NOTES

DE FACTO LIFE SENTENCES TRIGGER JUVENILE-SPECIFIC EIGHTH AMENDMENT PROTECTIONS: WHY *BOWLING* WAS WRONGLY DECIDED

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INTRODUCTION

At the start of 2020, "1,465 people were serving life-without-parole sentences for crimes committed as juveniles."[1] In 2019, another 2,000 were "serving virtual life imprisonment"—due to either stacked sentences or repeated denial of parole.[2] Henry Montgomery is one of those people.[3] In 1963, seventeen-year-old Henry Montgomery killed Deputy Sheriff Charles Hunt in Louisiana.[4] His lawyers argued that Henry became terrified and shot the officer in response to the officer frisking him.[5] While statistics from the 1960s are non-existent on this issue, the Southern Poverty Law Center has recently published data illustrating the disproportionate targeting of people of color by police officers in Louisiana.[6] After being tried and sentenced to death, Henry was retried on the grounds "that public prejudice had prevented a fair trial,"[7] notably that "Klan cross-burnings had been threatened."[8] He was later reconvicted and resentenced.[9] When sentencing him to life without the possibility of parole ("LWOP"), the court did not consider Henry's "young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation."[10] As of 2021, a seventy-four-year-old Henry has spent almost fifty-five years in prison—triple the amount of time he had lived outside of prison walls.[11]

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[1] Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Mar. 8, 2021), https://www.sentencingproject.org/publications/juvenile-life-without-parole/. This thirty-eight percent decrease from 2016 resulted from the decision in *Montgomery v. Louisiana* that made the ban on mandatory juvenile LWOP sentencing apply retroactively. *See* discussion *infra* Sections II.C–D.

[2] *Virtual Life Sentences*, THE SENTENCING PROJECT (Aug. 29, 2019), https://www.sentencingproject.org/publications/virtual-life-sentences/; *see* discussion *infra* Section II.C.

[3] Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016).

[4] *Id.*

[5] Katy Reckdahl, *Split-Second Flash of a Gun Still Resonates 52 Years Later*, CTR. FOR PUB. INTEGRITY (Jan. 26, 2016), https://publicintegrity.org/education/split-second-flash-of-a-gun-still-resonates-52-years-later/.

[6] *Racial Profiling in Louisiana: Unconstitutional and Counterproductive*, S. POVERTY L. CTR. (Sept. 18, 2018), https://www.splcenter.org/20180918/racial-profiling-louisiana-unconstitutional-and-counterproductive ("In 2016, for instance, [B]lack adults comprised only 30.6% of Louisiana's adult population but 53.7% of adults who were arrested and 67.5% of adults in prison. Overall, [B]lack adults are 4.3 times as likely as white adults to be serving a felony prison sentence in Louisiana.").

[7] *Montgomery*, 136 S. Ct. at 725.

[8] Reckdahl *supra* note 5.

[9] *Montgomery*, 136 S. Ct. at 725.

[10] *Id.* at 726.

[11] *Id.*

Through its police power, the State has the authority to protect the public health, safety, and welfare of its people by incarcerating criminals.[12] However, the Constitution also sets limits on when and how the state can use this power.[13] Most notably, the Eighth Amendment prohibits "cruel and unusual punishment,"[14] the breadth of which has been retroactively evaluated by the courts.[15] Caselaw has interpreted this mandate to mean that a court must strike down a sentence that is grossly disproportionate to the crime committed.[16] Through a series of three United States Supreme Court cases starting in 2005, the Court has expanded the Eighth Amendment to afford further protections for juvenile defendants.[17] The Court relied on the notion that juveniles, unlike adults, display "objective immaturity, vulnerability, and lack of true depravity,"[18] and, therefore, should not be subject to the "most severe penalt[ies] permitted by law."[19]

Starting with *Roper v. Simmons* in 2005, the majority ruled that juvenile offenders cannot be sentenced to death.[20] Shortly thereafter, in *Graham v. Florida*, the Supreme Court prohibited LWOP for juvenile offenders convicted of non-homicide offenses.[21] Most recently, in *Miller v. Alabama*, the Court prohibited mandatory LWOP for juvenile offenders and required sentencers "to take into account how children are different, and how those differences counsel

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[12] David J. Harding, *Do Prisons Make Us Safer,* SCI. AM. (June 21, 2019), https://www.scientificamerican.com/article/do-prisons-make-us-safer/ ("We incarcerate for multiple reasons, including justice and punishment, but one of the main justifications is public safety.").

[13] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[14] *Id.*

[15] *See* Trop v. Dulles, 356 U.S. 86, 99–101 (1958); Weems v. United States, 217 U.S. 349, 368–75 (1910).

[16] Ewing v. California, 538 U.S. 11, 30–31 (2003) ("We hold that Ewing's sentence . . . is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments"); *see* Miller v. Alabama, 567 U.S. 460, 489 (2012) (finding that a mandatory sentencing schemes that violates the "principle of proportionality" necessarily violates "the Eighth Amendment's ban on cruel and unusual punishment").

[17] *See Miller*, 567 U.S. at 489 (holding that the Eighth Amendment prohibits mandatory LWOP sentences for juvenile offenders); Graham v. Florida, 560 U.S. 48, 79 (2010) (holding that the Eighth Amendment requires courts to provide juvenile non-homicide offenders with a meaningful opportunity for release); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment prohibits juvenile offenders from being sentenced to death); *infra* notes 20–23 and accompanying text.

[18] *Graham*, 560 U.S. at 69, 78 (quoting *Roper*, 543 U.S. at 573).

[19] *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

[20] *Roper*, 543 U.S. at 578.

[21] *Graham*, 560 U.S. at 82.

against irrevocably sentencing them to a lifetime in prison."[22] The Supreme Court in *Montgomery v. Louisiana* expanded upon this and determined that *Miller* applies retroactively.[23] Although *Miller* leaves the door open for an LWOP sentence for a juvenile convicted of homicide, the holding requires an individualized analysis of the youth's characteristics and the nature of the offense "before imposing the harshest possible penalty for juveniles."[24]

Since the Supreme Court's ruling in *Miller*, circuits are split on whether a de facto life sentence without parole—due to either stacked sentences or repeated denial of parole—sufficiently infringes on a liberty interest such that the juvenile-specific Eighth Amendment protections are implicated.[25] With regard to the former, the Third, Seventh, Ninth, and Tenth Circuits have determined that stacked sentences trigger Eighth Amendment protections and are the de facto equivalent of LWOP sentences.[26] The Eighth Circuit has concluded otherwise, holding that a 600-month sentence did not implicate *Miller*.[27] With regard to the latter, only one circuit court has addressed this issue. In 2019, the Fourth Circuit held that the juvenile-specific Eighth Amendment protections are not triggered by repeated denials of parole as long as parole for a juvenile offender has been considered.[28] The argument for the Fourth Circuit is as follows: *Miller* and its lineage only control in cases involving juveniles sentenced to life *without* parole.[29]

In a landmark case in 1972, the Supreme Court stated that the liberty associated with parole "is valuable and must be seen as within the protection of the Fourteenth Amendment."[30] Thus, at a minimum, notice and a hearing are required before the state can revoke one's parole.[31] However, *Morrissey* does

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[22] *Miller*, 567 U.S. at 480, 489.

[23] Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

[24] *Miller*, 567 U.S. at 489.

[25] *Compare* United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018) (finding that virtual life sentences violate the Eighth Amendment), *with* United States v. Jefferson, 816 F.3d 1016, 1018–19 (8th Cir. 2016) (finding that virtual life sentences are not per se violative of the Eighth Amendment).

[26] *See Grant*, 887 F.3d at 142; Budder v. Addison, 851 F.3d 1047, 1059 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); Moore v. Biter, 725 F.3d 1184, 1193–94 (9th Cir. 2013).

[27] *Jefferson*, 816 F.3d at 1018–19.

[28] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 200 (4th Cir. 2019).

[29] *Id.*

[30] Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

[31] *Id.* at 488–89 ("Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board,

require that parole actually ever be granted.[32] Several circuit courts as well as the Supreme Court have described parole as a "legislative grace" rather than a right.[33] Yet, the Court in *Morrissey* explicitly stated, "constitutional rights [do not] turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"[34] Rather, they "depend[] on the extent to which an individual will be 'condemned to suffer grievous loss.'"[35] Further, *Graham* established that a death sentence and a life sentence are sufficiently similar for juveniles in the way their lives are permanently altered.[36] The Supreme Court expounded upon this idea in *Miller*, stating that "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'"[37] Thus, when juveniles have no meaningful opportunity for parole, their sentence equates to a death sentence, and they are condemned to suffer a grievous loss.[38] The Court prohibited such sentences for juveniles in *Roper*[39] and called for procedural safeguards when a grievous loss is at risk.[40]

Based on the protections afforded by the Eighth Amendment, as established in the *Miller* line of cases and policy considerations, this Note makes two arguments. First, this Note argues that de facto LWOP—whether due to stacked sentences or repeated denials of parole—is a violation of existing juvenile-specific Eighth Amendment protections. Second, this Note asserts that characteristics of the offender at the time of the offense, the spirit and letter of parole, and the purpose of parole support finding a liberty interest in a meaningful opportunity for release through parole hearings for juvenile offenders. Therefore, parole hearings for juvenile offenders require due process protections to ensure that the state, through its parole board, does not violate the Eighth Amendment.

The legal background contains three parts. In Part A, this Note will provide a brief introduction to the Eighth Amendment and the scientific studies and submissions to the Court that supported the Court's ruling with respect to juvenile culpability. In Part B, this Note will provide summaries of the three

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members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.").

[32] *Id.* (holding that due process is not violated if parole is denied as long as the parole board comports with certain procedures).

[33] *See, e.g.*, Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974); Bustos v. White, 521 F.3d 321, 326 (4th Cir. 2008); Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967).

[34] *Morrissey*, 408 U.S. at 481 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)).

[35] *Id.* (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 365, 374 (1971)).

[36] Graham v. Florida, 560 U.S. 48, 79 (2010).

[37] Miller v. Alabama, 567 U.S. 460, 474–75 (2012) (quoting *Graham*, 560 U.S. at 69).

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

[39] Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment prohibits juvenile offenders from being sentenced to death).

[40] *Morrissey*, 408 U.S. at 481.

pivotal cases that are the basis for juvenile-specific Eighth Amendment protections. In Part C, this Note will address the current legal standing of two issues left unanswered by the *Miller* Court: first, whether stacked and consecutive sentences are the same as LWOP for the purpose of Eighth Amendment protections, and second, whether repeated denial of parole is the same as LWOP for the purpose of Eighth Amendment protections.

I. LEGAL BACKGROUND

A. *The Eighth Amendment, Juvenile Brain Development, and Legal Culpability*

The Eighth Amendment sets the outer limits of the American criminal justice system and provides that "excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*."[41] In a pair of cases, *Trop v. Dulles* and *Weems v. United States*, the Supreme Court worked to decipher the meaning of "cruel and unusual."[42] In determining whether a punishment is cruel and unusual, a court must consider "the evolving standards of decency that mark the progress of a maturing society."[43] Additionally, a court must consider the principle of proportionality.[44] That is, "it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense."[45] Determining a person's level of culpability is crucial in deciding a fair and proportionate consequence for a person who breaks the law.[46]

Beginning in 2005 with *Roper* and continuing with *Graham* and *Miller*,[47] American courts and scientists alike considered how a juvenile's neurobiological and psychological maturity differs from an adult's, and they concluded that juveniles have a diminished level of culpability.[48] Studies show "that the areas of the brain responsible for impulse control and executive functioning . . . are undergoing drastic changes in juveniles,"[49] and this results

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[41] U.S. CONST. amend. VIII (emphasis added).

[42] Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910); U.S. CONST. amend. VIII.

[43] *Trop*, 356 U.S. at 101.

[44] *Weems*, 217 U.S. at 367.

[45] *Id.*

[46] Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 389 (1996).

[47] *See* Miller v. Alabama, 567 U.S. 460, 489 (2012); Graham v. Florida, 560 U.S. 48, 79 (2010); Roper v. Simmons, 543 U.S. 551, 578 (2005).

[48] Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults*, 9 QUINNIPIAC HEALTH L.J. 1, 4–5 (2005) (claiming that "[as a] juvenile's brain may not have fully matured and stabilized . . . juveniles may not be fully culpable for their crimes").

[49] *Id.* at 4.

in "diminished self-control."[50] As adolescents age and certain areas of the brain develop, they are better equipped to successfully suppress their impulses.[51] This explains the "age-crime curve," or the "emergence of criminal behavior, especially in males, during adolescence that peaks around 17 years of age and then decreases."[52]

The basic principles of the Eighth Amendment, when considered in light of "the distinctive attributes of youth," convinced the Supreme Court that the Eighth Amendment affords specific and heightened protections to juveniles that better address their lower levels of culpability and greater potential for reform and rehabilitation.[53] Part B details these specific and heightened protections.

B. *Juvenile-Specific Eighth Amendment Protections*

1. Roper v. Simmons

At age seventeen, Christopher Simmons was charged with "burglary, kidnaping, stealing and murder in the first degree" in Missouri in 1993.[54] He was tried as an adult, but the judge allowed the jurors to consider his age as a mitigating factor at sentencing.[55] In 1994, the jury found him guilty and unanimously voted for the death penalty.[56] Simmons obtained new post-conviction counsel who argued that expert testimony regarding his difficult home life, dramatic changes in behavior, drug use, and immaturity "should have been established in the sentencing proceeding."[57] Post-conviction counsel argued that failure to establish this evidence amounted to ineffective assistance

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[50] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS COGNITIVE SCI. & SOC'Y 63, 64 (2014).

[51] *See id.*; *see also* Peter Ash, *But He Knew It Was Wrong: Evaluating Adolescent Culpability*, 40 J. AM. ACAD. PSYCHIATRY L. 21, 25 (2012) ("[N]ew techniques have convincingly demonstrated that brain development continues through adolescence and into early adulthood, and that some of the areas of the brain which are still changing are those thought to be involved in social information processing, impulsivity, risk-taking, and decision making."); Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability,* ABA (Aug. 1, 2017) ("One of the key differences between adult and adolescent brains . . . is the lack of prefrontal cortex development in young brains [which affects impulsivity and susceptibility to peer pressure].").

[52] Cohen & Casey, *supra* note 50, at 63.

[53] Miller v. Alabama, 567 U.S. 460, 472 (2012) ("We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that . . . his deficiencies will be reformed."); *see* Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[54] *Roper*, 543 U.S. at 557.

[55] *Id.* at 557–58.

[56] *Id.*

[57] *Id.* at 558–59.

of counsel, in violation of the Sixth Amendment.[58] The trial court disagreed and denied post-conviction relief.[59]

In 2002, Simmons filed a new petition based on the Supreme Court's decision in *Atkins v. Virginia*.[60] In that case, the Court held that the Eighth and Fourteenth Amendments prohibit the execution of an intellectually disabled person.[61] Simmons drew parallels between Atkins' and his own circumstances and argued that "*Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed."[62] The Missouri Supreme Court agreed and resentenced Simmons to LWOP.[63] It held that:

> *[A] national consensus has developed against the execution of juvenile offenders*, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the *juvenile death penalty has become truly unusual* over the last decade.[64]

With this background in mind, the Supreme Court granted certiorari to consider Christopher Simmons's case.[65] The Court focused on "proportionality" and "the evolving standards of decency" to evaluate the scope of Eighth Amendment protections.[66] The Court considered a case from 1988, *Thompson v. Oklahoma*, which provided analysis for finding juveniles under the age of sixteen to be less culpable than adults.[67] The same reasons that justify society's perception that "juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[68] The fact that juveniles are less culpable and less likely to engage in "the kind of cost-benefit analysis that attaches any weight to the possibility of execution" makes the death penalty ineffective for both retributive and deterrent justifications.[69]

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[58] *Id.*

[59] *Id.* at 559.

[60] Atkins v. Virginia, 536 U.S. 304 (2002).

[61] *Id.* at 321.

[62] *Roper*, 543 U.S. at 559.

[63] *Id.* at 560.

[64] State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003) (en banc) (emphasis added).

[65] *Roper*, 543 U.S. at 560.

[66] *Id.* at 560–61.

[67] Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that a juvenile under sixteen is less able to evaluate consequences of conduct and less culpable).

[68] *Roper*, 543 U.S. at 561 (quoting *Thompson*, 487 U.S. at 835).

[69] *Id.* at 561–62 (quoting *Thompson*, 487 U.S. at 836–38).

The year after *Thompson* was decided, the Supreme Court decided *Stanford v. Kentucky*.[70] In that case, the Court, again referring to "standards of decency," held that "the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15."[71] After evaluating the number of states that permitted the death penalty, the Court determined that "there is no national consensus sufficient to label a particular punishment cruel and unusual."[72]

The Supreme Court decided *Stanford* the same day it decided *Penry v. Lynaugh*.[73] *Penry* held that the Eighth Amendment did not prohibit the execution of intellectually disabled persons.[74] As discussed above, the evolution of the standards of decency justified overruling *Penry* in *Atkins*.[75] Similarly, the *Roper* Court reconsidered *Stanford* in light of changed times and a better understanding of juvenile culpability.[76]

The *Roper* Court recognized a significant evolution in state approaches to juvenile capital punishment in the fifteen years since *Stanford*.[77] Five states that permitted the juvenile death penalty in 1989 had reversed their stance by 2005.[78] The Court found this change sufficient to show that societal views reflected the belief that juveniles are less culpable than adults.[79]

Because "the death penalty is reserved for a narrow category of crimes and offenders," the Supreme Court concluded in *Atkins* that it "must be limited to those offenders . . . whose *extreme culpability* makes them 'the most deserving of execution.'"[80] The *Roper* Court held that the Eighth Amendment prohibits capital punishment for juvenile offenders under eighteen[81] because "juvenile offenders cannot with reliability be classified among the worst offenders" and "a greater possibility exists that a minor's character deficiencies will be reformed."[82] To support their holding, the majority explained that:

> "[A] lack of maturity and an underdeveloped sense of responsibility . . . result in impetuous and ill-considered actions and decisions."

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[70] Stanford v. Kentucky, 492 U.S. 361 (1989).

[71] *Roper*, 543 U.S. at 562 (quoting *Stanford*, 492 U.S. at 370–71).

[72] *Id.* at 563 (quoting *Stanford*, 492 U.S. at 370–71).

[73] Penry v. Lynaugh, 492 U.S. 302 (1989).

[74] *Id.*

[75] Atkins v. Virginia, 536 U.S. 304, 313–15 (2002). *See* discussion *supra* notes 60–64.

[76] *Roper*, 543 U.S. at 564.

[77] *Id.* at 565–66.

[78] *Id.*

[79] *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

[80] *Id.* at 568–69 (quoting *Atkins*, 536 U.S. at 319) (emphasis added).

[81] *Id.* at 568.

[82] *Id.* at 569–70.

> . . . [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures [because of their lack of experience] . . . [and] the character of a juvenile is not as well formed as that of an adult.[83]

The Supreme Court explicitly denied a case-by-case approach and any argument that a categorical rule is "arbitrary and unnecessary."[84] The Court repeatedly emphasized a "juvenile offender's objective immaturity, vulnerability, and lack of true depravity."[85]

2. Graham v. Florida

At age sixteen, Terrance Jamar Graham participated in an attempted robbery in a Florida restaurant, during which his co-assailant struck the restaurant manager in the head with a metal bar.[86] Graham was arrested and charged with felony armed burglary with assault or battery.[87] A plea deal led to a sentence of three years of probation.[88] Less than six months later, Graham was charged with a violation of probation for his alleged involvement in a violent home invasion.[89] The trial judge, noting that Graham had demonstrated "an escalating pattern of criminal conduct" and that the judge "[could not] do anything to get [him] back on the right path," sentenced him to life, as provided in the Florida code.[90] Because Florida abolished its parole system in 1983,[91] Graham's sentence for a probation violation became a sentence of LWOP.[92] On appeal, the First District Court of Appeals of Florida denied Graham's Eighth Amendment challenge, and then, in 2009, the United States Supreme Court granted certiorari.[93]

In creating a categorical rule, precedent requires that the Supreme Court consider (1) "objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus," (2) "controlling precedents and . . . interpretation of the Eighth Amendment's text, history, meaning, and purpose," and (3) "its own independent judgment whether the punishment in question violates the

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[83] *Id.* (quoting Johnson v. Texas, 509 US. 350, 367 (1993)).

[84] *Id.* at 572.

[85] *Id.* at 573.

[86] Graham v. Florida, 560 U.S. 48, 53 (2010).

[87] *Id.*

[88] *Id.* at 54.

[89] *Id.*

[90] *Id.* at 57 (quoting Graham v. State, 982 So. 2d 43, 46 (Fla. Dist. Ct. App. 2008)) ("And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further . . . . [I]f I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions.").

[91] *Release Types*, FLA. COMMISSION ON OFFENDER REV. (2014), https://www.fcor.state.fl.us/release-types.shtml.

[92] *Graham*, 560 U.S. at 57.

[93] *Id.* at 58.

Constitution."[94] On the first point, the Court explained that although thirty-seven States have not outright prohibited juvenile LWOP, only eleven states actually impose those sentences.[95] On the second point, the Court recognized that juvenile culpability does not rise to the level of an adult.[96] On the third point, in making its own independent judgment, the Court observed similarities between LWOP and a death sentence, stating that "the sentence alters the offender's life by a forfeiture that is irrevocable."[97]

Moreover, the Court noted that the sentence must serve a legitimate goal—either "retribution, deterrence, incapacitation, [or] rehabilitation."[98] The majority determined that none of these goals justify a sentence of life imprisonment without parole for non-homicide crimes in "light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."[99] The Supreme Court did not require that parole ever be granted; however, it did require the presence of "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[100] The decision in *Graham* created the precedent that the Eighth Amendment's prohibition on cruel and unusual punishment includes LWOP sentences for juvenile nonhomicide offenders.[101]

3. Miller v. Alabama

Miller v. Alabama considers two lower court decisions with similar fact patterns to carve out a new restriction on the State's sentencing ability.[102] The juvenile offenders in the lower court cases were fourteen-year-old boys, Kuntrell Jackson and Evan Miller, respectively.[103]

At age fourteen, Kuntrell Jackson set out to rob a video store in Arkansas with two other boys.[104] One of the other boys shot and killed an employee in Jackson's presence.[105] Jackson was convicted of capital felony murder and aggravated robbery, which came with a mandatory sentence of death or life imprisonment without parole.[106] The Arkansas Court of Appeals dismissed

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[94] *Id.* at 61.

[95] *Id.* at 62, 64.

[96] *Id.* at 68 ("A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult").

[97] *Id.* at 69.

[98] *Id.* at 71.

[99] *See id.* at 74–75.

[100] *See id.* at 75.

[101] *Id.* at 82.

[102] Miller v. Alabama, 567 U.S. 460 (2012).

[103] *Id.* at 465–68.

[104] *Id.* at 465.

[105] *Id.* at 466.

[106] *Id.*

Jackson's claim that his sentence violated the Eighth Amendment in light of *Roper* and *Graham*.[107] The Supreme Court granted certiorari.[108]

Also at age fourteen, Evan Miller beat his mother's friend and drug dealer with a bat in Alabama after said dealer caught him stealing, and then Miller and some friends set the crime scene on fire.[109] Miller was sentenced to life without parole for "murder in the course of arson," and the Alabama Supreme Court denied review of his appeal.[110] The Supreme Court likewise granted certiorari in his case.[111]

In reversing both of the lower court decisions, the Supreme Court restated the notion that "the concept of proportionality is central to the Eighth Amendment['s]"[112] prohibition on cruel and unusual punishment and is evaluated against "the evolving standards of decency."[113] This notion supported the Court's earlier finding in *Roper* that no juvenile offender should be subjected to the death penalty.[114] Although the death penalty was not at issue in *Miller*, the Court reflected on the same "two strands of precedent" to evaluate the constitutionality of mandatory LWOP for juveniles: (1) "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity," and (2) the requirement "that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[115] Mandatory penalty schemes offend these strands of precedent by preventing the judge or jury from considering the mitigating qualities of juveniles before potentially subjecting them to an irrevocable punishment.[116] Because a scheme that disregards the qualities of youth "poses too great a risk of disproportionate punishment," the Court held "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole of juvenile offenders."[117]

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[107] *Id.*

[108] *Id.* at 469.

[109] *Id.* at 468.

[110] *Id.*

[111] *Id.* at 469.

[112] *Id.* (quoting Graham v. Florida, 560 U.S. 48, 59 (2010)).

[113] *Id.* at 469–70 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

[114] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

[115] *Miller*, 567 U.S. at 470.

[116] *Id.* at 474, 76.

[117] *Id.* at 479 (emphasis added). As of this writing, the reach of *Miller* is still being deliberated; *see* Nina Totenberg, *Supreme Court Examines When Juveniles May Be Sentenced to Life Without Parole,* NPR (Nov. 3, 2020), https://www.npr.org/2020/11/03/930892945/supreme-court-examines-when-juveniles-may-be-sentenced-to-life-without-parole#:~:text=Justice%20Stephen%20Breyer%20noted%20that,defendant%20is%20%22p

Notably, however, the Court did not decide that the Eighth Amendment categorically prohibits LWOP for all juvenile offenders.[118] Thus, the Court highlighted the severity of the punishment and the high risk of disproportionality while simultaneously leaving open the potential for such injustice.[119] Furthermore, the Court did not call for the immediate resentencing of juveniles who had been sentenced under a mandatory sentencing scheme.[120] Rather, this issue was ultimately considered in 2016 in *Montgomery v. Louisiana*.[121]

4. Montgomery v. Louisiana

Henry Montgomery, a seventeen-year-old who killed a Deputy Sheriff and spent nearly fifty years in prison, became the petitioner in *Montgomery v. Louisiana* in 2016.[122] Here, the Supreme Court found that *Miller* applies retroactively.[123] The Court stated:

> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions . . . . The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change . . . . [P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.[124]

Thus, in upholding *Miller*'s legacy, the Court emphasized the unique position of juvenile offenders and secured for them not only the right to hope for eventual release but also the opportunity to demonstrate the ability to change and be rehabilitated.[125]

Miller made clear that mandatory LWOP is unconstitutional, even for homicide offenses.[126] *Montgomery* strengthened this protection by extending *Miller*'s holding retroactively. The next part of this Note discusses two ways in

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ermanently%20incorrigible.%22 (discussing a Mississippi case that is currently in front of the United States Supreme Court that raises the issue "whether states may sentence a juvenile convicted of murder to life without parole, without finding that he is so incorrigible that there is no hope for his rehabilitation" and stating "Mississippi is among a handful of states that allows a life without parole sentence for juvenile crimes without required a finding of 'permanent incorrigibility'").

[118] *Id.* at 480.

[119] *See id.*

[120] *See id.*

[121] Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

[122] *Id.* at 725.

[123] *Id.* at 736–37.

[124] *Id.*

[125] *Id.*

[126] Miller v. Alabama, 567 U.S. 460, 473 (2012).

which states have attempted to work around these protections through the use of de facto life sentences.

C. *Two Unresolved Issues*

1. Are Stacked and Consecutive Sentences the Same as Life without Parole for the Purposes of Eighth Amendment Protections?

"Stacked" or "consecutive" sentences are those in which the convicted person must serve the full sentence of one offense before beginning to serve another.[127] These can become "de facto" or "virtual life sentences," which are "sentences that are so long that the sentenced person will likely die or live out a significant majority of their natural lives before they are released."[128]

The Third, Seventh, Ninth, and Tenth Circuits have determined that sentences that are the de facto equivalent of LWOP trigger juvenile-specific Eighth Amendment protections.[129] In *United States v. Grant*, the Third Circuit reasoned that the "concerns about the diminished penological justification for LWOP sentences for juvenile offenders apply with equal strength to de facto LWOP sentences."[130]

The Eighth Circuit is the only federal court of appeals to hold that a de facto life sentence without parole for juveniles does not violate the Eighth Amendment.[131] The Court of Appeals in *Jefferson* determined that a 600-month sentence did not implicate *Miller* where an individualized sentencing decision took into account the youth's distinctive characteristics.[132] The court came to this decision despite the fact that "50 years . . . becomes a virtual life sentence for most individuals" [133] and the judge did not claim to make a finding of incorrigibility.[134]

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[127] *The Effect of Concurrent and Consecutive Sentences on Texas Paroles,* TEX. PAROLE NOW (May 6, 2019), texasparolenow.com/the-effect-of-concurrent-and-consecutive-sentences-on-texas-paroles/.

[128] Julian Zhu, *Know More: De Facto Life Sentences,* RESTORE JUST. (Feb. 28 2019), https://restorejustice.org/know-more-de-facto-life/.

[129] *See, e.g.*, United States v. Grant, 887 F.3d 131 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018); Budder v. Addison 851 F.3d 1047 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).

[130] *Grant*, 887 F.3d at 142.

[131] *See* United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016).

[132] *Id.*

[133] Rovner, *supra* note 1.

[134] Miller v. Alabama, 567 U.S. 460, 472–73 (2012) (quoting Graham v. Florida, 560 U.S. 48, 72–73 (2010)) ("Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'").

a. *The Third, Seventh, Ninth, and Tenth Circuits*

In 2016, the Seventh Circuit decided that de facto life sentences trigger Eighth Amendment protections for juveniles in the same way that LWOP would.[135] In *McKinley v. Butler*, a sixteen-year-old shot a twenty-three year old to death.[136] The lower court sentenced the juvenile offender "to [two] consecutive 50-year prison terms, one for the murder and one for the use of a firearm to commit it."[137] McKinley challenged his sentence "as a cruel and unusual punishment," in violation of the Eighth Amendment.[138] The Court of Appeals noted that the *Miller* holding has two requirements.[139] First, it "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[140] Second, *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[141] Even more, because 100 years "is such a long term of years," McKinley's sentence became "a de facto life sentence."[142] So, although Illinois had no mandatory sentencing scheme in place, the state violated the juvenile's Eighth Amendment protections by sentencing McKinley to life without considering his youth.[143] This court vacated McKinley's sentence and instructed that the lower court treat the juvenile "as if he were . . . 16 [not] 26."[144]

In 2017, the Tenth Circuit decided this same issue in *Budder v. Addison*.[145] Sixteen-year-old Keighton Budder was convicted of several violent non-homicide crimes, and sentenced to, among other things, LWOP.[146] Two weeks later, the Supreme Court decided *Graham*.[147] In response to *Graham*, the Oklahoma Court of Criminal Appeals adjusted Budder's LWOP sentence to several consecutive sentences, amounting to 155 years of imprisonment.[148] Budder appealed, and the Tenth Circuit determined that his sentence violated the Eighth Amendment.[149] The court pointed out that "*Graham* announced a categorical rule" barring LWOP sentences "on *any* juvenile convicted of a non-

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[135] McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016).

[136] *Id.* at 909.

[137] *Id.*

[138] *Id.* at 910.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 911.

[143] *Id.* at 908.

[144] *Id.* at 914.

[145] Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017).

[146] *Id.* at 1049.

[147] *Id.* at 1050.

[148] *Id.* at 1050 (noting that pursuant to Oklahoma law, Budder would need to serve 85% of his sentence, or 131.75 years, before being eligible for parole).

[149] *Id.* at 1047.

homicide offense."[150] The court stated that labeling Budder's sentence as life *with* parole did not create a workaround to this categorical bar and Oklahoma must resentence Budder in such a way that would provide for "some realistic opportunity to obtain release before the end of that term."[151]

In 2018, the Third Circuit decided this issue in *United States v. Grant*.[152] Although the judgement was vacated later that year,[153] the court's rationale is still illuminating and useful in analyzing the contours of *Graham*. Corey Grant was sentenced such that "he w[ould] be released at age seventy-two at the earliest, which he purports to be the same age as his life expectancy."[154] This sentence came after the district court found him to not be incorrigible in light of his "upbringing, debilitating characteristics of youth, and post-conviction record."[155] The court held that a stacked sentence that "that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and therefore violates the Eighth Amendment."[156] The court relied on *Miller*'s reasoning that only incorrigible juvenile homicide offenders can be sentenced to LWOP,[157] and the concerns about the justification, or lack thereof, for juvenile LWOP mirror the concerns for de facto juvenile LWOP. [158] Therefore, de facto life sentences without a meaningful opportunity for release are incompatible with *Graham*'s and *Miller*'s holdings.[159]

Also in 2019, the Ninth Circuit decided this issue in *Moore v. Biter*.[160] Roosevelt Brian Moore, the juvenile offender, was sentenced to a 254-year sentence for committing multiple non-homicide crimes at the age of sixteen and

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[150] *Id.*

[151] *Id.* at 1056, 1059.

[152] United States v. Grant, 887 F.3d 131 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018).

[153] *Grant*, 905 F.3d at 285; *see* Court Docket, United States v. Grant, No. 16-3820 (3d Cir. Oct. 13, 2016) (stating in March of 2019 that the "appeal will be held C.A.V. pending the U.S. Supreme Court's decision in Mathena v. Malvo, No. 18-217."). The United States Supreme Court dismissed *Mathena v. Malvo* in February of 2020 after Virginia enacted a new law that made juvenile offenders eligible for parole after twenty years. *New Virginia law prompts dismissal of D.C. Sniper resentencing consideration*, NBC12 (Feb. 24, 2020), https://www.nbc12.com/2020/02/24/new-virginia-law-prompts-dismissal-dc-sniper-resentencing-consideration/.

[154] *Grant*, 887 F.3d. at 135.

[155] *Id.* at 135–37.

[156] *Id.* at 142.

[157] *Id.* ("[T]he sentence of LWOP *only* for juvenile homicide offenders whose crimes reflect permanent incorrigibility.")

[158] *Id.*

[159] *Id.* ("[Graham and Miller mandate] that sentencing judges must provide non-incorrigible juvenile offenders with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

[160] Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).

would not be eligible for parole until he was 144-years-old.[161] The court held that the "state court's failure to apply *Graham* was contrary to . . . clearly established Federal Law" and noted that *Graham*'s focus was not on the label of the sentence, but rather on whether the sentence would render it impossible for a juvenile to return to society.[162] The court also concluded that "Moore's sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime . . . regardless of his remorse, reflection, or growth."[163] That the sentence was not explicitly a life sentence did not remove it from the grasp of *Graham*, therefore the court found Moore's de facto life sentence unconstitutional under *Graham*.[164]

b. *The Eighth Circuit*

The Eighth Circuit is the only federal court of appeals to find that a de facto life sentence without parole for juveniles does not violate the Eighth Amendment.[165] At the age of sixteen, Robert James Jefferson joined a gang, and, by eighteen, was convicted of drug and homicide offenses, and was subsequently sentenced to LWOP.[166] In response to *Miller*, the U.S. District Court for the District of Minnesota sentenced Jefferson to 600 months in prison.[167] On appeal, Jefferson argued that his new sentence still violated *Miller*'s categorical bar against juvenile LWOP and that a "de facto life sentence on a juvenile . . . does not meet contemporary standards of decency."[168] The Eighth Circuit found that argument inapplicable because *Miller* "held that the mandatory penalty schemes at issue prevented the sentencing judge or jury from taking into account" the distinctive traits of juveniles that "diminish the penological justifications for imposing the harshest sentences on juvenile offenders."[169] In other words, rather than creating a categorical bar on LWOP for juvenile offenders, the Eighth Circuit found that *Miller* allows for discretionary LWOP sentences.[170] The court concluded that, because "the district court made an individualized sentencing decision that took full account

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[161] *Id.* at 1184–85.

[162] *Id.* at 1185, 1192.

[163] *Id.* at 1192.

[164] *Id.* at 1194.

[165] United States v. Grant, 887 F.3d 131, 146 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018).

[166] United States v. Jefferson, 816 F.3d 1016, 1017 (8th Cir. 2016).

[167] *Id.* at 1016; *see* Rovner, *supra* note 1 ("A sentence of 50 years or longer becomes a virtual life sentence for most individuals.").

[168] *Jefferson*, 816 F.3d at 1018.

[169] *Id.* at 1018–19.

[170] *See* United States v. Grant, 887 F.3d 131, 146 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018).

of 'the distinctive attributes of youth,'" Jefferson's sentence was not unreasonable and did not violate the Eighth Amendment.[171]

The Eighth Circuit cited to its sister circuits in defending its notion that its sentencing scheme does not violate contemporary standards of decency.[172] However, the Third Circuit explicitly declined to follow the Eighth Circuit on this issue, arguing the Eighth Circuit "misse[d] the point of *Graham* and *Miller*."[173] Not only must the judge or jury consider "distinctive traits of juveniles,"[174] but they must also only sentence juveniles explicitly determined to be incorrigible to LWOP.[175]

2. Is Repeated Denial of Parole the Same as Parole for the Purpose of the Eighth Amendment?

There is little discussion devoted to whether a life *with* parole sentence, where parole is repeatedly denied, becomes a de facto LWOP sentence that violates the juvenile-specific Eighth Amendment requirements in *Graham*.[176] This may well

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[171] *Jefferson*, 816 F.3d at 1020.

[172] *Id.* at 1019.

[173] *Grant*, 887 F.3d at 146.

[174] *Jefferson*, 816 F.3d at 1018–19.

[175] *Grant*, 887 F.3d at 146 (stating "a juvenile homicide offender may be sentenced to LWOP only if he or she is determined to be incorrigible at sentencing"). As of this writing, the reach of *Miller* is still being deliberated; *see* Nina Totenberg, *Supreme Court Examines When Juveniles May Be Sentenced to Life Without Parole,* NPR (Nov. 3, 2020), https://www.npr.org/2020/11/03/930892945/supreme-court-examines-when-juveniles-may-be-sentenced-to-life-without-parole#:~:text=Justice%20Stephen%20Breyer%20noted%20that,defendant%20is%20%22permanently%20incorrigible.%22 (discussing a Mississippi case that is currently in front of the United States Supreme Court that raises the issue "whether states may sentence a juvenile convicted of murder to life without parole, without finding that he is so incorrigible that there is no hope for his rehabilitation" and stating "Mississippi is among a handful of states that allows a life without parole sentence for juvenile crimes without a required finding of 'permanent incorrigibility'").

[176] *See, e.g.*, Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633 (2019) (arguing that LWOP sentences for juvenile offenders should be banned altogether because of the difficulty of determining incorrigibility, but not addressing how repeated denials of parole may implicate the Eighth Amendment); Daniel Jones, Note, *Technical Difficulties: Why a Broader Reading of Graham and Miller Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN'S L. REV. 169, 204–205 (2016) (arguing for state oversight of parole boards and the prohibition of lengthy term-of-years sentences for juvenile offenders, but not addressing how repeated denials of parole may implicate the Eighth Amendment); Therese A. Savona, Note, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182 (2013) (analyzing the similarities between stacked sentences and LWOP sentences but not addressing how repeated denials of parole may implicate the Eighth Amendment).

be because, as will be discussed in detail below, the letter of *Miller* and its lineage seem to only implicate sentences of life *without* parole.[177]

In 2019, the Fourth Circuit decided this issue in *Bowling v. Director, Virginia Department of Corrections*.[178] This is the only time a federal circuit court considered whether repeated denials of parole constitute an Eighth Amendment violation.[179] At seventeen, Thomas Franklin Bowling was sentenced to life *with* parole for "capital murder, robbery, marijuana possession and two counts of use of a firearm in connection with his role in a botched robbery that resulted in a homicide."[180] In April 2005, he became eligible for parole, which was subsequently denied.[181] Since then, the parole board has denied him parole yearly.[182] Bowling appealed the denial, alleging that the "repeated denial of his applications violated his Eighth and Fourteenth Amendment rights" as established in *Graham*.[183] The district court denied his claims.[184] The Fourth Circuit accepted his petition but did not find in his favor, declining to extend the juvenile-specific Eighth Amendment protections to juveniles sentenced to life with parole.[185] The court also declined to "find that those protections extend beyond sentencing proceedings."[186]

Every year, beginning in 2005 and until 2016, the parole board listed "seriousness of the crime" as a reason for Bowling's parole denial.[187] Although

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[177] *See* Miller v. Alabama, 567 U.S. 460 (2012).

[178] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 194 (4th Cir. 2019).

[179] *Id.* at 194. Some federal district courts have addressed this issue and reached the opposite conclusion. *See, e.g.*, Flores v. Stanford, No. 18 CV 2468 (VB), 2019 U.S. Dist. LEXIS 160992, at *25 (S.D.N.Y. Sept. 20, 2019) ("[A]n Eighth Amendment right that attaches to those [juvenile] offenders' parole proceedings, which the Constitution mandates must amount to a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"); Brown v. Precythe, No. 2:17-cv-04082-NKL, 2018 U.S. Dist. LEXIS 176272, at *19 (W.D. Mo. Oct. 12, 2018) ("One serving a JLWOP sentence is entitled to a meaningful and realistic opportunity to secure release upon demonstrated maturity and rehabilitation."); Hayden v. Keller, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) ("If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands.").

[180] *Bowling*, 920 F.3d at 194.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 197.

[187] *Id.* at 195.

the board considered a number of factors,[188] it denied parole "without specifically considering age-related mitigating characteristics as a separate factor in the decision-making process."[189] The Fourth Circuit emphasized that the Supreme Court had not held that the Eighth Amendment places a requirement on states to guarantee eventual freedom, "rather . . . before sentencing a juvenile to life without parole, sentencing courts [must] take into account how children are different."[190] The court found that the parole board satisfied due process requirements simply by providing Bowling with "an opportunity to be heard and a 'statement of reasons indicating . . . why parole has been denied.'"[191]

On Bowling's due process claim, the Fourth Circuit declared that, "a prisoner must identify a cognizable liberty interest . . . arising from the Constitution itself . . . [or from] a state-created liberty interest" to sufficiently claim that he was denied due process.[192] The court stated that there is no "'inherent right' to parole" and any right that may come from "*Miller* and its lineage . . . [did] not apply to Appellant's life with parole sentence."[193] Furthermore, the court concluded that the parole board complied with the Fourteenth Amendment by providing "an opportunity to be heard and a 'statement of reasons indicating . . . why parole has been denied.'"[194]

II. DE FACTO LIFE SENTENCES IN ANY FORM TRIGGER JUVENILE-SPECIFIC EIGHTH AMENDMENT PROTECTIONS

First, this Note will highlight the purpose and importance of a meaningful opportunity for release for juvenile offenders, followed by an elaboration of *meaningful opportunity for release*[195] and further structural changes this

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[188] *Id.* (highlighting "'the serious nature and circumstances of the crime'; 'prior offense history'; 'whether [Appellant's] release would be compatible with public safety and the mutual interests of society and [Appellant]'; 'whether [Appellant's] character, conduct, vocational training and other developmental activities during incarceration reflect the probability that [he] will lead a law-abiding life in the community and live up to all the conditions of parole'; '[Appellant's] personal history'; '[Appellant's] institutional adjustment'; '[Appellant's] change in attitude toward [himself] and others'; '[Appellant's] release plans'; '[Appellant's] evaluations'; 'impressions gained . . . by the parole examiner'; and 'any other information provided by [Appellant's] attorney, family, victims or other persons.'") (citing to the Joint Appendix filed by the parties in this appeal).

[189] *Id.* at 197.

[190] *Id.*

[191] *Id.* at 200 (quoting Bloodgood v. Garraghty, 783 F.2d 470, 473 (4th Cir. 1986)).

[192] *Id.* at 199.

[193] *Id.* (quoting Greenholtz v. Inmates Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

[194] *Id.* at 200 (quoting *Bloodgood*, 783 F.2d at 473).

[195] Graham v. Florida, 560 U.S. 48, 75 (2010) (requiring states provide juvenile offenders with "some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation") (emphasis added).

standard suggests must be made to sentencing and state parole systems. Then, this Note will describe the existing conditions of state parole systems and the changes, or absence thereof, that state courts and legislatures made in response to the *Miller* line of cases. After that, this Note will illuminate the liberty interest created by the Supreme Court and Due Process protections that follow. Subsequently, this Note will discuss the various ways that states define life sentences and why de facto life sentences must offer a meaningful opportunity for release. Lastly, this Note will argue for the expansion of the Eighth Amendment protections created by the Supreme Court in order to avoid grave erroneous judgements.

A. *Purpose of Meaningful Opportunity for Release*

As established above, "'juveniles have a lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures' . . . and their characters are 'not as well formed.'"[196] Moreover, "juveniles 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."[197] Thus, by sentencing a juvenile non-homicide offender to LWOP, the sentencer is prematurely denying their right to reenter society without recognizing the juvenile offender's capacity for rehabilitation.[198] Based on this line of reasoning, the Court in *Graham* determined that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life . . . it does [however] prohibit States from making the judgement at the outset that those offenders will never be fit to reenter society."[199] Additionally, the Court rejected any case-by-case analysis for sentencing a juvenile non-homicide offender to LWOP to avoid the risk that a sentencer will mistakenly determine that such a juvenile offender is sufficiently culpable to deserve LWOP.[200] Requiring a meaningful opportunity to obtain release affords each juvenile non-homicide offender the chance to demonstrate their growth and rehabilitation."[201]

The most severe punishments must be reserved for the most culpable criminals.[202] "'[R]etribution is not proportional if the law's most severe penalty is imposed' on the juvenile murderer."[203] By limiting the length of sentences for juveniles or only sentencing juveniles to life with a possibility of parole, the

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[196] *Id.* at 67 (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

[197] *Id.* at 68 (quoting *Roper*, 543 U.S. at 570).

[198] *Id.* at 74.

[199] *Id.* at 75.

[200] *Id.* at 78–79.

[201] *Id.* at 79.

[202] *Id.* at 68 (citing *Roper*, 543 U.S. at 569) ("[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments.").

[203] *Id.* at 71 (quoting *Roper*, 543 U.S. at 571).

sentencer protects themselves from violating the Eighth Amendment.[204] The meaningful opportunity for release, as opposed to requiring parole in name only, is necessary to give bite to the recognition that juveniles are different from adults.[205] To illustrate, a sentencer might recognize that a juvenile offender has diminished culpability and a high potential for rehabilitation. Therefore, the sentencer might sentence that juvenile offender to life *with* the possibility of parole. However, if the parole procedures do not, at a minimum, require the parole board to consider the juvenile's capacity for rehabilitation and demonstrated growth, then the parole board will fail to honor that recognition made and relied on by the sentencer. Thus, the sentencer risks imposing a de facto life sentence on the juvenile offender. This is exactly the behavior that the meaningful opportunity for release standard is designed to prevent.[206] The Supreme Court could have required the sentencing court to consider additional mitigating circumstances that are relevant to the offender's status as a juvenile to determine which offenders are incorrigible even for non-homicide offenses. However, the Court anticipated that this group—incorrigible juvenile non-homicide offenders—would be small.[207] This limitation, paired with the recognition of potential erroneous findings by the sentencing court, led the Court to determine that the risk of wrongfully enforcing the extreme punishment of LWOP on juveniles in non-homicide matters is too high.[208] This cautious approach that disfavors over-incarceration shows the importance that the Supreme Court places on a meaningful opportunity for release.[209]

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[204] *See id.* at 82 (holding that LWOP sentences for juvenile non-homicide offenders violate the Eighth Amendment).

[205] *See id.* at 78 ("[T]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive [LWOP].").

[206] *Id.* at 74 ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."); *see* Budder v. Addison, 851 F.3d 1047, 1059–60 (10th Cir. 2017) (invalidating a de facto life sentence as violative of Eighth Amendment protections despite not being a literal LWOP sentence).

[207] *Graham*, 560 U.S. at 77 ("[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish *the few incorrigible juvenile offenders from the many* that have the capacity for change.") (emphasis added).

[208] *Id.* at 78–79 (denying a case-by-case approach by arguing that the "categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.").

[209] *Id.* at 77 (expressing concern over the sentencer's inability to "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change").

B. *Meaning of "Meaningful Opportunity for Release"*

The *Graham* Court declined to elaborate on what a meaningful opportunity for release entails, leaving this determination to the States.[210] Professor Sarah French Russell, of Quinnipiac University School of Law, wrote extensively on this issue and surveyed parole boards nationwide to consider what this term means and "whether [the parole boards'] practices comply with the Court's Eighth Amendment mandate."[211] Russell posits that previous Supreme Court cases like *Rummel v. Estelle*,[212] *Solem v. Helm*,[213] and *Ewing v. California*[214] shed light on this term's meaning.[215] In these cases, the Court relied on the availability of parole as part of sentencing to consider "whether individual sentences for adult offenders withstood Eighth Amendment proportionality scrutiny."[216] These cases "reveal that courts must look beyond the mere technical availability of a release mechanism and examine how procedures actually operate in the specific state at issue."[217] The Court considered "the timing of the opportunity for release, the standards governing the release decision, and the actual likelihood of release."[218]

Thus, according to Professor Russell, a meaningful opportunity requires that: "(1) individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood of being released, and (3) the parole board . . . must employ procedures that allow an individual a meaningful opportunity to be heard."[219] Without satisfying each of these requirements, the State does not comport with the juvenile-specific Eighth Amendment protections.[220] Regarding the first component, if a juvenile offender is not given a chance of release during their life, they are subjected to

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[210] *Id.* at 75 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime, [but must] . . . give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *It is for the State*, in the first instance, *to explore the means and mechanisms* for compliance.") (emphasis added).

[211] Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L. J. 373, 373 (2014).

[212] Rummel v. Estelle, 445 U.S. 263 (1980).

[213] Solem v. Helm, 463 U.S. 277 (1983).

[214] Ewing v. California, 538 U.S. 11 (2003).

[215] Russell, *supra* note 211, at 380–83 (2014).

[216] *Id.* at 380.

[217] *Id.* at 382–83.

[218] *Id.* at 383.

[219] *Id.*

[220] *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (finding that LWOP for juvenile non-homicide offenders violates the Eighth Amendment).

a de facto life sentence.[221] On the second component, if the chance of release for a juvenile offender is unrealistic, the state risks going directly against the mandate made in *Graham*.[222] Concerning the third component, whereas a rehabilitated juvenile must not be subjected to a life sentence without parole, if there is no opportunity to be heard, the state risks evaluating the juvenile's progress toward rehabilitation inaccurately.[223]

C. *Existing Parole Systems and Legislative Responses to Graham*

Parole systems vary state by state and involve little regulation because, "historically, state parole boards have been able to make release decisions with little oversight from the courts regarding the criteria and procedures used for these decisions."[224] Parole boards have often considered a number of factors when evaluating a prisoner for release, including but not limited to, "the prisoner's background; the seriousness of the original offense; . . . and the degree of the prisoner's rehabilitation."[225] Recently, as discussed in critic Professor Russell's article, parole boards have become "a meaningless ritual in which the form is preserved but parole is rarely granted."[226] "[E]ven when a state provides a parole release process, courts have imposed few constraints . . . . Board members have few incentives to release individuals convicted of violent crimes, and plenty of disincentives."[227] Thus, these existing parole systems that go unregulated are inadequate to ensure that states comport with the constitutional standards of *Graham* and *Miller*.

In response to *Graham* and *Miller*, "a number of juvenile offenders serving LWOP or otherwise lengthy sentences have sought relief from courts."[228] Relief could theoretically come in any of the following forms: a resentence to life with the possibility of parole, a resentence to LWOP again only after the sentencing courts "first consider the relevant mitigating factors," or a resentence to a shorter

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[221] *See* United States v. Grant, 887 F.3d 131, 144 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018) (finding that a sentence that would not allow for parole until defendant reached seventy-two years violated Eighth Amendment).

[222] *Graham*, 560 U.S. at 82 (finding that LWOP for juvenile non-homicide offenders violates Eighth Amendment).

[223] *Id.* at 79 (finding juvenile non-homicide offenders are entitled to a chance to show rehabilitation).

[224] Russel, *supra* note 211, at 396.

[225] *Id.* at 397.

[226] *Id.* (quoting Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110–111 (NYU Press 2012)).

[227] *Id.* at 396–397 ("For example, in 2011 in Ohio, 6.9% of prisoners were granted release after release consideration hearings. In Florida, 3.5% of parole release decisions resulted in a grant of parole in fiscal year 2011–2012.").

[228] *Id.* at 383.

term for a lesser conviction.[229] Some state courts and legislatures attempted to adjust their standards to adhere to the newly established Eighth Amendment protections.[230] However, none of these approaches are sufficient without procedural and structural changes or additions because meaningful opportunity for release also requires a realistic likelihood of being released and a meaningful opportunity to be heard.[231]

After *Graham*, "Louisiana and Iowa converted LWOP sentences to sentences of life with the possibility of parole."[232] Arkansas and Missouri did not implement a similar conversion; rather, they gave "sentencing courts broader discretion to impose term-of-years sentences . . . or life."[233] These courts "held that if the state failed to persuade the sentencer beyond a reasonable doubt that LWOP was appropriate, then the trial court should vacate [the sentence] . . . and impose a sentence for . . . a term of years between ten and thirty years."[234] Alabama, Pennsylvania, Mississippi, and Wyoming state supreme courts held their respective "mandatory LWOP status unconstitutional . . . and concluded that sentencing courts may impose either LWOP or life with a parole eligibility date to be determined by the sentencing court."[235]

On the legislative side, a handful of states enacted new laws to comport with the *Graham* decision.[236] Nebraska and Louisiana are the only two states to implement specific procedures and rules to guide parole boards' decisions in juvenile offender cases.[237] Specifically, in Nebraska, "after an initial denial decision, the [parole] board must consider the inmate for release every year after the denial."[238] This provision comprises a state attempt to afford offenders a meaningful opportunity for release. In Louisiana, "the parole board shall consider an 'evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence

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[229] *Id.* at 384. For an example of the second approach *see* State v. Hart, 404 S.W.3d 232, 242 (Mo. 2013) (remanding the case and holding that the sentencer must conduct an individualized analysis of the juvenile offender before imposing LWOP).

[230] *See, e.g.*, S.B. 2646, 2020 Leg., Reg. Sess. (Miss. 2020) (recognizing that the current statutory scheme violates *Miller*, proposing the initiation of a case plan to increase possibility of rehabilitation and decrease risk of recidivism for juveniles, and requiring parole hearings for juveniles who have served the lesser of 50% of sentence or 20 years); S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013) (informing parole boards to consider certain factors related to juvenile offenders).

[231] Russell, *supra* note 211, at 376.

[232] *Id.* at 383.

[233] *Id.* at 385.

[234] *Id.*

[235] *Id.*

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

[237] Russell, *supra* note 211, at 388.

[238] *Id.* at 389.

pertaining to the offender.'"[239] In this way, the state directly responds to the Supreme Court's observation that juvenile offenders, by their nature, are different from adults, and therefore should receive different treatment tailored to their disposition.[240] Still, Henry Montgomery, the juvenile offender at the center of *Montgomery v. Louisiana*,[241] was denied parole in April of 2019.[242] Although Montgomery was commended as a "model prisoner" when he was resentenced to life with the opportunity for parole in 2017, and completed the parole board-required programming, he has since been denied parole twice, showing that Louisiana's laws are more hopeful, than pragmatic.[243]

Several states, including Wyoming, Delaware, California, and Ohio, have responded to the *Miller* line of cases by adjusting sentencing structures.[244] Texas and Colorado eliminated LWOP sentencing for juveniles before *Graham*.[245] Post-*Graham*, Wyoming, Delaware, and California followed suit in eliminating LWOP sentences for juveniles.[246] By eliminating LWOP, these states avoided running into the difficulty of measuring a juvenile's capability for rehabilitation.[247] Notably, however, these states' legislation "provide no special procedures or criteria for the parole board," nor do they address "the nature of the future parole hearing."[248]

In 2013, the governor of California signed Senate Bill 260, which provided special procedures for parole boards.[249] This bill ensures that parole boards "provide for a meaningful opportunity to obtain release" by giving "great weight to the diminished culpability of juveniles as compared to adults . . . and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[250]

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[239] *Id.* at 390.

[240] *See* Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[241] 136 S. Ct. 718 (2016).

[242] Katy Reckdahl, *Inmate from Supreme Court Case Rejected for Parole a Second Time*, JUV. JUST. INFO. EXCHANGE (Apr. 13, 2019), https://jjie.org/2019/04/13/inmate-from-supreme-court-case-rejected-for-parole-a-second-time/.

[243] *Id.*

[244] *See* Russell, *supra* note 211, at 391–92; Daniel Nichanian, *Ohio Will No Longer Sentence Kids to Life Without Parole*, THE APPEAL (Jan. 13, 2021), https://theappeal.org/politicalreport/ohio-ends-juvenile-life-without-parole/ ("A wave of states have adopted similar reforms since [*Miller*] . . . in a series of early 2010s rulings. Oregon, in 2019, and Virginia, in 2020, did this the most recently.").

[245] Russell, *supra* note 211, at 391.

[246] *Id.* at 391–92.

[247] Miller v. Alabama, 567 U.S. 460, 480 (2012) (holding that courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before sentencing them to LWOP).

[248] Russell, *supra* note 211, at 391–92.

[249] S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013).

[250] *Id.*

Similarly, in 2015, the governor of Connecticut signed Senate Bill 796 into law.[251] This new law provided special procedures to ensure the state was comporting with *Graham* and *Miller*.[252] Notably, this law provides for the appointment of counsel to indigent offenders at least twelve months prior to the offender's parole hearing.[253] Further, the law requires that the parole board should consider the following when ruling on the juvenile offender's parole:

> [The offender's] *demonstrated substantial rehabilitation* since the date such crime or crimes were committed considering such person's *character, background and history*, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and *increased maturity* since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or *obstacles that such person may have faced as a child* or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes.[254]

In this way, Connecticut establishes the value and importance of juvenile-specific guidelines for parole hearings and works to ensure its systems are not at risk of violating Eighth Amendment protections.[255]

In January 2021, the governor of Ohio signed Senate Bill 256 into law.[256] This bill, which applies retroactively, will make juvenile nonhomicide offenders "eligible for parole after no more than 18 years" and juvenile homicide offenders eligible "after no more than 25 to 30 years." Notably, this bill requires the parole board to consider examples of the juvenile offender's demonstrated rehabilitation and maturity.[257] Because parole boards still have immense

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[251] CONN. GEN. STAT. § 54-125a (2015).

[252] *Id.*

[253] *Id.* at § 54-125a, f(3).

[254] *Id.* at § 54-125a, f(4) (emphasis added).

[255] *See id.* (listing extensive considerations aimed at addressing juvenile culpability); *see also* Miller v. Alabama, 567 U.S. 460, 480 (2012) (holding that courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before sentencing them to LWOP); Graham v. Florida, 560 U.S. 48, 74–75, 82 (2010) (finding that the Eighth Amendment requires juvenile non-homicide offenders to be given a meaningful opportunity for release).

[256] Nichanian, *supra* note 244 ("Ohio is the 24th state, plus D.C., that will stop imposing sentences of juvenile Life Without Parole.").

[257] S.B. 256, 133 Gen. Assemb., (Ohio. 2021) (ordering the parole board to "consider youth and its characteristics as mitigating factors including: (i) the . . . age of the offender at the time of the offense and that age's hallmark features, including intellectual capacity,

discretion, however, "[t]he Legislative Services Commission has already projected that the board will reject most of the parole petitions it considers," leaving the juvenile offenders to remain incarcerated.[258]

D. *Creating a Liberty Interest to Trigger Due Process*

The Supreme Court's ruling in the *Miller* line of cases[259] should be viewed as creating a liberty interest for juvenile offenders in the opportunity for release. Creating a liberty interest would trigger procedural due process requirements for juvenile offenders during parole hearings.[260] Significantly, procedural due process would require the opportunity to be heard.[261] Despite the demands of *Graham* and *Miller*, many states have not made an effort to change their parole systems, and those that have made efforts have hardly done so adequately.[262]

In 1979, the Supreme Court addressed due process requirements as they relate to parole hearings in *Greenholtz*.[263] The Court determined that "states can avoid creating protected liberty interests by adopting statutes and regulations that make parole release discretionary."[264] However, the Court in *Graham*, which was decided *after Greenholtz*, ruled that a meaningful opportunity for release is no longer discretionary, but must be provided to a juvenile defender convicted of a nonhomicide crime.[265] In *Bowling*, the Fourth Circuit declared that "a prisoner must identify a cognizable liberty interest"—arising from the Constitution itself or a state-created liberty interest—to sufficiently claim that she was denied due process when the parole board denies her parole.[266] However, the Fourth Circuit declined to address whether "*Miller* and its lineage gives rise to a constitutionally protected liberty interest in juvenile-specific Eighth Amendment protections" because it concluded that the sentence at issue did not implicate these protections.[267] Nevertheless, the Supreme Court did in fact create, or rather illuminate, a liberty interest for juveniles arising out of the

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immaturity . . . (ii) the family home environment . . . (v) the offender's rehabilitation, including any subsequent growth or increase in maturity during confinement.").

[258] Nichanian, *supra* note 244.

[259] *See Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48; Roper v. Simmons, 543 U.S. 551 (2005).

[260] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019) (indicating that a cognizable liberty interest gives rise to due process claim).

[261] *Procedural due process,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/procedural_due_process.

[262] *See supra* notes 224–58 and accompanying text.

[263] Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9–11 (1979) ("That the state holds out the *possibility* of parole provides no more than a mere hope . . . a hope which is not protected by due process.") (emphasis added).

[264] Russell, *supra* note 211, at 399.

[265] Graham v. Florida, 560 U.S. 48, 74–75, 82 (2010).

[266] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019).

[267] *Id.*

Eighth Amendment when it secured for juvenile non-homicide offenders the right to a meaningful opportunity for release.[268]

E. *De Facto Life Sentences: Bowling was Wrongly Decided*

Graham recognized the "severity of sentences that deny convicts the possibility of parole"[269] and its holding emphasized "that the availability of release is relevant to Eighth Amendment analysis."[270] In requiring a meaningful opportunity to be heard, *Graham* necessitates changes to state parole systems for juveniles because existing parole systems are insufficient to ensure cooperation with juvenile-specific Eighth Amendment protections where parole hearings have become "meaningless ritual[s] in which the form is preserved but parole is rarely granted."[271] For these reasons, sentences that exceed a juvenile's life expectancy or result in the juvenile offender spending much of their life incarcerated are equivalent to a LWOP sentence for Eighth Amendment purposes.[272] Furthermore, repeated denial of parole under existing parole systems is also equivalent to a LWOP sentence for the same reasons.[273] In the former circumstance, there is no chance of release, and in the latter circumstance, the chance of release is not meaningful as required by *Graham*.[274] Consequently, it is clear that de facto life sentences are subject to *Graham* and *Miller* prohibitions. Thus, when the *Bowling* court exempted itself from the grasp of *Graham* and *Miller* based on only the label of the sentence,[275] it did so erroneously. A comprehensive understanding of juvenile culpability and the breadth of juvenile-specific Eighth Amendment protections makes it clear that *Bowling* was wrongly decided.

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[268] *Graham*, 560 U.S. at 74–75, 82.

[269] *Id.* at 70.

[270] Russell, *supra* note 211, at 382.

[271] *Id.* at 397 (quoting Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110–111 (NYU Press 2012)); *Graham*, 560 U.S. at 75–79; *see* discussion *supra* Section II.C.

[272] *See* Miller v. Alabama, 567 U.S. 460, 485 (2012) (stating that, for some juveniles, life without parole was possible due to "the confluence of state laws"); *Virtual Life Sentences*, *supra* note 2 ("[A] sentence of 50 years or longer becomes a virtual life sentence for most individuals.").

[273] *See* Russell, *supra* note 211, at 377.

[274] *Id.*; *see* discussion *supra* Section II.B.

[275] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019) (holding that *Graham* and *Miller* requirements did not apply to a sentence of life with the opportunity for parole even where parole is repeatedly denied).

1. Stacked Sentences

Both the text[276] and the spirit of the *Miller* line of cases support a finding that stacked sentences violate juvenile-specific Eighth Amendment protections: "There is no functional difference between an eighty-nine year sentence [sic] and a sentence of life without parole. Courts should . . . recognize the Supreme Court trilogy [*Ropers*, *Graham*, and *Miller*] for what it actually stands for."[277] This trilogy stands for the recognition that juveniles have a great capacity for "maturity and rehabilitation," and the state and sentencing court is prohibited "from making the judgment at the outset that those offenders never will be fit to reenter society."[278] By imposing de facto life sentences through stacked sentences on juvenile offenders, and not affording them any opportunity to be reevaluated for maturity and rehabilitation, the state is doing precisely what the Supreme Court prohibited.[279]

2. Repeated Denials of Parole

The Fourth Circuit erred in three ways in deciding *Bowling*.[280] First, the court declared that "a prisoner must identify a cognizable liberty interest arising from the Constitution itself . . . [or from] a state-created liberty interest" to sufficiently claim that he was denied due process.[281] Second, the court stated that there is no "inherent right to parole."[282] And third, it concluded that the parole board satisfied any due process requirements by providing "an opportunity to be heard and a [list of reasons for] . . . why parole has been denied."[283] All three statements are incorrect, as a matter of law.[284]

As an initial matter, the Supreme Court *did* create a liberty interest in a meaningful opportunity to obtain release.[285] Furthermore, not only does the Court's ruling in *Graham* confer a right to a parole hearing, it also creates a more substantive right to a parole hearing with procedural integrity sufficient to constitute a meaningful opportunity for release.[286] The Supreme Court

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[276] *See* Graham v. Florida, 560 U.S. 48, 69 (2010) (holding that imprisoning an offender until he dies "alters the remainder of his life by a forfeiture that is irrevocable" and thus is equivalent to the death sentence); Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on [juvenile] offenders.").

[277] Jones, *supra* note 176, at 205.

[278] *Graham*, 560 U.S. at 75.

[279] *Id.* at 73 ("A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.").

[280] *Bowling*, 920 F.3d 192.

[281] *Id.* at 199.

[282] *Id.*

[283] *Id.* at 200.

[284] *See supra* notes 269–75 and accompanying text.

[285] Graham v. Florida, 560 U.S. 48, 82 (2010) ("[The State] must provide him or her with some realistic opportunity to obtain release.").

[286] *Id.*

concluded that the penalties of death and LWOP were too extreme for juvenile non-homicide offenders and further held that, to avoid this cruel and unusual punishment in violation of the Eighth Amendment, the state must provide a juvenile offender with a meaningful opportunity for release.[287] Compared with adults, juveniles have lesser culpability and a greater potential for rehabilitation, and therefore, the Eighth Amendment affords them additional protection.[288] These protections are not suggestions; they are safeguards necessary to avoid violating the juvenile offenders' constitutionally protected right to not be sentenced to life without a meaningful opportunity for release.[289] As discussed above, the requirement to provide a meaningful opportunity for release attaches due process protections to parole hearings.[290] Thus, when the Virginia parole board did not consider mitigating factors regarding Bowling's circumstances as a juvenile offender, it effectively denied him due process of a meaningful opportunity for release.[291]

The Fourth Circuit held that the juvenile-specific Eighth Amendment protections detailed by the *Graham* Court are not triggered when a juvenile offender is sentenced to life with parole.[292] *Graham*, however, did not only prohibit LWOP sentences for juvenile non-homicide offenders, it required that juvenile non-homicide offenders be sentenced to life with *a meaningful opportunity* to obtain release.[293] By substituting the requirement of meaningful opportunity for release for merely the inclusion of parole in the sentence, the Fourth Circuit missed the spirit and letter of *Graham* and *Miller*.[294]

F. *Looking Forward*

The Supreme Court's rulings in the *Miller* line of cases send a clear message about juvenile culpability, the severity of life and death sentences, and the importance of parole.[295] Despite the clarity of its message, the Court has failed to give adequate guidance on how states should adjust both their sentencing structures and parole hearing procedures, leaving room for erroneous findings

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[287] Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that the Eighth Amendment prohibits mandatory LWOP sentences for juvenile offenders); *Graham*, 560 U.S. at 82 (holding that the Eighth Amendment requires courts to provide juvenile non-homicide offenders with a meaningful opportunity for release).

[288] *Miller*, 576 U.S. at 471; *Graham*, 560 U.S. at 74.

[289] *Graham*, 560 U.S. at 82.

[290] *See* discussion *supra* Section II.B.

[291] *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; Roper v. Simmons, 543 U.S. 551, 551 (2005).

[292] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019).

[293] *Graham*, 560 U.S. at 75.

[294] *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 75.

[295] *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. at 551.

that result in Eighth Amendment violations.[296] Although the Court warned of the risks of erroneous findings, it has still left open the possibility for LWOP for juvenile homicide offenders.[297] The same mitigating factors that persuaded the Court to prohibit LWOP for non-homicide offenses apply equally, if not more so, to homicide offenses.[298]

It should be no surprise that the juveniles convicted of homicide offenses are likely the ones who require the most help and compassion from the sentencer. Further, the risk of a court erroneously finding that a juvenile offender is sufficiently culpable to deserve LWOP is just as likely for juvenile homicide offenders as it is for juvenile non-homicide offenders.[299] Even more, the racial disparities are staggering. As of October 2019, eighty percent of juvenile offenders serving life sentences were people of color and more than fifty percent were Black.[300] Thus, the minimal requirement imposed on sentencers "to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,"[301] not only leaves room for erroneous findings but also for racist and prejudiced findings that cause irreparable harm. Because of these risks, the sentencer's discretion to subject juvenile homicide offenders to LWOP should be eliminated.

CONCLUSION

In *Roper*, *Graham*, and *Miller*, the Supreme Court established three juvenile-specific Eighth Amendment protections that limit the state's discretion in sentencing juvenile offenders.[302] In recent years, cases implicating those

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[296] *See, e.g.*, United States v. Jefferson, 816 F.3d 1016, 1018–19 (8th Cir. 2016) (finding that a 600-month sentence without parole, although virtually LWOP, does not implicate the Eighth Amendment prohibition on LWOP sentences where there has been no finding of incorrigibility).

[297] *Miller*, 567 U.S. at 479–80.

[298] *Graham*, 560 U.S. at 78 (quoting *Roper*, 543 U.S. at 572–73) (listing "immaturity, vulnerability, and lack of true depravity . . . [as] the differences between juvenile and adult offenders").

[299] Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1657–61 (2019).

[300] *Youth Sentenced to Life Imprisonment*, THE SENTENCING PROJECT (Oct. 8, 2019), https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/. *See also* Rovner, *supra* note 1 ("While 23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of JLWOP sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JWLOP sentence as their proportion of arrests for killing an African American (6.4%).").

[301] *Miller*, 567 U.S. at 489.

[302] *Id.*; *Graham*, 560 U.S. at 82 (holding that the Eighth Amendment requires courts to provide juvenile non-homicide offenders with a meaningful opportunity for release); *Roper*, 543 U.S. at 578 (holding that the Eighth Amendment prohibits juvenile offenders under the age of eighteen from being sentenced to death).

protections have been heard by several federal circuit courts.[303] The Third, Seventh, Ninth, and Tenth Circuit Courts found that various attempts at workarounds, namely stacked sentences, violate a juvenile offender's right to a meaningful opportunity for release.[304] The Fourth Circuit, when presented with another workaround in the form of repeated denials of parole, determined that these Eighth Amendment protections were not triggered as long as parole hearings, at least in name, were still available to the juvenile offender.[305] Taking into consideration the letter and spirit of precedent and the purpose of the meaningful opportunity for release, the Eighth Amendment protections are not satisfied by existing parole hearing procedures.[306] The Supreme Court has found that both a death sentence and a LWOP sentence, due to their severe nature, must only be imposed on the most culpable offenders.[307] Further, the Court has recognized that, unlike adults, juveniles lack the ability for "true depravity," and therefore, should not be subjected to the most severe penalties permitted by law.[308] Inadequate parole procedures provide a loophole through which states can incarcerate juvenile offenders without providing them a meaningful opportunity for release or finding them to be incorrigible,[309] both of which violate the Eighth Amendment.[310] Therefore, juvenile offenders are entitled to

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[303] *See, e.g.*, United States v. Grant, 887 F.3d 131 (3d Cir. 2018), *vacated*, 905 F.3d 285 (3d Cir. 2018); Budder v. Addison, 851 F.3d 1047 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016); Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).

[304] *See, e.g.*, *Grant*, 887 F.3d at 142; *Budder*, 851 F.3d at 1055–57; *Butler*, 809 F.3d at 911; *Moore*, 725 F.3d at 1191–92.

[305] Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 198 (4th Cir. 2019).

[306] *See Miller*, 567 U.S. at 480 (holding that courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before sentencing them to LWOP); *Graham*, 560 U.S. at 75 (finding that the Eighth Amendment requires juvenile non-homicide offenders to be given a meaningful opportunity for release); *see, e.g.*, Russell, *supra* note 211, at 389 (noting Nebraska parole boards are required to consider inmate for release every year after denial, but Nebraska does not establish what criteria must be considered).

[307] *See Miller*, 567 U.S. at 474–75 (finding that "imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable'" and, thus, is equivalent to a death sentence) (quoting *Graham*, 560 U.S. at 69); *Roper*, 543 U.S. at 568 (reaffirming that the death penalty "must be limited to those offenders . . . whose *extreme culpability* makes them 'the most deserving of the execution.'") (emphasis added) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

[308] *Graham*, 560 U.S. at 78.

[309] *See Bowling*, 920 F.3d at 199 (finding that repeated denial of parole for juvenile offender did not offend the Eighth Amendment because *Miller* is not implicated where juvenile offender is not sentenced to LWOP).

[310] *Miller*, 567 U.S. at 489 (holding that the Eighth Amendment prohibits mandatory LWOP sentences for juvenile offenders); *Graham*, 560 U.S. at 75 (holding that the Eighth Amendment requires courts to provide juvenile non-homicide offenders with a meaningful opportunity for release).

due process protections in parole hearings to ensure that the state, through its parole board, does not violate the Eighth Amendment.[311] For these enumerated reasons, the Fourth Circuit erred in its ruling in *Bowling* by failing to take into consideration these important Eighth Amendment protections.

[311] *See Miller*, 567 U.S. at 480 (holding that courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" before sentencing them to LWOP); *Graham*, 560 U.S. at 75 (finding that the Eighth Amendment requires juvenile non-homicide offenders to be given a meaningful opportunity for release).