A MODEL FOR JUVENILE PAROLE REFORM:

California's Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in Graham *and* Miller *to the Release Decision-Making Process*

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INTRODUCTION

Juvenile sentencing has experienced a number of significant changes in the past decade resulting from both judicial decisions and legislation. In 2005, in *Roper v. Simmons,*[2] the U.S. Supreme Court abolished the imposition of the death penalty for juvenile offenders who committed the crime of conviction while under the age of eighteen.[3] Five years later, in *Graham v. Florida,*[4] the Supreme Court created a categorical ban on life without parole sentences for juvenile offenders convicted of non-homicide offenses.[5] Included in its decision in *Graham,* the Supreme Court established a mandate holding that while a state is not required to guarantee release of a juvenile offender, it must provide the offender "some meaningful

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[2] 543 U.S. 551 (2005).

[3] *Id.* at 578. *See also infra* text accompanying note 29.

[4] 560 U.S. 48 (2010).

[5] *Id.* at 61, 82.

opportunity to obtain release."[6] Two years later, in *Miller v. Alabama,*[7] the Supreme Court considered the constitutionality of life without parole sentences for juvenile homicide offenders. In *Miller,* the Court held that "children are constitutionally different from adults for the purposes of sentencing."[8] Accordingly, juvenile offenders require individualized sentencing, and mandatory life without parole sentencing schemes for juvenile offenders violate the Eighth Amendment.[9] *Roper, Graham,* and *Miller* activated a new era of sentencing reform for juvenile offenders by recognizing the physiological and psychological differences between adult and juvenile offenders and setting forth guidelines for acknowledging these differences during sentencing.

In addition to sentencing reform, the decisions in *Graham* and *Miller* compel parole reform for juvenile offenders, based on the mandate that states must provide juvenile offenders with a meaningful opportunity to obtain release. In the modern American Parole System, policies and procedures vary greatly between states. Additionally, parole boards have traditionally operated with little oversight from the criminal justice system, resulting in arbitrary decision-making by parole boards and a lack of due process.[10] Furthermore, the parole decision-making process is deeply discretionary with boards permitted great flexibility in evaluating and weighing factors during the release decision-making process.[11] The mandate in *Graham,* to provide juvenile offenders with a meaningful opportunity to obtain release, implicates several challenges under the modern American Parole System.[12] For instance, the findings in *Roper, Graham,* and *Miller* demonstrate that age is a mitigating factor in juvenile sentencing decisions and juvenile offenders are less culpable than adults and more capable of change.[13] In contrast, youthful age is calculated as a factor for increased risk in the risk assessment tools used by parole boards during the

6 *Id.* at 75.

7 132 S. Ct. 2455 (2012).

8 *Id.* at 2464.

9 *Id.* at 2466.

10 *See infra* Part II.b.

11 *See infra* Part II.c.

12 *See infra* Part III.

13 Roper v. Simmons, 543 U.S. 551, 569 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2464–2465 (2012).

decision-making process.[14] Additionally, low release rates and the current criteria emphasized by parole boards in release decision-making hinder the opportunity for realistic release.[15] Ultimately, the modern parole system functions antagonistically to the fundamental principles set forth in *Roper, Graham,* and *Miller.*

Courts and legislatures have initiated a number of changes following the decisions in *Roper, Graham,* and *Miller.* These reforms, however, have primarily focused on juvenile sentencing schemes and only recently have begun to consider the parole process. In 2000, more than 100,000 juvenile offenders were incarcerated nationwide.[16] As a result of numerous policy changes following the recent court decisions, the number of incarcerated juvenile offenders has decreased approximately forty percent.[17] In 2013, several states — Arkansas, California, Louisiana, Texas, Wyoming, and Utah — enacted policy changes modifying the parole review process for juvenile offenders.[18] Most notably, California enacted Senate Bill 260, which requires the parole review board to conduct specialized Youth Offender Parole Hearings for juvenile offenders.[19] Following these changes, two states — Hawaii and West Virginia — enacted juvenile parole reforms in 2014.[20] Finally, in 2015, California expanded its Youth Offender Parole

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14 *See infra* Part III.c.

15 *See infra* Part III.b.

16 Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2013: Developments in Policy and Practice* (Jan. 2014), *available at* http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202013.pdf.

17 *Id.* at 17.

18 *Id.* at 15. The following reforms were made in each state. Arkansas, through House Bill 1993, enacted a measure that allows juvenile homicide offenders to gain parole eligibility after twenty-eight years. In Louisiana, House Bill 152 permits juvenile homicide offenders to become eligible for parole after thirty-five years. Senate Bill 2, in Texas, extended the sentence of forty years to life for a capital felony from defendants aged seventeen to those eighteen years of age. Wyoming, pursuant to House Bill 23, authorized parole review for juvenile offenders convicted of first-degree murder after twenty-five years. In Utah, Senate Bill 228 permits parole eligibility for juvenile offenders convicted of aggravated first-degree murder after twenty-five years. *Id.*

19 *See infra* Part IV.c.

20 Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2014: Developments in Policy and Practice* (Jan. 2015), *available at* http://sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf. Hawaii, under House Bill 2490, enacted comprehensive juvenile justice reform, including House Bill 2116, which

Hearings to include offenders who were under twenty-three years of age when convicted of the eligible controlling offense.[21] Parole reform for juvenile offenders is ripe for examination following the Supreme Court's recent decision in *Montgomery v. Louisiana,*[22] which held that the decision in *Miller* must be applied retroactively to state collateral review and specifically acknowledged the significant function of the parole system for juvenile offenders following the decisions in *Roper, Graham,* and *Miller.*[23]

This article focuses primarily on the parole system and the release of juvenile offenders.[24] The principal goal is to explain the implications and rationale set forth in *Roper, Graham,* and *Miller* and consider the application of those principles to parole hearings. Part I provides a brief account

non-retroactively abolished all LWOP sentencing for juvenile offenders. Additionally inmates in Hawaii receive parole review every year once eligible. In West Virginia, House Bill 4210 banned LWOP for juvenile offenders. Furthermore, all juvenile offenders are eligible for parole after serving fifteen years and West Virginia requires parole boards to consider age as a factor in the decision-making process. *Id.* at 11.

21 S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015). *See also infra* note 167.

22 ___ S. Ct. ___, 2016 WL 280758 (2016).

23 *Id.* at 15–16. The Court first determined that *Miller* set forth a "substantive rule of constitutional law" giving it a "retroactive effect." *Id.* Additionally, such an effect does not require re-sentencing, but can be remedied by permitting juvenile offenders to be considered for parole. *Id.* at 16. "Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States . . . . 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." *Id.* The Court concluded by stating,

> In light of what this Court has said in *Roper, Graham,* and *Miller* about how children are constitutionally different from adults in their level of culpability, . . . prisoners 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.

Id.

24 In this article, the term "juvenile offender" is used to describe an offender who, at the time the relevant offense was committed, was under the age of eighteen. A juvenile offender has often reached the age of majority at the time of sentencing and almost certainly is eighteen or older at the potential time of parole. This does not, however, remove their status as a "juvenile offender." Furthermore, following the Court's decision in *Miller,* a juvenile offender may be sentenced to life without parole for a homicide offense; so long as the sentencing decision and scheme were not mandatorily imposed. This article focuses only on juvenile offenders who receive a sentence, regardless of offense or length, which includes the opportunity or possibility for parole release.

of *Roper, Graham,* and *Miller,* focusing on the proportionality analysis employed by the Court and the distinct characteristics identified in the rationale. This section emphasizes the scientifically supported differences between juveniles and adults that compelled the decision in each case. Part II provides an overview of the parole system in America, beginning with a brief history of the genesis of parole in the United States. This section evaluates the existing procedures utilized by parole boards and assesses the impact that minimal oversight and maximum flexibility have had on parole board functions, including the discretion permitted in selecting and weighing criteria for release. Part III evaluates how *Graham*'s mandate requiring states to provide juvenile offenders with a "meaningful opportunity to obtain release" implicates several challenges in the modern parole system. Some of the challenges considered are: when, during incarceration, a state is required to provide a meaningful opportunity; whether the current system actually provides a realistic opportunity to obtain release; and how the current assessment of age is contrary to the findings in *Roper, Graham,* and *Miller.* Part IV examines recent legislation passed in California that targets parole hearings for youthful offenders. This section then suggests that the California legislation can be used as a viable model by other states to develop standards for juvenile offender parole hearings that adhere to the fundamental principles set forth in *Roper, Graham,* and *Miller* and provide juvenile offenders with an actual, realistic opportunity for release.

I. A DECADE OF CHANGE: THE LEGACY OF *ROPER, GRAHAM,* AND *MILLER*

Over the past decade, juvenile sentencing has been dramatically altered through the historic decisions in *Roper v. Simmons, Graham v. Florida,* and *Miller v. Alabama.*[25] These decisions created a special status of diminished

[25] Roper v. Simmons, 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders as a violation of the Eighth Amendment); Graham v. Florida, 560 U.S. 48 (2010) (creating a categorical ban on life without parole sentences for juvenile nonhomicide offenders as a violation of the Eighth Amendment); Miller v. Alabama, 132 S. Ct. 2455 (2012) (requiring individualized sentencing for juvenile homicide offenders, finding that mandatory life without parole sentencing schemes violate the Eighth Amendment).

culpability for juvenile offenders, through the acknowledgment that juveniles exhibit distinct differences from adults in maturity, susceptibility, and character.[26] Relying on neurological, psychological, and social scientific evidence, the Supreme Court recognized that juvenile offenders are not only less culpable than adults, but are also more capable of change and therefore require distinct, individualized sentencing schemes.[27]

a. Roper v. Simmons

In 2005, the United States Supreme Court dramatically altered precedent in *Roper v. Simmons* by re-evaluating the Eighth Amendment's cruel and unusual punishment jurisprudence as applied to juvenile sentencing.[28] In *Roper,* the Court held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed."[29] The decision and analysis used in *Roper* followed directly from *Atkins v. Virginia*[30] and set the foundation for the developments in juvenile sentencing moving forward.[31]

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[26] *See Roper,* 543 U.S. at 569–570; *Graham,* 560 U.S. at 68; *Miller,* 132 S. Ct. at 2464.

[27] *See Roper,* 543 U.S. at 569; *Graham,* 560 U.S. at 68; *Miller,* 132 S. Ct. at 2464–2465.

[28] 543 U.S. 551 (2005). The decision in *Roper* upended the holding in *Stanford v. Kentucky,* 492 U.S. 361 (1989), which previously controlled in the area of juvenile capital punishment jurisprudence. The Court in *Stanford* found the Eighth and Fourteenth Amendments did not bar the execution of juvenile offenders older than fifteen and younger than eighteen. *Id.* at 380.

[29] 543 U.S. at 578. The Court's decision to clearly define "juvenile offenders" as those under the age of eighteen is significant in that it creates a strict nationwide definition that must be observed in each state. *But see* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment bans the use of the death penalty for mentally retarded offenders, but allows each state to set its own parameters for defining such an offender).

[30] 536 U.S. 304 (2002). In *Atkins,* the Court abolished the death penalty for mentally retarded offenders, finding that such individuals "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. Furthermore, the execution of mentally retarded offenders would not satisfy the penological justifications of deterrence and retribution that are associated with the death penalty. *Id.* at 321.

[31] *Roper,* 543 U.S. at 559–560. Simmons was charged with burglary, kidnapping, stealing, and murder in the first degree and following a conviction at trial, the jury recommended the death penalty. *Id.* at 557–558. The Missouri Supreme Court affirmed the conviction, sentence, and denial of post conviction relief and the federal courts denied certiorari. *Id.* at 559. *See also* Simmons v. Bowersox, 235 F.3d 1124, *cert. denied,* 534 U.S.

In *Roper,* the Court conducted a proportionality analysis considering "evolving standards of decency" to evaluate the imposition of the death penalty as a punishment for juvenile offenders.[32] The Court found substantial evidence of a national consensus against the death penalty for juvenile offenders, citing that thirty states already prohibited the death penalty for juveniles.[33] Additionally, in the twenty states without formal prohibition, the practice was infrequent.[34] The Court thus concluded that society viewed juveniles as "categorically less culpable than the average criminal."[35] Furthermore, this diminished culpability would lessen, if not nullify, the penological justifications of retribution and deterrence, often cited as the "two distinct societal purposes served by the death penalty."[36] Ultimately, the Court concluded that the "death penalty is reserved for a narrow category of crimes and offenders" and, thus, is a disproportionate punishment for juvenile offenders.[37]

The crux of the Court's rationale rested on three normative characteristics of juvenile offenders: "a lack of maturity and an underdeveloped sense of responsibility," a greater "susceptib[ility] to negative influences," and a "character . . . [that] is not as well formed . . . ."[38] First, relying on scientific and sociological evidence, the Court acknowledged that a lack of maturity leads to impetuous and reckless behavior.[39] Second, juveniles

924 (2001); State v. Simmons, 944 S.W.2d 165 (en banc), *cert. denied,* 522 U.S. 953 (1997). Following the Supreme Court's decision in *Atkins,* 536 U.S. at 321, Simmons filed a new petition for post conviction relief based on the reasoning found therein. *Roper,* 543 U.S. at 559. The Missouri Supreme Court resentenced Simmons to life without the possibility of parole and the Supreme Court affirmed. *Id.* at 559–560. *See also* State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (2003).

32 *Roper,* 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

33 *Roper,* 543 U.S. at 564.

34 *Id.*

35 *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

36 *Id.* at 571. The Court rationalized: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability . . . is diminished . . . ." *Id.* Additionally, while the deterrent effect was unclear, the Court concluded that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Id.*

37 *Id.* at 569.

38 *Id.* at 569–570.

39 *Id.* at 569. Additionally, widespread recognition of a lack of maturity and responsibility has resulted in most states' limiting involvement in specified activities,

are more susceptible to negative influences, like peer pressure, and exhibit less control over their environment and autonomous decision-making functions.[40] Finally, the Court recognized that unlike an adult, a juvenile's character is "more transitory, less fixed" and has not yet fully formed.[41] Taken together, these three distinct characteristics indicate that juvenile offenders are less culpable, less morally reprehensible, and more capable of change. The rationale and analysis set forth in *Roper* laid the foundation for *Graham* and *Miller.*

b. Graham v. Florida

Five years after *Roper,* the Supreme Court considered, for the first time, a categorical ban on a term-of-years sentence for juveniles, ultimately holding that the Constitution prohibits a life without parole (LWOP) sentence for juvenile offenders convicted of a non-homicide offense.[42] In its analysis, the Court relied heavily on the categorical approach and proportionality review it previously used in *Roper.*[43] Furthermore, the holding in *Graham* continued to hinge on developmental and sociological science, along with the same rationale and characteristics identified in *Roper.*

As in *Roper,* the analysis in *Graham* began with an assessment of societal standards and values by considering indicia of a national consensus.[44] Unlike the clear consensus found in *Roper,* the Court discovered a mixed collection of statutes and thus turned its examination to the actual practice

such as voting and serving on a jury, to those aged eighteen and above. *Id. See generally* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective,* 12 Developmental Rev. 339 (1992).

[40] *Roper,* 543 U.S. at 569.

[41] *Id.* at 570.

[42] Graham v. Florida, 560 U.S. 48, 61, 82 (2010). Graham pled guilty to armed burglary and attempted armed robbery. *Id.* at 53–54. The court initially withheld adjudication and sentenced Graham to probation. *Id.* at 54. Within six months, Graham was arrested for violating his probation on suspicion of participating in another robbery. *Id.* Following trial, the court imposed the maximum penalty for the earlier armed burglary and attempted robbery offenses — life imprisonment and fifteen years, respectively. *Id.* at 57.

[43] *Id.* at 61–62.

[44] *Id.* at 62. The Court began its analysis by acknowledging that a national consensus, as evidenced by legislation, is the "clearest and most reliable objective evidence of contemporary values." *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

and application of the law in jurisdictions allowing for LWOP sentences for juveniles convicted of non-homicide offenses.[45] Upon examining application of the statutes, the Court determined that the practice of sentencing juveniles to LWOP for non-homicide offenses was infrequent and rarely imposed, noting that only 123 juveniles nationwide were serving LWOP sentences.[46] Satisfied that the application of the law in practice showed a national consensus in favor of a categorical ban, the Court then considered proportionality and culpability.

In assessing culpability, the Court turned to the characteristics of maturity, susceptibility, and character set forth in *Roper*.[47] Based on developments in the neurological and psychological sciences, the Court reasoned that the findings in *Roper* still accurately characterized the differences between juveniles and adults and appropriately demonstrated the diminished culpability of juvenile offenders.[48] Finding that juveniles, as a class, have a lessened culpability, the Court then considered the nature and severity of the offense committed and explained, "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[49] Precedent set forth that diminished culpability distinguished offenders from receiving the most severe punishments,[50] and following *Roper,* a sentence of life imprisonment without the possibility of parole was the most severe punishment permitted by law for juvenile offenders.[51]

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[45] *Graham,* 560 U.S. at 62. A census of state legislation found: six states prohibited LWOP for juvenile offenders, seven states allowed LWOP for juvenile offenders for homicide offenses only, and thirty-seven states plus the District of Columbia allowed LWOP for non-homicide juvenile offenders in specified circumstances. *Id. See also Id.* at 82–85 for an Appendix of the states in each category.

[46] *Id.* at 62–64. The Court further revealed that 77 of the 123 juvenile offenders serving LWOP sentences, or 63%, were located in Florida. Additionally, though thirty-seven states and the District of Columbia statutorily permitted LWOP sentences for juvenile non-homicide offenders, only eleven states actually imposed the sentence in practice. *Id.* at 64.

[47] *Id.* at 68.

[48] *Id.*

[49] *Id.* at 69.

[50] *See, e.g.,* Kennedy v. Louisiana, 554 U.S. 407, 439 (2008); Tison v. Arizona, 481 U.S. 137, 156 (1987); Enmund v. Florida, 458 U.S. 782, 798 (1982); Coker v. Georgia, 433 U.S. 584, 600 (1977).

[51] *Graham,* 560 U.S. at 69–70. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 569 (2005); Harmelin v. Michigan, 501 U.S. 957, 1001 (1990). *See also* Naovarath v. State, 105 Nev.

As a final step in the proportionality analysis, the Court again considered penological justifications, explaining that "a sentence lacking any . . . justification is by its nature disproportionate to the offense."[52] As in *Roper,* neither retribution nor deterrence would justify the imposition of LWOP for juvenile non-homicide offenders.[53] The Court further explained that the penological justifications of incapacitation and rehabilitation would also be inadequate to legitimize the sentence.[54] Therefore, the Court concluded that the Eighth Amendment prohibits a LWOP sentence for a juvenile non-homicide offender, thus creating the first categorical ban for a term-of-years sentence.[55] Perhaps the most significant and lasting implication of the decision in *Graham* is its allusion to the parole system with the assertion that a state is not required to guarantee release, but a state *must* provide the offender "some meaningful opportunity to obtain release."[56]

c. Miller v. Alabama

The Court in *Miller v. Alabama* extended the rationale adopted in *Roper* and *Graham* to invalidate the mandatory imposition of LWOP sentences for juvenile homicide offenders.[57] *Miller* enhances the proposition that

525, 526 (1989) (explaining that a life without parole sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the offender], he will remain in prison for the rest of his days").

[52] *Graham,* 560 U.S. at 71.

[53] *Id.* at 71–72. The Court explained that the retribution rationale would not apply as it relies on the proportionality of culpability and the sentence imposed. *Id.* at 71. Furthermore, the deterrence rationale applied in *Roper* would still pertain to the findings in *Graham* and would be amplified because the punishment was rarely imposed. *Id.* at 72.

[54] *Id.* at 72–74. The Court acknowledged that in many situations incapacitation is a legitimate penological justification, as recidivism is a serious risk, but in the context of juvenile non-homicide offenders, the justification is insufficient given the diminished culpability of the offender. *Id.* at 72. Finally, rehabilitation serves as a justification for parole, which is clearly absent in a life without parole sentence. *Id.* at 73.

[55] *Id.* at 82.

[56] *Id.* at 75.

[57] 132 S. Ct. 2455, 2463–2464 (2012). The rationale in *Roper* and *Graham* created two precedents. The first supported the categorical bans adopted in both cases based on the proportionality analysis. *Id.* at 2463. The second developed from *Graham,* when the Court analogized LWOP sentences for juveniles to the death penalty. *Id.* at 2463–2464.

"children are constitutionally different from adults for the purposes of sentencing" and established that the distinct differences between juveniles and adults require juvenile offenders to receive individualized sentencing, even for the most serious offenses.[58]

The Court began its analysis by acknowledging the characteristics of maturity, susceptibility, and character first defined in *Roper* and again found these differences between juveniles and adults to be controlling.[59] These differences in culpability, as the Court explains, are supported not only by neurological and social science,[60] but also by common sense.[61] Likewise, the Court reiterated its diminished culpability rationale from *Roper* and *Graham* to emphasize the lack of penological justifications for imposing the harshest, most severe punishments on juvenile offenders.[62]

The Court then shifted its rationale to apply the findings in *Graham* to the application of *Miller*. The Court explained that while *Graham* created a categorical ban on LWOP for non-homicide offenses, the rationale *Graham* applied regarding the "distinctive (and transitory) mental traits and environmental vulnerabilities" of juveniles was not crime-specific and is therefore implicated in *any* LWOP sentencing scheme enforced on a juvenile.[63] *Miller* further clarified that the distinct differences between juveniles and adults outlined in *Roper* and *Graham* require that sentencing authorities

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The Court then used the rationale in this comparison to consider the mandatory imposition of LWOP to juvenile offenders. *Id.*

[58] *Id.* at 2464. It is necessary to note that *Miller* does not invalidate LWOP sentences for juvenile homicide offenders, but only prohibits a sentencing scheme that applies such a punishment *mandatorily*.

[59] *Id.*

[60] *Id.* at 2464 n.5 (explaining that the science used to support the decisions in *Roper* and *Graham* has also developed to provide stronger support for the proposition).

[61] *Id.* at 2464 (emphasizing a proposition set forth in *Roper* that the differences between juveniles and adults defined by the Court are what "any parent knows"). *See also* Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (explaining that "youth is an objective circumstance" and "a widely shared characteristic that generates commonsense conclusions about behavior and perception").

[62] *Miller,* 132 S. Ct. at 2465. The Court cited to its findings in *Graham* regarding the lack of penological justifications for retribution, deterrence, incapacitation, and rehabilitation. *Id. See also* Graham v. Florida, 560 U.S. 48, 71–74 (2010).

[63] *Miller,* 132 S. Ct. at 2465. The Court further explains that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.*

consider youthfulness in order to maintain proportionality and a mandatory sentencing scheme removes any such individualized consideration, thus violating the fundamental principle established by these precedents.[64]

Roper, Graham, and *Miller* established that "children are constitutionally different from adults for the purposes of sentencing."[65] In conceptualizing these differences — ultimately identified as a lack of maturity, a higher susceptibility to pressure, and a still developing character[66] — the Court relied heavily on neurological, psychological, and sociological data.[67] Additionally, since the Court's decision in *Roper,* empirical research studies have continued to identify and support the neurological and psychological developmental science relied on in each opinion.[68] Ultimately, the shift in Eighth Amendment jurisprudence developed by *Roper, Graham,* and *Miller* places the emphasis on the offender, rather than the offense, for any case

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64 *Id.* at 2466. The Court also acknowledged that the rules created for LWOP are distinct for juvenile offenders because precedent defines LWOP as akin to the death penalty. *Id. See also* State v. Lyle, 854 N.W.2d 378, 402, 404 (Iowa 2014) (The Supreme Court of Iowa further extended the rationale in *Miller* to invalidate any mandatory minimum sentencing scheme for juvenile offenders because such a scheme does not allow the courts to consider youth as a mitigating factor in sentencing).

65 *Miller,* 132 S. Ct. at 2464.

66 Roper v. Simmons, 543 U.S. 551, 569–570 (2005).

67 *Roper,* 543 U.S. at 569; *Graham,* 560 U.S. at 68; *Miller,* 132 S. Ct. at 2464, 2464 n.5.

68 *See, e.g.,* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence,* 21 J. Res. on Adolescence 211, 212 (2011) (reviewing research and findings related to adolescent decision-making, including consideration of normative models, theoretical developments, and examination of the influence of social and emotional factors). *See also* Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity,* 24 Dev. & Psychopathology 1073, 1073 (2012). Research has identified three measures of psychosocial maturity — temperance, perspective, and responsibility — that continue to explain the distinct differences between juveniles and adults. *Id.* Temperance is described as the "ability to curb impulsive and aggressive behavior," whereas perspective examines the "ability to see things from multiple temporal and social vantage points." *Id.* Finally, responsibility is the "ability to function autonomously." *Id.* Evidence indicates that the degree and rate of development among adolescents for each measure is highly variable. *Id.* For a more detailed explanation of each of the three measures, see Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 Cardozo L. Rev. 1031, 1043–1046 (2014). Cohen also provides a physiological basis for the differences between juveniles and adults by exploring evidence of brain maturation through the use of magnetic resonance imaging (MRI). *Id.* at 1046–1048.

involving the conviction and sentencing of a juvenile.[69] Accordingly, as a means to provide the "meaningful opportunity for release" that the Court sought in *Graham,*[70] the established principles and jurisprudence should be applied to other areas of the justice system, namely the parole system.[71]

II. THE AMERICAN PAROLE SYSTEM: AN ANALYSIS OF PRACTICES AND POLICIES

a. History of the American Parole System

In 1876, New York became the first jurisdiction to implement what would become the modern American Parole System.[72] This system was predicated on an indeterminate sentencing scheme and a shifting focus to rehabilitation.[73] Interestingly, the system in New York was developed at a reformatory for youthful offenders.[74] By the early 1900s, most state and federal prisons were utilizing some form of a parole system,[75] and by the 1970s the established practice allowed over 70% of prisoners to obtain release through parole.[76]

A shift in ideology in the 1980s, and the rise of the "tough on crime" era, caused several changes in the American prison and parole systems.[77] Sentencing schemes changed in key ways, including: a reversion to determinate

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[69] *See* Cohen, *supra* note 68, at 1054.

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

[71] *See infra* Part II.b.

[72] *See* Cohen, *supra* note 68, at 1067.

[73] *Id.*

[74] *See Elmira System,* Encyclopedia Britannica, http://www.britannica.com/topic/Elmira-system (last visited Nov. 14, 2015). In 1876, Zebulon Brockway established a parole system at Elmira Reformatory, which housed youthful offenders. Brockway was influenced by Alexander Maconochie and the mark system he implemented in Australia. The system classified prisoners, provided vocational training, and awarded marks for good behavior. Once a prisoner had acquired enough marks, he was eligible for release. *Id. See also Mark System,* Encyclopedia Britannica, http://www.britannica.com/topic/mark-system (last visited Nov. 14, 2015).

[75] *See* Cohen, *supra* note 68, at 1067.

[76] Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 62 (2009). In this article, "parole" means the release of a prisoner from incarceration before the completion of the prisoner's sentence.

[77] *Id.* at 63.

sentencing, the introduction of mandatory minimums, and an escalation of LWOP sentences.[78] The enactment of "truth-in-sentencing" laws also affected the parole system through a significant decrease in release rates, with several states eliminating parole altogether.[79] These changes continue to plague the current parole system and, as a result, the release of eligible prisoners is rare in many states.[80]

b. Parole Boards: Existing Procedures and Due Process

Parole procedures and policies vary greatly by state, and the differences are so varied that a national consensus or trend cannot be determined.[81] The parole system has generally operated with little oversight from the courts, and the processes encounter less scrutiny than other aspects of the criminal

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[78] *Id.* at 65. *But see* Cohen, *supra* note 68, at 1068–1069 (noting that even with the trend toward retribution, indeterminate sentencing is still prevalent in the United States and is certainly contemplated as necessary regarding juvenile offenders, as evidenced by the decisions in *Graham* and *Miller*).

[79] *See* Petersilia, *supra* note 76, at 66–67 tbl. 3.1. *See also* Emily G. Owens, *Truthiness in Punishment: The Far Reach of Truth-in-Sentencing Laws in State Courts,* 8 J. Empirical Legal Stud. 239S (2011). In 1994, Congress passed the Violent Crime Control Act HR 3355 (VCCA) authorizing over $30 billion for law enforcement expenditures and projects and increasing the enactment of, what are commonly referred to as, truth-in-sentencing (TIS) laws. *Id.* at 239S. TIS laws affect the ability of a prisoner to obtain release via a parole board. *Id.* at 243S. Though statutes differ by state, the majority of states with TIS laws require an offender to serve at least 85% of his sentence before being eligible for release. *Id.* This is due, in large part, to the Truth-in-Sentencing incentive grants, 42 U.S.C. § 13704, which provide funding to states that require certain violent felons to serve at least 85% of a sentence without considering good behavior or other incentives.

[80] *See* Ohio Adult Parole Auth., Parole Board Report Calendar Year 2014 (2015), *available at* http://www.drc.ohio.gov/web/Reports/ParoleBoard/Calendar%20Year%202014%20Report.pdf (reporting in Ohio, in 2014, only 4.8% of eligible prisoners were released on parole after a hearing); Fla. Parole Comm'n, Florida Commission on Offender Review 2014 Annual Report, at 8, *available at* https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf (reporting in Florida, in 2014, out of the 4,626 inmates eligible for release, decisions were made for 31%, or 1,437, of offenders, with only 1.6%, or 23, of those decisions resulting in parole).

[81] *See* Jeremy Travis & Sarah Lawrence, Urban Institute, Beyond the Prison Gates: The State of Parole in America 1 (2002), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310583-Beyond-the-Prison-Gates.PDF. *See also* Joan Petersilia, Reforming Probation and Parole: In the 21st Century 139 (2002) (explaining that the Federal parole release system was abolished following the TIS reform movement).

justice system.[82] Additionally, there is very little available scholarship on parole processes and procedures.[83] This lack of inquiry and oversight into the parole system has resulted in parole boards' receiving significant latitude in developing release procedures, often to the detriment of due process.[84]

In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,[85] inmates in Nebraska filed a class action lawsuit against members of the parole board, claiming the state's parole statutes and procedures denied them procedural due process.[86] The Supreme Court rejected the finding of the lower courts that inmates have a constitutionally protected

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[82] *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment,* 89 IND. L.J. 373, 396 (2014); Laura Appleman, *Retributive Justice and Hidden Sentencing,* 68 OHIO ST. L.J. 1307, 1307 (2007).

[83] *See* Russell, *supra* note 82, at 399–400. In 2012, in an effort to address the lack of scholarship, Russell conducted a comprehensive, nationwide study of parole release procedures. *Id.* at 399. Forty-five states responded to the survey. *Id.* at 400. Findings from the survey examine the following aspects of state parole systems: the nature and type of interview or hearing utilized in each state, *Id.* at 400–401 & nn.176–187; the role and presence of an attorney during hearings, *Id.* at 402–403 & nn.188–196; the role and presence of the prosecutor during hearings, *Id.* at 403–404 & nn.197–202; input from the victim or a representative of the victim, *Id.* at 404–405 & n.203; consideration of other sources of input such as case history and criminal background, *Id.* at 405 & nn.204–210; and whether inmates are given access to such information, *Id.* at 405–406 & nn.211–213. The survey additionally inquired whether states applied special procedures when considering a juvenile offender for release. *Id.* at 400 n.175. At the time of the survey, some states would consider age among their criteria, but no board implemented separated procedures. *Id.* Since 2012, some states — California, CAL. PENAL CODE § 3051 (2014); Louisiana, LA. REV. STAT. ANN. § 15:574.4(D)(1) (Supp. 2013); and Nebraska, NEB. STAT. ANN. § 83-1, 110.04 (2013) — have enacted legislation that creates special procedures for juvenile offender hearings.

[84] *See* Russell, *supra* note 82, at 398 (explaining that the Constitution does not require parole procedures to meet minimal due process standards). *See also* Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners."). *But see* Russell, *supra* note 82, at 396 (further explaining that *Graham* challenges this proposition for juvenile offenders, because the mandate for a release mechanism is tied to constitutional jurisprudence).

[85] 442 U.S. 1 (1979).

[86] *Id.* at 3–4. Though statutes in Nebraska provided for both mandatory and discretionary parole, the issues in the case only addressed the discretionary parole practices. *Id.* at 4. The procedures implemented by the parole board in discretionary parole hearings were governed in part by the statutes and in part by the board's experience and prior practices. *Id.*

liberty interest in parole hearings,[87] and instead held, "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[88] The Court further explained, "a state may . . . establish a parole system, but it has no duty to do so,"[89] and, "a state may be specific *or* general in defining the conditions for release and the factors that should be considered by the parole authority."[90] Likewise, state courts have also generally declined to extend more than minimum due process safeguards to parole hearings.[91] The freedom and flexibility granted to parole boards has not only affected due process protections, but is also apparent in the various factors and criteria relied upon for release.

c. Factors Considered in Parole Hearings

The Supreme Court has acknowledged that the parole process is discretionary in nature[92] and, as a result, very few restrictions have been placed

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87 *See* Inmates of the Nebraska Penal & Correctional Complex v. Greenholtz, 576 F.2d 1274, 1276–1277 (8th Cir. 1978).

88 *Greenholtz,* 442 U.S. at 7.

89 *Id.*

90 *Id.* at 8 (emphasis added) (explaining that the lack of restrictions imposed on parole boards allows the system to comply with the public interest in deterrence and rehabilitation).

91 *See, e.g.,* Burghart v. Carlin, 264 P.3d 71, 73 (Idaho 2011) (finding that there is no liberty interest and right to procedural due process in Idaho for parole hearings); Hill v. Walker, 948 N.E.2d 601, 605–606 (Ill. 2011) (holding that the Illinois parole statute does not create an expectation of parole and therefore, does not require procedural due process); *In re* Hill, 827 N.W.2d 407, 419–420 (Mich. Ct. App. 2012) (finding that the Michigan statute does not trigger a protected liberty interest and that the inmate was not entitled to appointed counsel). *See generally* Russell, *supra* note 82, at 400–406 (reporting survey results about parole board procedures by state). Data collected from the survey demonstrates the minimal due process safeguards applied by states in parole hearings. Notable findings include: in some states, an inmate is not present for the parole hearing, *Id.* at 401 & n.187 (explaining that in Florida a hearing will be held by the decision-makers and will include the prosecutor and victim, but not the inmate); fourteen states do not allow an inmate to have an attorney present during a hearing or interview and six do not consider input from an inmate's attorney during the decision-making process, *Id.* at 402 & nn.188, 191; sixteen states allow a prosecutor to present testimony at a hearing, but only one state allows cross-examination, *Id.* at 404 & nn.200–201; and twenty-eight states do not allow an inmate to have full access to information from the prosecutor's office, *Id.* at 405 & n.211.

92 *Greenholtz,* 442 U.S. at 9–10 (The Court explained that a release decision "depends on an amalgam of elements, some of which are factual but many of which are

on parole boards in selecting criteria for release.[93] In general, parole boards will consider the following factors: the seriousness of the offense committed; the prisoner's background and prior criminal history, including past experiences with probation and parole; educational background and vocational skills; prison disciplinary record; participation in prison programs; level of remorse; mental and physical health, including substance abuse and treatment; the views of the victim and prosecutor; and the potential danger to the community.[94] Many states additionally require prospective parolees to complete evaluations and assessments that purport to measure the likelihood of recidivism.[95]

As with other areas of the parole process, parole boards are allowed great flexibility in evaluating and weighing these factors during the release decision-making process.[96] Board members have the power to determine which factors will be considered, to evaluate those factors subjectively,[97] and to decide the weight accorded to each factor.[98] As a result, some factors have emerged as highly influential and determinative in the decision-making

purely subjective appraisals by the Board members based upon their experience . . . .").

93 *See* Russell, *supra* note 82, at 396.

94 *Id.* at 397 (citing to Richard A. Bierschbach, *Proportionality and Parole,* 160 U. Pa. L. Rev. 1745, 1750–1751 (2012)). *See also* Cohen, *supra* note 68, at 1074.

95 *See* Cohen, *supra* note 68, at 1070–1072 & nn.170–173 (providing a general overview of actuarial-based risk and needs assessments). The evaluations take into consideration both static and dynamic factors. *Id.* at 1070. Static factors are fixed and include: "age at sentencing or at first offense, offense of conviction, prior probation or parole history, employment history, substance abuse history, and gender." *Id.* at 1071. Dynamic factors, on the other hand, may alter over time to reflect the prisoner's current status. *Id.* Dynamic factors include: "present age, active gang affiliation, prison programming, prison disciplinary violations, current custody level, and ongoing ties to the community." *Id.*

96 *Id.* at 1074.

97 *See* Petersilia, *supra* note 81, at 133–134 (explaining that one of the criticisms of the parole system includes the arbitrariness of decision-making that is based on personal experience and intuition rather than facts and data).

98 *See, e.g.,* Bryant v. Warden, 776 F.2d 394, 397 (2d Cir. 1985) (concluding that the parole board has discretion throughout the process, including the ability to determine the weight of mitigating factors); Nunez-Guardado v. Hadden, 722 F.2d 618, 624 (10th Cir. 1983) (explaining that the parole commission has the discretion to define the weight assigned to prisoner conduct); Rodriguez v. Board of Parole, 953 N.Y.S.2d 740, 741 (N.Y. App. Div. 2012) (concluding that the parole board is "not required to articulate every factor considered or give equal weight to each factor").

process: the offense committed is traditionally considered the "most influential factor in parole release decisions."[99] Institutional behavior has also been shown to affect release decisions, but only insofar as prison misconduct will negatively impact release — evidence of prison program participation and good behavior is unlikely to influence a release decision in a significant way.[100] In recent years, the potential danger posed by release has become increasingly influential in the decision-making process.[101]

Accordingly, the broad discretionary nature of parole boards, and the parole system as a whole, has led to a highly subjective release system. Release decisions are often predicated on very few factors, with the most influential being the offense committed — a static factor that a prisoner is unable to change.[102] Additionally, truth-in-sentencing laws have disrupted the need for a parole system by requiring certain offenders to serve at least 85% of a sentence before becoming parole eligible.[103] The adult parole system is not required to provide a meaningful opportunity for release.[104] Therefore, in order to fulfill the mandate set forth in *Graham,*[105] the parole system must be scrutinized and altered to account for differences in juvenile offenders.

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99 *See* Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State,* 27 J. Crim. Just. 321, 331–332 (1999). *See also* Cohen, *supra* note 68, at 1040–1041 (noting that "courts have generally upheld Board decisions based solely on offense severity if the hearing transcript and decision reflect at least some consideration of [other factors]"); W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment,* 109 Colum. L. Rev. 893, 896 (2009) (arguing that a parole denial based largely or solely on offense severity undermines the jury's verdict by extending the punitive sentence).

100 *See* Mary West-Smith et al., *Denial of Parole: An Inmate Perspective,* 64 Fed. Probation 3, 5 (2000). *See also* Cohen, *supra* note 68, at 1075 (explaining prison disciplinary infractions are "frequently-cited grounds for parole denials," but participation in programming rarely gives rise to release).

101 *See* Bierschbach, *supra* note 94, at 1751.

102 *See* Cohen, *supra* note 68, at 1076.

103 *See* Owens, *supra* note 79, at 243S and accompanying text.

104 *See* Ball, *supra* note 99, at 944.

105 Graham v. Florida, 560 U.S. 48, 75 (2010) (holding that a state does not have to guarantee release, but that a state must provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation").

III. A MEANINGFUL OPPORTUNITY FOR RELEASE: WHAT *GRAHAM*'S MANDATE MEANS FOR JUVENILE OFFENDERS AND THE PAROLE SYSTEM

In *Graham v. Florida,* the Supreme Court articulated a mandate that requires states to provide juvenile non-homicide offenders with "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[106] In contrast, there is no constitutional provision requiring states to provide any form of parole or early release for adult offenders.[107] As such, the mandate in *Graham* implicates several challenges under the modern American Parole System.

a. Timing: When Should a "Meaningful Opportunity" be Offered?

Following the decision in *Graham* a number of questions regarding compliance with the mandate were left unanswered, including — when, during incarceration, must a state provide a juvenile offender with a meaningful opportunity for release?[108] In the absence of a clear rule, jurisdictions have been mixed in their interpretation and response to the mandate.[109] At a

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106 *Id. See also* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (concluding, with regard to LWOP sentences for juvenile homicide offenders, "we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

107 *See supra* Part II.b–c.

108 *See* Russell, *supra* note 82, at 406. Another question implicated by the decision — whether one meaningful opportunity for release is sufficient or if periodic review is required. *Id.* at 411. Periodic review is typical in the parole system, but the length of time between reviews is becoming increasingly longer. *Id.* Additionally, periodic review is likely more beneficial for juvenile offenders, because it accounts for the differing rates of maturity and rehabilitation present in youthful offenders. *Id.* Furthermore, a single opportunity system means a state risks both that an offender will come up for review too early and be denied release and that review will come too late and a rehabilitated offender will remain incarcerated unnecessarily while waiting. *Id.*

109 The courts have been divided on whether a no-parole, term-of-years sentence that will exceed a juvenile's life expectancy violates the mandate, because the offender was not sentenced to "life." *Compare* Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012) (an eighty-nine year sentence did not violate the mandate and require relief), *and* Smith v. State, 93 So.3d 371 (Fla. Dist. Ct. App. 2012) (affirming an eighty-year sentence), *with* People v. Mendez, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (reversing a sentence that was not parole eligible for eighty-four years).

minimum, the mandate would require an opportunity for release prior to the completion of the full sentence or death.[110] However, many argue that a "meaningful opportunity for release" is synonymous with a meaningful opportunity to live outside of prison.[111]

In assessing when to provide a "meaningful opportunity" for review and release, a state may consider any number of solutions — two are discussed below. First, a state can develop policies using the evidence and rationale the Court relied upon to support its decision in *Graham*.[112] For example, the Court utilized neurological and psychological science to reinforce its rationale that children differ from adults.[113] This data, along with the factors first defined in *Roper* — maturity, susceptibility, and character[114] — was critical to the ultimate decision in *Graham*.[115] Evidence shows that brain and character maturation and development occurs well into late adolescence.[116] Therefore, states may be able to provide a "meaningful opportunity for release" if parole review is set to coincide with late adolescence, or the anticipated time of brain and character maturation.[117]

The drafters of the Model Penal Code (MPC) have constructed an alternative reform solution known as "second look sentencing."[118] The

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110 *See* Russell, *supra* note 82, at 407.

111 *Id.* at 408. *See also* Alice Ristroph, *Hope, Imprisonment, and the Constitution,* 23 Fed. Sent'g Rep. 75 (2010). Ristroph argues that the mandate in *Graham* means "the juvenile defendant is not to be denied hope, and the state is not to abandon hope for the juvenile's eventual rehabilitation." *Id.*

112 *See* Russell, *supra* note 82, at 409.

113 Graham v. Florida, 560 U.S. 48, 68 (2010) (explaining that neurological differences in brain development and maturation are evident between juveniles and adults).

114 Roper v. Simmons, 543 U.S. 551, 560–570 (2005).

115 *Graham,* 560 U.S. at 68–69.

116 *See* Brief for the American Psychological Association et al., as Amici Curiae Supporting Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778.

117 *See* Russell, *supra* note 82, at 409 (explaining that setting initial review at ten years from incarceration should allow for an offender's brain and character to have matured, making rehabilitation more likely).

118 Model Penal Code: Sentencing § 305.6 cmt. a (Tentative Draft No. 2, 2011). The American Law Institute (ALI) has been developing a model penal code for sentencing. Tentative Draft No. 2 was approved at the 2011 annual meeting. According to the website for the ALI, "the material [in Tentative Draft No. 2] may be cited as representing the Institute's position until the official text is published." *Model Penal*

proposal from the MPC alters the parole system by shifting the release mechanism to the judiciary.[119] "Second look sentencing" would allow a juvenile offender, after serving ten years, to petition the court for a "sentence modification."[120] Rather than a parole hearing to determine release, the "sentencing modification" would function as a re-sentencing, with the judiciary analyzing whether an offender's sentence should be altered.[121] The drafters of the MPC, consistent with the Court's holdings in *Roper, Graham,* and *Miller,* chose to create separate review standards for juvenile offenders, because research in psychology and criminology has continued to emphasize the differences between juvenile and adult offenders.[122]

The mandate in *Graham* specifies that a juvenile offender should be given a "meaningful opportunity to obtain release *based on* demonstrated maturity and rehabilitation."[123] Therefore, solutions adopted by the states should allow for a reasonable amount of time for an offender to demonstrate a change in maturity and character, but decision-makers should be wary of setting the timeframe both too early and too late.[124] Furthermore,

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Code: Sentencing, The American Law Institute, https://www.ali.org/publications/show/sentencing/#drafts (last visited Nov. 15, 2015).

[119] Model Penal Code: Sentencing § 305.6(1) (Tentative Draft No. 2, 2011).

[120] *Id.* § 6.11(A)(h). Additionally, the original sentencing court may allow an offender to become eligible for sentencing modification prior to the ten-year period. *Id. See also Id.* § 305.6 (creating a sentencing scheme for adult offenders, setting modification review at fifteen years).

[121] *Id.* § 305.6(4). A judiciary would determine "whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence." *Id.*

[122] *Id.* § 6.11A cmt. c. The comment further explains that differences between juveniles and adults have been recognized and supported by evidence in the following areas: blameworthiness, potential for rehabilitation, harm prevention, number of serious violent offenders, and deterrence. *Id.* § 6.11A cmt. c(1)–(5). *See also Id.* § 6.11A cmt. h (explaining that evidence suggests juveniles are more likely to change, and often do so to a greater degree than adult offenders); *Id.* § 6.11A cmt. g (recommending caps on juvenile sentences that are below the current maximum sentences available to adult offenders).

[123] Graham v. Florida, 560 U.S. 48, 75 (2010) (emphasis added).

[124] *See* Russell, *supra* note 82, at 410 & n.241. Russell emphasizes that creating an opportunity for review that is too early can be detrimental to juvenile offenders. Juvenile offenders often encounter a number of disciplinary issues in the first years of imprisonment, particularly if placed in adult prison, which can negatively affect parole decisions. *Id.*

as demonstrated by the examples above, parole reform for juvenile offenders may be achieved through either the judiciary or the legislature.

b. A Realistic Opportunity for Release

Another challenge implicated by the mandate in *Graham* centers on the likelihood of release and the criteria currently utilized by parole boards to determine release.[125] Additionally, the Eighth Amendment proportionality analysis relied on in *Graham* considers the likelihood of release in the assessment of sentence severity.[126] "Thus, under *Graham,* a meaningful opportunity for release means a realistic one."[127]

The *Graham* mandate makes an assessment of an offender's maturity and rehabilitation crucial to the release analysis.[128] In contrast, the current parole system generally emphasizes offense severity and will often base decisions solely on the committed offense.[129] The fundamental principle behind *Graham* and *Miller* is that children are less culpable than adults and more capable of change, indicating that sentencing schemes should account for these differences in spite of the severity of the offense.[130] The mandate in *Graham* suggests that, in the case of juvenile offenders, offense severity should be afforded little to no weight in the release decision-making process.[131]

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125 *See supra* Part II.c.

126 *Graham,* 560 U.S. at 79 (explaining that the Eighth Amendment does not permit a state to deny Graham the opportunity to atone for his crimes and obtain release). *See also* Solem v. Helm, 463 U.S. 277, 303 (1983); Rummel v. Estelle, 445 U.S. 263, 280–281 (1980).

127 *See* Russell, *supra* note 82, at 412. Russell also explains that *Graham* rejects the idea of clemency as an alternative to a meaningful opportunity. *Id. See also Graham,* 560 U.S. at 82 (concluding with the assertion, "a State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with *some realistic opportunity* to obtain release before the end of that term") (emphasis added).

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

129 *See supra* Part II.c. *See also* sources cited *supra* note 99 and accompanying text.

130 *See, e.g., Graham,* 560 U.S. at 68; Miller v. Alabama, 132 S. Ct. 2455, 2464–2465 (2012). *See also* Russell, *supra* note 82, at 412–413 (explaining that the Court in *Graham* and *Miller* acknowledges and accepts offense severity, but nevertheless determines that a juvenile offender should be given a meaningful opportunity to obtain release).

131 *See* Russell, *supra* note 82, at 413 (arguing that offense severity is taken into account during the initial sentencing, which includes the eligibility parameters for parole). *See also* Ball, *supra* note 99, at 971–972. Ball asserts that a parole board should not

Given the low release rates,[132] and the emphasis on offense severity in release decisions,[133] the current parole system is unlikely to provide a meaningful and realistic opportunity for release for juvenile offenders.[134] To mitigate this, states, through courts and legislatures, should set forth specific guidelines for juvenile offender parole decisions, outlining criteria that should play a significant role in the decision-making process.[135]

c. Age as a Necessary Factor in Release Decisions for Juvenile Offenders

Under the current parole system, age is considered in various ways and can often be both a static and dynamic factor.[136] Additionally, age is a significant factor evaluated by the risk assessment instruments used by parole boards in their decision-making process.[137] Contrary to the fundamental premise in *Graham* and *Miller* that youth are more capable of change, the risk assessment instruments generally estimate youthfulness as an increased measure of risk.[138] For example, even though the Court has held that juveniles are less culpable,[139] the risk assessment will correlate "early

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"consider the commitment offense in determining a prisoner's suitability for parole" and, particularly in the case of juvenile offenders, that parole should be based on rehabilitation. *Id.*

132 *See* sources cited *supra* note 80 and accompanying text.

133 *See supra* Part II.c. *See also* sources cited *supra* note 99 and accompanying text.

134 *See* Russell, *supra* note 82, at 414 (noting "one cannot conclude based on current parole release rates of prisoners convicted of violent crimes whether a particular state's parole board will provide a rehabilitated juvenile offender with a realistic chance for release").

135 *See infra* Part IV. *See also* Russell, *supra* note 82, at 413–414.

136 *See* Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 Brook. L. Rev. 119, 159 (2014). Age is a static factor when it remains fixed, as in age at the time of committed offense or age at first arrest. *Id.* Conversely, the current age of the offender is often considered as a dynamic factor, because risk of recidivism diminishes over time. *Id.* at 159–160.

137 *See* Christopher Slobogin, *Risk Assessment, in* The Oxford Handbook of Sentencing and Corrections, 196–197 (Joan Petersilia & Kevin R. Reitz, eds. 2012); James Austin, *The Proper and Improper Use of Risk Assessment in Corrections,* 16 Fed. Sent'g Rep. 194, 195 (2004).

138 *See* Slobogin, *supra* note 137, at 198–199 (explaining that youthfulness at the time of the offense committed will generally raise the level of risk associated with an offender).

139 *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2464–2465 (2012).

onset of criminal or delinquent activity . . . with a greater likelihood of future criminal behavior."[140] So, under the modern parole system, an offender's youthfulness is more likely to increase his risk level, thus decreasing the likelihood of release.[141]

Under the current parole system, the consideration of age as a criterion for release is contrary to both the mandate set forth in *Graham*[142] and the fundamental principle behind the decisions in *Roper, Graham,* and *Miller*.[143] In order for the parole system to provide a meaningful opportunity for release for juvenile offenders, states must alter their current criteria to adequately reflect the premise that youthfulness indicates a higher likelihood of rehabilitation.[144] Furthermore, changes must be implemented throughout the system in order to comply with the mandate in *Graham* and provide an actual and realistic opportunity for release for juvenile offenders.[145]

IV: A MODEL FOR JUVENILE PAROLE REFORM: CALIFORNIA'S ENACTMENT OF YOUTH OFFENDER PAROLE HEARINGS

In 2011, in *Brown v. Plata,*[146] the Supreme Court affirmed an order to relieve overcrowding in California prisons and impose a population limit in response to grossly inadequate facilities and care which violated the

140 *See* Annitto, *supra* note 136, at 159; Austin, *supra* note 137, at 197.

141 *See* Annitto, *supra* note 136, at 159–160. For example, in Nevada, that an inmate's risk score is increased by two points if he was incarcerated as a juvenile, whereas completion of prison programs may only reduce a score by one point. *Id*. at 159–160 & n.294.

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

143 *See* Roper v. Simmons, 543 U.S. 551, 569 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 132 S. Ct. 2455, 2464–2465 (2012).

144 *See* Annitto, *supra* note 136, at 414.

145 *Id.* Annitto argues that under the modern parole system, parole boards are not required to provide realistic release for offenders. *Id.* Accordingly, "simply making juvenile offenders eligible for parole under existing practices will not guarantee compliance with Eighth Amendment requirements." *Id.* Furthermore, state legislatures and courts are key to the implementation of criteria that will provide juveniles with a meaningful opportunity to obtain release. *Id.*

146 131 S. Ct. 1910 (2011).

Eighth Amendment ban on cruel and unusual punishment.[147] To satisfy the court-mandated prison population reduction, California passed three laws from 2012 to 2013, two of which directly affect juvenile offenders.[148] In 2012, California contributed to nearly half of the reported nationwide decline in prison populations.[149] As a result of these measures, California has become a leader in juvenile sentencing reform and has passed legislation that should serve as a model for other states to amend their parole release process for juvenile offenders.

a. California Addresses de Facto LWOP Sentences Following Graham *and* Miller

Following *Graham* and *Miller,* states[150] were left to address a number of unanswered questions, including how to confront de facto LWOP

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147 *Id.* at 1922–1923. The case arose from two class actions involving prisoners with mental disorders and medical disorders. *Id.* at 1922. The Court found that the prison populations were nearly double the capacity and had operated as such for eleven years. *Id.* at 1924. As a result, the mental health and medical care provided by the prisons did not meet constitutional minimums and had frequently caused serious harm and in some instances death. *Id.* at 1923.

148 Jesse Wegman, *Once Again, California Eases Harsh Sentencing Laws,* N.Y. Times (Sept. 25, 2013), *available at* http://takingnote.blogs.nytimes.com/2013/09/25/once-again-california-eases-harsh-sentencing-laws/?_r=0. The third law contributed to the release of prisoners serving sentences under California's Three Strikes Law. *Id.*

149 *See* Porter, *supra* note 16. In 2012, California's prison population was reduced by 15,035 prisoners. *Id.*

150 Along with California, Iowa also serves as a leader in juvenile sentencing reform and its courts have likewise reversed de facto LWOP sentences for juvenile offenders. In *State v. Ragland,* the Iowa Supreme Court established guidelines for applying *Miller.* 836 N.W.2d 107 (Iowa 2013). First, the court held that *Miller* applies retroactively in Iowa because it not only affects procedure, but also the substantive law. *Id.* at 117. Furthermore, the court reasoned that *Miller* must also apply to "sentences that are the functional equivalent of life without parole" given that the "spirit of the constitutional mandates of *Miller*" are based on the profound effect such sentences have on juveniles. *Id.* at 121. Finally, the court determined that the commutation provided by the governor for juvenile offenders currently serving LWOP sentences did not allow for the individualized sentencing required under *Miller. Id.* at 122. *See also* Mike Wiser, *Branstad commutes life sentences for 38 Iowa juvenile murderers,* The Gazette (July 16, 2012), http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/ (explaining that following the Court's decision in *Miller,* the governor of Iowa commuted the sentences of thirty-eight offenders, who were sentenced as juveniles to LWOP, to serve a mandatory sixty years in prison before being eligible for parole).

sentences.[151] California first considered a de facto LWOP sentence for a non-homicide juvenile offender in *People v. Caballero*.[152] The California Supreme Court held a term-of-years sentence for a juvenile non-homicide offender with a parole eligibility date that occurs outside of the life expectancy violates the Eighth Amendment.[153] Adhering to the rationale that juveniles are developmentally distinct from adults, the Court determined that the holding in *Graham* was not limited to a specific sentence, but rather requires that all juvenile non-homicide offenders be granted a realistic opportunity to obtain release.[154] The Court further explained that in order to receive a realistic opportunity to obtain release, offenders must be able to demonstrate a change in maturity and growth, which can only be achieved if the opportunity arises during an offender's lifetime.[155] Following the decision in *Caballero,* the California Legislature has enacted two significant reforms related to juvenile offenders.

b. The Fair Sentencing for Youth Act

Following the decisions in *Graham* and *Miller,* the California Legislature enacted the "Fair Sentencing for Youth Act" to address parole eligibility for juvenile offenders.[156] The Act allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after serving fifteen years.[157]

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151 A "de facto LWOP sentence" is a term-of-years sentence that will exceed, or in some instances more than likely exceed, a person's natural life, thus resulting in a virtual life sentence.

152 282 P.3d 291 (Cal. 2012). Caballero was sentenced on three counts — forty years to life, thirty-five years to life, and thirty-five years to life — to be served consecutively as 110 years to life. *Id.* at 293.

153 *Id.* at 295. The state argued that Caballero's sentences did not violate the categorical ban imposed by *Graham* because each sentence "was permissible individually because each included the possibility of parole within [Caballero's] lifetime." *Id.* at 294.

154 *Id.* at 295. The California Supreme Court reasoned that the Supreme Court's extension of *Graham*'s rationale in *Miller* to juvenile homicide cases supported the proposition that *Graham*'s ban on LWOP sentences for non-homicide offenses applied to all juvenile non-homicide cases. *Id.* at 294.

155 *Id.* at 295.

156 S.B. 9, 2012 Leg. (Ca. 2012), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120930_chaptered.pdf (codified at Cal. Penal Code § 1170 (West 2013)).

157 Cal. Penal Code § 1170(d)(2)(A)(i). Pursuant to Cal. Penal Code § 190.5(b) (West 2008), a juvenile offender age sixteen or seventeen in California may be sentenced

Upon consideration of specified factors,[158] if the offender's sentence is not recalled he may re-petition the court for review at a later date, allowing juvenile offenders serving a LWOP sentence multiple opportunities to obtain parole eligibility.[159] The "Fair Sentencing for Youth Act" does not address parole hearings, and likewise does not guarantee release through the parole system for juvenile offenders — the Act simply provides juvenile offenders serving LWOP sentences an opportunity to demonstrate rehabilitation, which in turn could provide a change in sentencing to possibly receive parole.[160]

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to LWOP or twenty-five years to life if convicted of murder in the first degree. Accordingly, under Cal. Penal Code § 1170(d)(2)(A)(i), the court may convert a LWOP sentence to life with the first possibility of parole after twenty-five years, meaning that an offender may petition the court for resentencing after fifteen years and, if granted, would become parole eligible after serving another ten years. *See also* People v. Gutierrez, 58 Cal. 4th 1354 (2014). In *Gutierrez,* the California Supreme Court held Cal. Penal Code § 190.5 constitutional following *Miller* because the statute provides courts with the discretion to sentence an individual to LWOP *or* twenty-five years to life and there is no "presumption in favor of life without parole." *Id.* at 1361.

158 Cal. Penal Code § 1170(d)(2)(F)(i)–(viii). Factors the court may consider include:

> The defendant was convicted pursuant to felony murder . . . does not have juvenile felony adjudications for assault . . . committed the offense with at least one adult codefendant . . . had insufficient adult support or supervision and had suffered from psychological or physical trauma . . . has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs . . . has maintained family ties or connections with others . . . has eliminated contact with individuals outside of prison who are currently involved with crime . . . has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

Id.

159 Cal. Penal Code § 1170(d)(2)(H). *See* Russell, *supra* note 82, at 392 n.126 (explaining that the Act applies retroactively to juvenile offenders currently serving LWOP sentences). *See also* Kelly Scavone, *How Long is Too Long? Conflicting State Responses to De Facto Life Without Parole Sentences after* Graham v. Florida *and* Miller v. Alabama, 82 Fordham L. Rev. 3439, 3474 (2014).

160 *See* Russell, *supra* note 82, at 392; Scavone, *supra* note 159, at 3475 (acknowledging that § 1170 may provide "juvenile offenders the opportunity for parole but may not actually be effective in providing any meaningful chance at rehabilitation and release for the majority of juvenile LWOP offenders").

c. California Provides a Realistic Opportunity to Obtain Release through Youth Offender Parole Hearings

In 2013, the California Legislature passed a bill creating special "Youth Offender Parole Hearings" for juvenile offenders in order to create a meaningful opportunity to obtain release consistent with *Graham*.[161] California Senate Bill 260 sets forth the intent of the state legislature, as follows:

> The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* and the decisions of the United States Supreme Court in *Graham v. Florida* and *Miller v. Alabama*. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.[162]

The Youth Offender Parole Hearings differ from adult parole hearings in that the parole board is instructed to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[163] Additionally, during its assessment, if the board uses risk assessment instruments,[164] such evaluations may only be administered by a licensed psychologist who must also

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[161] S.B. 260, 2013 Leg., 2013–2014 Reg. Sess. (Ca. 2013), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_bill_20130916_chaptered.pdf (codified at Cal. Penal Code §§ 3051, 4801 (West 2013)). For more information on California Senate Bill 260 and the Youth Offender Parole Hearings, see Human Rights Watch, *California Youth Offender Parole: A Guide for Prisoners and Their Families and Friends* (2014), *available at* http://www.caresforyouth.org/YOPH_SB_260_Guide_5-1-14_v3.pdf

[162] S.B. 260 § 1 (citations omitted).

[163] Cal. Penal Code § 4801(c). Additionally, "Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board." Cal. Penal Code § 3051(f)(2).

[164] *See supra* Part III.c.

give great weight to the diminished culpability and hallmark features of youth.[165] Furthermore, the bill created parameters, based on the offender's sentence, detailing when an offender will become eligible for a Youth Offender Parole Hearing.[166] When originally drafted, the bill applied to offenders who were convicted of a controlling offense that was committed before the age of eighteen.[167] In 2015, however, the state legislature passed California Senate Bill 261 extending the applicability of Youth Offender Parole Hearings to offenders who were convicted of a controlling offense that was committed under the age of twenty-three.[168]

California's Youth Offender Parole Hearings, created by California Senate Bill 260, address issues that currently plague the parole system and impede compliance with *Graham*'s mandate that youth offenders should receive a realistic opportunity to obtain release.[169] First, the decisions in *Graham* and *Miller* failed to establish timing guidelines that would direct states when an opportunity for release should be made available to offenders, leading to inconsistent interpretations and responses from the states.[170] Neurological and developmental data from the American Psychological Association (APA) shows that brain development continues through late adolescence,[171] and the drafters of the MPC have recommended "second

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165 Cal. Penal Code § 3051(f)(1).

166 S.B. 260 § 4 (codified at Cal. Penal Code § 3051(b)(1)–(3)). Accordingly, a juvenile offender serving a determinate sentence for the controlling offense, meaning a sentence with a fixed length, will become parole eligible, and thus eligible for a youth offender parole hearing, during his fifteenth year. § 3051(b)(1). A juvenile offender sentenced to a life term of less than twenty-five years for the controlling offense will become eligible in his twentieth year of incarceration. § 3051(b)(2). Finally, a juvenile offender sentenced to a life term of twenty-five years or more for the controlling offense will become eligible during his twenty-fifth year. § 3051(b)(3). As defined in the statute, the controlling offense "means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." § 3051(a)(2)(B).

167 S.B. 260 § 4. The statute, as originally enacted and currently, does not apply to offenders sentenced under California's Three Strikes Law or "Jessica's Law," also known as the Sexual Predator Punishment and Control Act.

168 S.B. 261, 2015 Leg., 2015–2016 Reg. Sess. (Ca. 2015), *available at* http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_261_bill_20151003_chaptered.pdf (codified at Cal. Penal Code §§ 3051, 4801 (West 2016)).

169 *See supra* Part III.

170 *See* cases cited *supra* note 109 and accompanying text.

171 *See supra* Part III.a. *See also supra* note 116 and accompanying text.

look sentencing" for juvenile offenders, which would allow youthful offenders to petition for resentencing after ten years.[172] Section 3051 of the California Penal Code addresses this timing issue by clearly setting forth parameters that detail when juvenile offenders are eligible for parole.[173] The guidelines developed under section 3051 exceed those recommended by the MPC, but effectively create a graduated scale based on sentence length that establishes set timeframes for parole eligibility. Additionally, section 1170 of the California Penal Code allows juvenile offenders sentenced to LWOP to petition the court for re-sentencing after fifteen years, which is supported by the data from the APA that juvenile brains continue to develop into late adolescence and suggests that California legislators are willing to provide even the most dangerous of juvenile offenders with the possibility of parole release upon a showing of growth and maturity.[174]

Another issue juvenile offenders face under the current parole system is the effect and weight of age as a factor in parole release decisions. Risk assessment instruments, used by many parole boards in release evaluations, consider age as a significant factor in the decision-making process.[175] Contrary to the evidence relied upon by the Court in *Roper, Graham,* and *Miller,* however, risk assessment tools generally conclude that a juvenile offender's age is an increased risk factor rather than an indication of susceptibility to rehabilitation.[176] In contrast, section 3051 requires that California parole boards choosing to utilize risk assessment tools must do so through a licensed psychologist and that the evaluation of those tools must "take into consideration the diminished culpability of juveniles."[177] Furthermore, while age need not be considered as a factor in other jurisdictions,[178] section 4801 of the California Penal Code mandates that the parole board

172 *See supra* notes 118–122 and accompanying text.

173 Cal. Penal Code § 3051(b)(1)–(3). *See supra* note 166 and accompanying text.

174 *See supra* notes 156–158 and accompanying text.

175 *See* sources cited *supra* note 137.

176 *See* sources cited *supra* notes 138, 140–141 and accompanying text.

177 Cal. Penal Code § 3051(f)(1).

178 *See* Cohen, *supra* note 68, at 1073–1076 (explaining the arbitrary nature of parole decision-making and the practice of giving different factors varying weight in the decision-making process); Annitto, *supra* note 136, at 144–145 (discussing the variations in state parole board decision-making and the arbitrariness associated with release decisions and the factors considered).

"shall give great weight to the diminished culpability of juveniles . . . [and] the hallmark features of youth."[179] Accordingly, the California legislation not only adequately considers age as a factor in its parole release decisions, but does so in a manner consistent with the fundamental principle behind the Court's decisions in *Roper, Graham,* and *Miller.*

Similarly, the current parole system's general emphasis on offense severity challenges *Graham's* mandate to provide a meaningful opportunity to obtain release.[180] Additionally, the prevalence of low release rates under the current system further decreases the opportunity for juvenile offenders to achieve a realistic chance of release consistent with *Graham*.[181] Under section 3051, juvenile offenders are still required to show significant rehabilitative improvements in order to obtain release, but the considerable weight afforded to youth under section 4801 increases the likelihood of parole suitability and the successful attainment of a realistic opportunity for release.[182] Early results from California "suggest that the effect of the specific criteria and rationale focused on development in the legislation, in tandem with a politically favorable environment, has been impactful."[183]

Though in its early stages, the Youth Offender Parole Hearings instituted under section 3051 of the California Penal Code demonstrate an effective juvenile sentencing and parole reform model that other states should consider adopting. The decisions in *Graham* and *Miller* addressed issues pertaining not only to the sentencing of juvenile offenders, but also to the parole of such offenders, by mandating a meaningful opportunity for release. The current parole system inadequately addresses this mandate and fails to provide a meaningful or realistic opportunity for release

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179 Cal. Penal Code § 4801(c).

180 *See supra* Part II.c. *See also* sources cited *supra* note 99 and accompanying text.

181 *See* sources cited *supra* note 80 and accompanying text.

182 *See* Human Rights Watch, *supra* note 161.

183 *See* Annitto, *supra* note 136, at 162 and n.308 (citing an interview the author conducted with Elizabeth Calvin from the Human Rights Watch). Annitto elaborates that in the initial months following the enactment of S.B. 260, "twelve out of twenty-one applicants were granted a parole release date," which illustrates a "stark contrast" with California's prior annual release rates, which at times were "zero percent." *Id. But see* Scavone, *supra* note 159, at 3478. Scavone notes that opponents to reforms like S.B. 260 will often argue that such mechanisms increase the risk of releasing dangerous offenders and place an undue burden on victims to participate in frequent or multiple parole hearings. *Id.*

for juvenile offenders. The reforms enacted in California through section 3051, section 4801, and section 1170 adhere to the fundamental principle in *Roper, Graham,* and *Miller* and provide an alternative mechanism for parole release for juvenile offenders, who have been shown to be constitutionally different from adult offenders.

CONCLUSION

Juvenile justice sentencing and reform policies have altered dramatically over the past decade. While the decisions in *Roper, Graham,* and *Miller* largely affected sentencing schemes for juvenile offenders, the Court additionally created a mandate in *Graham* that states must provide juvenile offenders with a meaningful and realistic opportunity to obtain release. This mandate directly affects the American Parole System, because it imposes a duty on the states regarding parole of juvenile offenders that does not exist for adult offenders. Currently, the modern parole system operates adversely to the fundamental principle that juveniles are constitutionally different than adults and must receive a meaningful opportunity to obtain release.

Since 2013, a number of states have begun to implement parole reforms for juvenile offenders in an effort to follow the mandate set forth in *Graham*. Most notably, California enacted Senate Bill 260 and implemented Youth Offender Parole Hearings for juvenile offenders. These hearings address the issues that exist in the current parole system by creating a clear timing component and requiring board members to afford great weight to the diminished culpability of juvenile offenders. This requirement significantly increases the likelihood that a juvenile offender will receive a meaningful and realistic opportunity to obtain release. The Supreme Court in *Roper, Graham,* and *Miller* declared that juveniles are constitutionally different from adults and instructed that states must provide juvenile offenders with a meaningful opportunity for release. In order to follow this mandate, states need to develop effective parole reform for juvenile offenders. California's Youth Offender Parole Hearings system offers other states a viable model of effective parole reform for juvenile offenders.

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