

## Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment

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*State parole boards have historically operated free from constitutional constraints when making decisions about whether to release prisoners. Recent Supreme Court decisions subject states to a new constitutional requirement to provide a “meaningful opportunity to obtain release” for at least some categories of juvenile offenders. Using original data collected through a survey, this Article provides the first comprehensive description of existing parole board release procedures nationwide and explores whether these practices comply with the Court’s Eighth Amendment mandate.*

*The Court’s recent decisions in *Graham v. Florida* and *Miller v. Alabama* prohibit sentences of life without the possibility of release (LWOP) for juvenile offenders in nonhomicide cases and forbid mandatory LWOP sentences in homicide cases. States must now provide nonhomicide juvenile offenders with a “meaningful opportunity to obtain release” and give judges the option of imposing a sentence with the chance of release on homicide offenders. Around the country, state courts, legislatures, and governors have started to respond to *Graham* and *Miller*. Yet there is little scholarship focusing on a central issue raised by these cases: What constitutes a meaningful opportunity to obtain release under the Eighth Amendment? The Court has declined to provide detailed guidance on the matter, stating that “[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance.”*

*Viewed in the context of the Court’s earlier Eighth Amendment jurisprudence, the meaningful opportunity for release requirement appears to encompass three distinct components: (1) a chance of release at a meaningful point in time, (2) a realistic likelihood of release for the rehabilitated, and (3) a meaningful opportunity to be heard. For the most part, states have responded to *Graham* and *Miller* by making juvenile offenders eligible for release under existing and long-standing parole board procedures. To date, the debate in the states has focused primarily on the first component of the meaningful opportunity requirement—when a juvenile offender should be eligible for release. Most states have paid little attention to whether existing parole board practices satisfy the other two components of the meaningful opportunity requirement. These practices, which were designed for a different purpose, may not offer a realistic chance of release and meaningful hearings for juvenile offenders.*

*Parole procedures in every state are different, and many parole boards operate under unwritten and unpublished rules. To understand existing practices, I sent a survey to every parole board in the country. The survey results revealed procedures*

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that, while adequate for adult offenders, may not survive Eighth Amendment scrutiny when applied to juvenile offenders under *Graham* and *Miller*. Such procedures include (1) preventing prisoners from appearing before decision makers, (2) denying prisoners the right to see and rebut evidence, and (3) limiting the role of counsel. I conclude that some states may not be able to rely on their existing parole board practices to provide a meaningful opportunity for release, and may need to craft special rules for considering release of juvenile offenders serving lengthy sentences.

INTRODUCTION .....	374
I. <i>GRAHAM V. FLORIDA</i> , <i>MILLER V. ALABAMA</i> , AND THE CHANCE OF RELEASE.....	377
A. THE EIGHTH AMENDMENT AND JUVENILE OFFENDERS .....	377
B. THE RELATIONSHIP BETWEEN THE EIGHTH AMENDMENT AND AN OPPORTUNITY FOR RELEASE .....	380
II. STATE RESPONSES TO <i>GRAHAM</i> AND <i>MILLER</i> .....	383
A. RESPONSES BY THE COURTS .....	383
B. LEGISLATIVE APPROACHES.....	388
C. CLEMENCY.....	395
III. EXISTING PAROLE BOARD STANDARDS AND PROCEDURES .....	396
A. STANDARDS FOR ASSESSING PAROLE RELEASE SUITABILITY .....	396
B. EXISTING PAROLE BOARD PROCEDURES: A NATIONAL SURVEY .....	398
IV. CONSIDERING THE SCOPE OF <i>GRAHAM</i> 'S MANDATE TO THE STATES.....	406
A. TIMING QUESTIONS .....	406
B. A REALISTIC CHANCE OF RELEASE.....	412
C. MEANINGFUL HEARINGS.....	415
CONCLUSION.....	433
APPENDIX .....	434

#### INTRODUCTION

In 2010, the Supreme Court held in *Graham v. Florida*<sup>1</sup> that imposing a sentence of life without the possibility of release (LWOP) on juvenile offenders in nonhomicide cases violates the Eighth Amendment's ban on cruel and unusual punishment. In such cases, states must now provide incarcerated juvenile offenders with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>2</sup> Two years later, *Miller v. Alabama*<sup>3</sup> held that the Eighth Amendment prohibits a sentencing scheme that mandates LWOP for juvenile offenders—regardless of the severity of the crime. Instead, juvenile homicide offenders facing possible life sentences are entitled to "individualized sentencing," and judges must have the option of imposing a sentence that allows a meaningful possibility of release.<sup>4</sup> Indeed, the Court emphasized that appropriate occasions for sentencing juvenile homicide offenders to LWOP "will be uncommon."<sup>5</sup>

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1. 130 S. Ct. 2011 (2010).

2. *Id.* at 2030.

3. 132 S. Ct. 2455 (2012).

4. *Id.* at 2460, 2469.

5. *Id.* at 2469.

Although *Graham* has received considerable scholarly attention,<sup>6</sup> there is little scholarship focusing on a central issue: What constitutes a “meaningful opportunity to obtain release”?<sup>7</sup> The Supreme Court has declined to provide detailed guidance on this question, stating that “[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance.”<sup>8</sup>

In the wake of *Graham* and *Miller*, juvenile offenders serving LWOP sentences have challenged their sentences in court, and judges have started to craft remedies.<sup>9</sup> In addition, state legislatures and governors are considering and adopting a range of possible responses to the Supreme Court decisions.<sup>10</sup> Viewed in the context of the Court’s earlier Eighth Amendment jurisprudence, it appears that *Graham*’s requirement that states provide a meaningful opportunity for release encompasses three distinct components: (1) individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood

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6. See, e.g., Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010); Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1 (2011); William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109 (2010); Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012); Richard S. Frase, *Graham’s Good News—And Not*, 23 FED. SENT’G REP. 54 (2010); Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL’Y 17 (2012); Dan Markel, *May Minors Be Retributively Punished After Panetti (and Graham)?*, 23 FED. SENT’G REP. 62 (2010); Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765 (2011); Alice Ristorph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75 (2010); Alison Siegler & Barry Sullivan, “‘Death is Different’ No Longer”: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327; Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79 (2010); Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381 (2012).

7. Several articles have addressed this issue to some degree but have a different focus from the present Article. See Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310 (2012); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1 (2011). Glynn and Vila argue that state incarceration policies currently impede the rehabilitation of juvenile offenders. In addition, the authors argue that states without parole systems must develop new release mechanisms, and they offer a model statute for reducing sentences for juvenile offenders. Glynn & Vila, *supra*, at 333–46. Green’s article argues that under *Graham* states must return to rehabilitative models of incarceration of juvenile offenders, and adopt a prison release mechanism that assesses “the individual juvenile life sentence offender’s success in attaining growth with a focus on the psychology of human conduct.” Green, *supra*, at 34.

8. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

9. See *infra* Part II.A.

10. See *infra* Part II.B–C.

of being released, and (3) the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard.<sup>11</sup> As states respond to *Graham* and *Miller*, questions emerge about the scope of each of these three components of the meaningful opportunity requirement.

First, a meaningful opportunity for release implies that the chance of release must come at a meaningful point in time in the offender's life. But when precisely during the course of a prisoner's incarceration must states provide this opportunity? Is one chance at release enough, or must states provide periodic review of sentences? Second, it is apparent under *Graham* that to be "meaningful," the chance of release for rehabilitated prisoners must be "realistic." Yet *Graham* does not say more about how likely states must make the possibility of release and provides little guidance on the criteria that states should use in assessing whether to grant release. Finally, to provide a meaningful opportunity for release, states must give meaningful consideration to a prisoner's suitability for release. But what constitutes meaningful consideration? Do existing parole procedures fulfill this mandate, or does *Graham* require parole boards to employ new procedures to ensure that juvenile offenders have a meaningful opportunity to be heard? Do procedural requirements for hearings stem from the Eighth Amendment, or does Fourteenth Amendment procedural due process analysis govern?<sup>12</sup>

Following *Graham* and *Miller*, most of the remedies created by courts and considered and enacted by legislatures involve simply making juvenile offenders eligible for parole under existing state parole practices.<sup>13</sup> Courts and legislatures have focused primarily on the timing of eligibility for release, but they have paid relatively little attention to whether parole boards will offer a realistic chance of release to these juvenile offenders and whether existing state parole procedures will actually provide a meaningful opportunity to be heard.<sup>14</sup>

Many parole boards follow unwritten and unpublished rules on significant matters, and information about the processes currently in place in the fifty states has not been compiled elsewhere.<sup>15</sup> To fill this void, I sent a survey to every parole board in the country. Using the survey results, this Article presents the first comprehensive description and analysis of parole release procedures nationwide. It is apparent from an examination of these procedures that simply making a juvenile offender eligible for parole may not ensure that the opportunity for release is truly meaningful. Rather, important features are missing from existing parole release processes in many states—features that are needed to ensure meaningful hearings for juvenile offenders.<sup>16</sup> For example, many state parole boards do not allow

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11. See *infra* Part IV.

12. Few scholars have considered procedural aspects of the *Graham* decision. Notable exceptions are Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 398 (2013), and Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745 (2012). These articles are discussed further *infra* notes 266–268 and accompanying text.

13. See *infra* Part II.

14. See *infra* Part II; see also Drinan, *supra* note 6, at 77–82 (offering suggestions for state legislative responses prior to *Miller*).

15. See *infra* notes 171–72 and accompanying text.

16. See *infra* Part IV.C.

prisoners to appear in person before the decision makers, deny prisoners the right to see and rebut significant information relied upon by the board in rendering a decision, and strictly limit the involvement of the prisoner's attorney.<sup>17</sup> If states are going to rely on their parole boards to provide a meaningful opportunity for release under the Eighth Amendment, many may need to craft special rules for boards to use when considering release for juvenile offenders serving lengthy sentences.

In responding to *Graham* and *Miller*, states need to move beyond simply considering when to make juvenile offenders eligible for release. They must also consider how to provide meaningful hearings and a realistic chance of release for rehabilitated offenders. Significantly, the scope of the Eighth Amendment's meaningful opportunity requirement is relevant not only in states that have imposed LWOP sentences on juvenile offenders in nonhomicide cases (in violation of *Graham*) and in states that mandate LWOP for certain offenses (in violation of *Miller*). Rather, even states that impose sentences of life *with* the possibility of parole on juvenile offenders must ensure that their parole processes in fact provide prisoners with a meaningful opportunity for release. If the chance of release is not meaningful under a state's existing parole system, then a sentence of life with parole is equivalent to an LWOP sentence for Eighth Amendment purposes. Thus, all states around the country must take a close look at whether their parole systems are operating consistently with new constitutional requirements.

Part I of the Article analyzes the Supreme Court's decisions in *Graham* and *Miller* and examines the relevance of release opportunities in Eighth Amendment jurisprudence. Part II describes the responses by courts and state legislatures to *Graham* and *Miller*, which for the most part have involved simply making juvenile offenders eligible for parole under existing state parole systems. Part III presents the results of a comprehensive survey of procedures currently used by parole boards nationwide. Part IV considers the scope of *Graham*'s mandate to the states and explores whether state responses are complying with Eighth Amendment requirements. The Article concludes with suggestions for reforms to existing parole practices in cases involving juvenile offenders serving lengthy sentences.

## I. *GRAHAM V. FLORIDA*, *MILLER V. ALABAMA*, AND THE CHANCE OF RELEASE

### A. *The Eighth Amendment and Juvenile Offenders*

In the past decade, the Supreme Court has placed new limits on the types of sentences that may be imposed on individuals who commit crimes under the age of eighteen. In 2005, the Court held in *Roper v. Simmons*<sup>18</sup> that the Eighth Amendment's ban on cruel and unusual punishment prohibits capital punishment for juvenile offenders because of their lessened culpability.<sup>19</sup> Five years later, in *Graham v. Florida*, the Court held that it violates the Eighth Amendment to impose a sentence of life without the possibility of release on some categories of juvenile

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17. See *infra* Part IV.C.

18. 543 U.S. 551 (2005).

19. *Id.* at 569–71.

offenders.<sup>20</sup> At least in nonhomicide cases, states must provide incarcerated juvenile offenders with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>21</sup>

Relying on *Roper*, the *Graham* Court noted that “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”<sup>22</sup> Moreover, “[t]hese salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”<sup>23</sup>

The idea that juveniles are capable of rehabilitation was central to the Court’s analysis in *Graham*. The Court emphasized that “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”<sup>24</sup> The Court reasoned that a sentence of life without the possibility of release “forswears altogether the rehabilitative ideal”<sup>25</sup> and “deprives the convict of the most basic liberties without giving hope of restoration.”<sup>26</sup> “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.”<sup>27</sup> However, “[t]his judgment is not appropriate in light of a juvenile nonhomicide offender’s capacity for change and limited moral culpability.”<sup>28</sup> The Court emphasized: “The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.”<sup>29</sup>

The Court thus held that 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.”<sup>30</sup> The Court declined to provide guidance on the details of this requirement, stating that “[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance.”<sup>31</sup> However, the Court rejected executive clemency as a sufficient mechanism for compliance, noting that this “remote possibility . . . does not mitigate the harshness of the sentence.”<sup>32</sup> The Court concluded that if a state “imposes a sentence of life it must

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20. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

21. *Id.* at 2030.

22. *Id.* at 2026 (quoting *Roper*, 543 U.S. at 569–70 (alteration in original)).

23. *Id.* (quoting *Roper*, 543 U.S. at 573).

24. *Id.* (quoting *Roper*, 543 U.S. at 570).

25. *Id.* at 2030.

26. *Id.* at 2027.

27. *Id.* at 2030.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 2027.

provide [the prisoner] with some realistic opportunity to obtain release before the end of that term.”<sup>33</sup>

Justice Thomas, dissenting, argued that the Court’s decision invited “a host of line-drawing problems to which courts must seek answers beyond the strictures of the Constitution.”<sup>34</sup> In particular, the dissent noted:

The Court holds that “[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,” but must provide the offender with “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” But what, exactly, does such a “meaningful” opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years.<sup>35</sup>

Two years after *Graham*, the Court held in *Miller v. Alabama* that a sentencing scheme that mandates a sentence of life without the possibility of release upon conviction of an offense violates the Eighth Amendment when applied to individuals who committed crimes when they were under the age of eighteen.<sup>36</sup> Even in the most serious homicide cases, juvenile offenders are entitled to “individualized sentencing” under the Eighth Amendment, and judges must have discretion to impose a sentence that allows a meaningful opportunity for release later in time.<sup>37</sup>

As in *Graham*, the Court in *Miller* emphasized the capacity of children to rehabilitate. The Court reasoned that children have “greater prospects for reform”<sup>38</sup> than adults and observed that mandatory LWOP “disregards the possibility of rehabilitation even when the circumstances most suggest it.”<sup>39</sup> *Miller* does not on its face prevent a sentence of life without release for homicide offenders. However, the Court noted that “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>40</sup> The Court stated that this is “especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”<sup>41</sup> The Court concluded: “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account

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33. *Id.* at 2034.

34. *Id.* at 2057 (Thomas, J., dissenting).

35. *Id.* (citation omitted).

36. 132 S. Ct. 2455, 2469 (2012).

37. *Id.* at 2460, 2469.

38. *Id.* at 2464.

39. *Id.* at 2468.

40. *Id.* at 2469.

41. *Id.* (quoting *Roper v. Simmons*, 534 U.S. 551, 573 (2005)).

how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>42</sup>

Thus, after *Graham*, a judge may not decide at the time of sentencing in a nonhomicide case to imprison a child for life. Instead, if a life sentence is imposed, it must be indeterminate: there must be a second look—and a “realistic” and “meaningful” opportunity for the individual to be released based on demonstrated rehabilitation.<sup>43</sup> In addition, under *Miller*, in homicide cases, sentencing courts must at least have the option of imposing a sentence that provides a meaningful opportunity for release.<sup>44</sup>

*Graham* and *Miller* give little guidance to states about the scope of the requirement that states provide “a meaningful opportunity to obtain release.” The Court had not used this phrase previously in Eighth Amendment jurisprudence, and the phrase did not appear in the briefing in *Graham*. Rather, it appears that the term was first used during oral argument in *Graham*, when counsel for Graham asserted that he was asking for states to provide “a meaningful opportunity to the adolescent offender to demonstrate that he has in fact changed, reformed, and is now fit to live in society.”<sup>45</sup> As Justice Thomas anticipated in his *Graham* dissent,<sup>46</sup> states are now confronted with various questions about how to comply with the meaningful opportunity requirement.

#### *B. The Relationship Between the Eighth Amendment and an Opportunity for Release*

Although *Graham* and *Miller* provide little guidance about what a “meaningful opportunity to obtain release” entails, clues regarding the significance of this phrase appear in some of the Court’s earlier Eighth Amendment decisions.

Before *Graham* and *Miller*, the Supreme Court had not applied categorical bans on sentences of imprisonment under the Eighth Amendment and thus had not made the possibility of release a component of a categorical rule.<sup>47</sup> Rather, the Court had applied categorical bans on sentences only in capital cases.<sup>48</sup> However, in considering whether individual sentences for adult offenders withstood Eighth Amendment proportionality scrutiny under the particular case circumstances, the Court had previously noted that the possibility of release is relevant to the Eighth Amendment analysis.

For example, in 1980, in *Rummel v. Estelle*,<sup>49</sup> the Court found that the availability of parole in the sentence under review weighed against finding an

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42. *Id.*

43. *Graham v. Florida*, 130 S. Ct. 2011, 2030, 2034 (2010).

44. *Miller*, 132 S. Ct. at 2460, 2469.

45. Transcript of Oral Argument at 7, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412).

46. *See Graham*, 130 S. Ct. at 2057 (Thomas, J., dissenting).

47. *Graham*, 130 S. Ct. at 2022 (noting that categorical restrictions were applied previously only in death penalty cases); *see Siegler & Sullivan, supra* note 6, at 336–53 (discussing the evolution of the Court’s Eighth Amendment categorical analysis).

48. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

49. 445 U.S. 263 (1980).



Eighth Amendment violation. In *Rummel*, the Court upheld a mandatory life sentence imposed on a defendant under a recidivist statute after his third felony conviction.<sup>50</sup> There, the Court emphasized that the prisoner was eligible for parole after serving twelve years.<sup>51</sup> The Court agreed with the prisoner that “his inability to enforce any ‘right’ to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years.”<sup>52</sup> However, “because parole is ‘an established variation on imprisonment of convicted criminals,’ . . . a proper assessment of Texas’ treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.”<sup>53</sup> The Court noted that “[i]f nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi’s, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony.”<sup>54</sup>

In contrast, several years later in *Solem v. Helm*,<sup>55</sup> the Court held that a sentence of life without the possibility of release was unconstitutional under the specific circumstances of the case: the offender’s sentence was imposed for a conviction of uttering a “no account” check for \$100, and his prior convictions were for nonviolent and “relatively minor” offenses.<sup>56</sup> In *Solem*, the Court emphasized that, barring executive clemency, the prisoner “will spend the rest of his life in the state penitentiary.”<sup>57</sup> The Court reasoned: “This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily.”<sup>58</sup>

Although *Rummel* noted that “the possibility of parole, however slim, serve[d] to distinguish Rummel” from those sentenced to life without the chance of parole,<sup>59</sup> *Solem* makes clear that the actual likelihood of release is relevant to the Eighth Amendment analysis. Although, in theory, the prisoner in *Solem* could have been released by executive clemency, the Court concluded that this possibility did not sufficiently mitigate the sentence given that clemency grants are unpredictable and rarely granted.

The Court in *Solem* observed that the South Dakota commutation system available to the prisoner was “fundamentally different from the parole system that was before [the Court] in *Rummel*.”<sup>60</sup> The Court noted that “[a]s a matter of law, parole and commutation are different concepts, despite some surface similarities.”<sup>61</sup> In particular, “[p]arole is a regular part of the rehabilitative process,” and

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50. *Id.* at 264–65.

51. *Id.* at 280–81.

52. *Id.* at 280.

53. *Id.* at 280–81 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

54. *Id.* at 281.

55. 463 U.S. 277 (1983).

56. *Id.* at 279–84.

57. *Id.* at 297.

58. *Id.* (footnotes omitted).

59. *Rummel*, 445 U.S. at 281.

60. *Solem*, 463 U.S. at 300.

61. *Id.*

“[a]ssuming good behavior, it is the normal expectation in the vast majority of cases.”<sup>62</sup> Moreover, because “[t]he law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time[,] . . . it is possible to predict, at least to some extent, when parole might be granted.”<sup>63</sup> In contrast, commutation “is an ad hoc exercise of executive clemency[, and a] Governor may commute a sentence at any time for any reason without reference to any standards.”<sup>64</sup>

After noting these general differences between clemency and parole, the *Solem* Court examined the particular characteristics of the clemency and parole processes in the states at issue to assess the actual likelihood of release through these systems. The Court noted that the “Texas and South Dakota systems in particular are very different,”<sup>65</sup> and “[i]n *Rummel*, the Court did not rely simply on the existence of some system of parole”<sup>66</sup> but “[r]ather it looked to the provisions of the system presented, including the fact that Texas had ‘a relatively liberal policy of granting ‘good time’ credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years.’”<sup>67</sup> In contrast, in South Dakota, no life sentence had been commuted in more than eight years.<sup>68</sup> Moreover, the Court reasoned that “even if Helm’s sentence were commuted, he merely would be eligible to be considered for parole,” and “[n]ot only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*.”<sup>69</sup>

The Court again highlighted the relevance of release to Eighth Amendment analysis in 2003 in *Ewing v. California*,<sup>70</sup> where it upheld application of California’s “three strikes” law to an individual convicted of felony grand theft for stealing three golf clubs. There, the defendant was sentenced to life with the possibility of parole after serving twenty-five years.<sup>71</sup> In declining to find an Eighth Amendment violation, the Court contrasted the sentence to one that did not allow the possibility of release.<sup>72</sup>

In sum, Supreme Court cases prior to *Graham* recognized that the availability of release is relevant to Eighth Amendment analysis. Indeed, *Graham* relied on *Rummel* and *Solem* in emphasizing the “severity of sentences that deny convicts the possibility of parole” and in rejecting executive clemency as an adequate mechanism for providing a meaningful opportunity for release.<sup>73</sup> *Rummel* and *Solem* reveal that courts must look beyond the mere technical availability of a release mechanism and examine how procedures actually operate in the specific

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62. *Id.*

63. *Id.* at 300–01.

64. *Id.* at 301.

65. *Id.*

66. *Id.*

67. *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 280 (1980)).

68. *Id.* at 302.

69. *Id.* at 302–03.

70. 538 U.S. 11 (2003).

71. *Id.* at 20.

72. *See id.* at 22.

73. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

state at issue. Central to the Court's Eighth Amendment analysis in these cases was the timing of the opportunity for release, the standards governing the release decision, and the actual likelihood of release.

These same matters considered in *Solem* and *Rummel* are relevant in determining whether states are in compliance with *Graham*. Viewed in the context of the Court's earlier Eighth Amendment jurisprudence, it is apparent that *Graham*'s requirement that states provide a meaningful opportunity for release encompasses three distinct components: (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 or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard. As discussed further below, as states respond to *Graham* and *Miller*, significant questions emerge about the scope of each of these components of the meaningful opportunity requirement. Before exploring the scope of *Graham*'s mandate, I consider initial responses by states around the country to *Graham* and *Miller*.

## II. STATE RESPONSES TO *GRAHAM* AND *MILLER*

Nationwide, state courts, legislatures, and governors are responding to the *Graham* and *Miller* decisions. For the most part, debate has centered on the issue of when states should make juvenile offenders eligible for release. Thus far, relatively little attention has been paid to the criteria and procedures that parole boards or other releasing authorities should use in assessing a prisoner's suitability for release. Below, I examine state responses to *Graham* and *Miller*.

### A. Responses by the Courts

Following *Graham* and *Miller*, a number of juvenile offenders serving LWOP or otherwise lengthy sentences have sought relief from courts. As the discussion below demonstrates, case law has focused primarily on when prisoners should become eligible for release, and there has been little litigation yet about the criteria and procedures that states should use when considering the suitability of prisoners for release.

Timing issues have arisen when appellate courts have granted relief to prisoners serving LWOP sentences and remanded the cases for resentencing. Some of these decisions have converted LWOP sentences to life-with-parole sentences and either have specified a particular time for parole eligibility or have left this timing question for the sentencing court to determine at resentencing.<sup>74</sup> For example, in responding to claims of unconstitutional sentences in nonhomicide cases, courts in Louisiana and Iowa converted LWOP sentences to sentences of life with the possibility of parole. The Louisiana Supreme Court determined that the appropriate remedy under *Graham* was to delete the parole eligibility restriction on a life sentence, which made the prisoner eligible for parole after serving twenty years in

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74. See *infra* notes 75–80 and accompanying text.

prison and reaching the age of forty-five.<sup>75</sup> Similarly, the Iowa Supreme Court held that *Graham* required severance of the no-parole restriction on an LWOP sentence.<sup>76</sup> This made the prisoner immediately eligible for parole consideration under the standard Iowa parole statute.<sup>77</sup> The Louisiana and Iowa courts did not give any special direction to the parole board about the nature of the hearing that it should ultimately provide to the prisoners.

Several courts have taken a similar approach in responding to *Miller* claims in homicide cases and have converted LWOP sentences to sentences of life with the chance of parole after a set number of years.<sup>78</sup> For example, in Colorado, an appellate court held that a juvenile offender's mandatory LWOP sentence was unconstitutional under *Miller* and that the appropriate penalty was the most serious statutorily authorized penalty that was constitutionally permissible—life imprisonment with the possibility of parole after forty years.<sup>79</sup> In Massachusetts, two trial courts have held post-*Miller* that mandatory LWOP sentences for first-degree murder are unconstitutional, and individuals must instead be sentenced pursuant to the second-degree murder statute, which provides a life sentence with the possibility of parole after fifteen years.<sup>80</sup>

Some appellate courts responding to *Miller* claims have remanded LWOP cases for resentencing and noted that courts may reimpose LWOP sentences if they first consider the relevant mitigating factors. Some of these courts have remanded without establishing an acceptable non-LWOP alternative sentence for the

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75. *State v. Shaffer*, 2011-1756, p. 3–4 (La. 11/23/11); 77 So. 3d 939, 942 (per curiam); see also *State v. Mason*, 2011-1190, p. 4–5 (La. App. 4 Cir. 4/11/12); 89 So. 3d 405, 408–09.

76. *Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010). Following *Bonilla*, Iowa enacted legislation providing that juvenile offenders convicted of nonhomicide class A felonies shall be eligible for parole only after serving twenty-five years. IOWA CODE § 902.1 (West Supp. 2013).

77. *Bonilla*, 791 N.W.2d at 702 n.3.

78. Courts are split on whether *Miller* applies retroactively to invalidate LWOP sentences where inmates had already exhausted direct appeals prior to the *Miller* decision. Compare *State v. Tate*, 2012-2763 (La. 11/5/13) (*Miller* not retroactive), *People v. Carp*, 828 N.W.2d 685 (Mich. Ct. App. 2012) (same), *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013) (same), and *Commonwealth v. Cunningham*, No. 38 EAP 2012, 2013 WL 5814388 (Pa. Oct. 30, 2013) (same), with *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (*Miller* retroactive), *People v. Morfin*, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012) (same), and *Jones v. State*, 2009-CT-02033-SCT (Miss. 2013); 2013 WL 3756564 (en banc) (same). In cases before the Second and Eighth Circuits, the federal government conceded that *Miller* is retroactive. See *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013) (order granting successive 28 U.S.C. § 2255 motion); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam).

79. *People v. Banks*, No. 08CA0105, 2012 WL 4459101, at \*20–21 (Colo. App. Sept. 27, 2012), cert. granted, 2013 WL 3168752 (Colo. June 24, 2013) (No. 12SC1022) (en banc).

80. *Commonwealth v. Brown*, No. 09-00963 (Mass. Super. Ct. Nov. 20, 2012) (memorandum of decision and order on the commonwealth's motion to report questions); *Commonwealth v. Peirce*, No. MICR2010-01188 (Mass. Super. Ct. Nov. 7, 2012) (memorandum of decision and order on defendant's motion to report questions). The cases are now pending before the Massachusetts Supreme Judicial Court.

sentencing court to consider,<sup>81</sup> whereas other courts have specified the acceptable alternatives to LWOP. For example, the Alabama, Pennsylvania, Mississippi, and Wyoming supreme courts held their mandatory LWOP statutes unconstitutional as applied to juvenile offenders and concluded that sentencing courts may impose either LWOP or life with a parole eligibility date to be determined by the sentencing court.<sup>82</sup> The Arkansas and Missouri supreme courts have given sentencing courts broader discretion to impose term-of-years sentences. In Arkansas, the state supreme court remanded a mandatory LWOP case for resentencing and directed the sentencing judge to impose a term of years between ten and forty years, or life.<sup>83</sup> The Missouri Supreme Court 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 defendant's first-degree murder conviction and impose a sentence for second-degree murder, which is punishable by a term of years between ten and thirty years, or life.<sup>84</sup>

Timing issues have also arisen in cases involving prisoners who are not technically serving LWOP sentences but are instead serving lengthy term-of-years sentences or life sentences that permit parole only after a very long period of time. Some courts have held that only sentences that are actually LWOP sentences entitle prisoners to relief under the Eighth Amendment—regardless of the length of the sentence.<sup>85</sup> Appellate courts are split on this issue in Florida, with several decisions

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81. See, e.g., *Wilson v. State*, No. 14-09-01040-CR, 2012 WL 6484718 (Tex. App. Dec. 13, 2012); *Washington v. State*, 103 So. 3d 917 (Fla. Dist. Ct. App. 2012); *Daugherty v. State*, 96 So. 3d 1076 (Fla. Dist. Ct. App. 2012); *State v. Simmons*, 2011-1810 (La. 10/12/12); 99 So. 3d 28; cf. *Rocker v. State*, No. 2D10-5060, 2012 WL 5499975 (Fla. Dist. Ct. App. Nov. 14, 2012) (remanding for resentencing and noting that LWOP would not be appropriate absent evidence that the juvenile shot the victim or intended that the victim be killed).

82. See *Ex Parte Henderson*, Nos. 1120140 & 1120202 2013 WL 4873077 (Ala. Sept. 13, 2013) (refusing to dismiss capital felony charges requiring LWOP for juvenile defendants and holding that the sentencing court may impose LWOP or life with parole); *Parker v. State*, 2011-KA-01158-SCT (Miss. 2013), 119 So. 3d 987 (en banc) (remanding for resentencing to LWOP or life with parole); *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) (same); *Bear Cloud v. State*, 2013 WY 18, 294 P.3d 36 (Wyo. 2013) (same). Intermediate appellate courts in some states have adopted the same approach. See *People v. Eliason*, 833 N.W.2d 357 (Mich. Ct. App. 2013) (remanding case for resentencing to LWOP or life with parole).

83. *Jackson v. Norris*, 2013 Ark. 175. This ruling followed the U.S. Supreme Court's remand of the case in the *Miller/Jackson* opinion. The Court rejected the state's argument that the LWOP sentence should be converted to a sentence of life with the possibility of parole.

84. *State v. Hart*, 404 S.W.3d 232 (Mo. 2013) (en banc).

85. See, e.g., *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (no relief on eighty-nine-year sentence); *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at \*6 (N.D. Ohio July 24, 2012) (no relief on eighty-four-year sentence because "long, even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham*'s holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Brown*, 2012-KP-0872 (La. 5/7/13); 2013 WL 1878911, at \*15 ("In our view, *Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime . . .").

finding lengthy term-of-years sentences unconstitutional under *Graham*<sup>86</sup> and other decisions denying relief even where the sentence plainly means the prisoner will die in prison.<sup>87</sup> The Florida Supreme Court is currently considering the issue.

The California Supreme Court concluded that a sentence of 110 years to life for a nonhomicide crime committed by a juvenile offender violated *Graham*.<sup>88</sup> The court instructed the sentencing court on remand to

consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board.<sup>89</sup>

The court noted that the "Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.'"<sup>90</sup> Following this decision, lower appellate courts in California have considered a number of cases where prisoners assert that their lengthy

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The Virginia Supreme Court held that a life sentence provided a meaningful opportunity for release under *Graham* because release was possible under the state's conditional release statute—which allows someone to petition for release and be subject to the ordinary parole-consideration process after reaching the age of sixty and serving ten years in prison. *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011).

86. *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at \*2 (Fla. Dist. Ct. App. Aug. 8, 2012) (reversing sentence of sixty years with mandatory term of fifty years); *Floyd v. State*, 87 So. 3d 45, 47 (Fla. Dist. Ct. App. 2012) (reversing eighty-year sentence). These Florida cases granting relief have remanded for resentencing without giving any direction to the sentencing courts about how to comply with *Graham* on resentencing. Parole was abolished in Florida in 1994, and Florida courts have urged the legislature to create a mechanism to comply with the Supreme Court decisions. *See, e.g.*, *Thomas v. State*, 78 So. 3d 644, 647 (Fla. Dist. Ct. App. 2011) (per curiam). The parole board continues to hear cases where the conviction occurred prior to 1994.

87. *Smith v. State*, 93 So. 3d 371, 374–75 (Fla. Dist. Ct. App. 2012) (affirming eighty-year sentence); *Henry v. State*, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012) (affirming ninety-year sentence); *Thomas*, 78 So. 3d at 647 (Fla. Dist. Ct. App. 2011) (affirming fifty-year sentence); *Gridine v. State*, 89 So. 3d 909 (Fla. Dist. Ct. App. 2011) (affirming seventy-year sentence), *review granted*, 103 So. 3d 139 (Fla. 2012) (No. SC12-1223).

88. *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *see also* *People v. J.I.A.*, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011) (reversing sentence requiring minimum confinement of 56.5 years), *cause transferred* 287 P.3d 70 (Cal. 2012) (No. S194841); *People v. De Jesús Nuñez*, 125 Cal. Rptr. 3d 616 (Cal. Ct. App. 2011) (reversing sentence that precluded parole for 175 years); *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Cal. Ct. App. 2010) (reversing sentence precluding parole for eighty-four years).

89. *Caballero*, 282 P.3d at 295. The court noted that other prisoners could file habeas petitions to allow the sentencing court "to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings," and "[b]ecause every case will be different, we will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case." *Id.* at 295–96. A concurring justice argued that the court should have ordered a full resentencing. *Id.* at 298–99 (Werdegar, J., concurring).

90. *Id.* at 295 (majority opinion) (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

sentences are effectively LWOP. Relief has been granted in some of these cases and denied in others.<sup>91</sup>

The Iowa Supreme Court held that that a juvenile offender serving a seventy-five-year sentence for second-degree murder and first-degree robbery, who would not be eligible for parole for 52.5 years, was entitled to resentencing under *Miller*.<sup>92</sup> The court also remanded for resentencing in a case of a juvenile offender serving a fifty-year sentence for robbery and burglary. The court concluded that this sentence, which did not permit parole consideration for thirty-five years, did not provide a “meaningful opportunity to obtain release” under *Graham*.<sup>93</sup>

In sum, post-*Graham/Miller* litigation has focused on when prisoners will become eligible for relief, and little attention has been paid to the standards and procedures that should be used when entities consider whether to grant release. One exception has emerged in Michigan, where a federal district court held that Michigan’s statute prohibiting parole in first-degree murder cases is unconstitutional under the Eighth Amendment as applied to juvenile offenders.<sup>94</sup> In November 2013, the court ordered the state to create “an administrative structure” for the purpose of processing and determining the appropriateness of parole for juvenile offenders serving LWOP sentences.<sup>95</sup> The court directed the state to give “notice to all such persons who have completed 10 years of imprisonment that their eligibility for parole will be considered in a meaningful and realistic manner.” In addition, the state must schedule public hearing for “each of the eligible prisoners

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91. See, e.g., *People v. Richardson*, No. A134783, 2013 WL 2432510 (Cal. Ct. App. June 4, 2013) (sentence of thirty-five years to life affirmed for felony murder); *People v. DeLeon*, B226617, 2013 WL 785622 (Cal. Ct. App. Mar. 4, 2013) (“Eighth Amendment does not categorically bar imposition of a sentence of 40 years to life for a homicide committed by a juvenile who did not kill or intend to kill.”); *People v. Argeta*, 149 Cal. Rptr. 3d 243 (Cal. Ct. App. 2012) (remanding for resentencing for juvenile sentenced to a minimum aggregate of 100 years for aiding and abetting a murder despite the fact that sentence on each charge separately was not life-equivalent). Currently pending before the California Supreme Court is the question of whether an LWOP sentence imposed on a juvenile for murder with special circumstances under section 190.5(b) of the Penal Code violates the Eighth Amendment after *Miller*. *People v. Gutierrez*, 147 Cal. Rptr. 3d 249 (Cal. Ct. App. 2012), review granted, 290 P.3d 1171 (Cal. 2013). Although section 190.5(b) gives discretion for judges to impose a sentence of either LWOP or twenty-five years to life, some appellate courts have interpreted the statute as establishing a presumption that LWOP is the appropriate sentence. See *People v. Moffett*, 148 Cal. Rptr. 3d 47, 55 (Cal. Ct. App. 2012) (citing cases and remanding for resentencing, stating that “[a] presumption in favor of LWOP, such as that applied in this case, is contrary to the spirit, if not the letter, of *Miller*, which cautions that LWOP sentences should be ‘uncommon’”), review granted, 290 P.3d 1171 (Cal. 2013). The court in *Moffett* remanded for the sentencing court to determine whether to impose LWOP or life with parole after twenty-five years.

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

93. *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013).

94. *Hill v. Snyder*, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013) (opinion and order granting in part and denying part plaintiff’s motion for summary judgment and denying defendants’ cross-motion for summary judgment).

95. *Hill v. Snyder*, No. 10-14568 (E.D. Mich. Nov. 26, 2013) (order requiring immediate compliance with *Miller*).

making application for consideration” and “[p]ut in place a process for preliminary determination of appropriateness of submission of each eligible prisoner’s application for parole to the entire Parole Board.” The Parole Board must explain its decisions regarding whether to grant release and may not issue a “no interest” order or anything “materially like” a “no interest” order. Vetoes by the sentencing judge shall not be permitted and the proceedings “from an initial determination of eligibility will be fair, meaningful, and realistic.” Finally, the court stated that “no prisoner sentenced to life imprisonment without parole for a crime committed as a juvenile will be deprived of any educational or training program which is otherwise available to the general prison population.” The court gave the state until the end of the year to comply with the order, or a special master may be appointed to oversee compliance.

### *B. Legislative Approaches*

In the wake of *Graham* and *Miller*, a number of states are considering legislation to respond to the decisions, and some states have already enacted legislation. With a few exceptions, the newly enacted statutes focus on the timing of parole eligibility for juveniles and do not provide special criteria or procedures for parole boards to consider in determining the suitability of these individuals for release.

The new statutes can be divided into two categories. First, following *Miller*, some states with mandatory LWOP schemes enacted new statutes that retain the possibility of life-without-parole sentences for juvenile offenders in at least some homicide cases but give judges discretion in these cases to impose sentences allowing the possibility of parole after a set period of time. Second, several states either eliminated LWOP sentences for juveniles entirely or provided opportunities for individuals serving LWOP sentences for crimes committed as juveniles to petition the court for sentence modification after a period of time.

Seven states fall within the first category and enacted statutes that retain LWOP for juveniles but give judges greater discretion. Five of these states—North Carolina, Pennsylvania, South Dakota, Utah, and Arkansas—provide no special criteria or procedures for parole boards to follow in assessing those inmates who receive parole-eligible sentences.<sup>96</sup> In contrast, the Nebraska and Louisiana statutes provide some special rules for parole boards to follow in juvenile cases.<sup>97</sup>

North Carolina was the first state to respond to *Miller*. The state’s new statute gives discretion to judges in first-degree murder cases to impose either LWOP or life with the possibility of parole after twenty-five years. North Carolina’s legislation eliminated LWOP as an option if the person is convicted under the felony murder doctrine. In those circumstances, the sentence must be life with the possibility of parole after twenty-five years.<sup>98</sup>

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96. See *infra* notes 99–105 and accompanying text.

97. See *infra* notes 106–17 and accompanying text.

98. S.B. 635, 2011 Gen. Assemb., Reg. Sess. (N.C. 2012).



Pennsylvania also passed legislation retaining life-without-parole sentences for first-degree murder.<sup>99</sup> However, as an alternative sentence for first-degree murder, the judge may now impose a sentence with a minimum of thirty-five years to life for youth ages fifteen to seventeen, and a minimum of twenty-five years to life for youth under the age of fifteen.<sup>100</sup> In second-degree murder cases, where LWOP used to be mandatory, LWOP is no longer an option. Instead, youth ages fifteen to seventeen must receive a minimum thirty-years-to-life sentence, and youth under the age of fifteen must receive a minimum twenty-years-to-life sentence.<sup>101</sup>

Under Utah's new statute, judges in aggravated first-degree murder cases may impose LWOP or sentences that allow parole after at least twenty-five years.<sup>102</sup> Arkansas also retained LWOP as an option for juveniles in some homicide cases but now permits judges to impose sentences in those cases providing parole eligibility after twenty-eight years.<sup>103</sup> New legislation in South Dakota retains life without parole as a sentencing option for judges in first- or second-degree murder cases.<sup>104</sup> However, judges in these cases now also have the option of imposing any term-of-years sentence.<sup>105</sup>

Unlike the statutes described above, new statutes in Nebraska and Louisiana address parole board hearing procedures for juveniles. Nebraska's new legislation retains life-without-parole sentences for juveniles but makes such sentences discretionary.<sup>106</sup> In class IA felony cases, judges may now impose a minimum sentence of forty years,<sup>107</sup> which allows parole eligibility after twenty years.<sup>108</sup> The Nebraska statute provides special criteria for the parole board to consider in juvenile cases.<sup>109</sup> Significantly, after an initial denial decision, the board must consider the inmate for release every year after the denial.<sup>110</sup>

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99. S.B. 850, 2011 Gen. Assemb., Reg. Sess. (Pa. 2012).

100. *Id.*

101. *Id.*

102. S.B. 228, 2013 Leg., Gen. Sess. (Utah 2013).

103. H.B. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

104. S.B. 39, 2013 Leg. Assemb., 88th Sess. (S.D. 2013).

105. *See id.*

106. Legis. B. 44, 103 Leg., 1st Sess. (Neb. 2013).

107. *Id.*

108. NEB. REV. STAT. ANN. § 83-1,110 (West, WestlawNext through end of 2013 reg. sess.).

109. These factors are the following:

- (a) The offender's educational and court documents;
- (b) The offender's participation in available rehabilitative and educational programs while incarcerated;
- (c) The offender's age at the time of the offense;
- (d) The offender's level of maturity;
- (e) The offender's ability to appreciate the risks and consequences of his or her conduct;
- (f) The offender's intellectual capacity;
- (g) The offender's level of participation in the offense;
- (h) The offender's efforts toward rehabilitation; and
- (i) Any other mitigating factor or circumstance submitted by the offender.

Neb. Legis. B. 44.

110. *Id.*

New statutes enacted in Louisiana also address parole hearing procedures. The first Louisiana statute, passed after *Graham* but before *Miller*, applies retroactively to anyone serving an LWOP sentence for a crime committed under the age of eighteen, except those convicted of first- and second-degree murder.<sup>111</sup> Under the statute, these inmates are eligible for parole after serving thirty years if various criteria relating to rehabilitation have been met.<sup>112</sup> The statute requires the parole board to meet in a three-member panel when considering an eligible juvenile offender for release, and, in determining if release is appropriate in these cases, 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 pertaining to the offender.”<sup>113</sup> The panel must also “render specific findings of fact in support of its decision.”<sup>114</sup> The second Louisiana statute, enacted after *Miller*, allows parole eligibility for juvenile offenders after thirty-five years in first- and second-degree murder cases—if the sentencing court determines that the person is entitled to parole eligibility.<sup>115</sup> Before imposing a life-without-parole sentence, the court must hold a hearing and consider aggravating and mitigating circumstances. LWOP sentences “should normally be reserved for the worst offenders and the worst cases.”<sup>116</sup> The statute adopts the same procedures and

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111. LA. REV. STAT. ANN. § 15:574.4(D)(1) (Supp. 2013).

112. *Id.* The criteria for parole eligibility are the following:

- (a) The offender has served thirty years of the sentence imposed.
- (b) The offender has not committed any disciplinary offenses in the twelve consecutive months prior to the parole eligibility date.
- (c) The offender has completed the mandatory minimum of one hundred hours of prerelease programming in accordance with R.S. 15:827.1.
- (d) The offender has completed substance abuse treatment as applicable.
- (e) The offender has obtained a GED certification, unless the offender has previously obtained a high school diploma or is deemed by a certified educator as being incapable of obtaining a GED certification due to a learning disability. If the offender is deemed incapable of obtaining a GED certification, the offender shall complete at least one of the following:
  - (i) A literacy program.
  - (ii) An adult basic education program.
  - (iii) A job skills training program.
- (f) The offender has obtained a low-risk level designation determined by a validated risk assessment instrument approved by the secretary of the Department of Public Safety and Corrections.
- (g) The offender has completed a reentry program to be determined by the Department of Public Safety and Corrections.
- (h) If the offender was convicted of aggravated rape, he shall be designated a sex offender and upon release shall comply with all sex offender registration and notification provisions as required by law.

*Id.*

113. *Id.* § 15.574.4(d)(2).

114. *Id.* § 15.574.4(d)(3).

115. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013).

116. *Id.*

criteria for parole-release decisions as those applicable in the nonhomicide cases addressed by the first legislation in Louisiana.<sup>117</sup>

The second category of statutes eliminates LWOP entirely for juvenile offenders or provides the opportunity for individuals serving LWOP sentences for crimes committed as juveniles to petition the court for sentence modification after a period of time. Prior to *Graham* and *Miller*, Colorado enacted legislation prospectively eliminating LWOP for individuals under the age of eighteen and providing that those convicted of a class 1 felony must be sentenced to life with the chance of parole after forty years.<sup>118</sup> Texas also acted prior to *Graham* and *Miller* and passed a statute providing that individuals under the age of seventeen convicted of capital felony are subject to life sentences with the possibility of parole after forty years rather than LWOP.<sup>119</sup> Following *Miller*, Texas expanded this reform to reach seventeen-year-olds as well.<sup>120</sup> In addition, after *Miller*, Wyoming eliminated life-without-parole sentences for juveniles.<sup>121</sup> Under the law, individuals convicted of first-degree murder committed under the age of eighteen are subject to life sentences with the possibility of parole after twenty-five years.<sup>122</sup> The Colorado, Texas, and Wyoming legislation provide no special procedures or criteria for the parole board in these juvenile cases.

New legislation in Delaware also eliminated sentences of life without the possibility of release for juveniles. Under the legislation, individuals serving mandatory sentences of natural life without the possibility of release for crimes committed as juveniles will now be resentenced and subject to a sentencing range of twenty-five years to life.<sup>123</sup> In addition, the law allows juveniles sentenced to more than twenty years to petition for sentence modification. Modification requests may be filed after thirty years for first-degree murder convictions and after twenty years for all other cases.<sup>124</sup> Inmates may receive subsequent reviews after five-year intervals, with discretion for the court to lengthen the time between petitions.<sup>125</sup> The statute does not provide criteria for the court to consider in determining whether to grant a resentencing request. In contrast to all of the states described above, Delaware's statute does not rely on a parole board to assess a juvenile offender's suitability for release.

The California legislature has enacted two relevant statutes since *Miller*. First, in September 2012, the governor signed Senate Bill 9, which allows individuals sentenced to LWOP for crimes committed under the age of eighteen to petition the

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117. *Id.*

118. COLO. REV. STAT. ANN. § 18-1.3-401(4)(b)(I) (West 2013). The governor has discretion to grant parole earlier if extraordinary mitigating circumstances exist. *Id.* § 17-22.5-403.7(2).

119. TEX. GOV'T CODE ANN. § 508.145(b) (West 2013).

120. S.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013).

121. H.B. 23, 62d Leg., Gen. Sess. (Wyo. 2013).

122. *Id.* The Act also allows for parole if the juvenile's sentence is commuted to a term of years. It further provides that juvenile offenders will not be eligible for parole if they commit specified acts after the age of eighteen. *Id.*

123. S.B. 9, 147th Gen. Assemb., Reg. Sess., sec. 6 (Del. 2013).

124. *Id.* sec. 4(d)(1)-(2), § 4202A.

125. *Id.* sec. 4(d)(3), § 4202A.

court for resentencing after fifteen years if certain criteria are met.<sup>126</sup> In cases where the prisoner is serving LWOP as a result of conviction for first-degree murder with special circumstances, the court may resentence the individual to life with the possibility of parole after twenty-five years.<sup>127</sup> This statute contained no provisions addressing the nature of the future parole hearing.<sup>128</sup>

A year later, in September 2013, the governor signed a second bill, Senate Bill 260, which creates special parole hearing procedures and criteria for eligible juveniles.<sup>129</sup> In particular, the statute requires the parole board to conduct “youthful offender parole hearings” for eligible prisoners that “provide for a

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126. CAL. PENAL CODE § 1170(d)(2)(A)(i) (West Supp. 2013). The bill that was enacted was S.B. 9, 2012 Leg., Reg. Sess. (Cal. 2012). The statute applies retroactively to prisoners currently serving LWOP sentences.

127. In California, youth ages sixteen and seventeen convicted of murder in the first degree with special circumstances may be sentenced to LWOP or life with the chance of parole after twenty-five years, in the discretion of the court. CAL. PENAL CODE § 190.5(b) (West 2008). Under the new legislation, the court can order a resentencing and convert the LWOP sentence to life with the chance of parole after twenty-five years. *See id.* § 1170(d)(2)(A)(i) (West Supp. 2013). If the court denies the first request for resentencing, the inmate has two more opportunities to seek resentencing. *Id.* § 1170(2)(H).

128. The California legislation does contain criteria for the court to consider in determining whether to grant the resentencing request. In particular, the court must consider certain factors:

- (i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.
- (ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
- (iii) The defendant committed the offense with at least one adult codefendant.
- (iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.
- (v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant’s involvement in the offense.
- (vi) The defendant 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, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.
- (vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.
- (viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

*Id.* § 1170(d)(2)(F).

129. S.B. 260, 2013 Legis., Reg. Sess. (Cal. 2013).

meaningful opportunity to obtain release.”<sup>130</sup> In reviewing the prisoner’s suitability for parole, the board “shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”<sup>131</sup> The statute permits statements to be submitted to the board from “[f]amily 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.”<sup>132</sup> In addition, subject to several exceptions,<sup>133</sup> Senate Bill 260 provides that juvenile offenders will be eligible for parole at a youthful offender parole hearing as follows: (1) those sentenced to determinate sentences will be eligible after fifteen years, (2) those sentenced to less than twenty-five years to life will be eligible after twenty years, and (3) those sentenced to twenty-five years to life will be eligible after twenty-five years.<sup>134</sup>

Thus, in California, juvenile offenders sentenced to LWOP can now petition the court for resentencing pursuant to the provisions created by Senate Bill 9. If the court grants resentencing and imposes a sentence of twenty-five years to life, the prisoner will be considered for parole pursuant to the “youth offender parole hearing” provisions of Senate Bill 260.

Several states are considering legislation that provides special criteria and procedures for parole boards to use in juvenile cases. For example, legislation considered last session by the Connecticut legislature would have eliminated LWOP for juvenile offenders and created special parole eligibility rules for juveniles serving lengthy sentences.<sup>135</sup> Significantly, the bill provides for the

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130. *Id.* § 4(e). The statute requires the board to “review and, as necessary, revise existing regulations and adopt new regulations” to ensure a meaningful opportunity to obtain release for eligible juvenile offenders. *Id.*

131. *Id.* § 5(c). In addition, the statute provides that

[i]n assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.

*Id.* § 4(f)(1).

132. *Id.* § 4(f)(2).

133. The statute does not apply to juveniles sentenced under the three strikes law or “Jessica’s law,” or sentenced to life in prison without the possibility of parole. *Id.* § 4(h). The bill also excludes individuals convicted of some crimes committed after turning eighteen. *Id.*

134. *Id.* § 4(b)(1).

135. H.B. 6581, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013). H.B. 6581 passed the House of Representatives by a vote of 137–4, but was not called for a vote in the state Senate before the end of the legislative session. See *Bill Status for Substitute for Raised H.B. No. 6581*, CT.GOV, [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=6581&which\\_year=2013&SUBMIT1.x=0&SUBMIT1.y=0](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6581&which_year=2013&SUBMIT1.x=0&SUBMIT1.y=0). Currently in Connecticut, individuals convicted of murder, felony murder, and several other serious offenses are not eligible for parole, and prisoners convicted of other violent felonies are eligible only after serving 85% of the sentence. CONN. GEN. STAT. ANN. § 54-125a(b)–(c) (West Supp. 2013). The bill, as amended by the House, provides parole eligibility for juvenile offenders after twelve years, or 60% of the sentence, whichever is longer. Under the bill, those serving more than fifty years

appointment of counsel for indigent inmates twelve months prior to the parole hearing.<sup>136</sup> Regarding parole hearing procedures, the bill allows counsel for the inmate and the prosecutor to provide written submissions, allows the board to hear testimony of experts or other witnesses at the board's request, and allows the inmate and victim to make a statement at the hearing.<sup>137</sup> The bill also provides specific criteria for the board to consider in assessing release.<sup>138</sup>

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(including life without parole) are eligible for parole after serving thirty years. The bill also makes juveniles ineligible for murder with special circumstances, which carries a mandatory life-without-parole sentence. The Connecticut Sentencing Commission recommended the original legislative proposal, which provided parole eligibility after ten years or 50% of the sentence served, whichever was longer, for those sentenced to less than sixty years and provided for parole eligibility after thirty years for those sentenced to sixty years or more. Conn. Sentencing Comm'n, *Juvenile Sentence Reconsideration Proposal*, CT.GOV, [http://www.ct.gov/opm/lib/opm/cjppd/cjabout/sentencingcommission/20121129\\_juvenile\\_sentence\\_reconsideration\\_proposal\\_r.pdf](http://www.ct.gov/opm/lib/opm/cjppd/cjabout/sentencingcommission/20121129_juvenile_sentence_reconsideration_proposal_r.pdf); Conn. Sentencing Comm'n, *Miller v. Alabama Proposal*, CT.GOV, [http://www.ct.gov/opm/lib/opm/cjppd/cjabout/sentencingcommission/20121129\\_miller\\_v\\_alabama\\_proposal\\_r.pdf](http://www.ct.gov/opm/lib/opm/cjppd/cjabout/sentencingcommission/20121129_miller_v_alabama_proposal_r.pdf).

136. Conn. H.B. 6581. The Connecticut proposal is the only state proposal thus far to include a provision for appointment of counsel in the parole process. Note, however, that California and Massachusetts provide counsel at all "lifer" parole hearings—i.e., those hearings for inmates serving life sentences who are eligible for parole. Cal. Dep't of Corr. & Rehabilitation, *Life Parole Process*, CA.GOV, [http://www.cdcr.ca.gov/parole/life\\_parole\\_process/index.html](http://www.cdcr.ca.gov/parole/life_parole_process/index.html); *Second Degree Lifer Parole Hearing Process*, MASS.GOV, <http://www.mass.gov/eopss/law-enforce-and-cj/parole/trans-svcs-unit/second-degree-lifer-parole-hearing-process.html>.

137. Conn. H.B. 6581.

138. The bill provides:

After such hearing, the board may allow such person to go at large on parole with respect to any portion of a sentence that was based on a crime or crimes committed while such person was under eighteen years of age if the board finds that such parole release would be consistent with the factors set forth in subdivisions (1) to (4), inclusive, of subsection (c) of section 54-300 and if it appears, from all available information, including, but not limited to, any reports from the Commissioner of Correction, that (A) there is a reasonable probability that such person will live and remain at liberty without violating the law; (B) the benefits to such person and society that would result from such person's release to community supervision substantially outweigh the benefits to such person and society that would result from such person's continued incarceration; and (C) such person has 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.

*Id.*

*C. Clemency*

Some states have responded to *Graham* and *Miller* by modifying sentences through clemency grants.<sup>139</sup> Following *Miller*, in Iowa, the governor commuted the LWOP sentences being served by thirty-eight juvenile offenders to life sentences with parole eligibility after sixty years.<sup>140</sup> The Iowa Supreme Court later found that this action did not render the sentences constitutional.<sup>141</sup> In Nebraska, the Pardons Board announced in November 2012 plans to conduct hearings for juvenile offenders serving LWOP sentences.<sup>142</sup> The Board, which is comprised of the governor, state attorney general, and secretary of state, has the power to commute sentences. Under the Board's plan, the new minimum sentence for prisoners would be fifty years.<sup>143</sup> The Board notified inmates and victims shortly before the planned hearings, and many objected to the plan, including defense lawyers and victims' families.<sup>144</sup> The hearings were canceled after a Nebraska judge enjoined the Board from acting.<sup>145</sup>

Prior to *Graham* and *Miller*, in 2007, Colorado's governor created a juvenile clemency board with authority to review clemency requests by juvenile offenders serving adult sentences.<sup>146</sup> Juvenile offenders serving LWOP sentences—who were

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139. Before *Miller*, Anthony Thompson argued that clemency should be granted on a systematic basis to juvenile offenders serving LWOP sentences for homicide offenses. Anthony C. Thompson, *Clemency for Our Children*, 32 CARDOZO L. REV. 2641 (2011). Professor Thompson asserted that clemency was justified in light of the Court's "inherently illogical" conclusion in *Graham* that juvenile homicide offenders could continue to be subject to LWOP. *Id.* at 2642.

140. See James Q. Lynch, Trish Mehaffey & Mike Wiser, *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, GAZETTE (Cedar Rapids, Iowa) (July 7, 2012, 10:05 PM), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/>.

141. Following the commutation, an Iowa trial court concluded that the clemency grant failed to comply with *Miller* and held that one of these individuals, who had served twenty-five years, should be immediately eligible for parole. See Chad Nation, *Jeffrey Ragland, Sentenced to Life at 17, May Soon be a Free Man*, OMAHA WORLD-HERALD (Aug. 29, 2012, 1:47 AM), <http://www.omaha.com/article/20120829/NEWS/708299918/1694>. The Iowa Supreme Court affirmed. *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013).

142. Todd Cooper, *Pardon Board's Plan to Resentence 27 Inmates Draws Chorus of Objections*, OMAHA WORLD-HERALD (Nov. 28, 2012, 1:51 PM), <http://www.omaha.com/article/20121128/NEWS/121129631/1690#pardon-board-s-plan-to-resentence-27-inmates-draws-chorus-of-objections>. The Board announced that it would hear only five minutes of testimony in the juvenile cases from the Attorney General's Office, the prosecutor involved in the case, one victim representative, and one inmate representative. *Id.*

143. *Id.*

144. *Id.*

145. Todd Cooper & Martha Stoddard, *Judge Grants Injunction to Stop Hearings for Juvenile Lifers*, OMAHA WORLD-HERALD (Nov. 30, 2012, 10:38 PM), <http://www.omaha.com/article/20121130/NEWS/711299887/1694#judge-grants-injunction-to-stop-hearings-for-juvenile-lifers>.

146. See Colo. Exec. Order No. B 009 07 (2007); Thompson, *supra* note 139, at 2701–05 (discussing the creation of Colorado's juvenile clemency board).

unaffected by Colorado's prospective elimination of LWOP for juveniles—are eligible to apply for clemency after serving at least ten years in prison.<sup>147</sup>

### III. EXISTING PAROLE BOARD STANDARDS AND PROCEDURES

As discussed above, state courts, legislatures, and governors have started to respond to *Graham* and *Miller*. For the most part, states have simply made juvenile offenders eligible for parole under existing parole board systems. States have been focused primarily on the timing of eligibility for release, and most appear to assume that existing state parole practices will provide the meaningful opportunity for release required by the Eighth Amendment.

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. In ordinary adult cases, there is no constitutional requirement that states provide a parole release mechanism at all—determinate sentencing is entirely lawful.<sup>148</sup> Moreover, even when a state provides a parole release process, courts have imposed few constraints.<sup>149</sup> *Graham* promises to change the interaction among courts and parole boards because the decision mandates a release mechanism that complies with constitutional standards. Simply making a juvenile offender eligible for parole under an existing parole system may not guarantee compliance with *Graham*'s mandate.<sup>150</sup>

Before assessing whether existing state parole practices comply with *Graham*'s meaningful opportunity requirement, one needs to have an understanding of the systems actually in place. Below, I consider existing parole standards and procedures.

#### A. Standards for Assessing Parole Release Suitability

State parole boards have traditionally had great flexibility in terms of the criteria that they use in making release decisions, and they have not been required to provide a realistic opportunity for release to prisoners.<sup>151</sup>

The Supreme Court has long emphasized the discretionary nature of parole decision making, observing that the parole release decision “depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release.”<sup>152</sup> In considering the

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147. Thompson, *supra* note 139, at 2704.

148. See *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (per curiam) (“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.” (citation omitted)).

149. See *infra* notes 151–70 and accompanying text.

150. See *infra* note 345 and accompanying text for a discussion regarding the benefits of appellate review of parole board decisions to ensure a meaningful opportunity for release.

151. See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 944 (2009) (“[A] parole board is free to deny parole for whatever reason, on whatever facts, for however long.”).

152. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979). The



suitability of a prisoner for release, parole boards have typically considered factors including the prisoner's background; the seriousness of the original offense; the prisoner's level of remorse; the degree of the prisoner's rehabilitation; the views of the victim, prosecutor, and community members; the potential danger to the community if the prisoner is released; and whether a release plan is in place that will provide the supportive services necessary for successful integration into the community.<sup>153</sup> More recently, parole boards have focused increasingly on the degree of danger presented by the inmate.<sup>154</sup>

In many states, the chance of obtaining parole is slim, particularly if the underlying offense was violent. Sharon Dolovich observes that “[w]hat in the middle decades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted.”<sup>155</sup> In some states, parole boards release only a small percent of individuals eligible for release. For example, in 2011 in Ohio, 6.9% of prisoners were granted release after release consideration hearings.<sup>156</sup> In Florida, 3.5% of parole release decisions resulted in a grant of parole in fiscal year 2011–2012.<sup>157</sup>

Board members have few incentives to release individuals convicted of violent crimes, and plenty of disincentives. When a parolee commits a violent crime after release—which will inevitably happen in at least a small percentage of cases—parole boards face major public criticism.<sup>158</sup> Such events may cause parole release rates within a state to shift over time.<sup>159</sup> The nature of the crime of conviction is often the driving force in parole decisions.<sup>160</sup>

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Court noted that the parole release decision “turns on a ‘discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.’” *Id.* (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Penal Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

153. Bierschbach, *supra* note 12, at 1750–51.

154. *Id.* at 1751.

155. Sharon Dolovich, *Creating the Permanent Prisoner, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96, 110–11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

156. OHIO ADULT PAROLE AUTH., PAROLE BOARD REPORT 1 (2012), available at <http://www.drc.ohio.gov/web/Reports/ParoleBoard/Calendar%20Year%202011%20Report.pdf>.

157. See FLA. PAROLE COMM’N, ANNUAL REPORT 2011–12, at 18–19, available at <https://fpc.state.fl.us/PDFs/FPCAnnualreport201112.pdf>. In both Ohio and Florida, parole was eliminated in the mid-1990s, but it remains available for inmates sentenced under the old regimes. In contrast, in Texas the overall parole approval rate for fiscal year 2011 was 31%. TEX. BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT FY 2011, at 4, available at [http://www.tdcj.state.tx.us/bpp/publications/BPP%20StatisticalReport\\_08-08-2012.pdf](http://www.tdcj.state.tx.us/bpp/publications/BPP%20StatisticalReport_08-08-2012.pdf).

158. See, e.g., Maria Cramer & Jonathan Saltzman, *’09 Parole of Officer’s Killer Gets Hard Look*, BOS. GLOBE, Dec. 29, 2010, at B1.

159. Ishan Taylor, *Halting Parole Spurs Concerns of Fallout*, N.Y. TIMES, Oct. 7, 2007, at O6 (discussing impact of triple homicide by parolees on parole release rates in Connecticut); *After Board Shakeup, Parole Rates Down in 2011*, WBUR (Aug. 9, 2011), <http://www.wbur.org/2011/08/09/massachusetts-parole-rates> (noting that parole release rates were down in Massachusetts after governor changed composition of board in wake of murder of police officer by parolee).

160. Ball, *supra* note 151, at 900–01.

Recent litigation in California has challenged exclusive reliance on the offense in denying parole. In California, parole decisions must be based on certain statutory factors, and courts have found that due process requires that board decisions considering these factors be supported by “some evidence.”<sup>161</sup> In 2008, the California Supreme Court held that the “some evidence” standard was not satisfied where the governor reversed the parole board’s recommendation for parole release based solely on the nature of the inmate’s offense.<sup>162</sup> The decision may have had some impact on release rates. A 2011 study of the California parole system found that “an inmate’s chance of being granted parole has increased in the last two years.” However, the study also concluded that “the length of time he or she must wait for a subsequent hearing when denied parole has also increased.”<sup>163</sup> Overall, the chance of an inmate serving a life sentence being granted parole by the board and not having the decision reversed by the governor was approximately 6% in 2010.<sup>164</sup>

Despite the California example, court oversight of substantive parole decisions is rare. For example, the Second Circuit recently rejected a challenge to New York’s parole release process, holding that the state’s alleged unofficial policy to deny parole to all violent felony offenders was not unconstitutional.<sup>165</sup> States have, for the most part, been free to set their own criteria for release and have had great discretion in determining how realistic to make the possibility of release for prisoners.<sup>166</sup> Unless state statutes specifically provide a basis for court oversight, courts have been largely uninvolved in monitoring parole decisions.

#### *B. Existing Parole Board Procedures: A National Survey*

In addition to having discretion over the criteria used for release decisions, states have also had great leeway in the procedures used by their parole boards in considering release. Under the federal constitution, parole release procedures need not comply with even minimal due process standards. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,<sup>167</sup> the Supreme Court held that the

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161. *In re Lawrence*, 190 P.3d 535, 546–48 (Cal. 2008).

162. *Id.* at 555. In California, the governor can reverse decisions of the parole board.

163. ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, STANFORD CRIMINAL JUSTICE CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 4 (2011), available at [http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf).

164. *Id.* There has been fluctuation in the rate of reversals of the board’s release decisions by the governor. As of April 2011, Governor Jerry Brown had overruled fewer than 20% of the parole dates approved by the board. In contrast, Governor Arnold Schwarzenegger overruled 70% of decisions, and Governor Gray Davis reversed 98%. Bob Egelko, *Life with Parole About a 20-year Term*, S.F. CHRON., Sept. 16, 2011, at C2.

165. *Graziano v. Pataki*, 689 F.3d 110 (2d Cir. 2012) (per curiam). In New York, as of 2009, the initial parole release rate was 8% for individuals serving life sentences for A-1 violent felonies, with the subsequent parole release rate at 13%. Alan Rosenthal, Patricia Warth & Andy Correia, *Parole Reform*, ATTICUS, Winter 2011, at 27, 27.

166. See Ball, *supra* note 151, at 944.

167. 442 U.S. 1 (1979).

mere existence of a parole release process does not create a constitutionally protected liberty interest in parole release. The Court nevertheless found that because Nebraska's parole statute created an expectation of release, minimal due process standards were required in that instance.<sup>168</sup> However, following *Greenholtz*, states can avoid creating protected liberty interests by adopting statutes and regulations that make parole release discretionary. In other words, statutes providing that a parole board "may" (rather than "shall") release a prisoner if various criteria are met do not create a liberty interest.<sup>169</sup> Moreover, even if the language of a particular state statute creates a liberty interest in parole release, the due process protections that will attach are quite modest.<sup>170</sup>

Thus, states have been able to adopt parole release procedures free from federal constitutional constraints. *Graham* raises the question of whether these existing procedures will provide meaningful hearings for juvenile offenders. To assess this question, one must understand the nature of the parole procedures actually in place. Yet there is little recent scholarship regarding parole release processes<sup>171</sup> and no up-to-date information compiled regarding the procedures currently used by parole boards around the country.<sup>172</sup>

To fill this void, this Article provides a comprehensive examination of parole release procedures nationwide. In June 2012, I sent a survey to the chairs of the parole releasing authorities in the forty-nine states where such authorities

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168. *Id.* at 12; *see also* *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987) (Montana statute created a liberty interest in parole). Following the Supreme Court's decision in *Sandin v. Connor*, 515 U.S. 472 (1995), which rejected the view that a state regulation created a liberty interest for purposes of prison disciplinary proceedings, some scholars questioned whether *Greenholtz* remained good law. *See, e.g.*, Ball, *supra* note 151, at 947. However, the Court's more recent decision in *Swarthout v. Cooke*, 131 S. Ct. 859 (2011) (per curiam), explicitly relies on *Greenholtz*. *Id.* at 862–63.

169. *See, e.g.*, *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (no right to a hearing because no protected liberty interest in parole); *Irving v. Thigpen*, 732 F.2d 1215, 1217–18 (5th Cir. 1984) (per curiam); *Candelaria v. Griffin*, 641 F.2d 868, 869–70 (10th Cir. 1981).

170. In *Greenholtz*, the Court found that a formal evidentiary hearing was not required for every inmate and refused to require that every adverse parole decision include a statement of the evidence relied upon. *See Greenholtz*, 442 U.S. at 15.

171. Some articles about parole board decision making were published in the 1970s, when indeterminate sentencing came under scrutiny. *See, e.g.*, Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814–17 (1975); Comment, *The Parole System*, 120 U. PA. L. REV. 282, 284–86 (1971). Although there are several examples of more recent scholarship, *see, e.g.*, Ball, *supra* note 151; Dolovich, *supra* note 155; Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 567–69 (1994), parole has received relatively little academic attention.

172. It appears that the only attempt at collection of information about parole boards nationwide has come from the Association of Paroling Authorities International (APAI). APAI conducted a survey in 2007 that asked parole boards various questions about the procedures used in parole release decisions. *See* SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RESEARCH ON YOUTH & SOC. POLICY, FINDINGS FROM THE APAI'S INTERNATIONAL SURVEY OF RELEASING AUTHORITIES (2008), available at <http://www.apaintl.org/documents/surveys/2008.pdf>. APAI has not updated this survey.

operate.<sup>173</sup> In all, forty-five states responded to the survey.<sup>174</sup> Below, the results of the survey are reviewed.<sup>175</sup>

### 1. Direct Interaction with Inmates

One set of questions in the survey focused on the nature of the interaction between the decision makers on the parole board and the prisoner. Forty-three state boards conduct interviews or hearings with inmates, in at least some cases, as part of the parole release process. Two states (Alabama and North Carolina) report that interaction with the inmate is not part of the process in any case. Nine boards call these interactions with inmates “interviews,”<sup>176</sup> thirty states categorize them as “hearings,”<sup>177</sup> and four use both terms.<sup>178</sup> Nine boards conduct these proceedings exclusively in person.<sup>179</sup> Eight boards rely exclusively on videoconferencing or telephone.<sup>180</sup> The remaining boards use some combination of in-person meetings, video conferencing, and telephone hearings.<sup>181</sup>

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173. Releasing authorities have somewhat different names in different states. For simplicity, this Article refers to all state releasing authorities as “parole boards.” Maine does not have a parole release process.

174. Surveys were received from every state except for Arizona, Indiana, Mississippi, and Oklahoma.

175. The survey asked states the following question: “Do any special procedures or guidelines apply when the inmate being considered for parole release is serving a sentence based on an offense committed as a juvenile?” Follow-up with states that answered yes to this question revealed that some boards use special criteria relating to age at the time of the offense in assessing parole eligibility or suitability, but none of the boards use different procedures in considering these cases. Note that California, Louisiana, and Nebraska have since enacted statutes with special procedures governing parole in some cases involving juvenile offenders. *See supra* notes 106–17, 126–34 and accompanying text.

176. Florida, Georgia, Iowa, Michigan, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin.

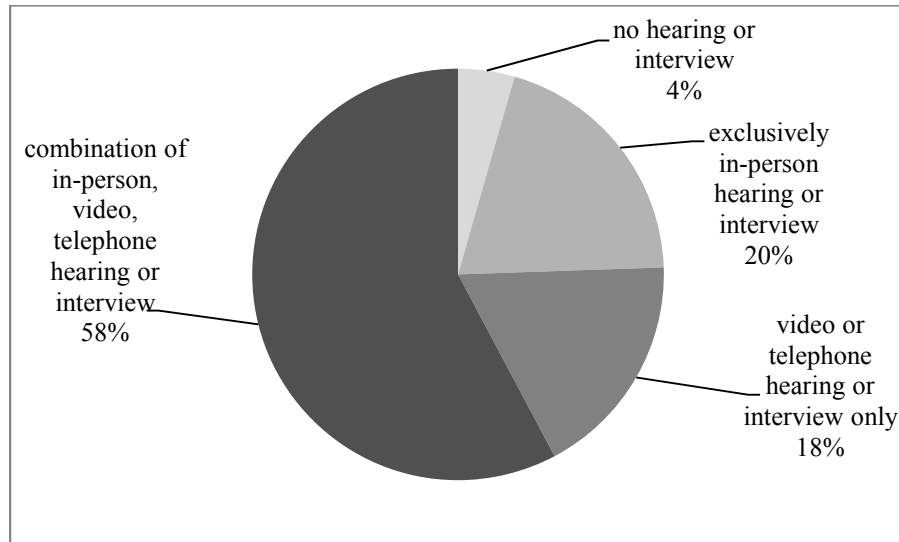
177. Alaska, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Washington.

178. Connecticut, Idaho, Massachusetts, and Wyoming.

179. California, Delaware, Florida, Georgia, Illinois, Massachusetts, Nebraska, Texas, and Wyoming. Georgia reports that a parole staff member interviews an inmate in person as part of the “parole consideration process.” However, this will typically occur during the “initial prison diagnostic process.”

180. Colorado, Iowa, Louisiana, Michigan, Minnesota, New York, Ohio, and South Carolina.

181. Alaska, Arkansas, Connecticut, Hawaii, Idaho, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.



**Figure 1.** Type of hearing or interview

In some states, the individual or individuals speaking directly with the inmate in an interview or hearing is not the same person or group that makes the decision regarding release. The survey defined “releasing authority member” as an individual with the authority by law to make parole release decisions. Twenty-four boards use panels comprised exclusively of releasing authority members for interviews or hearings with inmates, and panels range in size from two to seven members.<sup>182</sup> Four boards use individual members of releasing authorities to conduct interviews or hearings with inmates,<sup>183</sup> and one state uses an individual member in some instances and a panel in other instances.<sup>184</sup> Three boards conduct interviews using exclusively employees of the releasing authority who lack decision-making authority.<sup>185</sup> Eleven boards use non-decision makers to conduct at least some of the interviews or hearings.<sup>186</sup>

In several states, a hearing occurs in front of the decision makers, but the inmate is not present.<sup>187</sup> For example, in Florida, an inmate is interviewed by an employee of the releasing authority, and then the decision makers conduct a separate hearing that the prosecutor, victim, and others may attend. Alabama’s board has no direct interaction with the prisoner at all, but decision makers conduct a hearing with other participants.

182. Alaska, California, Colorado, Delaware, Hawaii, Iowa, Kentucky, Louisiana, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, Washington, West Virginia, and Wyoming.

183. Arkansas, Illinois, Michigan, and Wisconsin.

184. Kansas.

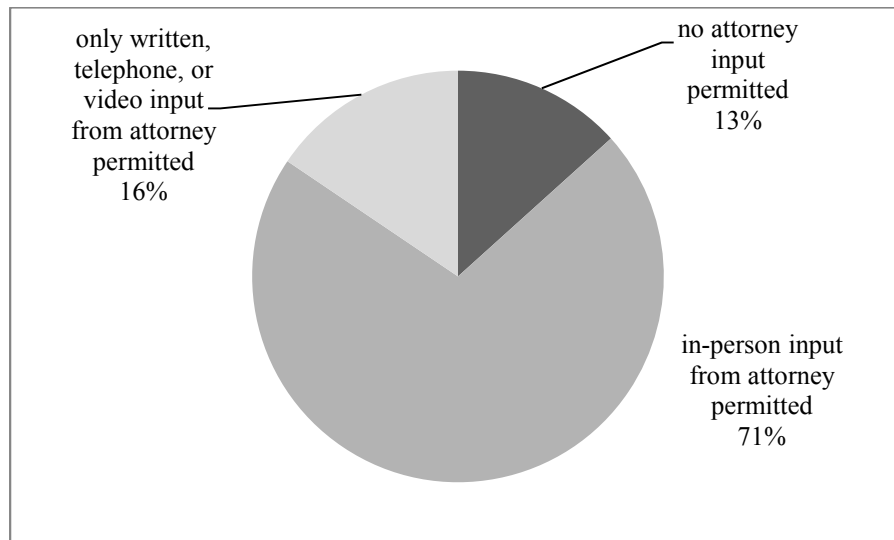
185. Florida, Georgia, and Virginia.

186. Connecticut, Idaho, Maryland, Massachusetts, Missouri, Nevada, New Jersey, Pennsylvania, Tennessee, Texas, and Utah.

187. Florida and Alabama.

## 2. Role of Counsel for the Prisoner

A second set of questions focused on the role of counsel for prisoners at parole release hearings. Thirty-nine boards report that input from an inmate's attorney is considered by the board in the parole release decision, and six boards do not consider input from a prisoner's attorney at all.<sup>188</sup> Thirty-two boards allow attorneys the opportunity to make an in-person statement,<sup>189</sup> with seven allowing attorney input only through some combination of written, telephone, or videotaped correspondence.<sup>190</sup> Fourteen boards do not permit an attorney to be present at all for the inmate's interview or hearing,<sup>191</sup> with one state allowing the attorney to be present only at some types of hearings.<sup>192</sup> Florida and Alabama do not permit an inmate to appear at the hearing before the releasing authority members, but do permit an attorney to appear and speak at this hearing.



**Figure 2.** Input from prisoner's attorney

188. The six states that do not consider attorney input are Colorado, Connecticut, Iowa, Michigan, New Mexico, and Vermont. New Mexico noted that written information may be submitted but does not weigh in the decision.

189. Alabama, Alaska, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming. In some states, this in-person input from the attorney is not permitted at the time of the inmate's interview or hearing, but rather is allowed at a separate meeting.

190. Kentucky, New Jersey, New York, North Carolina, Pennsylvania, Utah, and Wisconsin.

191. Florida, Georgia, Kentucky, Maryland, Michigan, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Vermont, Virginia, and Wisconsin.

192. Massachusetts.

Thirty-five boards permit an attorney for the inmate to present a written report from a mental health professional who has evaluated the inmate,<sup>193</sup> with twenty-three of those boards also allowing the attorney to present oral testimony or a statement from the expert.<sup>194</sup> Twenty boards allow attorneys to present the oral testimony or statements of other witnesses at some types of hearings.<sup>195</sup>

Ten boards report that they can appoint an attorney to represent an indigent inmate in the parole release process in at least some cases at no cost to the inmate.<sup>196</sup> New Jersey reports that it would appoint counsel only if the prisoner was “incompetent to understand the nature of the parole hearing.” Similarly, Tennessee states that appointment of counsel “would occur in situations where offender is mentally challenged or physically incapacitated.” In Ohio, public defenders represent inmates at all full board open hearings, which occur only after the board votes to recommend release and the prosecutor, victim, or court objects. In Massachusetts and California, individuals serving life sentences with the chance of parole have a right to appointed counsel. The remaining thirty-five states report that they do not appoint counsel in any parole release case.

### 3. Role of the Prosecutor

Forty-three boards reported that they consider input from the prosecutor’s office in making a parole release decision. Of these boards, thirty allow an in-person statement from the prosecutor at an interview, hearing, or in-person meeting.<sup>197</sup> Thirteen allow input only through written correspondence, telephone interview, or videotaped correspondence.<sup>198</sup> Two states (New Mexico and Wyoming) do not consider input from prosecutors in making the release decision.<sup>199</sup>

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193. Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

194. Alabama, Alaska, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Wyoming. Massachusetts reported allowing attorneys to present oral testimony or a statement from a mental health expert at just some types of hearings.

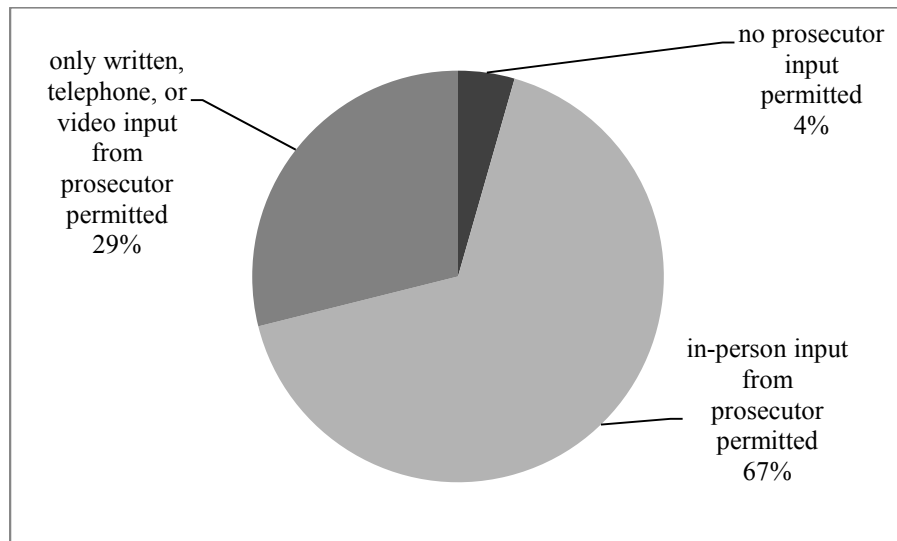
195. Alabama, Arkansas, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, and Wyoming. Massachusetts reported allowing attorneys to present oral testimony or statements of other witnesses at just some types of hearings.

196. California, Colorado, Hawaii, Massachusetts, Montana, New Jersey, Ohio, Oregon, Tennessee, and Washington.

197. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, and West Virginia.

198. Georgia, Iowa, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Texas, Utah, Washington, and Wisconsin.

199. New Mexico noted that written information may be submitted but does not weigh in the decision.



**Figure 3.** Input from prosecutor

Sixteen boards allow the prosecutor to present testimony or statements from witnesses at the parole release hearing or interview.<sup>200</sup> Of these boards, only one (New Hampshire) allows the inmate or his attorney to cross-examine the witnesses.<sup>201</sup> New Hampshire also allows the prosecutor to cross-examine the inmate at the hearing and to cross-examine individuals who make statements on behalf of the inmate.<sup>202</sup>

#### 4. Victim Input

All boards responding to the survey consider input from the victim or victim's representative in the parole release decision.<sup>203</sup> All boards except for one allow the

200. Alabama, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Tennessee.

201. Massachusetts responded "maybe" to this question, and South Dakota said "it had never come up" previously, but the board would allow it if it did.

202. Massachusetts responded "maybe" to this question.

203. Some states have statutory or constitutional requirements regarding victim participation in parole proceedings. *See, e.g.*, ARIZ. CONST. art. II, § 2.1(A)(9) (victim has right "[t]o be heard at any proceeding when any post-conviction release from confinement is being considered"); NEV. CONST. art. I, § 8(2)(c) (victim has right to be "[h]eard at all proceedings for the . . . release of a convicted person after trial"); TEX. CODE CRIM. PROC. ANN. art. 56.02 (a)(7) (West 2006 & Supp. 2012) (providing victims with the right to "participate in the parole process"); *see also* Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 382–99 (2009) (discussing victim input in the parole release decision-making process).



victim to make an in-person statement at an interview or hearing. Pennsylvania permits only written or videotaped correspondence.

### 5. Other Input

Forty-four boards report that written case history and summaries of the inmate's background are compiled for consideration by the board in the parole release decision.<sup>204</sup> In twelve states, an employee of the board compiles these summaries.<sup>205</sup> In twenty-one states, an employee of the department of corrections compiles these summaries.<sup>206</sup> Eleven states use a combination of department of corrections and board employees to compile summaries.<sup>207</sup>

Forty-three boards consider input from others who know the inmate (such as family members, employers, relationship group members, teachers, or counselors).<sup>208</sup> In twenty-nine states, input may be provided from at least some of these categories of individuals through an in-person statement at an interview, hearing, or other form of meeting.<sup>209</sup> Thirteen states permit this form of input only by written, telephone, or videotaped correspondence.<sup>210</sup>

### 6. Access to Information

Twenty-eight boards prevent inmates from full access to information provided by the prosecutor's office,<sup>211</sup> and thirty-seven boards prevent inmates from full access to input provided by the victim or victim's representative.<sup>212</sup> When a mental

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204. In Oregon, summaries are compiled in only some types of cases. New Mexico reports that the board members consider the entire inmate's file.

205. Alabama, Connecticut, Georgia, Idaho, Kansas, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, and Washington.

206. Alaska, Arkansas, California, Colorado, Hawaii, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New Hampshire, New York, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

207. Delaware, Florida, Illinois, Massachusetts, Missouri, Montana, Nebraska, Ohio, Oregon, Tennessee, and Virginia.

208. In Alaska, input from such individuals is not considered. New Mexico reports that input from such individuals may be submitted in writing, but will not weigh in the decision.

209. Alabama, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming. Massachusetts reported that in-person input from these individuals is permitted only at some types of hearings.

210. California, Connecticut, Georgia, Iowa, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Utah, Washington, and Wisconsin.

211. Alabama, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

212. Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri,

health professional employed by the parole board conducts an evaluation of an inmate for the board's consideration, twelve states do not permit inmates to see the conclusions and recommendations of the professional.<sup>213</sup>

#### IV. CONSIDERING THE SCOPE OF *GRAHAM*'S MANDATE TO THE STATES

As discussed, states around the country have started to respond to *Graham* and *Miller*. A number of states have simply made juvenile offenders eligible for parole under existing state parole regimes, and other states are considering this approach. The survey results described above detail existing parole board procedures in states around the country. Next, I explore the scope of *Graham*'s meaningful opportunity requirement. Then, informed by the survey results, I consider whether state responses to *Graham* and *Miller* are satisfying the Supreme Court's mandate.

##### A. Timing Questions

A first question relates to timing in assessing a state's compliance with the Eighth Amendment requirement that it provide a "meaningful opportunity" for release. The Court declined in *Graham* to specify when during the course of a juvenile offender's incarceration states must offer the chance of release in nonhomicide cases. *Miller* similarly did not articulate what type of sentence would be an acceptable alternative to LWOP in homicide cases.

Even prior to *Graham*, the Court found that the timing of eligibility for release bears on the severity of the sentence under Eighth Amendment analysis. In *Rummel*, the prisoner's eligibility for parole after twelve years was significant to the Court's decision to uphold the sentence against an Eighth Amendment challenge.<sup>214</sup> In *Graham*, the Court emphasized the role that a prisoner's hope for release plays in assessing the severity of a sentence.<sup>215</sup> A sentence that deprives a prisoner of a sense of hope regarding the future is uniquely punitive. The Court reasoned that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences."<sup>216</sup> Although the state does not execute the prisoner, "the sentence alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration."<sup>217</sup> The Court stated:

As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that

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Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

213. Delaware, Georgia, Maryland, Montana, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, and Tennessee.

214. *Rummel v. Estelle*, 445 U.S. 263, 280–81 (1980).

215. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

216. *Id.*

217. *Id.*

whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”<sup>218</sup>

The Court further observed: “Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”<sup>219</sup>

As Alice Ristroph has argued, *Graham* should be understood to mean not only that states cannot deny hope to juvenile offenders but also that “the state is not to abandon hope for the juvenile’s eventual rehabilitation.”<sup>220</sup> In other words, both the prisoner’s sense of hope and society’s sense of hope for the prisoner are relevant. The state should not “mak[e] the judgment at the outset” to give up on a teenager and imprison him for life.<sup>221</sup> Rather, the state should allow at least the possibility that someone of that age can change and contribute to society.

At the very least, *Graham* requires states to give eligible juvenile offenders a chance of release before they are expected to die. Otherwise, the sentence fails to offer any hope to the prisoner and does not mitigate its severity. Thus, even if a life sentence offers the chance of parole, it will violate *Graham* if release is not possible until after a prisoner is expected to die. The Iowa governor’s commutation of LWOP sentences to sentences of life with the possibility of parole after sixty years falls in this category of inadequate responses to the Court’s Eighth Amendment holding.<sup>222</sup> Under the governor’s response, prisoners would not be eligible for release until their mid-to-late seventies at the earliest, and they may well have died in prison before that time. Similarly, a no-parole, term-of-years sentence that will imprison a juvenile offender past his life expectancy plainly violates *Graham*.<sup>223</sup>

But what about a sentence of thirty or forty years, which would probably allow a prisoner the chance of release before death, but which would mean that release

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218. *Id.* (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

219. *Id.* at 2032. Studies confirm that juvenile offenders serving LWOP or other lengthy sentences indeed experience extreme feelings of hopelessness. Negative psychological effects of imprisonment typically increase as someone serves a sentence, and then begin to reverse as release approaches. John J. Gibbs, *The First Cut Is the Deepest: Psychological Breakdown and Survival in the Detention Setting*, in *THE PAINS OF IMPRISONMENT* 97 (Robert Johnson & Hans Toch eds., 1982); Stanton Wheeler, *Socialization in Correctional Communities*, 26 AM. SOC. REV. 697 (1961). For those serving LWOP sentences, the reverse effect is not experienced. Moreover, those who enter prison at a young age are likely to suffer the most. Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in *PRISONERS ONCE REMOVED* 33 (Jeremy Travis & Michelle Waul eds., 2003); U.S. DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 190 (2012) (“[M]ost adult jails or prisons are ill-equipped to meet the needs of children or keep them safe. They are much more likely to commit suicide in an adult jail than in a juvenile facility.” (citations omitted)).

220. Ristroph, *supra* note 6, at 75.

221. *Graham*, 130 S. Ct. at 2030.

222. *See supra* note 141 and accompanying text.

223. Several courts have held as much, whereas other courts have held that *Graham* applies only to “life” sentences and not term-of-years sentences, regardless of their length. *See supra* notes 85–91 and accompanying text.

could not come until quite late in life? How soon before expected death must the chance for release come to make the opportunity “meaningful”? This issue arose during the litigation of *Graham*. The petitioner’s brief in *Graham* referenced Colorado law, which prohibits LWOP for juvenile offenders convicted of the most serious crimes and makes them eligible for parole after forty years.<sup>224</sup> At oral argument in *Graham*, upon questioning from Justice Alito, petitioner’s counsel stated that the Colorado statute was “probably . . . constitutional.”<sup>225</sup> Justice Alito’s dissent referenced this statement: “Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as forty years without the possibility of parole ‘probably’ would be constitutional.”<sup>226</sup> Justice Thomas’s dissent similarly referenced Colorado’s statute and counsel’s statement at oral argument.<sup>227</sup> However, the majority opinion in *Graham* did not elaborate on the timing issue but simply asserted that states must provide juvenile offenders with a “meaningful opportunity to obtain release.”

Although some might assert that providing the chance for release after forty years’ imprisonment fulfills *Graham*’s mandate, the better view is that a “meaningful opportunity” for release means that review should come at a point in time that provides the prisoner with the chance to live a meaningful life outside of prison. Thus, *Graham* should not be understood to mean simply that a prisoner must have a chance to be released shortly prior to his expected date of death. Rather, for the chance of release to be meaningful, review must occur at a point in time that will give a prisoner a sense of hope about the future and that reflects society’s hope that the prisoner can rejoin society in a meaningful way. A young prisoner contemplating spending at least thirty to forty years in prison—a much longer span of time than he or she has lived outside of prison—will almost certainly experience a profound sense of hopelessness. Such a sentence means being incarcerated past the typical childbearing age, past the timeframe in which one could start a meaningful career, and past the age in which one could expect parents or other former caregivers to still be alive. In contrast, providing a juvenile with hope that he or she may someday lead a meaningful life outside of prison will encourage efforts at rehabilitation.<sup>228</sup>

As noted, a federal judge in Michigan has ordered the state to consider juvenile offenders for parole after they have served ten years in prison.<sup>229</sup> This timing for

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224. Reply Brief of Petitioner at 17, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412).

225. Transcript of Oral Argument at 6, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412).

226. *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting).

227. Justice Thomas noted: “In light of the volume of state and federal legislation that presently permits life-without-parole sentences for juvenile nonhomicide offenders, it would be impossible to argue that there is any objective evidence of agreement that a juvenile is constitutionally entitled to a parole hearing any sooner than 40 years after conviction.” *Id.* at 2057–58 n.13 (Thomas, J., dissenting) (emphasis omitted).

228. *Cf. id.* at 2032 (majority opinion) (“A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.”). By giving prisoners a chance of a meaningful life outside of prison, prisons can encourage good behavior.

229. *See supra* note 95 and accompanying text. A bill introduced in the U.S. Congress

release eligibility would provide prisoners with a sense of hope and would allow individuals the chance to live meaningful lives outside of prison. Given *Graham*'s emphasis on adolescent brain development and maturation,<sup>230</sup> it would be logical to tie the timing of an initial review to when one can expect an individual to have obtained a fully mature brain and a more stable character. Brain and character maturation typically occurs by the time someone reaches his or her early twenties.<sup>231</sup> Thus, juvenile offenders could be expected to undergo significant change by a ten-year mark.

Another source of guidance comes from the current draft of the American Law Institute's Model Penal Code (MPC) for sentencing, which recommends a "second look" at juvenile sentences after ten years.<sup>232</sup> Under the MPC's proposed provision, an individual serving a prison sentence for a crime committed under the age of eighteen would be able to petition a court for a sentence modification after serving ten years in prison.<sup>233</sup> The MPC draft recommends a second-look procedure for most adult offenders as well, and would allow these prisoners to petition the court for a sentence modification after serving fifteen years in prison.<sup>234</sup> Under both the adult and juvenile provisions, the judicial panel (or other judicial decision maker) could shorten the sentence at this later point in time if the modified sentence would better serve the purposes of sentencing.<sup>235</sup> The MPC recommends a shorter time frame for review of juvenile offender cases because "adolescents can generally be expected to change more rapidly in the immediate post-offense years, and to a greater absolute degree, than older offenders."<sup>236</sup>

*Graham* and *Miller* do not resolve whether states can adopt bright-line rules on timing for eligibility for release, or whether sentencing courts must have discretion to set a particular date for release consideration based on the individual

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would have required states to adopt policies to grant juvenile offenders serving sentences of more than fifteen years a meaningful opportunity for parole or supervised release at least once during their first fifteen years of incarceration, and at least once every three years thereafter. The bill was not enacted. Juvenile Justice Accountability and Improvement Act of 2011, H.R. 3305, 112th Cong. (2011).

230. *Graham*, 130 S. Ct. at 2026.

231. See, e.g., Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers & Mental Health America as Amici Curiae Supporting Petitioners at 22–27, *Graham*, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2236778; Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, ANNALS N.Y. ACAD. SCIENCES, June 2004, at 77, 77.

232. The American Law Institute (ALI) has been working since 1999 to develop the MPC for sentencing. The most recent draft of the MPC was approved by the ALI membership at its 2011 Annual Meeting. See MODEL PENAL CODE: SENTENCING (Tentative Draft No. 2, 2011).

233. *Id.* § 6.11A(h).

234. *Id.* § 305.6. The one narrow exception to the adult offender second-look provision would be in cases where a life-without-parole sentence is the "sole alternative to a death sentence." *Id.* § 305.6 cmt. (b)(2).

235. The goal of such review hearings is to determine "whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence." *Id.* § 305.6(4).

236. *Id.* § 6.11A cmt. h. The proposal also recommends absolute caps on juvenile sentences that are below adult maximums. *Id.* § 6.11A cmt. g.

circumstances of the offense and offender. Most legislative responses thus far have cabined judicial discretion by requiring juvenile offenders to serve lengthy mandatory minimum sentences prior to any parole eligibility.<sup>237</sup> However, the California Supreme Court adopted an individualized approach with respect to *Graham* claims and instructed sentencing courts to consider the particular circumstances of the offense and offender in setting a parole eligibility date.<sup>238</sup> Given *Miller*'s focus on individualized sentencing, and emphasis that life-long sentences for juveniles should be "uncommon," statutes like Pennsylvania's that give judges the option of imposing LWOP or a sentence of thirty-five years to life are contrary to the spirit of the decision and may well be unconstitutional.

It bears noting that while review of a sentence under *Graham* cannot come too late, it also cannot come too early. If the opportunity for release for a juvenile offender comes too soon after conviction, the prisoner will not have had a meaningful chance to rehabilitate. A number of states have sentence review mechanisms that provide for court review of sentences.<sup>239</sup> However, if sentence review must be sought close in time to sentencing, then it does not provide the sort of "second look" procedure contemplated by *Graham*. *Graham* requires a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>240</sup> Therefore, there must be an opportunity to seek release after a juvenile offender has had enough time to mature and change.<sup>241</sup>

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237. See *supra* Part II.A.

238. See *supra* notes 89–90 and accompanying text. Another timing issue not resolved by *Graham* and *Miller* is the length of parole supervision that may follow release. Can a juvenile offender released by the parole board be subject to parole supervision for the rest of his or her life? Does the Constitution place any limit on the type of parole violations that can justify revocation and imprisonment for the remainder of the life sentence? Under existing parole systems, the conditions of parole release can be extremely stringent and quite punitive in and of themselves. Moreover, a minor and noncriminal misstep such as missing a curfew can land a parolee back in prison. Arguably, *Graham* and *Miller* bear on these post-release issues.

239. See, e.g., ARIZ. REV. STAT. ANN. § 13-4037(A) (2010); CONN. GEN. STAT. ANN. § 51-195 (West 2005). For a discussion of state appellate sentencing review, see Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 3 n.9 (1988). Sentencing review under these statutes typically requires filing a request shortly after sentencing. See, e.g., CONN. GEN. STAT. ANN. § 51-195 (application must be filed within thirty days of sentencing). In Connecticut, the Sentence Review Division cannot consider post-sentencing rehabilitation in reviewing the appropriateness of the sentence. See *Miller v. Warden*, No. 556724, 2002 WL 1724044, at \*11 (Conn. Super. Ct. June 26, 2002).

240. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

241. Another problem with coming before the parole board "too early" is that it is not atypical for juvenile offenders to have difficulty adjusting to prison in their early years, and they may have disciplinary problems as a result. Many individuals convicted as juveniles are placed directly in adult prison and they may not yet have the skills to handle the conflicts and threats that occur regularly in prison. As a result, they may react by fighting or engaging in other aggressive behavior. These problems are compounded if the child is mentally ill or has been exposed to trauma. See U.S. DEP'T OF JUSTICE, *supra* note 219, at 110. Prison officials may react by using disciplinary methods such as isolation and restraints, which can further exacerbate the child's difficulty in adjusting to prison life. See HUMAN RIGHTS WATCH & ACLU, *GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES* 51–52 (2012).

A final consideration relating to timing is whether *Graham* requires that states provide only one opportunity for release, or whether periodic review is required. Again, *Graham* is silent on this issue. Parole systems typically provide periodic review, although the length of time between reviews differs.<sup>242</sup> In recent years, some states have increased the length of time between reviews in response to complaints by victims about the trauma of repeatedly revisiting the crime.<sup>243</sup> Periodic review is logical in terms of assessing rehabilitation, because prisoners mature and reform at different rates, and it is difficult *ex ante* to predict when someone might be ready for release. Moreover, a prisoner's ability to demonstrate rehabilitation may be heavily dependent on the availability of programming within prisons. Indeed, many of the juvenile offenders serving LWOP sentences were excluded from participation in programming because they had no chance of ever being released.<sup>244</sup> A single review date set early means that some individuals will not have had enough time to establish readiness for release. However, a single review date set late likely means holding people in prison who present no risk to the community. Finally, a single review date creates an all-or-nothing structure for the decision maker. In close calls, the best approach may be to defer decision and to review the case again after more information can be obtained. In some instances, a decision maker might want to see how a prisoner progresses in a particular program or toward a specific goal before making a decision on release.<sup>245</sup>

In sum, to provide a meaningful opportunity for release, states must provide the opportunity for release at a meaningful time. In responding to *Graham* and *Miller*, states have focused on this timing component of the decisions. Some states have plainly fallen short in their responses, whereas other responses are closer to the line. These timing questions will no doubt be the subjects of future litigation. States

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242. For example, in Massachusetts, inmates serving life sentences who are denied parole must be reconsidered at regular intervals not to exceed five years. See *Frequently Asked Questions*, MASS.GOV, <http://www.mass.gov/eopss/agencies/parole-board/frequently-asked-questions.html>. In New York, an inmate denied parole at the parole board interview must be allowed to reappear within twenty-four months of the last appearance. See N.Y. State Dep't of Corr. & Cmty. Supervision, *New York State Parole Handbook*, NY.GOV, [https://www.parole.ny.gov/intro\\_handbook.html#h2\\_27](https://www.parole.ny.gov/intro_handbook.html#h2_27).

243. For example, in California prior to 2008, the parole board typically held hearings for inmates serving life sentences on an annual basis after the initial term was served. Proposition 9 changed the default period between hearings from one year to fifteen years, with a minimum period of three years between hearings. See *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1103–04 (9th Cir. 2011). In Georgia, the Board of Pardons changed the frequency of parole hearings from every three years to up to every eight years for inmates serving life sentences. See *Garner v. Jones*, 529 U.S. 244, 247 (2000).

244. HUMAN RIGHTS WATCH, *AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES* 26–36 (2012). In addition, regardless of any exclusion policies, some prisons have limited rehabilitative programming and long waitlists for programs. See, e.g., Michael Rothfeld, *As Rehab Programs Are Cut, Prisons Do Less to Keep Inmates from Returning*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-rehab17>.

245. The Model Penal Code draft recommends periodic review for both adult and juvenile offenders. See MODEL PENAL CODE: SENTENCING §§ 6.11A(h), 305.6(2) (Tentative Draft No. 2, 2011).

seeking to minimize litigation and the potential for additional resentencings should avoid adopting sentencing schemes that deny parole for forty or fifty years. Rather, starting periodic review at a ten- or fifteen-year mark is well within constitutional limits, consistent with the MPC approach, and gives sufficient time for the offender to mature and change before the initial review.

*B. A Realistic Chance of Release*

A second component of the meaningful opportunity requirement relates to the likelihood that states will actually grant release, and the criteria used by authorities in assessing release.

The actual likelihood of release bears on the severity of a sentence and is relevant to Eighth Amendment analysis. Although the Court in *Graham* uses the phrase “meaningful opportunity to obtain release” several times in the decision,<sup>246</sup> it concludes the opinion by stating: “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.”<sup>247</sup> *Graham* specifically rejects the view that the possibility of clemency provides an adequate chance for release, asserting that clemency for the prisoner is a “remote possibility . . . [that] does not mitigate the harshness of the sentence.”<sup>248</sup> The Court’s decisions in *Solem* and *Rummel* likewise reveal that the actual likelihood of release is relevant to Eighth Amendment analysis.<sup>249</sup> Thus, under *Graham*, a meaningful opportunity for release means a realistic one.

Regarding the criteria for release, *Graham* requires that states “give defendants like Graham some meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*.”<sup>250</sup> Therefore, an assessment of whether the prisoner has matured and rehabilitated must be central to the release decision. A releasing authority that relies too heavily on the severity of the initial offense in denying release will run afoul of the Eighth Amendment. *Graham* and *Miller* take as given that the offense is serious. Under *Graham*, a realistic chance of release must be provided even when the juvenile offender was convicted of a violent crime such as rape or kidnapping.<sup>251</sup> And *Miller* holds that the judge must have a sentencing option that would allow a juvenile convicted of even the most heinous murder offense the realistic chance for release.<sup>252</sup> Under these decisions, a juvenile offender’s chance of release thus must be tied to whether he or she has

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246. *Graham v. Florida*, 130 S. Ct. 2011, 2030, 2033 (2010).

247. *Id.* at 2034 (emphasis added).

248. *Id.* at 2027.

249. See *Solem v. Helm*, 463 U.S. 277, 300–03 (1983); *Rummel v. Estelle*, 445 U.S. 263, 280–81 (1980).

250. *Graham*, 130 S. Ct. at 2030 (emphasis added).

251. *Id.* at 2051–52 (Thomas, J., dissenting) (emphasizing a particularly “depraved” case to which *Graham*’s holding applies).

252. *Miller v. Alabama*, 132 S. Ct. 2455, 2487 (2012) (Alito, J., dissenting) (stating that under the Court’s holding “[e]ven a 17 1/2-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a ‘child’ and must be given a chance to persuade a judge to permit his release into society”).



“demonstrated maturity and rehabilitation.”<sup>253</sup> The severity of the crime is taken into account in determining the original sentence—including the date for parole eligibility. Under *Graham* and *Miller*, crime severity should not influence an assessment of release suitability.<sup>254</sup>

Accordingly, under *Graham* and *Miller*, rehabilitated juvenile nonhomicide offenders must have a realistic chance of release, and judges must have the option of imposing such a sentence on homicide offenders. For the most part, state legislation and court decisions have not focused on fulfilling this aspect of the Court’s mandate.<sup>255</sup> Rather, legislatures and courts seem to assume that as long as they make juvenile offenders eligible for parole at an appropriate time, existing parole board practices will provide a meaningful opportunity for release. Yet, absent specific direction, it is far from clear that parole boards will offer a realistic chance of release. As has been described, in many states, parole board release rates are quite low, and the nature of the offense often drives the decision.<sup>256</sup>

To ensure compliance with the Supreme Court’s mandate, states should provide specific guidance to parole boards about assessment of juvenile offender cases. For example, the bill considered last session by the Connecticut legislature instructs the parole board to consider a number of factors relating to rehabilitation, including whether “the offender has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes.”<sup>257</sup> In addition, the board must consider whether the individual has contributed “to the welfare of other persons through service” and made “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.”<sup>258</sup> Finally, the proposal specifically states that the board should consider “the opportunities for rehabilitation in the adult correctional system.”<sup>259</sup> Thus, this statutory language requires the board to consider rehabilitation-related factors, and gives a fair amount of guidance regarding the factors relevant to assessing rehabilitation. Despite this helpful guidance, the Connecticut proposal also instructs the board to consider whether release would adhere to the purposes of sentencing set forth in General Statutes section 54-300(c)(1)–(4).<sup>260</sup> Because the purposes of sentencing include an assessment of

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253. *Graham*, 130 S. Ct. at 2030.

254. David Ball asserts that current policy in California allows the parole board to “second-guess the jury” by deeming a crime sufficiently serious “to deny suitability for parole even when a jury did not.” Ball, *supra* note 151, at 971. In his view, consistent with the Sixth Amendment jury trial right, the parole board should not “consider the commitment offense in determining a prisoner’s suitability for parole.” *Id.* Similarly, under the Court’s Eighth Amendment jurisprudence, the crime of conviction is taken into account in determining a juvenile offender’s original sentence. The parole suitability question should be based on an assessment of rehabilitation—not the nature of the original crime. *See id.* at 972.

255. *See supra* Part II.A-B.

256. *See supra* notes 151–66 and accompanying text.

257. H.B. 6581, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

258. *Id.*

259. *Id.*

260. *Id.*

the seriousness of the offense,<sup>261</sup> this factor may stray too far from the criteria for release intended by *Graham*.

Louisiana's new statute also contains rehabilitation-focused factors. However, one factor is of concern. The statute states that an individual will be eligible for parole consideration only if he or she "has obtained a low-risk level designation determined by a validated risk assessment instrument approved by the secretary of the Department of Public Safety and Corrections."<sup>262</sup> Risk assessments under these instruments are often tied to factors that are immutable—such as age at the time of offense, nature of the offense, and elementary school maladjustment.<sup>263</sup> Thus, this requirement is likely to include consideration of factors unrelated to rehabilitation, and reduce the chances that a rehabilitated juvenile offender will actually be released.

It bears noting that 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. Going forward, data will need to be collected to determine the release rates of juvenile offenders sentenced to long prison terms. Moreover, an analysis of the prisoner's degree of rehabilitation needs to be assessed to determine if parole boards are complying with *Graham*, for *Graham* requires a realistic chance of release for *rehabilitated* juvenile offenders, not for all juvenile offenders. Over time, trends in these cases will emerge, and it may be possible for prisoners to establish that a parole board is failing to grant release in an appropriate number of juvenile cases involving rehabilitated prisoners.

In sum, historically, parole boards have not been required to make the possibility of parole release realistic for inmates. Thus, simply making juvenile offenders eligible for parole under existing practices will not guarantee compliance with Eighth Amendment requirements. To help ensure a realistic chance of release for rehabilitated juvenile offenders, state legislatures and courts should craft special criteria for parole boards to consider in assessing the suitability of these prisoners for release. Looking forward, parole boards should know that their decisions with respect to juvenile offenders will be subject to increased scrutiny by courts.

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261. CONN. GEN. STAT. ANN. § 54-300(c) (West Supp. 2013) (“[S]entencing should reflect the seriousness of the offense and be proportional to the harm to victims and the community.”).

262. LA. REV. STAT ANN. § 15:574.4 (Supp. 2013).

263. See, e.g., Barbara E. McDermott, John F. Edens, Cameron D. Quanbeck, David Busse & Charles L. Scott, *Examining the Role of Static and Dynamic Risk Factors in the Prediction of Inpatient Violence: Variable- and Person-Focused Analyses*, 32 LAW & HUM. BEHAV. 325, 326 (2008). For an interesting discussion regarding risk assessment by parole boards, see W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 397–40 (2011). Ball asserts that parole boards fail to engage in an accurate cost-benefit analysis when making release determinations because they consider only the risk of release, and not its benefit. *Id.* at 400–03.

### C. Meaningful Hearings

The third component of the meaningful opportunity requirement relates to the procedures employed by the releasing authority in making a release decision. Below, this procedural aspect of *Graham* is explored.

#### 1. The Eighth Amendment, the Fourteenth Amendment, and Parole Release Hearings

The Court in *Graham* explicitly declined to tie its holding to a requirement that states make nonhomicide juvenile offenders eligible for parole.<sup>264</sup> Rather, likely because of the wide variation in parole practices in states around the country, the Court instead employed the phrase “meaningful opportunity to obtain release.”<sup>265</sup> Although the Court did not elaborate further on the meaning of this phrase, it is clear that a “meaningful opportunity to obtain release” must encompass the concept that states provide meaningful consideration of a prisoner’s suitability for release. Otherwise, one cannot be confident that an inmate’s maturity and rehabilitation have been accurately assessed. Thus, a state’s existing parole system will comply with the Eighth Amendment only if it actually uses a meaningful process for considering release. In other words, the parole board must provide more than pro forma consideration. In addition, *Graham*’s meaningful opportunity mandate leaves room for states to use release mechanisms other than parole to comply with the decision.

Thus, although *Graham* is typically viewed as a case that places substantive limits on punishment, it is also a case about procedure. Richard Bierschbach is one of the few scholars to consider the procedural aspect of the *Graham* decision.<sup>266</sup> He explains that *Graham* allows “the most severe form of punishment for juvenile offenders—life in prison—[to be] imposed, but only if it is accompanied by the procedural protection of parole.”<sup>267</sup> “Parole thus conceptually severs *Graham* from *Roper*, *Atkins*, and other classic proportionality cases on which it relied for much of

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264. Instead, the Court requires states to provide prisoners with a “meaningful opportunity to obtain release” and provides that “[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance.” *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

265. *Id.* at 2016.

266. See Bierschbach, *supra* note 12, at 1748. Professor Bierschbach argues that *Graham* should be understood not only as a substantive limit on punishment, but as establishing a rule of constitutional criminal procedure, “one that links the validity of punishment to the institutional structure of sentencing.” *Id.* In particular, “[b]y requiring the State to revisit its first-order sentencing judgments at a later point in time, *Graham* mandates a procedural space for granular, textured, and ultimately more reliable sentencing determinations.” *Id.*; see also Bierschbach & Bibas, *supra* note 12, at 398–400 (arguing that most commentators have missed the “procedural nuances” of *Graham* and *Miller*, and these cases—like *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—are part of a “larger structural and procedural framework for constitutionally tailoring punishment”).

267. Bierschbach, *supra* note 12, at 1766.

its doctrinal support. Despite their obvious similarities, none of those cases linked the constitutionality of punishment to a procedural rule.<sup>268</sup>

There are several possible frameworks for considering the process required by *Graham*. First, *Graham* could be viewed as creating a right to a hearing with procedural protections that stem from the Eighth Amendment. The Court recognized in *Graham* that the possibility of release bears on an assessment of the severity of the sentence, and a sentence without a meaningful chance of release is unduly severe for nonhomicide juvenile offenders.<sup>269</sup> Thus, as a substantive matter under the Eighth Amendment, the sentence must allow a meaningful and realistic chance for release based on demonstrated maturity and rehabilitation. To satisfy this right to the chance of release, states must provide meaningful consideration of the individual circumstances of the prisoner. In this way, the procedural rights needed to ensure meaningful consideration of a prisoner for release can be viewed as originating from the Eighth Amendment.

Prior cases have recognized that certain procedural rights flow from the Eighth Amendment. Bierschbach observes that the “interaction of substance and procedure that drives the constitutional significance of parole” makes *Graham* resemble the Court’s decisions in *Woodson v. North Carolina* and *Lockett v. Ohio*.<sup>270</sup> In *Woodson v. North Carolina*,<sup>271</sup> the Court held that a mandatory death penalty statute violates the Eighth Amendment because it does not allow “particularized consideration” of the circumstances of the case.<sup>272</sup> Similarly, in *Lockett v. Ohio*,<sup>273</sup> the Court held that the Eighth Amendment requires states in death penalty cases to allow broad consideration of any mitigating factors regarding the offense or offender.<sup>274</sup> These cases have emphasized the need for enhanced procedural protections to ensure that reliable judgments are made about whether to impose the uniquely severe penalty of death.<sup>275</sup>

Although scholars have described *Woodson* and *Lockett* as requiring “super due process” in the capital context,<sup>276</sup> the cases invoke the Eighth Amendment rather

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268. *Id.* at 1766–67 (footnote omitted).

269. *See Graham*, 130 S. Ct. at 2027–30.

270. Bierschbach, *supra* note 12, at 1749.

271. 428 U.S. 280 (1976) (plurality opinion).

272. *Id.* at 303. The dissent in *Woodson* accused the plurality opinion of “import[ing] into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed.” *Id.* at 324 (Rehnquist, J., dissenting).

273. 438 U.S. 586 (1978) (plurality opinion).

274. *Id.* at 604.

275. *Id.* at 604–05; *Woodson*, 428 U.S. at 305 (noting the qualitative difference between death and life imprisonment and the “corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”).

276. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622 n.22 (1986); Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089, 1114–15 (2012).

than procedural due process analysis as the basis for the holdings.<sup>277</sup> *Miller* relies on *Woodson* and *Lockett* in prohibiting mandatory LWOP for juvenile offenders, and itself encompasses a procedural holding grounded in the Eighth Amendment.<sup>278</sup> Indeed, *Miller* shows the Court's willingness to find that Eighth Amendment procedural rights attach outside of the capital context. Although a parole hearing does not determine if a juvenile offender will live or die, its outcome is of profound significance to the prisoner: denial of parole means the prisoner will die in prison. Thus, drawing upon the Court's prior jurisprudence, one could view the Eighth Amendment as requiring certain procedural protections at parole hearings to ensure that boards give meaningful consideration to the release decision and make reliable judgments.

Alternatively, one could view *Graham* instead as triggering procedural due process protections under the Fourteenth Amendment for juvenile offenders at parole hearings. As discussed, under the Supreme Court's decision in *Greenholtz*, minimal due process protections do not attach to parole release hearings unless state statutes create a liberty interest in release, and many states have chosen to avoid constitutional constraints by creating purely discretionary parole regimes.<sup>279</sup> *Graham*'s Eighth Amendment requirement that states provide a "meaningful" and "realistic" chance of release could be seen as creating a liberty interest for juvenile offenders in release—regardless of whether applicable state statutes have otherwise created such an interest. After *Graham*, release decisions for juvenile offenders serving life sentences are no longer purely discretionary for states. Rather, prisoners have a certain entitlement: although they are not guaranteed release, they are entitled to a realistic chance of release if they demonstrate maturity and rehabilitation. This entitlement could be viewed as creating a liberty interest. Under this framework, one would apply traditional procedural due process analysis to determine what procedures *Graham* requires. Indeed, although the Supreme Court had not used the phrase "meaningful opportunity to obtain release" prior to *Graham*, the Court has frequently used the term "meaningful opportunity" in reference to procedural due process requirements.<sup>280</sup>

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277. See *Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 304. Other cases rely on the Eighth Amendment to find that enhanced procedures apply in capital cases. See, e.g., *Mills v. Maryland*, 486 U.S. 367 (1988) (recognizing the right to the benefit of nonunanimous jury decision on mitigating circumstances in capital cases). Bierschbach references *Woodson* and *Lockett*, explaining that "*Graham* is not the first time the Court has hinged the constitutionality of a punishment on this type of procedural rule." Bierschbach, *supra* note 12, at 1767.

278. *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012) ("That correspondence—*Graham*'s '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,'—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty." (alteration in original) (citation omitted) (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2038–39 (2010) (Roberts, C.J., concurring in the judgment))).

279. See *supra* notes 169–71 and accompanying text.

280. The most common use of the phrase is in reference to a "meaningful opportunity to be heard." See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (stating that due process requires "a meaningful opportunity to be heard"). The Court has used the term "meaningful opportunity" in reference to due process requirements in other contexts as well. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that due process required that a

Somewhat analogous to *Graham* are the Court's decisions addressing the procedures required for sanity and clemency hearings of death-sentenced prisoners, which have applied due process analysis. In *Ford v. Wainwright*,<sup>281</sup> the Supreme Court held that the Eighth Amendment prohibits a state from inflicting the death penalty upon a prisoner who is insane, and concluded that Florida's procedures for determining the sanity of a death row prisoner had been inadequate. In detailing the procedures required for sanity hearings, the *Ford* plurality drew upon both procedural due process cases and Eighth Amendment precedent such as *Woodson*.<sup>282</sup> However, Justice Powell's concurrence, which controls, analyzed the matter explicitly under the due process clause.<sup>283</sup> In *Ohio Adult Parole Authority v. Woodard*,<sup>284</sup> the Court considered whether death-sentenced inmates are entitled to any procedural protections in clemency determinations. A plurality of the Court held that they were not.<sup>285</sup> However, a concurring opinion by Justice O'Connor concluded that certain minimal due process protections attach to clemency proceedings because a prisoner under a sentence of death has a continuing interest in life.<sup>286</sup> Thus, relying on *Ford* and *Woodard*, courts might use procedural due process analysis in considering the scope of *Graham*'s mandate.

In sum, *Graham* plainly has a procedural component—states must provide meaningful consideration of a prisoner's suitability for release. Less immediately apparent is how courts will analyze *Graham*'s procedural requirements when faced with claims from prisoners alleging that they were denied meaningful hearings under state parole rules. Courts might use an Eighth Amendment framework for considering such claims, or they could turn to traditional procedural due process analysis.

Considering the Eighth Amendment as the source of procedural rights for release hearings could lead to a more robust view of those rights. Eighth Amendment procedural rules, as they have developed in the capital context, are focused on the importance of reliable judgments and on the need for individual consideration of the offense and offender. Courts often find heightened protections attach given the severity of the punishment at issue.<sup>287</sup>

In contrast, under a procedural due process approach, courts will likely start by looking at existing due process requirements for parole hearings. Historically, even where a state statute has created a liberty interest, courts have required only very

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U.S. citizen being held as enemy combatant be given a "meaningful opportunity" to contest factual basis for his detention); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (stating that due process entitles a defendant to "a meaningful opportunity to present a complete defense") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

281. 477 U.S. 399, 410, 417–18 (1986) (plurality opinion).

282. *Id.* at 411–14.

283. *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment); *see also* *Panetti v. Quarterman*, 551 U.S. 930 (2007) ("[Under *Ford*,] [o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." (quoting *Ford*, 477 U.S. at 426, 424 (1986) (Powell, J., concurring in part and concurring in the judgment))).

284. 523 U.S. 272 (1998) (plurality opinion).

285. *Id.* at 288.

286. *Id.* at 288–89 (O'Connor, J., concurring in part and concurring in the judgment).

287. *See* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

minimal process for parole release decisions. For example, in *Greenholtz*, the Supreme Court found that Nebraska's informal hearing process provided adequate process, and a formal evidentiary hearing was unnecessary.<sup>288</sup> In addition, the Court refused to require the parole board to provide a written statement of the evidence relied upon in reaching a decision and instead found that a simple communication of reasons for the parole denial sufficed.<sup>289</sup> More recently, in *Swarthout v. Cooke*,<sup>290</sup> the Court held that due process was satisfied when California lifers “were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied.”<sup>291</sup> *Cooke* reversed the Ninth Circuit's holding that due process requires “some evidence” supporting the parole board's decision denying release.<sup>292</sup>

Courts considering the process required by *Graham* might distinguish these prior parole cases and find that more process is due to juvenile offenders serving life sentences. As discussed further below, this category of prisoners faces unique challenges in presenting an effective case for release, and the interest at stake—whether one will be released before death—is serious. Nevertheless, if courts use due process analysis, it may be an uphill battle for juvenile offenders to secure greater procedural protections than those required for adult offenders in jurisdictions where due process protections attach.

In any event, regardless of whether one views release hearing procedures as governed by Eighth Amendment or procedural due process analysis, the core requirement of *Graham* is that parole boards give juvenile offenders meaningful hearings. As discussed below, there are several aspects of current parole practices in many states that threaten to deny juvenile offenders a meaningful opportunity to be heard. Before discussing these problematic parole practices, I explore the special challenges facing juvenile offenders seeking release.

## 2. The Challenges of Presenting a Case for Release

An assessment of the procedures necessary to ensure meaningful hearings for juvenile offenders requires consideration of the special challenges facing juvenile offenders in seeking release.

Presenting a persuasive case for release is a difficult endeavor, especially for a prisoner convicted of a violent offense. Juvenile offenders serving lengthy sentences will tend to face particular obstacles in presenting an effective case for release. The first challenge is that many will lack the self-confidence, education, and organizational skills required to make a persuasive presentation. Some of these individuals have been incarcerated since they were thirteen or fourteen years old and thus grew up in prison.<sup>293</sup> Many had limited education prior to incarceration<sup>294</sup> and

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288. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 14–15 (1979).

289. *Id.* at 15–16.

290. 131 S. Ct. 859 (2011).

291. *Id.* at 862.

292. *Id.* at 862–63.

293. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 4 (2007).

294. See ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS:

have not had opportunities within prison to develop critical skills.<sup>295</sup> Some were victims of trauma and abuse before their arrests<sup>296</sup> and have been further victimized in prison.<sup>297</sup> Some suffer from depression or other mental illnesses.<sup>298</sup>

A second challenge is the prisoner's access to relevant mitigating information. An individual may not have a clear memory of his or her childhood, particularly if it was marked by exposure to stress and trauma.<sup>299</sup> Some information—such as the prisoner's prenatal exposure to drugs—may not be known at all by the prisoner. The individual, having grown up in prison, may have lost ties to family members or others who could help supply relevant details. In addition, an individual may not accurately remember the crime itself, especially if mental illness or drug use was involved. Extensive investigation of a person's background is necessary to present an accurate picture to the releasing authority, and usually an evaluation by a mental health expert will be required.<sup>300</sup> A psychiatrist or psychologist could provide insight about the ways in which the inmate's youth or mental illness may have contributed to the crime, could speak to how an inmate has changed over the years, and could assess the degree of risk he or she currently presents to the community.<sup>301</sup> Yet a prisoner detained since childhood cannot be expected to

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FINDINGS FROM A NATIONAL SURVEY 3 (2012), available at [http://www.sentencingproject.org/doc/publications/jj\\_The\\_Lives\\_of\\_Juvenile\\_Lifers.pdf](http://www.sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf) (surveying juvenile lifers and finding that two in five had been enrolled in special education classes prior to incarceration, only 46.6% had been attending school at the time of their offense, and 84.4% had been suspended or expelled from school at some point in time).

295. *Id.* at 4 (finding that 61.9% of juvenile lifers are not engaged in programming in prison—32.7% had been denied because they will never be released from prison and an additional 28.9% were in prisons without sufficient programming or had completed all available programming).

296. *Id.* at 10 (finding that 79% of juvenile lifers witnessed violence at home or in foster care or group homes; 46.9% experienced physical abuse; one in five juvenile lifers was sexually abused, with 77.3% of girls reporting being sexually abused).

297. *See id.* at 19 (“Teenagers face a heightened risk of suicide, sexual assault and physical assault when housed in adult prisons.”); U.S. DEP’T OF JUSTICE, *supra* note 219, at 190 (2012) (finding that children “are much more likely to commit suicide in an adult jail than in a juvenile facility” and “five times as likely to be sexually abused or raped as they would be in a juvenile facility”).

298. HUMAN RIGHTS WATCH, “WHEN I DIE, THEY’LL SEND ME HOME”: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 39 (2008).

299. J. Douglas Bremner, John H. Krystal, Steven M. Southwick & Dennis S. Charney, *Functional Neuroanatomical Correlates of the Effects of Stress on Memory*, 8 J. TRAUMATIC STRESS 527, 528 (1995); J. Douglas Bremner & Meena Narayan, *The Effects of Stress on Memory and the Hippocampus Throughout the Life Cycle: Implications for Childhood Development and Aging*, 10 DEV. & PSYCHOPATHOLOGY 871, 873 (1998); Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 106 PROC. NAT’L ACAD. SCIENCES 6545, 6546 (2009).

300. In the capital context, advocates have recognized the importance of presenting mental health evaluations that are informed by an extensive investigation of the client's life history. *See* Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 966–74 (2008).

301. *Id.* at 974–76.



muster the resources for a thorough investigation and mental health evaluation on his or her own.

A third challenge in presenting the case for release is articulating multiple, and at times conflicting, narratives to the decision maker. On the one hand, the decision maker will want to hear that the prisoner acknowledges the seriousness of the offense, takes full responsibility for it, and feels genuine remorse.<sup>302</sup> On the other hand, mitigating circumstances regarding the offense are highly relevant to an assessment of the seriousness of the crime, and the decision maker needs to be persuaded that the prisoner has rehabilitated.<sup>303</sup> But it is difficult for someone to focus on remorse for a terrible act while at the same time cataloging one's accomplishments. And it is extremely hard for a person to express remorse and take responsibility for the crime at the same time as he or she suggests mitigation regarding an offense. Yet in many cases involving those convicted as juveniles it will be particularly important to present mitigating evidence regarding the offense itself, as the offense will often involve circumstances demonstrating the juvenile's reduced culpability.

A final challenge is that juvenile offenders who have been detained for many years are typically isolated, and many will lack connections and support from the community. This isolation makes it more difficult for them to present a solid release plan to the decision maker, and it means that they are less likely to have individuals in the community advocate for their release.<sup>304</sup> Parole boards need to be persuaded that the juvenile offender—who has never lived in the community as an adult—will be able to successfully reintegrate into society. A release plan that shows who will support an individual upon his release, where he will live, and how he will find employment can be quite persuasive. Failure to provide such a plan may be fatal to the effort to obtain release.

### 3. Parole Release Procedures and Meaningful Hearings

As discussed below, the survey of parole board procedures reveals several areas of concern about existing practices. In particular, many states deny prisoners the chance to present the case for release in person before the decision maker and prevent prisoners from seeing and rebutting key information relied upon by the decision maker.<sup>305</sup> Moreover, many states place strict limits on the role that a prisoner's counsel can play in the process.<sup>306</sup> Given the special challenges facing juvenile offenders in presenting an effective case for release, these procedures threaten to deny meaningful hearings for these prisoners.

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302. Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 512–26 (2008) (discussing the role of remorse at parole hearings).

303. *See id.* at 511–12 (examining the factors considered by parole boards in assessing a prisoner's suitability for release).

304. *See* HUMAN RIGHTS WATCH, *supra* note 244, at 41 (describing the isolation of juveniles serving LWOP sentences).

305. *See supra* notes 176–87, 211–13 and accompanying text.

306. *See supra* notes 188–95 and accompanying text.

## a. In-Person Hearing Before Decision Makers

The survey of parole boards shows that many states do not allow the prisoner to appear in person before the decision maker.<sup>307</sup> In several states, parole decisions are made based on “file review,” and there is no interaction at all between the prisoner and the board.<sup>308</sup> In other states, the person who interacts with the prisoner is an employee of the parole board, and not someone with decision-making power.<sup>309</sup> At hearings in some of these states, the prisoner is absent and the decision makers interact directly with other key players—including the victim and prosecutor.<sup>310</sup> In other instances, the decision maker interacts with the prisoner, but does so via videoconference or telephone.<sup>311</sup>

Historically, where no liberty interest is created by state statute, states have been free to deny in-person parole hearings to prisoners. In states where a liberty interest exists, case law does not establish whether due process requires an in-person hearing for adult offenders—as the systems upheld by the Supreme Court in *Cooke* and *Greenholtz* both allowed inmates to appear in person.<sup>312</sup> But regardless of the law governing hearings for adult offenders, a strong argument can be made that states should allow juvenile offenders to appear in person before decision makers to ensure compliance with *Graham*’s meaningful opportunity requirement.<sup>313</sup>

307. *See supra* notes 176–87 and accompanying text.

308. Alabama and North Carolina.

309. *See supra* notes 182–86 and accompanying text.

310. *See supra* note 187 and accompanying text.

311. *See supra* note 180 and accompanying text.

312. *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (per curiam) (stating inmates were “allowed to speak at their parole hearings and to contest the evidence against them”); *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (stating inmate was “permitted to appear before the Board and present letters and statements on his own behalf”). Prior to *Greenholtz*, the Second Circuit rejected a due process challenge to the New York system that denied in-person hearings before the decision makers. *Zurak v. Regan*, 550 F.2d 86, 96 (2d Cir. 1977) (“Although a personal interview might provide the inmate with a better opportunity to present his case to the Board, we think that, under all the circumstances, the inmate has sufficient opportunity to present the relevant facts through the parole officer and by his own submission of any information helpful to his cause.”).

Lower courts have generally rejected due process challenges to the use of videoconferencing at parole release and revocation hearings. *See, e.g., Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 776 (6th Cir. 2008) (finding no due process violation where videoconferencing technology used for witness testimony at parole revocation proceeding); *Pappas v. Ky. Parole Bd.*, 156 S.W.3d 303, 306 (Ky. Ct. App. 2004) (finding that videoconferencing in a parole release hearing does not violate due process). In some jurisdictions, courts have found that in-person parole release hearings are statutorily required. *See Terrell v. United States*, 564 F.3d 442, 454–55 (6th Cir. 2009) (holding that federal statute requires prisoners to be physically present at federal parole hearings, and videoconferencing does not suffice).

313. Allowing a prisoner to appear before the decision maker has an added benefit: it fosters a sense of legitimacy in the system. *See TOM R. TYLER, WHY PEOPLE OBEY THE LAW* 3–7 (1990) (arguing procedural justice is a central component of how individuals make judgments about the legitimacy of authorities). If prisoners feel release decisions will be fairly assessed, they are more likely to comply with prison rules and work toward obtaining

The Supreme Court has observed that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,”<sup>314</sup> and written submissions are an “unrealistic option” for individuals “who lack the educational attainment necessary to write effectively.”<sup>315</sup> In addition,

written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision.<sup>316</sup>

The Court has recognized similar deficiencies with second-hand presentations of information to decision makers.<sup>317</sup>

These concerns are certainly present with respect to parole hearings for juvenile offenders. As outlined above, juvenile offenders face unique challenges in seeking release at parole hearings. Denial of an in-person hearing is particularly problematic for juvenile offenders since prisoners detained since childhood will often “lack the educational attainment necessary to write effectively,”<sup>318</sup> and are likely to be much more capable of expressing themselves orally. In addition, under *Graham*, the parole board must determine the extent of a juvenile offender’s rehabilitation. Assessing the character and credibility of the prisoner is central to determining if he or she has truly rehabilitated. A written submission by the prisoner, or a second-hand summary from a third party, simply cannot convey the same amount of information as a direct interaction.

A telephone or videoconference hearing does allow direct interaction between the prisoner and decision maker, but it does not permit the same level of interaction as an in-person hearing. Indeed, in the immigration context, scholars have found that the use of videoconferencing for an asylum hearing reduces the chance that an applicant will be granted relief.<sup>319</sup> Given the challenges that juvenile offenders may face in expressing themselves, and *Graham*’s mandate that release decisions focus

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rehabilitation. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 217–22 (2008) (noting that a person’s views regarding the legitimacy of the criminal justice system influence the likelihood that he or she will comply with the law).

314. *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970).

315. *Id.* at 269.

316. *Id.*; see also *Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) (“[W]ritten submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.”).

317. *Goldberg*, 397 U.S. at 269.

318. *Id.*

319. Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008) (finding that videoconferencing roughly doubles the chances that an asylum applicant will be denied relief). The authors argue that videoconferencing “changes the ‘adjudicative quality’ of the Immigration Judge’s decision by fundamentally altering the perception of the testimony.” *Id.* at 266. Among other problems, use of videoconferencing prevents eye contact between the applicant and the decision maker, and undermines the ability of the applicant to build an emotional connection with the judge. See *id.* at 268–69.

on assessing rehabilitation, telephone or videoconference hearings may not provide a meaningful hearing.

b. Access to Information

The survey establishes that a majority of states do not give prisoners the right to see significant information relied upon by the decision maker.<sup>320</sup> Although some jurisdictions ensure full access to information provided by the prosecutor and victim, other states prevent prisoners from seeing some or all of this information.<sup>321</sup> In addition, many states prevent prisoners from seeing the conclusions and recommendations of mental health professionals who examined them for the board.<sup>322</sup>

The ability to see and rebut information relied upon by a decision maker is a crucial part of ensuring a fair hearing.<sup>323</sup> Without knowledge of the information relied upon by the parole board, the prisoner cannot dispute its accuracy or provide an alternative account. A bar on information provided by the victim and prosecutor prevents the prisoner from rebutting descriptions of the crime or other adverse information that may be crucially important to the decision maker. Moreover, mental health evaluations could contain erroneous information that has a major influence on the release decision. Finally, virtually all boards rely on summaries of information regarding the prisoner compiled for the hearing by either department of correction or board employees.<sup>324</sup> This information too might contain inaccuracies. Giving prisoners access to the information on which the decision makers rely is an important component of ensuring a meaningful hearing.<sup>325</sup>

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320. *See supra* notes 211–13 and accompanying text.

321. *See supra* notes 211–12 and accompanying text.

322. *See supra* note 213 and accompanying text.

323. In other contexts, courts have held that due process requires the chance to rebut adverse information. *See, e.g.*, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987) (“We conclude that minimum due process for the employer in this context requires notice of the employee’s allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.”); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (stating that due process requires “disclosure to the parolee of evidence against him” at revocation proceeding and the chance to confront witnesses).

324. *See supra* note 204 and accompanying text.

325. Parole boards may try to justify the lack of disclosure on safety grounds. However, some jurisdictions do allow inmate access to victim and prosecutor information, and thus apparently have not found these concerns to trump the other interests at stake. Victims and prosecutors can choose not to disclose information to the board that they do not want shared with the inmate.

In states where due process protections attach to parole release hearings, courts are split on whether access to institutional files is required. *See Walker v. Prisoner Review Bd.*, 694 F.2d 499, 503 (7th Cir. 1982) (collecting cases and stating that the relevant inquiry should be whether “the combination of procedures available to the parole candidate is sufficient to minimize the risk that a decision will be based on incorrect information”).

## c. Role of Counsel

The survey demonstrates that some states do not allow attorneys for prisoners to have a meaningful role in the parole release process. For example, six states do not consider attorney input at all in making a release decision,<sup>326</sup> and fourteen states do not permit an attorney to be present for the inmate's interview or hearing.<sup>327</sup> Only ten states responding to the survey appoint counsel for indigent prisoners in any cases at all,<sup>328</sup> and two of these states restrict appointment of counsel to instances where the inmate cannot understand the proceedings.<sup>329</sup> Even if counsel is provided, the funding may be extremely limited. For example, in California, attorneys appointed for "lifer" hearings are paid a maximum of \$400 for a case.<sup>330</sup>

The role of counsel at ordinary parole release hearings is not surprising, given existing due process jurisprudence. The due process clause requires the appointment of counsel in only a narrow range of cases.<sup>331</sup> Even when courts have found that due process rights attach to parole release hearings, they have not required appointment of counsel.<sup>332</sup> Moreover, courts have rejected due process challenges to restrictions on the involvement of even retained counsel at parole release hearings.<sup>333</sup>

Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders. As discussed above, juvenile offenders often lack skills essential to presenting an effective case for release.<sup>334</sup> Given their confinement and lack of resources, these prisoners cannot undertake the extensive investigation of their backgrounds and offenses that is the basis for a persuasive presentation. Counsel could undertake this investigation and also retain

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326. See *supra* note 188 and accompanying text.

327. See *supra* note 191 and accompanying text.

328. See *supra* note 196 and accompanying text.

329. See *supra* note 196 and accompanying text.

330. Katera Estrada Rutledge, *Successful Parole Consideration Hearings: The Basic Handbook for the Life Prisoner*, RUTLEDGE & RUTLEDGE (April 2012), <http://www.rutledgeattorneys.com/pages/content/13044>.

331. See *Turner v. Rogers*, 131 S. Ct. 2507, 2523 (2011).

332. *Currie v. Hill*, No. C 11-6315 PJH (PR), 2012 WL 5340930, at \*2 (N.D. Cal. Oct. 25, 2012) (finding no due process right to counsel for California parole release hearing).

333. In *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976), the Second Circuit upheld the Connecticut Parole Board's restriction on the involvement of counsel. The court reasoned:

The justification advanced by the Board for excluding counsel or counsel-substitute from the hearing itself is quite reasonable: The purpose of the hearing in the Connecticut system is to enable the members personally to speak with and observe the inmate, to determine his attitude towards his crime, readiness for parole and the like. The members feel that this can best be achieved by hearing the inmate's own words, unguided by the presence or promptings of counsel. We find that the state's interest in excluding persons other than the inmate from the hearings outweighs the "need for and usefulness" to the inmate of having such a representative, despite the inmate's concededly great interest in the decision being made.

*Id.* at 84.

334. See *supra* notes 240-45 and accompanying text.

a mental health expert in appropriate cases.<sup>335</sup> In addition, counsel could help a prisoner navigate the difficulty one encounters in simultaneously expressing remorse and mitigation. Given the severity of the crimes, it will be necessary at hearings to confront the circumstance of the offense and explain how the inmate's youth and other factors at the time of the crime mitigate culpability. Counsel could focus on these issues, while the inmate can express remorse and the desire to atone.

Some parole boards take the view that counsel interferes with the board's ability to connect directly with the prisoner and assess whether he or she is genuinely committed to change.<sup>336</sup> Certainly, it is important for the prisoner to speak directly to the decision maker. A decision maker needs to be persuaded by the prisoner that he or she is truly remorseful and reformed.<sup>337</sup> But the presence of counsel need not interfere with the client's direct communication with the board. Counsel could play an important role in investigating, collecting, and presenting factual information so that the release decision is based on a full presentation of the relevant evidence. The prisoner could focus on a personal statement for the board.<sup>338</sup>

The bill considered in Connecticut during the last legislative session provides a possible model regarding the appointment of counsel in juvenile cases.<sup>339</sup> Under the proposal, the parole board would appoint counsel for indigent juvenile offenders twelve months prior to the parole release hearing.<sup>340</sup> Appointed counsel would then

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335. See Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 397–410 (2012) (discussing the mitigating circumstances present in many juvenile offender cases and counsel's role in collecting this evidence).

336. *Holup*, 544 F.2d at 84.

337. There are, of course, dangers in making decisions based on an assessment of remorse. See Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1469, 1520 (2002) (challenging the notion that judges can truly interpret the emotional state of juvenile offenders and questioning "the validity of remorse as a predictor of future character").

338. Rhode Island recognizes the separate roles that counsel and the inmate can play and the ways in which these roles can complement each other. The Parole Board's website states: Inmates do not need to be represented at the initial parole hearing or at any reconsideration hearing. Many inmates do choose to have legal representation when they are uncomfortable speaking on their own behalf. Others choose to have legal representation because they believe that there are mitigating circumstances that an attorney could better explain to the Parole Board. Be advised that even if the inmate is represented by an attorney, the inmate will still have to answer questions from the Parole Board. While the Parole Board does allow attorneys to be present at hearings, the Board does not allow attorneys to speak for the inmate. The Parole Board wants to weigh the inmate's insight and level of remorse and they will only be able to do so by hearing directly from the inmate. Having an attorney present does not provide the inmate with a better chance of getting a positive parole decision.

State of R.I. Parole Bd. & Sex Offender Cmty. Notification Unit, *Frequently Asked Questions*, RI.GOV, <http://www.paroleboard.ri.gov/faq/>.

339. H.B. 6581, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

340. *Id.* § 1(f)(3). A limitation in the Connecticut proposal is that it would allow the Board of Pardons and Paroles to continue its existing (and longstanding) practice of preventing counsel from speaking at the parole release hearing. See *id.* (allowing the

have sufficient time to investigate and develop mitigating evidence, retain a mental health expert, and assist the inmate in preparing a release plan.

In sum, existing parole board restrictions on the role of the prisoner's counsel are problematic. Boards should rethink their policies on attorney involvement in order to ensure meaningful hearings for juvenile offenders.

d. Notice, Recording, Statement of Reasons for Decision, and Review

In addition to the procedures discussed above, several other procedures are important to ensuring meaningful hearings. First, releasing authorities should provide adequate notice to prisoners of the date of a hearing so that prisoners and their attorneys can adequately prepare.<sup>341</sup> Second, to enable review of the decision, parole boards should record hearings and provide a statement of reasons for the decision.<sup>342</sup> Notice, recording, and a statement of reasons are core requirements of a meaningful hearing recognized by courts in many other contexts.<sup>343</sup> Indeed, notice of parole hearings is already required in many jurisdictions, and some parole boards currently record hearings and provide statements of reasons.<sup>344</sup>

Providing a mechanism for direct review of parole board decisions involving juvenile offenders would help ensure that these prisoners receive a meaningful opportunity for release. Allowing appellate review of a parole board's finding of unsuitability is critical to enforcing *Graham*'s meaningful opportunity requirement because it would allow reversal of decisions that were not made in a meaningful or accurate manner. In addition, allowing appellate review would promote greater consistency in decisions by the board and would help foster development and

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offender to speak but limiting counsel to submitting reports and other documents); *see also Holup*, 544 F.2d at 84–85 (upholding Connecticut's practice of preventing counsel from participating at parole hearings).

341. Notice was provided in *Cooke* and *Greenholtz* and thus was not explicitly at issue in those cases. *See Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) (per curiam); *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979). The Court's decision in *Cooke* implies that notice is required if due process protections attach. *See Cooke*, 131 S. Ct. at 862.

342. As with the issue of notice, a statement of reasons was provided in *Cooke* and *Greenholtz*. *Cooke*, 131 S. Ct. at 862; *Greenholtz*, 442 U.S. at 5. Again, the Court's decision in *Cooke* implies that a statement of reasons is required if due process protections attach. *See Cooke*, 131 S. Ct. at 862.

343. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267, 271 (1970) (requiring "timely and adequate notice" and for the decision maker to "state the reasons for his determination and indicate the evidence he relied on").

344. For example, Massachusetts issues written parole release decisions for "lifer hearings"—those involving inmates sentenced to life with the chance of parole for second-degree murder. Notice is provided prior to hearings, and they are recorded by audio and videotape. *Second Degree Lifer Parole Hearing Process*, *supra* note 136. In California, notice is provided for "lifer hearings" and written transcripts of hearings are available. CAL. DEP'T OF CORR. & REHABILITATION, PAROLE SUITABILITY HEARING HANDBOOK 11 (2010), *available at* [http://www.cdcr.ca.gov/Victim\\_Services/docs/BPHHandbook.pdf](http://www.cdcr.ca.gov/Victim_Services/docs/BPHHandbook.pdf). In its post-*Graham* legislation, Louisiana enacted a requirement that the panel deciding whether to release a juvenile offender "render specific findings of fact in support of its decision." LA. REV. STAT ANN. § 15:574.4(d)(3) (West Supp. 2013).

refinement of the meaningful opportunity requirement. Indeed, appellate review can be viewed as an essential ingredient of *Graham*'s meaningful opportunity requirement itself. Part of what makes a process meaningful is the ability to force decision makers to justify their decisions and to be able to challenge these decisions before another body.<sup>345</sup>

### 1. Other Procedural Models

As discussed, existing parole procedures in many states may fail to ensure meaningful hearings for juvenile offenders. As states look to modify existing practices to comply with *Graham* and *Miller*, they may draw upon procedures used for different types of hearings. Below, several possible procedural models are considered.

#### a. Parole Revocation Hearings

Some of the procedures already used by parole boards at parole revocation hearings provide a possible model for states to use for *Graham* hearings. In *Morrissey v. Brewer*,<sup>346</sup> the Supreme Court held that minimal due process rights attach to a decision to revoke parole. The Court required:

- (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, 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.<sup>347</sup>

In *Gagnon v. Scarpelli*,<sup>348</sup> the Court applied the same standards with respect to probation revocation proceedings. The Court in *Gagnon* also found that a parolee or probationer facing revocation has a qualified right to appointed counsel.<sup>349</sup>

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345. Even absent a statutory right to appeal the parole decision, prisoners denied parole could assert in court that their sentences violate the Eighth Amendment because they were not provided a meaningful opportunity for release. However, a statutory right to appeal is preferable for the reasons described, and given the procedural and jurisdictional hurdles that prisoners may encounter in attempting to bring such an Eighth Amendment challenge.

346. 408 U.S. 471 (1972).

347. *Id.* at 489.

348. 411 U.S. 778 (1973).

349. *Id.* at 790. The right attaches if there is a substantial issue regarding whether the alleged violation occurred or, even if it is clear that the violation occurred, there are "substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Id.*



Thus, because of these due process requirements, parole boards already have procedures in place for appointment of counsel for at least some revocation proceedings. In addition, boards must have procedures regarding written notice of revocation hearings, disclosure of evidence to parolees, testimony of witnesses at hearings, and written statements of reasons for decisions. Applying some of these same procedural protections to parole release hearings for juvenile offenders would be a relatively straightforward task.

#### b. Psychiatric Review Boards

Psychiatric review boards provide another possible procedural model for release hearings for juvenile offenders. These boards periodically review patients detained pursuant to findings of not guilty by reason of insanity to determine if they can be released without causing danger to the community.<sup>350</sup> As with hearings under *Graham*, the hearings by the psychiatric review board consider whether someone should be released from confinement—usually after a lengthy period of time. At issue at both types of hearings is whether someone has changed since the time of an offense and can be safely released. Moreover, like the psychiatric review hearings, juvenile offender hearings will often involve the consideration of mental health information.

States use a variety of procedures to review the suitability for release of those found not guilty by reason of insanity. For example, in Connecticut, detailed statutory provisions govern the procedures of the Psychiatric Security Review Board. The person responsible for psychiatric care for the patient must submit a report to the board every six months, and the board must hold a hearing to review the suitability of patients for discharge at least every two years.<sup>351</sup> The patient has the right to appear at all proceedings before the board and, if indigent, to have counsel appointed.<sup>352</sup> Prior to a hearing, “the board, acquittee and state’s attorney may each choose a psychiatrist or psychologist to examine the acquittee.”<sup>353</sup> The acquittee and state’s attorney have the right to examine any documents considered by the board.<sup>354</sup> The hearing must be open to the public,<sup>355</sup> a record must be kept,<sup>356</sup> and an order of the board may be appealed to the court.<sup>357</sup>

Substantially more procedural protections attach to psychiatric review hearings than to parole release hearings, despite some of the similarities between these types

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350. Carolyn Alexander, *Oregon’s Psychiatric Security Review Board: Trouble in Paradise*, 22 LAW & PSYCHOL. REV. 1, 9–13 (1998); Deborah C. Scott, Howard V. Zonana & Marjorie A. Getz, *Monitoring Insanity Acquittees: Connecticut’s Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 981–82 (1990).

351. CONN. GEN. STAT. ANN. §§ 17a-585 to -586 (West 2006).

352. *Id.* § 17a-596(d) (West Supp. 2013).

353. *Id.* § 17a-596(a).

354. *Id.* § 17a-596(d).

355. *Id.*

356. *Id.* § 17a-596(g).

357. *Id.* § 17a-597 (West 2006).

of proceedings.<sup>358</sup> States can look to the procedures utilized at psychiatric hearings as a possible model for *Graham* compliance.

### c. Court-Based Models

Although most states thus far have focused on making juvenile offenders eligible for parole as the means for compliance with *Graham* and *Miller*, the meaningful opportunity for release need not be provided through a parole board process at all. Instead, states could consider a sentence modification mechanism that would allow juvenile offenders to petition a court for resentencing and release.<sup>359</sup>

Currently, in most state systems, there is no mechanism for the court to reevaluate a sentence after a period of time.<sup>360</sup> However, as discussed above, the current draft of the Model Penal Code for sentencing recommends such a “second look” procedure for adult and juvenile offenders.<sup>361</sup> Under the MPC’s proposal, an individual serving a prison sentence for a crime committed under the age of eighteen would be able to petition a court for a sentence modification after serving ten years in prison, and the judge could shorten the sentence at this later point in time if the modified sentence would better serve the purposes of sentencing.<sup>362</sup>

A court-based sentence modification procedure could certainly provide a meaningful opportunity for release within the meaning of the Eighth Amendment.<sup>363</sup> There are some advantages to a court-based approach. Judges

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358. *See Foucha v. Louisiana*, 504 U.S. 71, 78–79 (1992). An individual found not guilty by reason of insanity is “entitled to release when he has recovered his sanity or is no longer dangerous.” *Id.* at 77 (internal quotation marks omitted). Thus, unlike inmates governed by a discretionary parole regime, committed acquittees have an entitlement to release based on certain criteria.

359. For more on judicial sentence modification, see generally Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010), and Margaret Colgate Love & Cecelia Klingele, *First Thoughts About “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011).

360. Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 1 (2003); Klingele, *supra* note 359, at 498. In some jurisdictions, sentence modification is possible but only with the government’s consent. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-39(b) (West 2012) (requiring the consent of prosecutor for modification of sentence longer than three years); FED. R. CRIM. P. 35(b) (resentencing possible, upon government motion, based on prisoner’s substantial assistance in the investigation or prosecution of another). Wisconsin and Maryland have sentence modification procedures that do not rely on the prosecutor’s motion. In Wisconsin, postsentencing rehabilitation is not a ground for sentence modification. *See* Klingele, *supra* note 359, at 507. In Maryland, a sentence modification motion must be filed within ninety days of sentencing, but judges can wait up to five years to act on the motions. *Id.* at 503.

361. *See* MODEL PENAL CODE: SENTENCING §§ 6.11A(h), 305.6 (Tentative Draft No. 2, 2011).

362. *Id.* § 6.11A(h).

363. The MPC proposal leaves many procedural matters to the states, and thus adoption

generally have no occasion to take a second look at sentences that they have previously imposed, and they typically do not come face-to-face with someone who is many years into a lengthy prison sentence.<sup>364</sup> A second-look hearing before a judge would expose the judge to a story of rehabilitation and could make the judge more likely to believe that rehabilitation is possible in future cases. In addition, the hearing may make the meaning of lengthy prison sentences more concrete to the judge. Hence, the judge may be less inclined in future cases to impose a lifelong sentence with no opportunity for review.

On the other hand, precisely because judges are not used to taking a second look at sentences, they may be more reluctant to alter previously imposed sentences, even in the face of compelling accounts of rehabilitation.<sup>365</sup> Parole boards are used to letting at least some people out of prison and view themselves as having expertise in making judgments about who has been reformed and should be released. Although parole boards may be risk adverse, they do actually release some prisoners. Judges, on the other hand, are not used to making this sort of back-end sentencing decision. Nevertheless, judges do make decisions about pretrial release, and about whether to place someone in prison at all. They are thus called upon to make decisions about whether an individual can be safely released into the community. A “second look” sentencing assessment would not be entirely foreign to a judge.

It appears that only three states currently have court-based second-look procedures in place for juvenile offenders.<sup>366</sup> In 1995, the Oregon legislature enacted a second-look procedure.<sup>367</sup> This reform followed legislation in 1994 that created mandatory transfer laws and mandatory minimum sentences for juvenile offenders. The second-look procedure applies to individuals who committed crimes under the age of eighteen and were sentenced to more than twenty-four months imprisonment following transfer to adult court.<sup>368</sup> Under the procedure, the court must hold a hearing when the juvenile offender has served half of the sentence.<sup>369</sup>

The Oregon statute lays out detailed requirements regarding the nature of the second-look hearing. Notice of the hearing must be provided to relevant parties, the hearing must be recorded and open to the public, and indigent prisoners have the

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of the proposal would not automatically provide a meaningful hearing under the Eighth Amendment. *See id.* §§ 6.11(A)(h), 305.6 cmt. In addition, *Graham* focuses on rehabilitation in assessing release suitability, whereas under the MPC the judge considers whether a lesser sentence would better serve the overall “purposes of sentencing.” *Compare Graham v. Florida*, 130 S. Ct. 2011, 2029–30 (2010), with MODEL PENAL CODE: SENTENCING § 305.6(4).

364. *See Sarah French Russell, Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 156–60 (2012).

365. *Id.* (discussing reluctance of courts to revisit sentences, even when there has been an obvious error).

366. These states are Oregon, Delaware, and California.

367. JASON ZIEDENBERG, IMRAN AHMAD & SHANNON WRIGHT, CAMPAIGN FOR YOUTH JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON’S YOUTH 9–10 (2011), available at [http://www.campaignforyouthjustice.org/documents/Misguided\\_Measures\\_July\\_2011.pdf](http://www.campaignforyouthjustice.org/documents/Misguided_Measures_July_2011.pdf).

368. OR. REV. STAT. § 420A.203 (2011).

369. *Id.*

right to appointed counsel.<sup>370</sup> The prisoner has a right to examine all reports and documents submitted to the court and must be given access to records maintained by the Oregon Youth Authority and Department of Corrections.<sup>371</sup> At the hearing, the prisoner “may examine all of the witnesses called by the state, may subpoena and call witnesses to testify on the person’s behalf, and may present evidence and argument.”<sup>372</sup> In considering release, the court must consider various factors regarding the prisoner’s background, offense, and efforts at rehabilitation.<sup>373</sup> The prisoner “has the burden of proving by clear and convincing evidence that [he or she] has been rehabilitated and reformed, and if conditionally released . . . , would not be a threat to the safety of the victim, the victim’s family or the community . . . and . . . would comply with the release conditions.”<sup>374</sup> The court must make specific findings regarding these matters.<sup>375</sup> The prisoner or the state may appeal an order entered under the statute.<sup>376</sup>

Thus, procedurally, the statute provides a structure for a hearing that gives prisoners a meaningful opportunity to present a case for release. Other states can look to this Oregon statute in creating similar court-based second-look procedures, or in adopting procedures for their parole boards to use.

The second-look procedure for juvenile offenders recently enacted in Delaware also permits prisoners to petition the court for resentencing, as does the new statute in California. The Delaware statute specifies no criteria or procedures for the court

370. *Id.* § 420A.203(2)(c)–(d), (3)(b), (3)(h)–(i).

371. *Id.* § 420A.203(3)(e)–(f).

372. *Id.* § 420A.203(3)(g).

373. These factors are the following:

- (A) The experiences and character of the person before and after commitment to the Oregon Youth Authority or the Department of Corrections;
- (B) The person’s juvenile and criminal records;
- (C) The person’s mental, emotional and physical health;
- (D) The gravity of the loss, damage or injury caused or attempted, during or as part of the criminal act for which the person was convicted and sentenced;
- (E) The manner in which the person committed the criminal act for which the person was convicted and sentenced;
- (F) The person’s efforts, participation and progress in rehabilitation programs since the person’s conviction;
- (G) The results of any mental health or substance abuse treatment;
- (H) Whether the person demonstrates accountability and responsibility for past and future conduct;
- (I) Whether the person has made and will continue to make restitution to the victim and the community;
- (J) Whether the person will comply with and benefit from all conditions that will be imposed if the person is conditionally released;
- (K) The safety of the victim, the victim’s family and the community;
- (L) The recommendations of the district attorney, the Oregon Youth Authority and the Department of Corrections; and
- (M) Any other relevant factors or circumstances raised by the state, the Oregon Youth Authority, the Department of Corrections or the person.

*Id.* § 420A.203(4)(b).

374. *Id.* § 420A.203(3)(k).

375. *See id.* § 420A.203(4)(a).

376. *Id.* § 420A.203(6).

to use in considering resentencing requests.<sup>377</sup> In California, even if the judge grants a resentencing request, the judge cannot actually release the prisoner. Rather, the court can simply convert the LWOP sentence to a sentence of life with parole eligibility.<sup>378</sup> Thus, California's new parole release hearing procedures for juveniles must also be considered to determine if the scheme complies with the Eighth Amendment.<sup>379</sup>

In sum, states amending their laws to comply with *Graham* and *Miller* should ensure that legislation specifically addresses the procedures that will be used for considering release for juvenile offenders. In establishing these procedures, states can draw upon procedural models used at parole revocation and psychiatric review board hearings. In addition, states can consider court-based models such as Oregon's second-look procedure.

#### CONCLUSION

After *Graham* and *Miller*, states are subject to a new constitutional requirement to provide a "meaningful opportunity to obtain release" for at least some categories of juvenile offenders. This requirement encompasses three distinct components: (1) a chance of release at a meaningful point in time, (2) a realistic likelihood of release for the rehabilitated, and (3) a meaningful opportunity to be heard.

For the most part, states have responded to *Graham* and *Miller* by simply making juvenile offenders eligible for parole under existing parole practices. Yet existing parole systems were designed for a different purpose and have previously operated free from constitutional constraints. In ordinary adult cases, states do not need to provide prisoners with a realistic chance of release or a meaningful hearing. Indeed, the survey data presented in this Article reveals parole practices in many states that impede meaningful consideration of an inmate's suitability for release. Some states may not be able to rely on their existing parole board practices to provide a meaningful opportunity for release as the Eighth Amendment requires and may need to craft special rules for boards to use when considering release for juvenile offenders serving lengthy sentences.

The scope of the Eighth Amendment's meaningful opportunity requirement is relevant not only in states that have imposed LWOP sentences on juvenile offenders in nonhomicide cases or that mandate LWOP for homicide offenses. Rather, even states that impose sentences of life *with* the possibility of parole on juvenile offenders must also ensure that their parole processes in fact provide prisoners with a meaningful opportunity for release. All states should examine whether their parole systems are operating consistently with the new constitutional requirements.

*Graham* and *Miller* also provide an opportunity for states to rethink the manners in which their parole boards treat adult offenders. If the legislature (and/or judge or jury) has provided a prisoner with the chance for parole, then this chance should be meaningful. Providing meaningful hearings for all parole-eligible prisoners will lead to more accurate decisions and foster a sense of fairness and legitimacy about the parole system.

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377. See *supra* notes 123–25 and accompanying text.

378. See *supra* notes 126–28 and accompanying text.

379. See *supra* notes 129–34 and accompanying text.

## APPENDIX

## SURVEY OF STATE PAROLE PRACTICES

**Table 1.** Direct contact with prisoner

	Interview or hearing with inmate in at least some cases?	Called interview (I) or hearing (H)?	How conducted? In person (P); video (V); telephone (T)	Conducted exclusively by releasing authority member/s?
Alabama	N	n/a	n/a	n/a
Alaska	Y	H	P, T	Y
Arizona	X	X	X	X
Arkansas	Y	H	P, V	Y
California	Y	H	P	Y
Colorado	Y	H	V, T	Y
Connecticut	Y	Both	P, V, T	N
Delaware	Y	H	P	Y
Florida	Y	I	P	N
Georgia	Y	I	P	N
Hawaii	Y	H	P, V	Y
Idaho	Y	Both	P, V, T	N
Illinois	Y	H	P	Y
Indiana	X	X	X	X
Iowa	Y	I	V	Y
Kansas	Y	H	P, V, T	Y
Kentucky	Y	H	P, V	Y
Louisiana	Y	H	V	Y
Maine	X	X	X	X
Maryland	Y	H	P, V	N
Massachusetts	Y	Both	P	N
Michigan	Y	I	V	Y
Minnesota	Y	H	V	Y
Mississippi	X	X	X	X
Missouri	Y	H	P, T	N
Montana	Y	H	P, T	Y
Nebraska	Y	H	P	Y
Nevada	Y	H	P, V	N
New Hampshire	Y	H	P, V	Y
New Jersey	Y	H	P, V	N
New Mexico	Y	H	P, V	Y
New York	Y	H	V	Y
North Carolina	N	n/a	n/a	n/a
North Dakota	Y	H	P, V, T	Y
Ohio	Y	H	V	Y
Oklahoma	X	X	X	X
Oregon	Y	H	P, V, T	Y
Pennsylvania	Y	I	P, V	N
Rhode Island	Y	H	P, V, T	Y
South Carolina	Y	H	V	Y
South Dakota	Y	H	P, V	Y
Tennessee	Y	H	P, V	N
Texas	Y	I	P	N
Utah	Y	H	P, V	N
Vermont	Y	H	P, V, T	Y
Virginia	Y	I	P, V, T	N
Washington	Y	H	P, V	Y
West Virginia	Y	I	P, V	Y
Wisconsin	Y	I	P, V, T	Y
Wyoming	Y	Both	P	Y

**Table 2.** Input from attorney for prisoner

	Attorney input considered?	In-person input from attorney?	Attorney present at inmate interview or hearing?	Appointment of counsel (in any cases)?
Alabama	Y	Y	n/a	N
Alaska	Y	Y	Y	N
Arizona	X	X	X	X
Arkansas	Y	Y	Y	N
California	Y	Y	Y	Y
Colorado	N	n/a	Y	Y
Connecticut	N	n/a	Y	N
Delaware	Y	Y	Y	N
Florida	Y	Y	N	N
Georgia	Y	Y	N	N
Hawaii	Y	Y	Y	Y
Idaho	Y	Y	Y	N
Illinois	Y	Y	Y	N
Indiana	X	X	X	X
Iowa	N	n/a	Y	N
Kansas	Y	Y	Y	N
Kentucky	Y	N	N	N
Louisiana	Y	Y	Y	N
Maine	X	X	X	X
Maryland	Y	Y	N	N
Massachusetts	Y	Y	Depends	Y
Michigan	N	n/a	N	N
Minnesota	Y	Y	Y	N
Mississippi	X	X	X	X
Missouri	Y	Y	Y	N
Montana	Y	Y	Y	Y
Nebraska	Y	Y	Y	N
Nevada	Y	Y	Y	N
New Hampshire	Y	Y	Y	N
New Jersey	Y	N	N	Y
New Mexico	N	N	N	N
New York	Y	N	N	N
North Carolina	Y	N	n/a	N
North Dakota	Y	Y	Y	N
Ohio	Y	Y	N	Y
Oklahoma	X	X	X	X
Oregon	Y	Y	Y	Y
Pennsylvania	Y	N	N	N
Rhode Island	Y	Y	Y	N
South Carolina	Y	Y	Y	N
South Dakota	Y	Y	Y	N
Tennessee	Y	Y	Y	Y
Texas	Y	Y	N	N
Utah	Y	N	Y	N
Vermont	N	n/a	N	N
Virginia	Y	Y	N	N
Washington	Y	Y	Y	Y
West Virginia	Y	Y	Y	N
Wisconsin	Y	N	N	N
Wyoming	Y	Y	Y	N

**Table 3.** Other input from attorney for prisoner

	Can attorney present mental health expert testimony?	Can attorney present other witness testimony or statements?	Can attorney present written mental health report?
Alabama	Y	Y	Y
Alaska	Y	—	Y
Arizona	X	X	X
Arkansas	Y	Y	Y
California	Y	N	Y
Colorado	N	N	N
Connecticut	N	N	Y
Delaware	Y	Y	Y
Florida	Y	Y	Y
Georgia	N	N	Y
Hawaii	Y	Y	Y
Idaho	Y	Y	Y
Illinois	Y	Y	Y
Indiana	X	X	X
Iowa	N	N	N
Kansas	Y	Y	Y
Kentucky	N	N	N
Louisiana	Y	Y	Y
Maine	X	X	X
Maryland	N	N	Y
Massachusetts	Depends	Depends	Y
Michigan	N	N	N
Minnesota	N	N	N
Mississippi	X	X	X
Missouri	N	N	Y
Montana	Y	Y	Y
Nebraska	Y	Y	Y
Nevada	Y	Y	Y
New Hampshire	Y	Y	Y
New Jersey	N	N	Y
New Mexico	N	N	N
New York	N	N	Y
North Carolina	N	N	Y
North Dakota	Y	Y	Y
Ohio	N	N	Y
Oklahoma	X	X	X
Oregon	Y	Y	Y
Pennsylvania	N	N	Y
Rhode Island	Y	Y	Y
South Carolina	Y	N	Y
South Dakota	Y	Y	Y
Tennessee	Y	Y	Y
Texas	N	N	Y
Utah	Y	N	Y
Vermont	N	N	N
Virginia	N	N	N
Washington	N	N	Y
West Virginia	N	N	N
Wisconsin	N	N	N
Wyoming	Y	Y	Y



**Table 4.** Input from prosecutor

	Input from prosecutor considered?	In-person input from prosecutor?	Prosecution witness testimony/statement permitted?
Alabama	Y	Y	Y
Alaska	Y	Y	N
Arizona	X	X	X
Arkansas	Y	Y	Y
California	Y	Y	Y
Colorado	Y	Y	N
Connecticut	Y	Y	N
Delaware	Y	Y	Y
Florida	Y	Y	Y
Georgia	Y	N	N
Hawaii	Y	Y	Y
Idaho	Y	Y	Y
Illinois	Y	Y	Y
Indiana	X	X	X
Iowa	Y	N	N
Kansas	Y	Y	N
Kentucky	Y	Y	N
Louisiana	Y	Y	Y
Maine	X	X	X
Maryland	Y	Y	N
Massachusetts	Y	Y	Depends
Michigan	Y	N	N
Minnesota	Y	N	N
Mississippi	X	X	X
Missouri	Y	Y	Y
Montana	Y	Y	Y
Nebraska	Y	Y	Y
Nevada	Y	N	N
New Hampshire	Y	Y	Y
New Jersey	Y	N	N
New Mexico	N	N	N
New York	Y	N	N
North Carolina	Y	N	N
North Dakota	Y	Y	Y
Ohio	Y	Y	N
Oklahoma	X	X	X
Oregon	Y	Y	N
Pennsylvania	Y	N	N
Rhode Island	Y	Y	N
South Carolina	Y	Y	N
South Dakota	Y	Y	Y
Tennessee	Y	Y	Y
Texas	Y	N	N
Utah	Y	N	N
Vermont	Y	Y	N
Virginia	Y	Y	N
Washington	Y	N	N
West Virginia	Y	Y	N
Wisconsin	Y	N	N
Wyoming	N	n/a	N

**Table 5.** Input from victim

	Input from victim considered?	In-person input from victim?
Alabama	Y	Y
Alaska	Y	Y
Arizona	X	X
Arkansas	Y	Y
California	Y	Y
Colorado	Y	Y
Connecticut	Y	Y
Delaware	Y	Y
Florida	Y	Y
Georgia	Y	Y
Hawaii	Y	Y
Idaho	Y	Y
Illinois	Y	Y
Indiana	X	X
Iowa	Y	Y
Kansas	Y	Y
Kentucky	Y	Y
Louisiana	Y	Y
Maine	X	X
Maryland	Y	Y
Massachusetts	Y	Y
Michigan	Y	Y
Minnesota	Y	Y
Mississippi	X	X
Missouri	Y	Y
Montana	Y	Y
Nebraska	Y	Y
Nevada	Y	Y
New Hampshire	Y	Y
New Jersey	Y	Y
New Mexico	Y	Y
New York	Y	Y
North Carolina	Y	Y
North Dakota	Y	Y
Ohio	Y	Y
Oklahoma	X	X
Oregon	Y	Y
Pennsylvania	Y	N
Rhode Island	Y	Y
South Carolina	Y	Y
South Dakota	Y	Y
Tennessee	Y	Y
Texas	Y	Y
Utah	Y	Y
Vermont	Y	Y
Virginia	Y	Y
Washington	Y	Y
West Virginia	Y	Y
Wisconsin	Y	Y
Wyoming	Y	Y

**Table 6.** Input from other sources

	Written case history/summaries compiled?	Does parole board or DOC employee compile summary?	Input from others who know inmate?	In-person input from others who know inmate?
Alabama	Y	Board	Y	Y
Alaska	Y	DOC	N	n/a
Arizona	X	X	X	X
Arkansas	Y	DOC	Y	Y
California	Y	DOC	Y	N
Colorado	Y	DOC	Y	Y
Connecticut	Y	Board	Y	N
Delaware	Y	Both	Y	Y
Florida	Y	Both	Y	Y
Georgia	Y	Board	Y	N
Hawaii	Y	DOC	Y	Y
Idaho	Y	Board	Y	Y
Illinois	Y	Both	Y	Y
Indiana	X	X	X	X
Iowa	Y	DOC	Y	N
Kansas	Y	Board	Y	Y
Kentucky	Y	DOC	Y	Y
Louisiana	Y	DOC	Y	Y
Maine	X	X	X	X
Maryland	Y	Board	Y	Y
Massachusetts	Y	Both	Y	Depends
Michigan	Y	DOC	Y	Y
Minnesota	Y	DOC	Y	N
Mississippi	X	X	X	X
Missouri	Y	Both	Y	Y
Montana	Y	Both	Y	Y
Nebraska	Y	Both	Y	Y
Nevada	Y	DOC	Y	Y
New Hampshire	Y	DOC	Y	Y
New Jersey	Y	Board	Y	N
New Mexico	N	n/a	N	N
New York	Y	DOC	Y	N
North Carolina	Y	Board	Y	Y
North Dakota	Y	DOC	Y	Y
Ohio	Y	Both	Y	Y
Oklahoma	X	X	X	X
Oregon	Depends	Both	Y	Y
Pennsylvania	Y	Board	Y	N
Rhode Island	Y	DOC	Y	N
South Carolina	Y	Board	Y	Y
South Dakota	Y	DOC	Y	Y
Tennessee	Y	Both	Y	Y
Texas	Y	Board	Y	N
Utah	Y	DOC	Y	N
Vermont	Y	DOC	Y	Y
Virginia	Y	Both	Y	Y
Washington	Y	Board	Y	N
West Virginia	Y	DOC	Y	Y
Wisconsin	Y	DOC	Y	N
Wyoming	Y	DOC	Y	Y

**Table 7.** Prisoner access to information

	Access to prosecutor input?	Access to victim input?	Access to mental health evaluation? (where conducted by parole board)
Alabama	N	N	n/a
Alaska	Y	Y	n/a
Arizona	X	X	X
Arkansas	Y	Limited	n/a
California	Y	—	Y
Colorado	N	N	n/a
Connecticut	Y	Y	Y
Delaware	N	N	N
Florida	Limited	Limited	n/a
Georgia	N	N	N
Hawaii	Y	Y	Y
Idaho	N	N	n/a
Illinois	Limited	N	n/a
Indiana	X	X	X
Iowa	N	N	n/a
Kansas	N	N	n/a
Kentucky	Limited	Limited	n/a
Louisiana	N	N	n/a
Maine	X	X	X
Maryland	Limited	N	N
Massachusetts	Y	Some cases	n/a
Michigan	Y	N	Y
Minnesota	Limited	With consent	Y
Mississippi	X	X	X
Missouri	Y	N	n/a
Montana	Y	—	N
Nebraska	N	N	n/a
Nevada	Limited	With consent	n/a
New Hampshire	Y	Y	n/a
New Jersey	Limited	N	N
New Mexico	N	N	n/a
New York	N	N	N
North Carolina	N	N	N
North Dakota	Limited	N	n/a
Ohio	Limited	N	N
Oklahoma	X	X	X
Oregon	Y	Y	Y
Pennsylvania	N	N	N
Rhode Island	With consent	With consent	N
South Carolina	Y	Limited	N
South Dakota	Y	Limited	n/a
Tennessee	Limited	N	N
Texas	N	N	n/a
Utah	Y	Y	Y
Vermont	Y	Limited	Y
Virginia	N	N	n/a
Washington	Y	Limited	Y
West Virginia	N	Limited	n/a
Wisconsin	Limited	N	—
Wyoming	n/a	N	Y