their sentences.⁹⁹ The Massachusetts bill incorporates some interesting provisions to ensure that youthful characteristics are prioritized, including requiring at least two people who specialize in child psychology and mental development to be on a commission considering the use of “developmental evaluations” in parole hearings.¹⁰⁰

93. CAL. PENAL CODE § 3051(b).

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

95. H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014).

96. S.B. 370, 81st Leg., Reg. Sess. (W. Va. 2014) (“The West Virginia Legislature hereby finds that: (1) Nationally, eighty percent of juveniles serving life sentences reported witnessing violence in their homes; more than fifty percent witnessed weekly violence in their neighborhoods. (2) Nearly fifty percent of all children sentenced to life imprisonment without parole have been physically abused; twenty percent of juveniles serving life sentences have been sexually abused.”).

97. H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014).

98. *Id.*

99. H.B. 4307, 188th Gen. Ct. (Mass. 2014).

100. *Id.*

In February 2014, Hawaii passed legislation that banned LWOP for juvenile offenders.¹⁰¹ It too began with a paragraph reiterating the key findings on adolescent development and the diminished culpability of youth from the Supreme Court's jurisprudence.¹⁰² The original bill not only eliminated LWOP as a sentencing option for juveniles, but also would have established a process for sentencing modification after a juvenile had served either ten years in prison or the statutory minimum for the offense.¹⁰³ However, this portion of the bill was ultimately stricken from the version that passed.¹⁰⁴

Connecticut enacted a law in June 2015 creating specialized parole hearings for juvenile offenders.¹⁰⁵ Now, all juvenile offenders in Connecticut will have the opportunity to be released on parole after serving between twelve and thirty years in prison.¹⁰⁶

Legislation in this area is evolving rapidly. Nineteen states passed related legislation between 2012 and 2015.¹⁰⁷ Fourteen states no longer allow LWOP as a sentencing option for juveniles.¹⁰⁸ The "meaningful opportunity to obtain release" issues are a hot topic in both state legislatures and the courts.¹⁰⁹ Given the contested nature of this issue, the following analysis of California's newly implemented legislation is particularly timely.

III.

A STUDY OF CALIFORNIA'S EFFORT TO PROVIDE A "MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE"

California has been on the cutting edge of implementing legislative and judicial reforms that respond to the spirit of the Supreme Court's decisions in *Graham* and *Miller*. The remainder of this Article presents data about the first six months of the implementation of California's YOPHs and analyzes this data in the context of pre-existing academic discourse on the topic.

101. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (as enacted) (codified at HAW. REV. STAT. ANN. § 706-656 (West, Westlaw through 2015 Act 243)).

102. *Id.* (as introduced in the House on Jan. 23, 2014).

103. *Id.*

104. *Id.* (as enacted).

105. S.B. 796, Gen. Assemb., Reg. Sess. (Conn. 2015).

106. CONN. GEN. STAT. § 54-125a(f) (LexisNexis, LEXIS through 2015 legislation).

107. See ROVNER, *supra* note 72, at 2 (summarizing legislation passed by Arkansas, Delaware, Florida, Hawaii, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, Washington, and Wyoming). In addition to these thirteen states, California, Colorado, Connecticut, Massachusetts, Vermont, and West Virginia have passed related legislation. See *supra* Part I.A-B.

108. See *supra* note 79.

109. See Annitto, *supra* note 15, at 125 (explaining that legislators are "currently deciding" how to design "alternative sentencing and release structures" and "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").

Graham's meaningful opportunity for release is operationalized in most states by their parole systems.¹¹⁰ Eligibility for a parole hearing has been referred to as the "distinguishing factor" between constitutional and unconstitutional sentences.¹¹¹ Under *Graham*, LWOP sentences are unconstitutional for non-homicide juvenile offenders, while adding the possibility of parole arguably renders a life sentence constitutional.¹¹² Under *Miller*, a mandatory life sentence would not violate the Constitution as long as parole is a possibility.¹¹³ Therefore, examining parole hearing procedures and outcomes for juvenile offenders sentenced to life is critical to understanding the real-world impacts of *Graham* and *Miller*.

Despite the central importance of parole hearings in this area of the law, academic examinations of the issue are scarce.¹¹⁴ Similarly, the Supreme Court did not provide guidance on the requirements of parole hearings in *Graham* or *Miller*. However, its holdings are essentially toothless if youth offenders are processed through parole hearings that do not offer realistic opportunities to earn release.¹¹⁵

A. S.B. 260: The Law and Its Implementation

California S.B. 260 followed California S.B. 9, a 2012 law that created a mechanism for resentencing juvenile offenders with LWOP sentences.¹¹⁶ However, S.B. 260 is much broader than S.B. 9; it applies to almost all juveniles sentenced as adults, rendering them eligible for parole after they have served between fifteen and twenty-five years in custody.¹¹⁷ It draws on the spirit and reasoning of *Graham* and *Miller* but goes farther than the Supreme Court requires. S.B. 260 is, in the words of some advocates, a "game changer" because it creates an opportunity for parole for virtually all juveniles sentenced in adult court. Extending the law to apply to those juveniles sentenced to determinative terms—lengthy sentences that are not "life" sentences—expanded the law's reach dramatically. Whereas there are approximately 2,623 juvenile offenders

110. See Glynn & Vila, *supra* note 74, at 333; Bierschbach, *supra* note 14 (discussing *Graham*'s role in shifting decision-making authority from the judges, juries, and prosecutors at the front end of the process to parole boards at the back end).

111. See, e.g., Bierschbach, *supra* note 14, at 1747 ("[P]arole was the distinguishing factor in *Graham* between a constitutional and unconstitutional life sentence.").

112. See generally *Graham v. Florida*, 560 U.S. 48 (2010) (holding that LWOP sentences for non-homicide juvenile offenders violate the Eighth Amendment of the United States Constitution).

113. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

114. See Bierschbach, *supra* note 14, at 1746 (explaining that legal scholars have focused on *Graham*, but "the significance of parole to the decision remains almost entirely unexplored.").

115. See Cohen, *supra* note 64, at 1058 (arguing that if eligibility for parole does not afford true expectation of release, it should not render otherwise invalid sentence valid).

116. S.B. 9, 2012 Leg., Reg. Sess. (Cal. 2012).

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

serving life sentences in California,¹¹⁸ an estimated 6,500 California people in California prisons qualify for YOPHs under S.B. 260.¹¹⁹

Those sentenced to determinative term-of-years sentences, regardless of the length of the sentence, are eligible for parole after serving fifteen years in custody, which includes time spent in juvenile hall and jail facilities.¹²⁰ People sentenced to life terms of less than twenty-five years to life are eligible for release after serving twenty years, and those with sentences of twenty-five years or more to life are eligible for parole after serving twenty-five years.¹²¹ Those who were originally sentenced to LWOP may petition to have their sentence reduced to a twenty-five year to life sentence under the procedures set out in S.B. 9.¹²² This requires petitioning the sentencing court for a resentencing hearing that considers, among other things, mitigating characteristics relating to the individual's youth at the time of the crime and evidence of rehabilitation while in prison.¹²³ If the court sentences the youth offender to twenty-five years to life, he then becomes eligible for a parole hearing under the procedures S.B. 260 sets forth for those with a twenty-five to life sentence.¹²⁴ Under this schema, virtually every juvenile offender has an opportunity to obtain release after serving twenty-five years.¹²⁵

There are four exceptions that disqualify certain juvenile offenders from the YOPH process.¹²⁶ First, anyone sentenced to a third strike is not eligible.¹²⁷ Second, a juvenile offender is also ineligible if, after turning eighteen-years-old, he commits an additional crime where malice aforethought is a necessary element of the offense or where a life sentence is imposed.¹²⁸ Crimes that include malice aforethought as a necessary element include murder, attempted murder, and assault with a deadly weapon by a prisoner.¹²⁹ Third, people sentenced to

118. ASHLEY NELLIS & RYAN KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 20 (2009), http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf.

119. Elizabeth Calvin, Speech at Youth and the Law Seminar, Southwestern Law School (Mar. 17, 2014).

120. CAL. PENAL CODE § 3051(b)(1) (West Supp. 2015).

121. PENAL § 3051(b)(2).

122. S.B. 9, 2012 Leg., Reg. Sess. (Cal. 2012).

123. *Id.*

124. PENAL § 3051(h). *See, e.g.*, Marisa Gerber, *With Parole, A New Start*, L.A. TIMES, March 25, 2015, at B1 (reporting on release of Edel Gonzalez, who was resentenced from LWOP to twenty-five-years to life and was then found suitable for parole in Youth Offender Parole Hearing.)

125. There are some exceptions. Juveniles sentenced to LWOP for an offense where the victim was tortured, or where the victim was a member of law enforcement, are excluded from resentencing under PENAL § 1170(d)(2)(A)(ii).

126. PENAL § 3051(b)(3).

127. PENAL § 3051(h).

128. *Id.*

129. BOARD OF PAROLE HEARINGS, CALIFORNIA DEP'T OF CORR. AND REHAB., PROPOSED REGULATIONS GOVERNING YOUTH OFFENDER PAROLE HEARINGS (2015), [http://www.cdcr.ca.gov/BOPH/docs/reg_revisions/BPH%20RN%20-%2015%20CCR%20\(youth%20offender\)%20-](http://www.cdcr.ca.gov/BOPH/docs/reg_revisions/BPH%20RN%20-%2015%20CCR%20(youth%20offender)%20-)

LWOP are not eligible unless they are resentenced to twenty-five years to life under the process outlined in S.B. 9.¹³⁰ Finally, people convicted of a sex offense subject to a life sentence under California's "one strike" law are excluded.¹³¹

In addition to creating an accelerated timeline for parole hearings for youth offenders, S.B. 260 established specialized standards and procedures the parole board must follow in YOPHs. For example, BPH officers must meet with inmates six years prior to their initial YOPH eligibility date in order to "provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior."¹³² This is a chance for people to learn about the steps they should take to prepare for their parole hearings.

Most importantly, YOPHs are supposed to be different than other parole hearings because BPH is required to give "great weight" to "the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."¹³³

Like other California parole hearings, they take place on site at the prisons where the individuals are housed and are generally conducted by a Commissioner and a Deputy Commissioner.¹³⁴ There are seventeen Commissioners in the state, each appointed by the governor.¹³⁵ A District Attorney usually participates in the hearing to oppose parole. In California, all inmates are entitled to counsel at parole hearings, and the state provides attorneys for those who would not otherwise be represented.¹³⁶ However, the state compensates attorneys a maximum \$400 per case; experienced parole attorneys assert that preparing for a parole hearing in a competent manner requires far more time than a \$400 payment would allow for.¹³⁷

%20Draft%20for%20MAY%20Public%20Board%20-%20last%20updated%205-7-2015.pdf.

130. PENAL § 3051(h) ("This section shall not apply to cases in which . . . an individual was sentenced to life without the possibility of parole . . .").

131. *Id.*

132. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013) (amending PENAL § 3041(a)).

133. *Id.*

134. *See* PENAL § 3041(a).

135. CAL. PENAL CODE § 5075(b).

136. *See* ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 12 (2011), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf>.

137. *See* Brief for Post-Conviction Justice Project as Amicus Curiae Supporting Petitioner at 18–19, *In re Alatraste*, No. S214652 (Cal. May 20, 2014) [hereinafter Brief for Post-Conviction Justice Project] (arguing "[i]t is unreasonable to expect prisoners to develop the record given the current funding allotted to Board-appointed attorneys").

B. Methods and Demographic Information

This study examines the first six months of the implementation of California's law. It tracks the quantitative outcomes of all 144 YOPHs that were scheduled between January 1, 2014—the date the law went into effect—and June 30, 2014. Moreover, it analyzes the qualitative content of 107 of the 109 YOPHs that were conducted during this timeframe. BPH was unable to provide complete transcripts for two of the hearings, which is why two were left out of the transcript-review portion of the study.

Information about the hearings was gathered from three primary sources: (1) YOPH schedules posted on California's BPH website on a monthly basis; (2) Parole Suitability Hearing Results lists published on the BPH website on a weekly and monthly basis; and (3) individual transcripts from all of the YOPHs that were held, which are available to the public and were requested from BPH on an individual basis. The lists of scheduled hearings were cross-referenced against the hearing results lists in order to identify which hearings were postponed and which were actually held. With the assistance of a team of research assistants, I then requested the transcripts of all hearings that were conducted during this time period.

Based on a preliminary review of twenty transcripts, I designed an online database including sixty fields to code information contained in the individual transcripts. Transcripts range in length from 100 to over 200 pages. Fields included demographic data such as the inmate's age at the time of the crime and age at the time of the hearing. The database also tracked the prison where the hearing was held and the names of the Commissioners charged with making the decisions. Other important fields included a description of the offense, information about any childhood abuse, the number (and nature) of disciplinary infractions, and whether the prisoner is identified as a prison gang member.

The database also included some open-ended questions to allow researchers to capture information that did not neatly fit into another field. For example, researchers were asked whether anything else stood out from the transcript; they were also asked to include any comments made about the inmate's emotions and to summarize the reasons the Commissioners provided for their decision. Six research assistants read through transcripts entered information into the database. I reviewed all of the entries by comparing them to the transcripts, making corrections as needed.

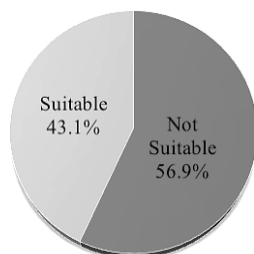
One hundred and forty-four YOPHs were scheduled between January 1 and June 30, 2014. Of the 144 hearings scheduled within these six months, 109 were conducted and thirty-five were postponed.¹³⁸ Out of the thirty-five postponed

138. This information was obtained by combining information contained in publications available on the website of the California Department of Corrections and Rehabilitation. See generally *Board of Parole Hearings*, CAL. DEP'T OF CORRECTIONS AND REHABILITATION, <http://www.cdcr.ca.gov/BOPH/> (last visited Aug. 12, 2014); *Youth Offender Parole Suitability Hearings*, http://www.cdcr.ca.gov/BOPH/parole_suitability_hearings_2014.html; *Parole*

hearings, eleven were stipulations whereby the prisoner stipulated that he was not suitable for parole. Twenty-four others were postponed for other reasons, without an admission of unsuitability for parole.¹³⁹

Out of the 109 hearings that were held during this six-month period, forty-seven were granted (43.1%); sixty-two were denied (56.9%).¹⁴⁰ However, that is not the end of the story. In California, the Governor has the power to reverse the decisions of BPH for people convicted of homicide. Although previous California governors typically reversed almost all parole grants for people convicted of murder, California's current governor Jerry Brown allows most parole decisions to stand. In 2014, he reversed twenty percent of BPH's decisions overall; this number includes YOPHs in addition to all other parole hearings.¹⁴¹ Out of the forty-seven grants for youth offenders in the sample, Governor Brown reversed eleven, at a rate of twenty-four percent.¹⁴² Overall, thirty-five men were released under S.B. 260 in its first six months.

Results of YOPH Hearings, January 1, 2014-June 30, 2014



All of the people who had YOPHs during this six-month period were male. They were housed in twenty-two different prisons across the state. Most were

Suitability Hearing Results for 2014, <http://www.cdcr.ca.gov/BOPH/pshResults.html>.

139. Postponements have become increasingly common in California parole practice when attorneys anticipate their client will be denied parole, for example, due to recent disciplinary infractions. See WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 11 (discussing the increase in the use of waivers and stipulations to delay parole hearings and the impact of Marsy's Law on this process). Rather than risk the parole board setting the next hearing ten or fifteen years out, as is within their discretion to do, many choose to stipulate to parole ineligibility in order to schedule the next parole hearing within the next few years.

140. *Board of Parole Hearings*, *supra* note 138.

141. David Siders, *Jerry Brown's Parole Reversal Rate Holds Steady*, THE SACRAMENTO BEE (Feb. 20, 2015), <http://www.sacbee.com/news/politics-government/capitol-alert/article10783583.html> (reporting that Governor Brown allowed eighty percent of the Parole Board's decisions to grant parole to convicted murders to stand and that he reversed a total of 133 out of 672 parole grants).

142. See GOVERNOR EDMUND G. BROWN, JR., EXECUTIVE REPORT ON PAROLE REVIEW DECISIONS: DECISIONS FOR THE PERIOD JANUARY 1, 2014 THROUGH DECEMBER 31, 2014 (2015), https://www.gov.ca.gov/docs/2014_Executive_Report_on_Parole_Review_Decisions.pdf.

committed to state prison for murder convictions. Only twelve were sentenced to life for crimes other than homicide: seven for attempted murder, four for kidnapping, and one for forcible oral copulation.¹⁴³ Of those convicted of murder, fifty-four were for first degree murder and forty-one for second degree. They were all incarcerated for indeterminate life terms ranging from seven-to-life to thirty-six-to-life, meaning that the BPH and the Governor have the power to determine whether they will ever be released from prison.

Most Serious Commitment Offense

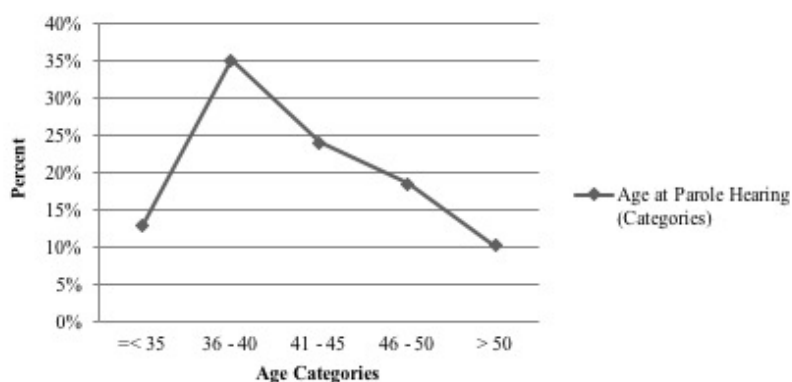


Some of these prisoners were convicted of multiple offenses arising out of the same event. Over seventy-five percent committed crimes against only one victim. In addition to the one case where the most serious offense committed was forcible oral copulation, five additional individuals were convicted of rape or forcible oral copulation in addition to murder, attempted murder, or kidnapping. Out of the entire sample, 5.5% were convicted of one of these two sex offenses.

All of the individuals in the sample were under eighteen years of age when they committed their offense. One was fourteen, seven were fifteen years old, forty-two were sixteen, and fifty-seven were seventeen at the time they committed the crimes that resulted in the life sentence. They had served an average of 24.7 years in custody, ranging from twelve to forty-three years. They ranged in age from twenty-nine to sixty-three at the time of their parole hearings; the average age was forty-two, with a median of forty-one years old. Most had been to previous parole hearings, although twenty-one had never had a parole hearing before.

143. This is a list of the most serious crimes they were sentenced for; many of these men were convicted of multiple offenses. Notably, of the four sentenced to life for kidnapping, two were also convicted of robbery and one was convicted of rape.

Age at Parole Hearing (Categories)



Thirty percent of the sample had been involved with prison gangs according to information contained in the suitability hearing transcripts, although that association may have been in the past.

Reliable information about the race of the potential parolees was not available from the BPH website or the parole hearing transcripts I obtained, so data is lacking in this area. This is a particularly important area for future research given the entrenched nature of racial disparities in the criminal justice arena.¹⁴⁴ In California, there are 2,623 juvenile offenders serving life sentences.¹⁴⁵ Of the juvenile lifers, 31.5% are Black, 11.7% are White, and 45.2% are Hispanic.¹⁴⁶ The impact of race on parole suitability decisions under S.B. 260 is a critical issue that I hope to be able to obtain more information about in the future.

C. Findings of the Study

The following section presents the study's major findings. When possible, as in the case of the grant rate, I compare the results of the YOPHs to results of California parole hearings for adult offenders within the same time period. However, much of the comparison data would only be available by coding the transcripts of adult offenders within the same time period, a task beyond the scope of this study. In an effort to draw some comparisons between YOPHs and parole hearings for the general population, I occasionally draw upon a study of California parole hearings conducted by Robert Weisberg, Debbie A. Mukamal, and Jordan D. Segall of the Stanford Criminal Justice Center.¹⁴⁷ Their research includes detailed information derived from reviewing 448 parole hearing

144. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

145. NELLIS & KING, *supra* note 118, at 20.

146. *Id.*

147. WEISBERG, MUKAMAL & SEGALL, *supra* note 136.

transcripts from hearings conducted in 2009 and 2010.¹⁴⁸ I use their data from 2010 as a rough point of comparison throughout this section.¹⁴⁹

i. Grant Rate

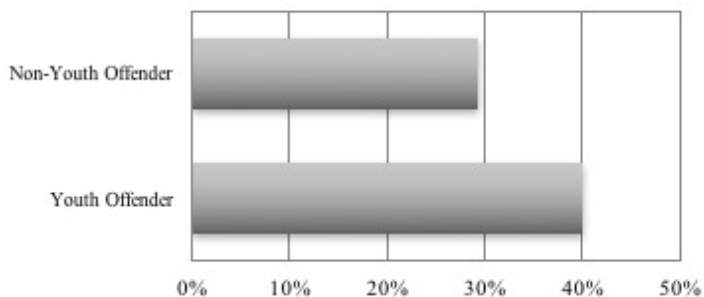
In its first eleven months, S.B. 260 created at least marginally more meaningful opportunities for release given that youth offenders were released at a higher rate than non-youth offenders during the same time period.

The law went into effect on January 1, 2014, and the first youth offender parole hearing took place on January 7 of the same year.¹⁵⁰ Two hundred and sixty hearings were scheduled in the first eleven months of 2014. In nineteen of these hearings, the prisoner stipulated to being unsuitable for parole.¹⁵¹ Putting aside these nineteen stipulations, 241 hearings were actually held. One hundred and four people were found suitable, while 137 were found unsuitable for parole, equating to a grant rate of 43.15%.

In contrast, the grant rate for California parole hearings (excluding YOPHs) during that same period—from January through December of 2014—was 32.33%. Thus the grant rate for youth offenders over the first year of the program was approximately eleven percent higher than for non-youth offenders. During this time period, youth offenders were statistically more likely to be found suitable than adult offenders.¹⁵² This finding is statistically significant at the 0.01 level.

**Percentage of Parole Hearings Resulting in a Finding of Suitability,
Including Stipulations to Parole Unsuitability¹⁵³**

January 1 – November 30, 2014



148. *Id.* at 18.

149. This is by no means a perfect mechanism for comparison given the temporal gap of four years between the comparison sets, and I hope to incorporate more recent data about parole for the general population in California into future research on Youth Offender Parole Hearings. Nonetheless, this data provides a useful comparison group for this preliminary examination.

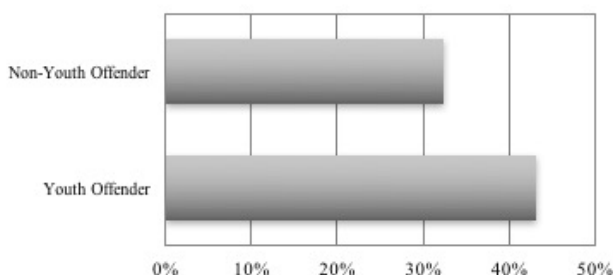
150. A youth offender parole hearing was scheduled for Sean Clarke on January 2, 2014, but the hearing did not take place because Clarke stipulated to a three-year postponement. The first youth offender parole hearing that took place was for Joseph Davidson on January 7, 2014. Davidson was found suitable for parole, although Governor Brown later reversed the decision.

151. *See supra* note 143 for more information regarding stipulations.

152. P-Value is 0.0007 with a Critical Value of 6.6349.

153. Critical Value is 6.6349; p-value is 0.0003

**Percentage of Parole Hearings Resulting in a Finding of Suitability,
Excluding Stipulations to Parole Unsuitability¹⁵⁴
January 1, 2014 to November 30, 2014**



These numbers are based on the first eleven months of S.B. 260's implementation. I chose to analyze the first eleven months rather than limit these numbers to the six months I focus on in the transcript-review portion of the study because this larger sample allows for greater reliability.¹⁵⁵ It is important to keep in mind that this data is preliminary and that results may change substantially as S.B. 260 is implemented more broadly.¹⁵⁶

154. Critical Value is 6.6349; p-value is 0.0007.

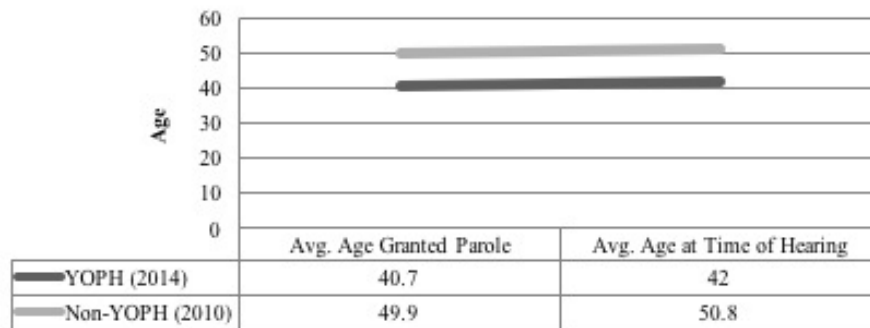
155. Lists of the names of individuals scheduled for YOPH hearings from January through November 2014 were publicly available on the California Department of Corrections and Rehabilitation ("CDCR") website; I was able to determine the results of the hearings by comparing the names of the Youth Offenders to the monthly parole suitability hearing results also on the CDCR website. The suitability findings for non-Youth Offenders were calculated based on these monthly lists. I counted each non-Youth Offender who was found suitable and did the same for all of those found non-suitable between January and November of 2014. Unfortunately, CDCR stopped publicly posting the names of youth offenders as of December 2014. Therefore, I was unable to identify which December 2014 hearings were YOPHs and compare the numbers for all of 2014.

156. Notably, the Youth Offender Parole Hearings in this sample differ from those that will be scheduled in the coming months and years. All of the hearings that were scheduled during the first six months of the law's implementation were for people with life sentences who would have otherwise been eligible for parole at some point, even if the law had not changed. Most of the lifers who had parole hearings in this initial six-month period had already anticipated parole hearings during this time. S.B. 260 renders some lifers eligible for parole at an accelerated timeline; those who would otherwise have to wait longer than twenty-five years now become eligible for parole at the end of twenty-five years. It would be reasonable to consider that lifers who did not expect to appear in parole hearings for several more years may not be as prepared as those who were expecting to go before the Board within the first six months of S.B. 260. In addition, one groundbreaking aspect of S.B. 260 is that it created the opportunity for parole of young people sentenced to lengthy determinative sentences. The outcomes of these hearings may be quite different because these individuals never expected to be eligible for parole. In contrast to people with life sentences who knew they would need to prove themselves deserving of parole, those with determinative sentences have likely not been participating in prison programming with the goal of proving their rehabilitation. Over time, these differences should even out as people become aware of their parole eligibility at the outset of their incarceration.

ii. Age at Release

In the sample, YOPHs resulted in opportunities for release at a younger age. In the first six months of S.B. 260's implementation, youth offenders who were granted parole had an average age of 40.7, which is 9.2 years younger than the average age of lifers who were granted parole in California in 2010.¹⁵⁷ This is consistent with the younger age at which people qualify for YOPHs; the average age of people who had YOPHs in this six-month period was forty-two, which is 8.7 years younger than the average age of prisoners serving life terms who had parole hearings in 2010, which was 50.8 years old.¹⁵⁸

Age Comparison: YOPH and Non-YOPH



This preliminary data regarding the decreased age at which people qualified for parole is one indication that S.B. 260 may be creating more meaningful opportunities for people to be released because younger people will have more time to build meaningful lives outside of prison.

Over time, the age gap will probably widen between youth offenders and the general parole-eligible population because this preliminary data is skewed for two reasons. First, the only people scheduled for parole hearings during the time of this study were people with life sentences. Under the different timeframes for parole eligibility established by S.B. 260, people with life sentences must serve twenty to twenty-five years in order to be eligible for parole, unless they would otherwise be eligible for parole earlier. However, those with determinate term-of-years sentences qualify after a shorter period of time—fifteen years. Thus, as California begins to hold YOPHs for people who qualify after serving fifteen years in custody, the average age at the time of release for youth offenders may decrease.¹⁵⁹

157. WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 21.

158. The state average referenced here is from 2010. *Id.*

159. On the other hand, those with determinate sentences never anticipated appearing before the parole board. Therefore, they may not be as well-prepared for their parole hearings and may be less likely to be found suitable for parole than their counterparts who were sentenced to life terms and therefore have been anticipating appearing before the parole board.

In the first six months of S.B. 260's implementation, no hearings for people serving determinative sentences were held, so this population is not represented in this sample. Second, the average age may decrease because some of the people currently being scheduled for YOPHs did not have the opportunity to qualify for release under these new standards at the twenty-five year mark and have thus served more time before their initial suitability hearings. S.B. 260 renders juvenile lifers eligible for parole after twenty-five years even if they otherwise would not have qualified for parole for many more years. For example, an inmate serving fifty-years to life would have otherwise had to serve forty-two years in prison before being eligible for release; S.B. 260 shaves seventeen years off of the initial suitability hearing date. Since this is a new law, many are having their first YOPH after serving longer than twenty-five years in prison. Over time, as people are considered at the fifteen, twenty, or twenty-five year marks of their sentences, the average age at the time of release should decrease for youth offenders.

iii. Statistically Significant Factors

I tested the following variables using a logistic regression analysis to determine whether they were statistically significant predictors of the outcomes of the YOPHs in the sample: age at time of offense; age at parole hearing; presence of the victim/next of kin at the hearing; presence of a juvenile record; whether the crime was committed with others; any history of physical, sexual, or emotional abuse of the prisoner; cumulative number of disciplinary infractions; number of years since last disciplinary infraction; prison gang involvement; number of victims of the crime; whether this was the initial hearing; the rating of the risk assessment; what the most serious commitment offense was; and whether the prisoner committed rape or forcible oral copulation as part of the commitment offense.

According to the logistic regression analysis, only four of these variables were statistically significant predictors as to whether the outcome of a hearing would be suitable or not suitable. These were: (1) age at time of offense; (2) cumulative number of disciplinary infractions; (3) number of years since last disciplinary infraction; and (4) risk assessment rating. The remaining variables were not statistically significant in predicting the outcome of the hearings.

In some respects, these findings are similar to the results of the Stanford study, which tracked the outcomes of California parole hearings in 2010. Like the Stanford study, the number of victims of the crime, the commitment offense, and the presence of a prior juvenile record were not statistically significant variables.¹⁶⁰

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between

160. WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 20–21.

suitable and not suitable outcomes (chi square = 71.387, $p < .000$ with $df = 14$). Nagelkerke's R^2 of .694 indicated a moderately strong relationship between prediction and grouping. Prediction success overall was eighty-nine percent (91.9% for Not Suitable and 84.2% for Suitable). The Wald criterion demonstrated that number of years since last disciplinary infraction, risk assessment rating, and whether the inmate had committed rape or forcible oral copulation in the commitment offense made significant contributions to prediction ($p < .050$). The remainder predictors were not significant predictors.

iv. Pre-Commitment Factors

California parole hearings generally begin with a review of "pre-commitment factors" relating to life experiences that occurred prior to the offense for which the prisoner is serving life. BPH Commissioners typically address the individual's childhood, previous criminal history, and circumstances that contributed to the prisoner's criminality in this portion of the hearing.

For S.B. 260 hearings, I expected that challenges during the prisoners' childhoods, such as experiences with abuse, would help to explain their law-breaking behavior as teenagers and would therefore impact the suitability determination. Although the transcripts indicated that sixty-six of the 107 youth offenders (61.7%) had experienced physical, sexual, and/or emotional abuse during their childhoods, this was not a statistically significant predictor of the outcome of the hearing.

Seventy-five percent of the individuals in the sample had a prior juvenile record of delinquency, but the presence or absence of a juvenile record was also not statistically significant. This is notable because under California's Factors Governing Parole Suitability and Unsuitability, the presence of a juvenile record that includes violence is a factor that points towards unsuitability, and the lack of a juvenile record points towards suitability.¹⁶¹ However, using one's juvenile record as a reason to find an inmate unsuitable for parole conflicts with S.B. 260's emphasis on growth and maturation since the time of the crime. The fact that this variable was not significant may indicate that BPH is giving more weight to the prisoner's more recent behavior rather than using a historic juvenile record as a reason to deny parole.

An individual's age at the time of the commission of the commitment offense was statistically significant in this study. Younger ages were correlated to higher suitability rates. This may indicate that Commissioners find it easier to see the influence of the hallmarks of youth and their diminished culpability in younger offenders than in their older peers.

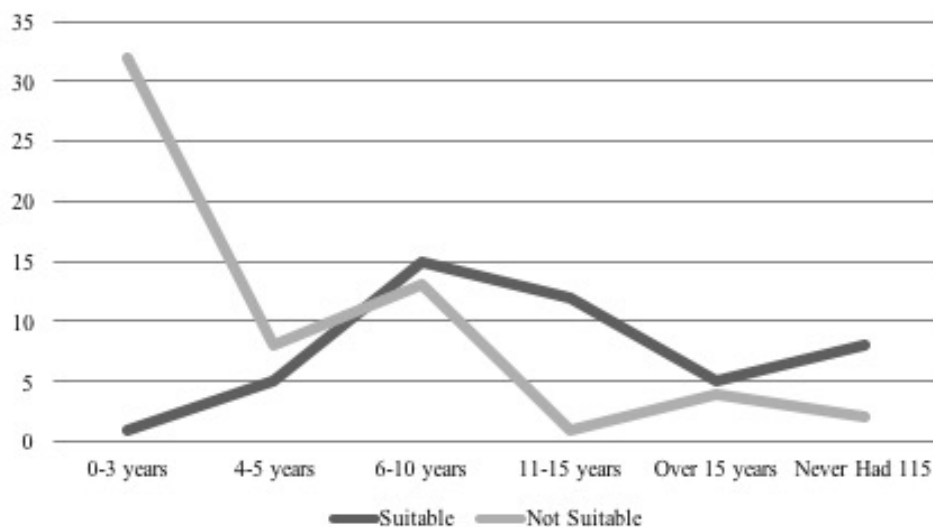
161. CAL. CODE REGS. tit. 15, §§ 2402(c) (Westlaw through 8/21/15 Register 2015, No. 34), 2281(d) (Westlaw through 12/18/15 Register 2015, No. 51).

v. Weight of Disciplinary Infractions

Of the 107 individuals in this sample, most had received at least one disciplinary infraction under section 115 of Title 15 of California's Code of Regulations during their time in prison. Nine of the 107 (8.4%) had never been issued a disciplinary infraction. Most had between one and ten on their records, with sixteen individuals receiving more than twenty over the course of their prison careers.

This study indicates that BPH has been willing to consider change over time with respect to disciplinary infractions in YOPHs thus far. While the majority of those granted release have fewer than five section 115 infractions on their records, seven people with ten or more infractions were found suitable, including individuals with nineteen, twenty, and twenty-two infractions on their records. A closer review of the individual transcripts of these three cases indicates that in each, BPH noted that the disciplinary infractions were not recent. This is one indication that BPH may be giving more weight to young offenders' growth and development over time rather than focusing on a cumulative total.

Number of Years Since Last Disciplinary Infraction



Similarly, the data shows that the length of time since the last disciplinary infraction seems to be more important than the total number of infractions on an individual's record. In fact, the length of time since the last disciplinary

infraction is the single most important predictive variable tracked in this study.¹⁶² For each additional year that an individual went without obtaining a disciplinary infraction, he was 1.31 times more likely to have been found suitable.¹⁶³

However, an individual's cumulative total of disciplinary infractions was still found to be one of four statistically significant variables correlated to the outcome of the YOPH according to a logistic regression analysis. Total number of section 115 infractions was significant at the .001 level, indicating that there *is* a relationship between one's overall disciplinary history and the likelihood of being found suitable for parole. Nine of those found suitable had zero disciplinary infractions, and eight had only one infraction. On the other hand, nineteen of the forty-seven who were found suitable had more than five infractions on their records, amounting to 40.4% of those found suitable. Forty-nine out of the sixty who were found unsuitable (81.7%) had more than five disciplinary infractions on their records. Thirty percent of those in the sample with more than five disciplinary infractions were found suitable, which differs from the results of the 2010 Stanford study where only eleven percent of those with more than five disciplinary infractions were granted parole.¹⁶⁴

162.

Variables in the Equation									
		B	S.E.	Wald	df	Sig.	Exp(B)	95% EXP(B)	C.I. for
								Lower	Upper
Step 1 ^a	age_offense	-.573	.601	.909	1	.340	.564	.174	1.831
	age_parole	-.061	.071	.728	1	.394	.941	.818	1.082
	victim_present	1.449	1.012	2.051	1	.152	4.260	.586	30.959
	juvenile_record	.597	.932	.411	1	.522	1.817	.293	11.290
	crime_others	.667	.818	.665	1	.415	1.948	.392	9.677
	abuse_hx	1.549	.823	3.538	1	.060	4.706	.937	23.637
	no_115	-.039	.055	.500	1	.479	.962	.865	1.071
	years_115	.270	.081	10.970	1	.001	1.310	1.116	1.536
	prison_gang	-.675	.787	.734	1	.392	.509	.109	2.383
	no_victims	-.334	.428	.612	1	.434	.716	.310	1.655
	initial_hrg	-1.077	.872	1.526	1	.217	.341	.062	1.880
	risk_assess	-1.476	.426	12.002	1	.001	.229	.099	.527
	serious_offense	.053	.325	.027	1	.870	1.055	.558	1.995
	rape_foc	-4.296	2.137	4.041	1	.044	.014	.000	.898
	Constant	12.005	9.581	1.570	1	.210	163628.843		

a. Variable(s) entered on step 1: age_offense, age_parole, victim_present, juvenile_record, crime_others, abuse_hx, no_115, years_115, prison_gang, no_victims, initial_hrg, risk_assess, serious_offense, rape_foc.

163. *See id.*

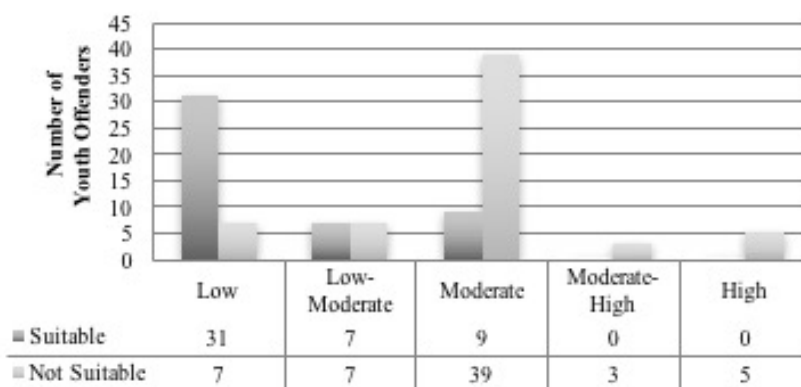
164. WEISBERG, MUKAMAL & SEGALL *supra* note 136, at 23.

vi. Risk Assessments

In California, as in many other states, psychologists prepare Risk Assessment reports that are submitted to the parole board assessing a prisoner's suitability for parole.¹⁶⁵ California uses the Compas rating test to weigh a variety of factors and to predict an individual's risk of future violence. With respect to this sample of youth offenders, the vast majority were found to present a low (38.0%), low/moderate (13.8%), or moderate (44.0%) risk of violence if released. Only eight of the 107 were rated a moderate/high or high risk.

The rating on the risk assessment was one of the four statistically significant predictors found in the logistic regression analysis. Within this sample, parole was more likely to be granted for those with a low or low/moderate risk assessment. Thirty-one out of thirty-eight inmates with a low risk assessment and seven out of fifteen inmates with a low/moderate risk assessment were found suitable for parole. Similar to the Stanford study, no one with a moderate/high or a high risk assessment was found suitable. One notable difference appears to be for those ranked with a moderate risk assessment. Out of forty-nine inmates ranked "moderate" in the Stanford study, only two were found suitable whereas out of forty-nine ranked moderate in the Youth Offender sample, nine were found suitable.

YOPH Risk Assessment Ratings



vii. Giving Great Weight to the Hallmark Features of Youth

In the YOPH transcripts reviewed in this study, the Commissioners consistently acknowledged that the hallmark features of youth must be given great weight under the law, but it is unclear whether these hallmark features actually impacted their decisions. One or more hallmark features of youth were recognized even among ninety percent of the cases where parole was denied. The presence of hallmarks of youth in cases where parole was denied may

165. See *infra* Part IV.C for a detailed discussion of risk assessments.

indicate that the Commissioners are not giving the “great weight” that S.B. 260 requires to these characteristics.

For example, seventy-three percent of the sample committed their commitment offense with at least one other person, and susceptibility to influence is one of the key hallmarks of youth. However, this variable did not have a statistically significant predictive value, indicating that it may not be given “great weight” in practice.

BPH Commissioners justified denying parole even when they recognized hallmark features of youth due to two primary factors. In ninety-six percent of the denials where hallmark features of youth were acknowledged, Commissioners explained that they found the diminished culpability of these offenders outweighed by either (1) prison misconduct or (2) a lack of insight, remorse and/or honesty about the offense. Two of the cases appeared to have been denied due to an inmate’s mental health issues rather than these other considerations.

In sum, a prisoner’s age when the crime was committed, their disciplinary history while in prison, and the risk assessment rating were predictors of parole suitability, while the presence of hallmark features of youth were not. This indicates that decision-making in YOPHs may not differ significantly from other parole hearings. One of the key contributions of S.B. 260 was to require the hallmark features of youth be given “great weight,” so the fact that this variable does not appear to be having a statistically significant outcome on suitability determinations indicates that S.B. 260 may not be functioning as intended. I analyze some of the reasons behind this problem, and some possible solutions based on other states’ models, in the remainder of this Article.

IV.

KEY COMPONENTS RENDERING RELEASE OPPORTUNITIES MORE MEANINGFUL

This Part analyzes the study’s findings in relation to three areas that are essential to crafting truly meaningful opportunities for release: (1) a person’s age at the time of parole eligibility; (2) the likelihood of obtaining release; and (3) opportunities for rehabilitation in prison. In each of these areas, S.B. 260 does not seem to be having as strong an impact as it should in order to render these opportunities for release truly meaningful. I discuss the study’s findings on each of these topics in the national context in order to highlight the need for improvement in California’s model for YOPHs.

A. How Old Is Too Old?: Age at the Time of Parole

In order for an opportunity for release to be meaningful, it should occur within a timeframe that would allow the individual to live a meaningful life outside of prison. Being released at a younger age opens more doors to obtaining an education, building a career, and having a family. But how does this

reasoning translate into numbers? When must an opportunity for release be available in order for it to be meaningful?

As reported in Part II, members of this study's sample were released at an average age of 40.7, which is 9.2 years younger than the average age at which other California lifers were found suitable for parole. On the one hand, the fact that youth offenders are being paroled nearly a decade earlier than their adult offender counterparts is an indication that their age at the time of release allows them more meaningful opportunities to move on with their lives. On the other hand, this timeframe still forecloses many possibilities in people's lives. It is unclear whether people incarcerated in their teenage years and paroled in their early forties will be able to establish meaningful careers, family relationships, and friendships after release. In order to be meaningful, release should be available in a timeframe that does not foreclose these opportunities. For women, the possibility of having children is limited at this age, and the same would hold true for men with partners of their same age.

As this Part explores, many (including the Model Penal Code) recommend opportunities for juvenile release after ten years, which would mean people being released in their mid-twenties. California should aspire to bring its average age of release closer to this mark.

i. Meaningful vs. Geriatric Release

Recent court decisions have focused on age at the time of release in interpreting *Graham*; their reasoning supports the idea that mere release from prison at *some* age is not necessarily meaningful. Rather, as discussed in Part I, many courts have entertained the idea that parole eligibility in old age is not the kind of meaningful opportunity contemplated by *Graham* and is, instead, more akin to LWOP. In *State v. Null*, where the Iowa Supreme Court found a 52.5 year prison sentence to amount to a *de facto* LWOP sentence, the Court explained, "we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*."¹⁶⁶ According to the court, "geriatric release" is not meaningful.¹⁶⁷ Similarly, the Mississippi Supreme Court ruled that a sentencing statute requiring a life sentence with the possibility of release at the age of sixty-five amounts to LWOP and thus violates *Miller*.¹⁶⁸

The age at which a young offender qualifies for release impacts whether he will have the opportunity to live a meaningful life. For example, Herman Wallace was released last year after serving more time in solitary confinement

166. *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013).

167. *Id.* On the other hand, Virginia's Supreme Court held that the opportunity to be paroled at the age of sixty constituted a meaningful opportunity to obtain release in compliance with *Graham*. *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011).

168. *Parker v. State*, 119 So. 3d 987 (Miss. 2013). *But see Angel*, 74 S.E.2d 386 (holding parole at age sixty qualifies as meaningful opportunity for release).

than any other prisoner in the United States. Wheeled out of the prison gates on a gurney, he died two days later.¹⁶⁹ Although he was released from prison during his lifetime, this is not what the Supreme Court had in mind when it established the meaningful opportunity to obtain release requirement.

In contrast, young people who commit serious crimes but are released in young adulthood have gone on to make valuable contributions to society. For example, Dwayne Betts served over eight years for a carjacking he committed when he was sixteen.¹⁷⁰ After his release from prison in his mid-twenties, he went on to graduate from college and publish two books.¹⁷¹ Edwin Desamour spent more than eight years in prison for a homicide he committed at the age of sixteen; he was released in 1997 and went on to found a nonprofit dedicated to helping young people avoid “making decisions that could lead to the double tragedy of them taking someone else’s life and ending up in prison.”¹⁷² These are the kind of opportunities the Court contemplated; age clearly impacts just how meaningful an individual’s release may be. As the Iowa Supreme Court explains, “[t]he prospect of geriatric release . . . does not provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society.”¹⁷³

In *Graham*, the Supreme Court considered the importance of offering juvenile offenders a “chance for fulfillment outside prison walls” and a “chance for reconciliation with society.”¹⁷⁴ This reasoning implies that a meaningful opportunity for release would allow juveniles the opportunity to be released with enough time remaining in their lives to find fulfillment and reconciliation. Offering young offenders hope that they will be able to earn their release was also central to the Supreme Court’s reasoning in *Graham*.¹⁷⁵

169. Herman Wallace: ‘Angola Three’ Inmate Dies Days After Release from Solitary, THE GUARDIAN (Oct. 4, 2013), <http://www.theguardian.com/world/2013/oct/04/herman-wallace-angola-three-dies-solitary-confinement>.

170. See Meredith Blake, *The Exchange: R. Dwayne Betts on Prison, Poetry and Justice*, THE NEW YORKER (Nov. 30, 2010), <http://www.newyorker.com/books/page-turner/the-exchange-r-dwayne-betts-on-prison-poetry-and-justice>; DWAYNE BETTS, *A QUESTION OF FREEDOM* (2009).

171. *Id.*

172. Edwin Desamour, *My Story: Why Pennsylvania Lawmakers Should Not Throw Away the Key on Locked-Up Kids* (October 15, 2002), <http://fairsentencingofyouth.org/wp-content/uploads/2013/01/My-Story.pdf>.

173. *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

174. *Graham*, 560 U.S. at 79.

175. *Id.* (“Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.”).

ii. State Laws

State laws range in terms of when they allow juvenile offenders to qualify for release. Most establish the possibility of release after juvenile offenders have served somewhere between ten to forty years in prison, with an average of twenty-five years.

At the low end of the spectrum, a federal court in Michigan ordered the state to create a parole process for juveniles sentenced to life without parole; under the court's order, young offenders could qualify for parole after serving ten years.¹⁷⁶ This plan has not yet gone into effect because the Sixth Circuit granted a stay while the case is on appeal.¹⁷⁷ Hawaii recently considered legislation that would have allowed youth offenders to be resentenced after as little as ten years.¹⁷⁸ This is consistent with the American Law Institute's recommendations in the Model Penal Code, which recommends that juvenile offenders be eligible for sentencing modification after they have served ten years in custody.¹⁷⁹ It is also consistent with international practices and human rights principles.¹⁸⁰ Other states at the low end of the spectrum include California, Florida, Massachusetts, and West Virginia, all of which have established parole eligibility for some youth offenders after fifteen years.¹⁸¹

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

177. Order at 4–5, Maxey v. Snyder, No. 13-2661 (6th Cir. Dec. 23, 2013), https://www.michigan.gov/documents/ag/Hill_v._Snyder_6th_Cir._Order_443146_7.pdf

178. H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (as introduced in the House on Jan. 23, 2014).

179. MODEL PENAL CODE: SENTENCING (AM. LAW INST., Tentative Draft No. 2, 2011).

180. See generally Convention on the Rights of the Child art. 37(b), opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (stating that incarceration should “be used only as a measure of last resort” for juveniles and should be imposed “for the shortest appropriate period of time”). See also Beth Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, 20 CARDOZO J. INT’L & COMP. LAW 105 (2011) (reviewing the juvenile justice system created in Oaxaca, Mexico, where maximum length of confinement for a juvenile offender is ten years); Frieder Dunkel, *Juvenile Justice in Germany*, in INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 225, 230 (Josine Junger-Tas & Scott H. Decker eds., 2006) (describing the German juvenile justice system and reporting that the maximum prison term a juvenile may be sentenced to is ten years). But see CONNIE DE LA VEGA, AMANDA SOLTER, SOO-RYUN KWON & DANA MARIE ISAAC, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 58 (2012) (surveying 164 countries and concluding that “the majority of countries prescribe sentences for juvenile offenders to a maximum of 25 years”).

181. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013) (juvenile offenders sentenced to determinative term-of-years sentences are eligible for parole after serving fifteen years); FLA. STAT. ANN. § 775.082(1)–(3) (Westlaw through 2015 1st Reg. Sess. and Special Session A) (juveniles sentenced to under twenty-years in prison are eligible for parole after serving fifteen years); MASS. GEN. LAWS ch. 279 § 24 (West Supp. 2015) (establishing parole eligibility for juveniles sentenced of second degree murder at fifteen years); H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014) (all juveniles are eligible for parole after serving fifteen years).

In an extensive law review article addressing parole hearings for youth offenders, Sarah Russell argues for parole eligibility at the ten year mark and critiques state laws that offer the opportunity for release only after thirty or forty years in prison, arguing that these sentences “mean being incarcerated past the typical childbearing age, past the timeframe in which one could start a meaningful career, and past the age in which one could expect parents or other former caregivers to still be alive.”¹⁸² Social scientists have found that social connections, and relationships with family and friends, are central to people’s perceptions of having meaningful lives.¹⁸³ Similarly, raising a child is connected to meaningfulness in one’s life.¹⁸⁴ Release at an age that forecloses or limits these possibilities would seem to fall short of qualifying as a meaningful opportunity.

At the high end of the spectrum, Colorado and Texas require juvenile lifers to serve forty years before they are eligible for parole.¹⁸⁵ Louisiana provides for parole hearings for juvenile offenders after they have served thirty or thirty-five years in custody.¹⁸⁶

The national median an individual with a life sentence must serve prior to becoming eligible for parole is twenty-five years.¹⁸⁷ A twenty-five year parole eligibility date would mean that most youth offenders would be eligible for release in their early forties and is relatively consistent with the average age of release in this study. Release in one’s early forties offers more opportunities to develop meaningful lives than those statutes that only allow for parole eligibility after an individual has served forty years, rendering them eligible for parole in their late fifties.

Youth offenders in California articulate common desires for their release: to reunite with their parents before they die and help care for them as the age; to establish families of their own; to embark on meaningful careers; and to make a positive difference in people’s lives, particularly young people who seem headed down a path to crime.¹⁸⁸ While S.B. 260 offers some possibilities for establishing meaningful lives after release, people would undoubtedly have greater access to creating meaning in their lives if they were paroled in their twenties or early

182. Russell, *supra* note 11, at 408.

183. Roy F. Baumeister, Kathleen D. Vohs, Jennifer L. Aaker, Emily N. Garbinsky, *Some Key Differences Between a Happy Life and a Meaningful Life*, 8 J. OF POSITIVE PSYCHOL. 505, 510-11 (2013).

184. *Id.* at 511.

185. COLO. REV. STAT. §18-1.3-401(4)(b)(I) (2015); TEX. GOV’T CODE ANN. § 508.145(b) (West Supp. 2014).

186. LA. REV. STAT. ANN. § 15:574.4(D)(1) (Westlaw through 2015 legislation). Subsequent reforms allow for parole eligibility for juveniles convicted of homicide after thirty-five years in prison. § 15:574.4(E)(1).

187. NELLIS & KING, *supra* note 118, at 5.

188. This anecdotal information is derived from conversations I have had with youth offenders in California.

thirties. Lowering the average age of release would ensure that California's YOPHs provide more meaningful opportunities, as contemplated by *Graham*.

B. Likelihood of Obtaining Release

Graham and *Miller* will not result in meaningful changes to the law if parole is merely an illusory possibility.¹⁸⁹ As the Supreme Court implied in *Graham*, a realistic chance of being released is also necessary to render the opportunity meaningful.¹⁹⁰ While S.B. 260 made release *more* realistic for youth offenders during its first six months, release was still unlikely. As discussed in Part II, thirty-five out of 109 people were ultimately released under S.B. 260 during the study's timeframe, at a rate of only thirty-two percent (when factoring in reversals by the Governor).

The mere existence of a parole hearing does little to distinguish an LWOP sentence from a life sentence if the possibility of being released is slim, as it often is. Sharon Dolovich argues there is "little practical difference" between LWOP and life with the possibility of parole sentences.¹⁹¹ According to Dolovich, whereas parole hearings in the mid-twentieth century were a "meaningful process in which parole boards seriously considered individual claims of rehabilitation," they have developed into "in most cases a meaningless ritual in which the form is preserved but parole is rarely granted."¹⁹²

Nationwide, only a fraction of those who are eligible for parole are actually released. In New York, the parole release rate is thirteen percent for people serving life sentences for violent felonies.¹⁹³ Michigan's release rate for lifers was 8.2% over the past thirty years.¹⁹⁴ Ohio's dipped to 6.9% in 2011.¹⁹⁵

In 2010, a California inmate serving a life sentence in California had an eighteen percent chance of being granted parole by the parole board and a six percent chance of actually being released.¹⁹⁶ Things have changed since 2010, in large part because California's current governor allows a much higher number of BPH decisions to stand.¹⁹⁷ In 2014, life prisoners had a thirty-two percent chance

189. Bierschbach, *supra* note 14 at 1761 ("It is hard to see a difference in severity between a sentence of life without parole and one of life with parole when parole release is neither required nor guaranteed.").

190. *Graham v. Florida*, 560 U.S. 48 82 (2010).

191. Sharon Dolovich, *Creating the Permanent Prisoner, in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 96, 110 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2012).

192. *Id.* at 111.

193. Russell, *supra* note 11, at 398 n.165 (citing, Alan Rosenthal, Patricia Warth & Andy Correia, *Parole Reform*, ATTICUS, Winter 2011, at 27, 27).

194. *Parole from Past to Present*, MICH. DEP'T OF CORRECTIONS, http://www.michigan.gov/corrections/0,4551,7-119-1435_11601-331908--,00.html (last visited August 14, 2014).

195. Tom Beyerlein & Laura A. Bischoff, *Changes May Help More State Prisoners Get Parole*, DAYTON DAILY NEWS (June 18, 2012 11:45 A.M.), http://www.daytondailynews.com/news/news/crime-law/changes-may-help-more-state-prisoners-get-parole/nPgwm/?__federated=1.

196. WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 11–12.

197. California's current governor, Jerry Brown, has approved eighty-two percent of the

of being found suitable for parole and a twenty-six percent chance of being released.¹⁹⁸

S.B. 260 significantly improved the likelihood of release for juvenile offenders in the first year of its implementation. In 2014, YOPHs were more likely than parole hearings involving adult offenders to result in findings of suitability.¹⁹⁹ In the first eleven months of 2014, forty-three percent of YOPHs resulted in findings of suitability in contrast to thirty-two percent of non-YOPHs; the grant rate for YOPHs was eleven percent higher than for other parole hearings.

These findings indicate that California's law may be accomplishing what it set out to do. However, S.B. 260's opportunities do not seem realistic enough. The majority of YOPHs in the first year resulted in denials. The law may not be having the transformative effect many contemplated it would. In Part IV, I discuss several changes that have the potential to make the likelihood of release more realistic.

C. Access to Rehabilitative Programming

An offender must generally demonstrate that he or she has been rehabilitated in order to be found suitable for parole. Offering opportunities for young offenders to rehabilitate while they are in prison is fundamental to providing a meaningful opportunity for release. If they do not have access to rehabilitative programs, it will be nearly impossible to prove they have been rehabilitated in their parole hearings.²⁰⁰ The transcript review portion of the study confirmed that limited access to rehabilitative programming is a major

parole board's decisions regarding suitability for parole whereas Arnold Schwarzenegger approved only twenty-seven percent and Grey Davis approved only two percent. *Record Number of Inmates with Life Sentences Winning Parole in California*, FOXNEWS.COM (Feb. 26, 2014) [hereinafter *Record Number of Inmates*], <http://www.foxnews.com/us/2014/02/25/record-number-inmates-with-life-sentences-winning-parole-in-california/>. The likelihood of prisoners with life sentences being granted parole in California has improved dramatically in the past six years due in part to a 2008 California Supreme Court decision that mandates that people may only be found unsuitable for parole if there is "some evidence of present dangerousness." See *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008).

198. The thirty-two percent chance of being released is based on data reported on the results of all parole hearings in 2014. The twenty-six percent chance of release was calculated based on the fact that Governor Jerry Brown approved eighty-two percent of the Board of Parole Hearing's decisions in 2014. See *Record Number of Inmates*, *supra* note 197.

199. This data is derived from an analysis of the results of all parole hearings held in California between January 1, 2014 and November 30, 2014 and the results of Youth Offender Parole Hearings held in the same timeframe. Unfortunately, the state did not release results for December of 2014, so this conclusion is based on data from 11 out of twelve months in 2014.

200. The year after the *Graham* decision, Sally Terry Green argued that *Graham's* meaningful opportunity for release requirement should push states to develop more robust rehabilitative options for young offenders who will not be able to qualify for release unless they can demonstrate rehabilitation. See Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1 (2011).

obstacle facing youth offenders seeking parole under S.B. 260. Greater access to rehabilitation is a critical requirement for ensuring meaningful opportunities for release.

i. National Context

Across the country, juvenile offenders serving life sentences are often prohibited from participating in rehabilitative programming while in prison.²⁰¹ One national survey found that sixty-two percent of juvenile lifers were not participating in rehabilitative programs in prison despite the fact that most desired to do so.²⁰² Eighty-two percent of those not enrolled in programs indicated that they wanted to participate but could not because either the prison did not offer such programming or they had been denied the opportunity to participate.²⁰³

Marcia Levick and Robert Schwartz reviewed state prohibitions on juvenile lifers participating in rehabilitative programming and recommend increasing rehabilitative options in prisons to make parole more possible to attain.²⁰⁴ They concluded that, in many states, there are fewer rehabilitative opportunities available to young offenders than to their adult counterparts.²⁰⁵ In Missouri, Louisiana, and Florida, for example, institutional rules prevent youth offenders from participating in rehabilitative programming.²⁰⁶ According to Levick and Schwartz, “[a]fter *Miller*, states must make sure that their approach to prison programming, and its impact on parole hearings, recognizes youths’ capacities for rehabilitation and leaves open the possibility of their release.”²⁰⁷

Massachusetts specifically addressed this problem in its youth parole legislation, including the following provision:

The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in section 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures

201. See Levick & Schwartz, *supra* note 8, at 393 (“[R]ehabilitation is often undermined by state laws and regulations that deny juvenile lifers access to prison programs such as Alcoholics Anonymous, Narcotics Anonymous, vocational training, and courses to achieve a GED or college degree.”).

202. ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 4 (2012), http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

203. *Id.* at 24.

204. *Id.* at 35–36.

205. *Id.*

206. Levick & Schwartz, *supra* note 8, at 397–98.

207. *Id.* at 396.

determined by the department, the placement shall not be categorically barred based on a life sentence.²⁰⁸

ii. California

The California Department of Corrections and Rehabilitation classifies prisoners under a system that weighs an offender's young age and a lengthy sentence as factors that warrant placement on a higher security level yard.²⁰⁹ As such, many youth offenders are housed in maximum security prisons at the outset of their prison terms; it can take many years for them to qualify for transfer to lower-security prisons. Rehabilitative options are quite limited in California's maximum security prisons. This presents a dilemma; young offenders have less access to rehabilitative programming, but they must show evidence of extensive participation on rehabilitative programming in order to qualify for release.

S.B. 260 did not specifically address this issue, and limited access to rehabilitative programming has come up in many of the YOPHs. For example, consider this exchange from one hearing:

Deputy District Attorney ("DDA"): So would the Panel confirm with the inmate that before—is it correct that before 2008 that there had been no attempts at participating in self-help, academics or training other than what's just been mentioned?

...

Presiding Commissioner: So between '96 [when he entered California Department of Corrections and Rehabilitation ("CDCR")] and 2008, did you make any efforts to participate in self-help? And if so, what did you do?

Inmate: Yes. I started participating in self-help when the time I left Level IV to Level II which was, yeah, 2008.

...

DDA (closing): It strikes me that though he was received in 1996, there was a startling lack of activity, positive activity in [CDCR] until he ended up on the doorstep of—or perhaps just after his first minimal eligible parole date in 2008. Some of it may have been due to restrictions in his housing But to have gone so long in [CDCR] with virtually no self-improvement . . . speaks to a little bit of where this inmate is coming from, maybe a little late to understanding how important

208. H.B. 4307, 188th Gen. Ct. (Mass. 2014).

209. See OFFICE OF RESEARCH AND EVALUATION BRANCH, CAL. DEP'T OF CORR. AND REHAB, EXPERT PANEL STUDY OF THE INMATE CLASSIFICATION SCORE SYSTEM 15 (2011), <http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf>.

these things can be in guaranteeing to the community that he is no longer an unreasonable risk.²¹⁰

Despite a general acknowledgment among those at the hearing that, due to prison rules, he was not eligible to participate in self help and other rehabilitative programming for the first twelve years that he was incarcerated because he was housed in a maximum security facility with no access to such programming, the DDA used the prisoner's lack of participation in such activities as a reason to deny parole.

This is a theme that emerged in many of the transcripts reviewed in this study. In one exchange, the prisoner was asked about his participation in self help programming. He explained that he was in "closed custody" from 1991 through 2000 where, according to the inmate, "the only thing that was provided for me at the time was [vocational education]" and he did not have access to self help classes.²¹¹ He was then transferred out of state for six years because he "cooperated with the DA" on an investigation. While out of state, he reported that he similarly did not have access to self-help programming. He was asked whether he read books on self-help topics, or whether he took correspondence classes. The inmate explained why he did not: "At the time, I was young . . . I just wasn't aware of a lot of things that I could have done while being in a cell."

At the hearing, he explained that he is actively trying to participate in self-help classes at his current prison, but access is limited.

"[I]n Chuckawalla, there's only three self-help groups right now. Other prisons have more than that. I think, for my best interest, it would be to establish myself in an environment where I could just get involved with groups constantly, every day, take my time, take the time and the advantages that have been given to me. In here, I don't have that . . . As for AA and NA, man, it's hard to get in there. You have capacity only for 25 individuals. You have like 40 guys trying to get into one class. There's not enough room."²¹²

In explaining their decision to find him unsuitable for parole, the Presiding Commissioner explained: "You have a very limited, and I say very limited, too, self-help, so that you can understand here's why I'm in prison and here's what I need to do to rehabilitate myself. You've taken eight courses in 27 years." Given the emphasis S.B. 260 places on rehabilitation, institutional changes are needed within California prisons in order to offer juvenile offenders more opportunities for rehabilitation earlier in their sentences.

210. Transcript of Life Term Parole Consideration Hearing of Wilfredo Estabillo at 107, CDC No. H-73306 (Cal. Board of Parole Hearings Feb. 25, 2014).

211. Transcript of Life Term Parole Consideration Hearing of Ronald Cordova at 15–18, CDC No. H-05970 (Cal. Board of Parole Hearings June 12, 2014).

212. *Id.* at 65.

iii. Expanding Access to Rehabilitative Programs

It is common for young offenders to get into trouble when they first enter the prison system, often out of fear and efforts to survive as vulnerable, young people in violent environments where they are often preyed upon. It is well documented that juvenile offenders are at greater risk of attack, both physical and sexual, when transferred to adult prisons.²¹³ Being the youngest, smallest person on the prison yard presents unique challenges. As such, some end up committing violent acts and are sent to even higher security housing units (“SHU”). Once in the SHU, there is virtually no access to programming.

In 2014, California passed Assembly Bill 1276 (A.B. 1276) to change the procedures used to determine the security level of the prison where a young offender should be housed.²¹⁴ Recognizing that “[t]here are often negative influences at higher custody level facilities” and that “younger inmates tend to be more vulnerable to physical and sexual assault at those facilities,” A.B. 1276 requires California prisons to “make individual assessments of people entering prison under 22 years of age and [to] classify these individuals at lower custody level facilities whenever possible.”²¹⁵ In addition, it requires that youth offenders who are “denied a lower security level” nonetheless “be considered for placement in a facility that permits increased access to programs.”²¹⁶ This law went into effect on July 1, 2015, so its impact on YOPHs remains to be seen.²¹⁷ In addition to changing the classification system, efforts are underway to expand access to rehabilitative programs for youth offenders in California. For example, a pilot project channeled youth offenders into prison yards that offered college courses, mentoring, and “a college-dormitory environment more conducive to learning than a typical prison environment.”²¹⁸

The state of Missouri has a promising model that allows juvenile offenders sentenced to adult prisons to access rehabilitative services in specialized facilities where they are housed together. This nationally acclaimed approach is referred to as a “blended sentencing model” whereby the Division of Youth Services runs a facility specifically for juveniles who have been tried as adults.²¹⁹

213. See, e.g., VINCENT SCHIRALDI & JASON ZEIDENBERG, JUSTICE POLICY INST., *THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS* (1997) (summarizing research on the increased vulnerability of juveniles housed in adult prisons to rape, suicide, and physical assault).

214. A.B. 1276, 2013–14 Leg. Sess. (Cal. 2014).

215. *Id.*

216. *Id.*

217. See CAL. PENAL CODE § 2905(d) (West Supp. 2015).

218. Dana Toyama, *Hollywood Executive Produces More than Comedies*, CAL. DEP’T OF CORR. & REHAB. (Jan. 31, 2012) <http://cdcrtoday.blogspot.mx/2012/01/hollywood-executive-produces-more-than.html>.

219. See *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, MO. DEP’T OF SOC. SERVS. (June 22, 2006) [hereinafter *Dual Jurisdiction Program*], <http://dss.mo.gov/dys/djp.htm>; see also MISSOURI’S CRIMINAL JUSTICE SYSTEM 191 (Frances P. Reddington ed., 2014).

They are housed separately from other adult offenders, creating a safer environment that is more conducive to education and rehabilitation.²²⁰ In addition, the facility offers greater access to rehabilitative programming.²²¹

In *Montgomery v. Louisiana*, the Supreme Court noted the rehabilitative activities Henry Montgomery had participated in while in prison—including coaching a boxing team, working in the prison’s silkscreen, and serving as a peer mentor—as examples of the kind of evidence he might show to demonstrate “his evolution from a troubled, misguided youth to a model member of the prison community.”²²² Providing access to these kinds of programs is thus central to creating realistic opportunities for release.

In these three crucial areas, S.B. 260 appears to be falling short of offering truly meaningful opportunities for release to young offenders. Although they may be released at a younger age than other parolees, the average age of release still far exceeds the ten- to fifteen-year benchmark that would make the opportunity truly meaningful. And despite the fact that people are more likely to be released on YOPHs than in general parole hearings, release is still unlikely under the new model. Finally, systematic problems that limit participation in rehabilitative programs are interfering with people’s opportunities for release. The following section recommends several changes to the law that could address these shortcomings.

V.

RECOMMENDATIONS FOR YOUTH-SPECIFIC PAROLE HEARINGS

Just three years ago, legal commentators reported, “there are no parole systems in place that contemplate the differences between adults and children convicted before the age of eighteen.”²²³ Now, California and a handful of other states have developed youth-specific standards for parole hearings. More states will likely follow suit. This study’s conclusions about some of the limitations of California’s approach under S.B. 260 highlight critical issues that should inform guidelines for youth-specific parole hearings across the country.

The move towards specialized standards for youth offenders is critical because parole procedures designed for adults are inconsistent with the Supreme Court cases on juvenile sentencing.²²⁴ In a law review article on parole for juvenile offenders, Professor Laura Cohen uses the case of a young man convicted of felony murder in New York to highlight the incongruence between parole hearing standards and the Supreme Court’s jurisprudence surrounding meaningful opportunities for release for juvenile offenders.²²⁵ Cohen explains,

220. See *Dual Jurisdiction Program*, *supra* note 223.

221. *Id.*

222. *Montgomery v. Louisiana*, No. 14-280, slip op. at 21 (U.S. Jan. 25, 2016).

223. Glynn & Vila, *supra* note 74, at 333.

224. Cohen, *supra* note 64, at 1035–42.

225. *Id.*

“none of the Parole Boards that held his fate in their hands ever even acknowledged his developmental immaturity at the time of his offense or the obvious maturation that occurred during his many years in prison.”²²⁶ Although this young man was ultimately released from prison after fifteen years, the Parole Board’s analysis of his case over the course of four parole hearings highlights the problems with using adult standards to evaluate juvenile offenders’ cases.²²⁷ Cohen concludes that the Supreme Court’s holdings in *Graham* and *Miller* “will be neutered unless parole boards are compelled to evaluate inmates convicted as teenagers in a specialized, developmentally conscious manner.”²²⁸ Moreover, many of the standards typically employed in parole hearings are systematically biased against juvenile offenders.

Miller’s reasoning would seem to require parole boards to consider the “hallmark features of youth” when assessing whether a youth offender should be released. Quoting *Graham*, the *Miller* opinion says, “[a]n offender’s age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take youthfulness into account at all would be flawed.”²²⁹ However, as Megan Annitto explains in a recent law review article comparing judicial resentencing procedures with parole hearings as responses to *Miller*, “[w]ithout reform, there is a strong case that most parole systems in their current form, with only the most ‘anemic’ protections in place, do not” provide meaningful opportunities for release.²³⁰ Legal scholars seem to agree that, as Gerard Glynn and Ilona Vila write, “[f]or parole to be an appropriate response to *Graham*, the state system of parole must include child-specific criteria.”²³¹

Vague standards directing parole boards to consider youthful characteristics or the diminished culpability of youth do not go far enough. One of the lessons from this study is that relatively vague standards, such as those contained in the text of S.B. 260, may not be enough to ensure that parole boards adequately consider the myriad ways youthful characteristics mitigate blameworthiness for criminal involvement. Although in 2014 YOPHs resulted in higher suitability in relation to the adult offenders, preliminary results from 2015 indicate that the grant rate for YOPHs has dropped. In fact, suitability rates of the YOPHs between January and April of 2015 were lower than the grant rates of their adult counterparts; adult offenders were found suitable at a rate of nineteen percent whereas youth offenders were found suitable at a rate of twelve percent.²³² In other words, youth offenders were *less likely* to be granted parole than their adult counterparts in the first four months of 2015.

226. *Id.* at 1042.

227. *Id.*

228. *Id.* at 1065. Cohen also discusses the importance of courts reviewing parole denials. *Id.*

229. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)).

230. Annitto, *supra* note 15, at 143–44.

231. Glynn & Vila, *supra* note 74, at 333.

232. Brief for Post-Conviction Justice Project, *supra* note 137, at 14.

This dip in the suitability grant underscores the challenge of introducing a different paradigm—one focused on adolescent development principles—into an established parole system, particularly when the same parole board members are expected to take a dramatically different approach when considering parole for youth offenders. Although in virtually all of the S.B. 260 hearings in this sample, the Commissioners stated on the record that they considered and gave “great weight” to the hallmark features of youth in the hearing, there seems to be quite a bit of variation in terms of how individual Commissioners apply these standards. Some Commissioners found people suitable for parole in eighty percent of the YOPHs they heard while others found people suitable in only twenty percent of the YOPHs they presided over.

More detailed substantive guidelines may help to guide decision-makers in the right direction while promoting more consistency. In order to comply with *Graham*, *Miller*, and *Montgomery*, procedures should not only require parole boards to consider the hallmark features of youth, but include more detailed standards to ensure that youthful characteristics are given the weight they deserve.

This Part addresses four major areas where specific guidelines governing parole hearings for young offenders are essential to rendering release opportunities meaningful. First, the facts surrounding one’s commitment offense should be given less weight than an individual’s change and rehabilitation over time. Second, disciplinary issues that occurred towards the beginning of young offenders’ prison terms should not be held against them given that these problems often arise due to efforts to protect themselves within the violent context of adult prisons.²³³ Disciplinary records should be viewed in light of research about the dangers young offenders face when they enter prison and in the context of adolescent development research. Third, risk assessments should be restructured so that they do not systematically bias young offenders. They should also be administered by adolescent development experts. And fourth, parole suitability factors must be consistent with adolescent development research.

A. The Crime Should Carry Less Weight Than an Individual’s Change and Maturation

As the Supreme Court recognized in *Graham*, “[a] juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”²³⁴ Nonetheless, the decisions in the majority of the YOPHs in the study resulting in findings of unsuitability were based at least in part on the crime.

233. See JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2000), http://www.cclp.org/documents/BBY/Youth_Crime_Adult_Time.pdf.

234. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

This is problematic because a youth offender's change since the time of the offense should be weighed more heavily than the circumstances of the crime itself. In *Graham* and *Miller*, the Supreme Court emphasized juvenile offenders' capacities to change as they mature. Specifically, the Court stated, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults . . . for a greater possibility exists that a minor's character deficiencies will be reformed."²³⁵ In addition, the Court reasoned that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."²³⁶ Just this year, the Court reiterated "that children who commit even heinous crimes are capable of change," and indicated that "those who demonstrate the truth of this central intuition"—those who demonstrate change—must be afforded the opportunity for release.²³⁷ Denying parole based on the circumstances surrounding a crime that occurred decades ago contradicts this central premise.

S.B. 260 provides that the parole board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."²³⁸ Based on the fact that the nature of the commitment offense was cited as a reason to deny parole in many YOPHs, this is an area where more specific guidelines could bring parole decisions in line with the Supreme Court's jurisprudence. For YOPHs, dynamic factors relating to an offender's rehabilitation and change should be given more weight than fixed, unchanging factors from the time of the offense.²³⁹

This recommendation—that the crime itself factor less into parole decisions for juvenile offenders—would represent a dramatic change from the typical decision-making process in parole hearings. Prior studies on parole hearings have identified the severity of the criminal offense and the length of the sentence

235. *Id.* at 68.

236. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

237. *Montgomery v. Louisiana*, No. 14-280, slip op. at 21 (U.S. Jan. 25, 2016).

238. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013), *codified at* CAL. PENAL CODE § 4801(c). This emphasis on the offender's change over time dovetails nicely with current California law governing parole hearings more broadly. In 2008, the California Supreme Court held in *Lawrence* that a prisoner must be found suitable for parole unless the Board of Parole Hearings can present "some evidence" that the inmate would currently pose an "unreasonable risk of danger" if released. CAL. CODE REGS. tit. 15 § 2402(a) (Westlaw through 8/21/15 Register 2015, No. 34); *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008). This decision was groundbreaking because it moved parole decision-makers away from fixating on the commitment offense and required them to prioritize evidence of an offender's rehabilitation and likelihood of re-offending. *See* Joey Hipolito, *In re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CAL. L. REV. 1887, 1897 (2009) ("Rather than facing a rubberstamp denial, inmates who have rehabilitated themselves now have a realistic possibility of being granted parole.").

239. *See* Levick & Schwartz, *supra* note 8, at 405 (arguing that "parole boards should be required to replace the offense-centered and largely discretionary evaluation of juvenile offenders' parole eligibility with the offender-centered approach established in *Roper*, *Graham*, and *Miller*").

to be among the most important predictors of hearing outcomes.²⁴⁰ A 1999 study in New Jersey found the criminal offense to be the most influential factor in whether parole was granted even where a statute explicating prohibited the parole board to be influenced by the offense type.²⁴¹ Most parole frameworks place a heavy emphasis on fixed factors relating to the crime or the individual's character at the time of the offense.²⁴²

In my study of S.B. 260, the type of crime an individual was convicted of was not correlated to the suitability outcome.²⁴³ The data from this sample did not show a difference in the likelihood of parole depending on whether the individual was convicted of first degree murder, second degree murder, attempted murder, or kidnapping.

However, the reasons Commissioners provided for denying parole in many cases focused on the nature of the commitment offense, or to closely related issues such as an individual's lack of insight or honesty about the offense.²⁴⁴ There were many cases where the Board denied parole based on the nature of the commitment offense where it did not seem warranted. In one case, where the Commissioner concluded Benigno Morales was not suitable for parole in part because the crime was "particularly brutal," the researcher noted that this "surprised me because his involvement sounds pretty minimal."²⁴⁵ In this case, a friend had gotten into a fight and was losing, so Morales intervened. Unbeknownst to Morales, his friend stabbed the other person in the fight, and he subsequently died. Morales even testified against his friend at the trial.

240. See John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315, 330 (1990) (severity of crime and length of sentence among influences for Wisconsin parole board members); Richard Tewksbury & David Patrick Connor, *Predicting the Outcome of Parole Hearings*, CORRECTIONS TODAY, June–July 2012, at 54;

241. Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. OF CRIM. JUST. 321 (1999).

242. See, e.g., 15 CAL. CODE REGS. §§ 2402(c)–(d). See also Annitto, *supra* note 15, at 138 (describing a Michigan procedure that allows judges to veto consideration of parole suitability in a parole hearing and reporting that "[t]he majority of the judicial objections were based upon the applicant's initial offense").

243. See *supra* Part II.C.iii.

244. Denials based on a lack of insight, remorse and/or honesty about the offense generally relate back to the commitment offense itself. Under California law governing all parole hearings—for adult offenders as well as youth offenders—parole may only be denied if the prisoner presents a current risk of danger. *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008). If a denial is based on the commitment offense, there must be some nexus between the offense and the individual's current risk to society. See *id.* at 560 ("Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense."). In practice, Commissioners often find this nexus by concluding that a prisoner does not have sufficient insight, remorse, or honesty about the offense. See *In re Shaputis*, 190 P.3d 573, 581 (Cal. 2008); *In re Mims*, 137 Cal. Rptr. 3d 682, 690 (2012) (recognizing that lack of insight is "routinely invoked" as a reason to deny parole).

245. See Transcript of Life Term Parole Consideration Hearing of Benigno Morales, CDC No. P-74897 (Cal. Board of Parole Hearings May 29, 2014).

In the case of Kevin Andition, who killed and sexually assaulted an eight-year-old when he was sixteen, the facts of the crime are disturbing given the young age of the victim.²⁴⁶ However, he was found to present a low risk of future violence in the risk assessment and had a relatively minor disciplinary history. Andition had a total of two disciplinary infractions. The most recent occurred in 1998, sixteen years before the parole hearing, for unauthorized use of a copy machine. These factors would normally favor a finding of suitability, particularly if the parole board viewed his commitment offense in light of the diminished culpability of youth. Although the Commissioners acknowledged that the crime was influenced by youthful characteristics such as his impulsivity and poor capacity for decision-making when he was sixteen, the decision to find him unsuitable for parole revolved almost entirely around the commitment offense. The Commissioners found that he showed “insufficient remorse,” took “limited responsibility,” committed the life crime in an “atrocious manner,” could not adequately explain his reasons for committing the life crime, and was inconsistent when he discussed whether he penetrated the victim.

Similarly, in the case of Anthony Couey, the BPH decision seemed to rest on the commitment offense rather than on his change and rehabilitation.²⁴⁷ His risk assessment rating was low/moderate, and his disciplinary infraction—for being out of bounds—occurred twenty years prior to this parole hearing. He had participated in vocational courses, counseling, religious activities, and had obtained his GED while in prison. In denying his parole, the Commissioners cited his lack of insight into the causative factors underlying the life crime, his failure to accept responsibility, and his callous indifference towards others as primary reasons for denying him parole. Here too, the decision seemed to revolve around the life crime rather than his change over time.

Denying parole based on the commitment offense is problematic in light of *Graham* and *Miller* for two primary reasons. First, it overlooks the diminished culpability the Supreme Court has recognized in young people. Second, it minimizes the importance of an individual’s change since the time of the commitment offense. Thus, parole boards should weigh the nature of the crime that triggered the prison sentence in light of: (1) the diminished culpability of the offender at the time of the offense given his youthful characteristics and (2) the unique capacity of young offenders to mature, such that their characteristics at the time of the offense no longer define them.

Parole standards could be modeled after sentencing hearings for youth facing LWOP, where *Miller* requires individual consideration of the juvenile offender’s age and the “wealth of characteristics and circumstances attendant to

246. See Transcript of Life Term Parole Consideration Hearing of Kevin Andition, CDC No. D-96017 (Cal. Board of Parole Hearings Jan.17, 2014).

247. See Transcript of Life Term Parole Consideration Hearing of Anthony Couey, CDC No. D-36023 (Cal. Board of Parole Hearings Jan.16, 2014).

it.”²⁴⁸ According to Levick and Schwartz, “[t]hese include, at a minimum, age and developmental attributes, some of which are immaturity, impetuosity, failure to appreciate risks and consequences, the juvenile’s family and home environment, circumstances of the offense, the extent of his participation, the way familial and peer pressures may have affected his or her behavior, a lack of sophistication in dealing with a criminal justice system that is designed for adults, and potential for rehabilitation.”²⁴⁹

A presumption that a young offender is no longer dangerous could arise if his criminal behavior resulted from his immaturity, failure to appreciate the consequences of his actions, or if his actions resulted from his susceptibility to influence. Similarly, a presumption against current dangerousness could also be established by evidence of maturity, growth, and change since the time of the offense.

Florida law emphasizes the importance of a juvenile offender’s change and maturation over time by directing the resentencing court to consider not only his “maturity and rehabilitation,” but also “[w]hether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.”²⁵⁰ Moreover, Florida gives concrete guidance regarding how to assess the diminished culpability of young offenders by requiring the resentencing court to consider “[w]hether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person” and “[w]hether the juvenile offender’s age, maturity, and psychological development at the time of the offense affected his or her behavior.”²⁵¹ Similarly, Nebraska requires the parole board to consider both the “offender’s level of participation in the offense” as well as his “ability to appreciate the risks and consequences of his or her conduct.”²⁵² West Virginia instructs the parole board to consider an offender’s “immaturity at the time of the offense.”²⁵³ These more specific guidelines may help parole boards to consider the diminished culpability of young offenders more accurately.

B. Recent Positive Behavior Should Outweigh Previous Misconduct

A prisoner’s behavior, as demonstrated by the presence or absence of disciplinary infractions, is one of the most consistently recognized factors impacting parole decision-making.²⁵⁴ In my study of S.B. 260, both the number

248. *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012).

249. Levick & Schwartz, *supra* note 8, at 392.

250. FLA. STAT. ANN. § 921.1402(6)(b) (Westlaw through 2015 1st Reg. Sess. and Special Session A).

251. *Id.* at § 921.1402(6)(d), (f).

252. NEB. REV. STAT. § 83-1,110.04(2)(g), (e) (2014).

253. W. VA. CODE ANN. § 62-12-13b(b)(4) (LexisNexis 2014).

254. See, e.g., Peter Hoffman, *Paroling Policy Feedback*, 9 J. RES. CRIME & DELINQ. 117, 124 (1972) (analyzing 270 federal parole decisions and concluding that institutional behavior was the primary factor determining the outcome of parole decisions in hearings following the initial

of disciplinary infractions and the length of time since the last infraction were statistically significant variables that predicted suitability outcomes.

A parole board's consideration of disciplinary infractions may be inappropriately applied to youth offenders if they are not assessed in a developmental context. For example, youth may have more disciplinary violations than their adult counterparts at the beginning of their prison term because (1) they are more vulnerable to attack by older inmates and therefore must act aggressively to protect themselves and (2) they are more impulsive as a result of their youth.²⁵⁵

A study of prison disciplinary issues identified age as "the most consistent and strongest determinant of prison violence, with those younger than eighteen at entrance to prison being far more likely than adults to be involved in various levels of prison misconduct and violence."²⁵⁶ Absent a consideration of the developmental context and vulnerability of juvenile offenders in adult prisons, these disciplinary issues are likely to dramatically decrease the likelihood of parole. Studies on parole hearings consistently identify an inmate's behavior while in prison as one of the most influential factors impacting parole decisions.²⁵⁷

Viewed in a developmental context, older disciplinary infractions should not influence parole decisions for youth offenders, particularly if the offender has demonstrated more recent disciplinary-free behavior. The findings of this study indicate that BPH may be prioritizing the length of time since the last disciplinary infraction more than the total number of disciplinary infractions incurred over an inmate's prison history, although this is not entirely clear. If true, this would be a positive sign. Focusing on behavior change over time rather than the total number of disciplinary infractions would provide more meaningful opportunities for release.

The unique capacity of juveniles to change over time—to grow out of their adolescent risk-taking behavior and to mature into law-abiding adults—is fundamental to the Supreme Court's jurisprudence. According to *Graham*, "[j]uveniles are more capable of change than are adults."²⁵⁸ The recency of

hearing); John S. Carroll, Richard L. Wiener, Dan Coates, Jolene Galegher, James J. Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 LAW & SOC'Y REV. 199, 211–12 (1982).

255. See Levick & Schwartz, *supra* note 8, at 394 ("When juveniles start their sentences poorly—for any number of reasons—including their efforts to 'act tough' to get by—their misbehavior can be used against them decades later.").

256. Attapol Kuanliang, Jon R. Sorensen & Mark D. Cunningham, *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence*, 35 CRIM. JUST. & BEHAV. 1186 (2008).

257. See Tewksbury & Connor, *supra* note 244, at 56. In the 2010 Stanford study on California parole hearings, only eleven percent of inmates with more than five disciplinary infractions were granted parole, in contrast to twenty-five percent of those with no infractions. WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 23.

258. *Graham v. Florida*, 560 U.S. 48, 68 (2010).

disciplinary issues should thus be weighed much more heavily than the total number of disciplinary infractions, particularly in cases where a youth offender was engaged in disruptive behavior while still young. Developmental research demonstrates that the adolescent brain is not fully formed until the age of twenty-five.²⁵⁹ Thus poor-decision making and risk-taking behavior that occurred prior to the age of twenty-five should carry less weight in light of the greater importance of how the individual behaves as a mature adult.

Parole boards should also be educated about the risks juvenile offenders face when they are transferred to adult facilities in order to understand their behavior in prison. The Department of Justice reports, “juveniles in adult facilities are at much greater risk of harm than youth housed in juvenile facilities.”²⁶⁰ One study found that forty-seven percent of juveniles in adult prisons were victims of violence.²⁶¹ A 1989 study found that juveniles incarcerated in adult facilities were fifty percent more likely to be assaulted with a weapon and five times more likely to be sexually assaulted than their counterparts in juvenile facilities.²⁶²

C. Risk Assessments Should Be Designed to Properly Assess Juvenile Offenders

Parole boards often assess an inmate’s rehabilitation in conjunction with predictions about risks of recidivism using risk assessments that predict people’s future dangerousness using a standardized set of questions, many of which focus on fixed characteristics that cannot change over time.²⁶³ The use of risk assessments to predict the likelihood of recidivism has become a cornerstone of most states’ parole hearing processes.²⁶⁴ Prisoners’ risk levels are assessed based on numerical scores where fixed characteristics “such as age at the time of offense, nature of the offense, and elementary school maladjustment” are used to predict an individual’s likelihood of reoffending.²⁶⁵ Youth is often included as a

259. See SCOTT & STEINBERG, *supra* note 32 (reporting that brain development occurs until at least age twenty-five).

260. JAMES AUSTIN, KELLY DEDEL JOHNSON & MARIA GREGORIOU, BUREAU OF JUSTICE ASSISTANCE, DEPARTMENT OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

261. *Id.* at 8.

262. Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and State Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989).

263. See generally Annitto, *supra* note 15.

264. See SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RESEARCH ON YOUTH & SOC. POLICY, FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES 9, 12 (2008), http://paroleboard.arkansas.gov/Resources/Documents/Publications/2008APAI_Survey.pdf; John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 405-06 (2006).

265. Russell, *supra* note 11, at 414.

factor that increases an individual's risk and therefore decreases the likelihood of parole.²⁶⁶

There are two primary problems with using risk assessments for juvenile offenders: (1) they have not been tested and validated for this specific population and (2) by relying on static, unchanging factors, their rating scales fundamentally conflict with the Supreme Court's acknowledgment that juveniles are uniquely capable of change as they mature.

Revising risk assessments to properly evaluate youth offenders is critical to offering meaningful opportunities for release because they strongly influence parole decisions. In my study of S.B. 260, risk assessment ratings were one of four statistically significant variables.²⁶⁷ In the 2010 Stanford study, parole was denied for all inmates who had a moderate/high or high ratings on risk assessment; only 2 inmates with a moderate risk assessment were found suitable.²⁶⁸ Similarly, in my S.B. 260 study, zero people with risk assessment ratings of moderate/high or high were released, whereas eighty-one percent of those with a risk assessment of "low" were found suitable for parole. Low risk assessment ratings are a prerequisite for parole in some states. Louisiana's guidelines governing consideration for parole eligibility for juvenile offenders require that "[t]he offender has obtained a low-risk level designation determined by a validated risk assessment instrument."²⁶⁹

The Compas, California's risk assessment tool, is similar to most risk assessments tools used for parole eligibility determinations nationwide because it is based on both static, or unchanging, factors as well as dynamic factors that can change over time as the young offender grows and matures.²⁷⁰ It treats an offender's age at the time of the offense as a characteristic that increases the risk of re-offending. However, according to the Supreme Court's reasoning in *Graham* and *Miller*, age should be construed as a mitigating rather than an aggravating factor. In contrast, being a juvenile at the time of commitment to prison increases an individual's score under many of the risk assessments.²⁷¹

266. See, e.g., CAL. CODE REGS. tit. 15 § 2402(d)(7) (Westlaw through 8/21/15 Register 2015, No. 34) (noting that "[t]he prisoner's present age reduces the probability of recidivism," with older ages favoring suitability).

267. See *supra* Part II.C.iii. California is one of many states that require the consideration of a risk assessment in the parole decision-making process. CAL. CODE REGS. tit. 15 § 2240 (Westlaw through 12/18/15 Register 2015, No. 51); Annitto, *supra* note 15, at 152–53. Like Michigan, California uses the Compas test, which tracks up to one hundred factors about the parole-eligible prisoner, ultimately rating a prisoner as a low, moderate, or high risk of future violence. Annitto, *supra* note 15, at 155.

268. WEISBERG, MUKAMAL & SEGALL, *supra* note 136, at 23.

269. LA. REV. STAT. ANN. § 15:574.4(D)(1)(f) (Westlaw through 2015 legislation).

270. See 15 CAL. CODE REGS. § 2240(b) (stating that the Comprehensive Risk Assessment "will consist of both static and dynamic factors").

271. See, e.g., Levick & Schwartz, *supra* note 8, at 408 (discussing a Georgia classification system that awards a one point reduction for those who enter prison between the ages of twenty and forty and no point reduction for those under the age of twenty at the time of their prison commitment).

Relying on static, unchanging factors such as the seriousness of the commitment offense or the age of the offender at the time of the offense contradicts the core assumptions of the *Graham* and *Miller* decisions—that young people are uniquely likely to change as they mature. Thus continuing to use risk assessments designed for adult offenders conflicts with the spirit of *Graham* and *Miller*.

In an article examining the use of risk assessments in decision-making about release for juveniles sentenced to adult prison, Megan Anitto warns that if risk assessments are not calibrated to consider the unique position of juvenile offenders, “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.”²⁷²

Using risk assessments that disadvantage young offenders contradicts Supreme Court precedent in three fundamental ways. First, *Graham* is based on the overriding premise that juveniles are less culpable than adults due to their developmental immaturity.²⁷³ Second, *Miller* directly addresses the importance of considering mitigating factors in assessing the conduct of juvenile offenders.²⁷⁴ The Supreme Court conceptualizes “brutal or dysfunctional” family or home situations, for example, as mitigating rather than aggravating characteristics.²⁷⁵ Whereas risk assessments treat instability or abuse as a child as a risk factor, a developmental approach would view this as a mitigating factor that could be transformed and overcome through maturity and rehabilitation. Third, risk level is typically increased by factors that do not apply to the life of someone who was incarcerated prior to adulthood. For example, risk level is typically decreased by factors such as being married and having a history of employment.²⁷⁶

Risk assessments that minimize the importance of an individual’s growth, maturity, and rehabilitation also contradict the spirit of *Graham*, *Miller*, and *Montgomery*. *Graham*’s meaningful opportunity for release requires that release be based on an individual’s demonstrated maturity and rehabilitation. The Supreme Court in *Miller* critiqued mandatory life without parole sentences because they “prevent[] those meting out punishment from considering a

272. Anitto, *supra* note 15, at 161.

273. See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; . . . A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988))).

274. *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (“[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered’ in assessing his culpability.” (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982))).

275. See *id.*, at 2468.

276. Anitto, *supra* note 15, at 160.

juvenile's 'lessened culpability' and greater 'capacity to change,' and run[] afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."²⁷⁷ Focusing on immutable factors, such as the offense type, contradicts this requirement.

Instead, risk assessments should not be used unless they are specifically designed for youth offenders by experts in the field of adolescent development. Using a test designed for adults contradicts the Supreme Court's findings about the unique characteristics of adolescents.

In addition, risk assessments should be administered by adolescent development experts. Under S.B. 260, the risk assessments are conducted by the same forensic psychologists that conduct the evaluations of adult offenders. As such, they do not necessarily possess an expertise in the field of adolescent development that S.B. 260 requires.²⁷⁸

Louisiana requires that the parole board "consider a written evaluation of the offender by a person *who has expertise in adolescent brain development* and behavior and any other relevant evidence pertaining to the offender."²⁷⁹ Similarly, a Massachusetts court recently ordered funding for attorneys to hire experts in adolescent development to provide their opinions in these cases. Formalizing procedures for infusing YOPHs with the opinions of adolescent development experts would improve the predictive quality of risk assessments for youth offenders while rendering their opportunities for release more meaningful.²⁸⁰

D. Suitability Factors Should Be Consistent with Adolescent Development Research

In addition to the guidelines set forth in S.B. 260, California's general suitability and unsuitability factors governing parole release decisions apply to YOPHs. This presents a problem because many of these factors contradict the reasoning in *Graham* and *Miller*, as well as the spirit and purpose of S.B. 260. For example, the absence of a juvenile record points towards suitability whereas a record of assaultive behavior as a juvenile points towards unsuitability.²⁸¹

277. *Miller*, 132 S. Ct. at 2460.

278. "In assessing growth and maturity, psychological and risk assessment instruments, if used by the board . . . shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." CAL. PENAL CODE § 3051(f)(1) (West Supp. 2015).

279. LA. REV. STAT. ANN. § 15:574.4(D)(2) (Westlaw through 2015 legislation).

280. *See* *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349, 363–64 (Mass. 2015).

281. *See* CAL. CODE REGS. tit. 15, § 2402(d)(1) (Westlaw through 8/21/15 Register 2015, No. 34) (recognizing that one factor "tending to indicate suitability" is that "[t]he prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims"); *Id.* at § 2402(c)(2) (recognizing that another factor tending to show unsuitability is whether "[t]he prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age").

However, in light of the unique capacity of juveniles to change as they grow and mature, behavior as a juvenile should no longer be relevant to an assessment of their current risk to society if released. Rather, these factors should not apply to youth offenders, and their current behavior—or their behavior as fully formed adults—should be considered instead.

Similarly, under California law, unstable social history weighs against suitability, whereas a stable social history weighs in favor of suitability for parole,²⁸² despite the fact that an unstable social history helps to explain how a child could be driven to commit a serious crime. Explaining how one's development impacted his criminality has also been interpreted to demonstrate unsuitability for parole. According to one California case, "minimizing aspects of the commitment offense reflects a denial of responsibility, and is probative of current dangerousness."²⁸³

In the study, I tracked several factors that I believed would be indicative of an unstable social history, including exposure to physical, sexual, or emotional abuse as a child and the age one first used drugs or alcohol. None of these individual factors were correlated to the suitability outcomes.²⁸⁴ Under the reasoning of *Miller*, I anticipated that these factors would correspond to parole grants in YOPHs. The Supreme Court has viewed evidence of instability in the home, exposure to abuse, and substance abuse as mitigating evidence to help explain the adolescent's behavior. Under *Miller*, youthfulness is viewed as a mitigating factor that diminishes responsibility.²⁸⁵

In *Roper*, *Graham*, and *Miller*, the Supreme Court acknowledged that juveniles have "limited 'contro[l] over their environment' and lack the ability to extricate themselves from horrific, crime-producing settings."²⁸⁶ Thus it seems unfair to hold an unstable family or community environment against a juvenile offender when determining their eligibility for parole years later. Parole boards should treat information about a juvenile's traumatic childhood, including evidence of delinquent behavior and unstable family or community environments, as mitigating rather than aggravating. Evidence pertaining to the

282. 15 CAL. CODE REGS. §§ 2402(c)(3), (d)(2).

283. *In re Tapia*, 207 Cal. App. 4th 1104, 1112 (2012).

284. *See supra* Part II.C.iv.

285. *See Miller v. Alabama*, 132 S. Ct. 2455, 2467, ("[J]ust as the chronological age of a minor is itself a mitigating factor of great weight, so must the background and mental and emotional development of a young offender be considered" in assessing his culpability." (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982))). When the Court considered the childhood of defendant Kuntrell Jackson in the *Miller* opinion, it viewed circumstances such as the impact of age on the "calculation of the risk" and "Jackson's family background and immersion in violence" as mitigating factors that relate to a juvenile offender's "diminished moral culpability" and that "a sentencer should look at." *Id.* at 2468–69. Similarly, the Court presented facts about Evan Miller's childhood victimization, including physical abuse and neglect that led him to attempt suicide four times, as "a pathological background [that] might have contributed to a 14-year-old's commission of a crime." *Id.* at 2469.

286. *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

individual's youth should not be used as a justification to deny parole. Rather, if the youth offender has moved past a traumatic childhood, his resilience should support a finding of suitability.

Florida, Nebraska, and West Virginia set forth specific criteria that must be considered in parole or resentencing decisions for juvenile offenders. Florida specifically requires the resentencing court to consider "[w]hether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense."²⁸⁷ West Virginia requires the parole board to consider the family and community environment.²⁸⁸ Nebraska requires the parole board to consider not only "the offender's age at the time of the offense," but also his "ability to appreciate the risks and consequences of his or her conduct" and "his intellectual capacity."²⁸⁹ Taken together, specific guidelines like these may steer parole boards to properly consider age, decision-making abilities, home environment, and exposure to trauma in a developmentally appropriate context for those who committed serious crimes as juveniles. At a minimum, standards such as juvenile history or unstable social history should not count against youth offenders in their parole hearings.

VI.

CONCLUSION

Senate Bill 260 and the Youth Offender Parole Hearings it created brought about some important changes in its first six months. Youth offenders were released when they were nearly ten years younger than their adult counterparts, and they were more likely to be found suitable for parole. However, the results are not as dramatic as one might expect given the dramatic shift in the law. Further, results from YOPHs in 2015 indicate that the initial success of S.B. 260 may have been illusory. Crafting more specific guidelines to ensure that the diminished culpability of youth offenders and their unique capacity to change over time are emphasized over static factors surrounding their criminal behavior as teenagers is essential to providing meaningful opportunities for release. In addition, incorporating the opinions of experts in the field of adolescent development into the decision-making process is crucial to ensure that youth-specific parole hearings adequately consider the adolescent development research that has been so influential in the Supreme Court.

287. FLA. STAT. ANN. § 921.1402(h) (Westlaw through 2015 1st Reg. Sess. and Special Session A).

288. W. VA. CODE § 61-11-23(b) (2014).

289. NEB. REV. STAT. § 83-1,110.04(2)(e), (f) (2014).