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## A Realistic and Meaningful Opportunity for Release: Recommendations for Parole Review for People Serving Long Sentences for Crimes Committed as Youth

TESSA BIALEK\*

### INTRODUCTION

In the late 1980s and 1990s, rising crime rates and the myth of the juvenile superpredator led many states to change the way that people were prosecuted and sentenced for crimes they committed under age 18, to devastating effect. The confluence of harsher penalties, mandatory minimum sentences, and easier, and sometimes automatic, transfer from juvenile to adult court, meant that thousands of children across the country received adult sentences for their crimes, often without any consideration of their youth. Over the same period, developmental research began to emerge that demonstrated that the adolescent brain is not yet fully developed and that the psychosocial maturity of youths differs fundamentally from that of adults. Studies confirmed that young people exhibit heightened immaturity, impulsivity, risk taking, and susceptibility to peer pressure. But studies also showed that youths are likely to outgrow criminal behavior, which for young people typically reflects the transient qualities of youth rather than irreparable criminality.

In a series of decisions beginning in 2005, the United States Supreme Court, citing this emerging understanding of neurological and psychosocial

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development, acknowledged that children are different for purposes of sentencing, less culpable and more capable of change than adults who commit the same crimes. It therefore held that the Eighth Amendment prohibits treating children the same as adults in sentencing, imposing categorical prohibitions on the death penalty for crimes committed under age 18 and on life without parole for nonhomicide crimes committed under age 18. It further held that life without parole is a disproportionate sentence for most people who commit homicide crimes under age 18, and that the penalty may be imposed only after consideration of the mitigating factors of youth, and only in the rare instance in which a homicide crime reflects irreparable corruption rather than the transient immaturity of youth, although no express finding is required. Taken together, these decisions require a realistic and meaningful opportunity for release for the vast majority of people sentenced for a crime committed under age 18.

Thus, states began to reform how they sentenced children by abolishing juvenile life without parole, implementing individualized resentencing proceedings, expanding eligibility for sentence modification or parole, or some combination of these and other reforms. In the wake of such reforms, however, more people than ever are serving life or long sentences with parole eligibility. For many serving parole eligible sentences, parole processes and procedures also implicate Eighth Amendment protections. Parole processes that don't enable realistic review or a meaningful opportunity to demonstrate post-crime maturity or rehabilitation may also raise due process, state constitutional, or other legal issues. More broadly, robust parole processes offer an important course correction. For anyone in this cohort, parole offers an opportunity to reevaluate long sentences in light of what we now know about youth psychosocial and neurological development. Meaningful parole consideration in this context can promote the rehabilitative ideal and support people sentenced as children in realizing productive adult lives outside of prison.

In recent years, people serving life or other lengthy sentences for crimes committed under age 18 have filed lawsuits challenging parole processes and procedures that, they argue, fail to provide the requisite consideration of youth or realistic and meaningful opportunity for release. These lawsuits challenge decision-making criteria that fail to emphasize youth-related factors, or that focus on offense conduct to the exclusion of post-crime maturity and rehabilitation. They also challenge parole procedures that limit opportunities to correct the record or ensure accuracy, impede a meaningful showing of post-crime growth and change, or preclude judicial review. The results of these lawsuits have been mixed at best—some courts have rejected any efforts to apply the Supreme Court's Eighth Amendment jurisprudence in this context, and others have affirmed anemic parole processes under which few are ever released. But, in some states, these lawsuits have resulted in judicial decisions or settlement agreements that offer guidance on what

parole should look like in this context. And elsewhere, litigation has complemented or catalyzed legislative reform efforts, resulting in new policies and procedures for parole review of this cohort. Building on the case law and legislative reforms, this article proposes model policies for robust constitutional compliance and meaningful, comprehensive parole review for people serving long sentences for crimes committed as youth.

The article proceeds as follows:

PART I describes the changes in law in the late 1980s and early 1990s that resulted in a marked increase in young people sentenced to life or life-like sentences, as well as the evolving understanding of psychosocial and neurological development that followed.

PART II summarizes the U.S. Supreme Court's Eighth Amendment jurisprudence on this topic.

PART III discusses the subsequent changes that states across the country have made to the ways that they sentence people for crimes committed under age 18, the ensuing rise in parole-eligible life and life-like sentences for that cohort, and the ways in which existing parole systems fell (and continue to fall) short.

PART IV explores the constitutional dimensions of parole review in this context and the judicial decisions that have begun to fill in the contours of the relevant requirements.

Finally, PART V offers model policies, with commentary, addressing the substantive and procedural components of parole review for people sentenced for crimes committed under age 18. The model policies aim to ensure a realistic and meaningful opportunity for release that is based on assessment of youth and post-crime maturity and rehabilitation, with procedures to support decision-makers in comprehensive and accurate parole review.

#### I. BACKGROUND: THE MYTH OF THE JUVENILE SUPERPREDATOR, CHANGES IN YOUTH PROSECUTION AND SENTENCING, AND AN EMERGING UNDERSTANDING OF PSYCHOSOCIAL AND NEUROLOGICAL DEVELOPMENT

In the late 1980s and early 1990s, crime, including violent crime, was at a high point in the United States,<sup>1</sup> including a marked rise in violent crime committed by people under the age of 18.<sup>2</sup> This rise in crime captured the attention and fear of the public, and led to criticism of the juvenile justice system as inadequate to confront these perceived threats.<sup>3</sup> During this

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<sup>1</sup> Crime and violent crime rates peaked in that era in 1991. *See* MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUST., CRIME TRENDS: 1990–2016, 3, 6 (2017).

<sup>2</sup> *See, e.g.*, JEFFREY BUTTS & JEREMY TRAVIS, URB. INST.: JUST. POL'Y CTR., THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, 2 (2002) (reporting that the number of juvenile arrests for "Violent Index" offenses grew 64 percent between 1980 and 1994, and that the juvenile arrest rate for murder grew 167 percent between 1984 and 1993 alone).

<sup>3</sup> *Id.*

period, a theory emerged that purported to explain this rise in violent crime by youths: the juvenile “superpredator.”<sup>4</sup> Political scientist John J. DiIulio, Jr., then a Princeton University professor, first used the term in 1995, with clear racial undertones,<sup>5</sup> to describe the “ever-growing numbers of hardened, remorseless juveniles who were showing up in the system” and to predict “a sharp increase in the number of super crime-prone young males,” raised in “abject moral poverty” and poised to “do what comes ‘naturally’: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.”<sup>6</sup> DiIulio predicted the “need to incarcerate at least 150,000 juvenile criminals in the years just ahead.”<sup>7</sup> The superpredator theory at once described and fueled a phenomenon already visible in changes being made to how states, and judges, sentenced young people: a belief that youths who committed serious crimes were somehow *more* dangerous than adults and *more* deserving of the harshest penalties.

During this era, nearly every state in the nation reformed the way that it prosecuted and sentenced people under age 18 for serious crimes, redrawing the boundaries of the juvenile court and exposing many more youth to the adult criminal justice system and its penalties.<sup>8</sup> Previously, transfer to adult court and imposition of adult punishment was rare.<sup>9</sup> In this period, however, states amended laws to make it easier to try young people in the adult system, including lowering the minimum age of adult court jurisdiction, shifting discretion to prosecutors to initiate proceedings in adult court through charging decisions, expanding the kinds of crimes that enabled or mandated transfer to adult court, and withdrawing juvenile jurisdiction for certain categories of crimes.<sup>10</sup> Simultaneously, changes made to many

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<sup>4</sup> See, e.g., *State v. Belcher*, 342 Conn. 1, 14 (2022) (noting that DiIulio’s “dire predictions centered disproportionately on the demonization of Black male teens”).

<sup>5</sup> *Id.* at 13.

<sup>6</sup> John DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

<sup>7</sup> *Id.*

<sup>8</sup> See *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later>; John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 584–85 (2016) (“From 1992 to 1999, forty-nine states and the District of Columbia amended their transfer statutes to make it easier for juveniles to be tried in adult court and face adult sentences.”).

<sup>9</sup> ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 4 (2008).

<sup>10</sup> See, e.g., HUM. RTS. WATCH & AMNESTY INT’L, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* (2005), <https://www.hrw.org/report/2005/10/12/rest-their-lives/life-without-parole-child-offenders-united-states> (noting that rates of JLWOP for black youth were ten times greater than for white youth); Mills, *supra* note 8, at 585 (describing changes including lowering the minimum age of transfer, expanding the catalogue of offenses permitting or requiring transfer, shifting discretion from judges to prosecutors, and noting that by 1999, more than half of states had mandatory transfer for some crimes); see also, MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, SENT’G PROJECT, *THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT* 17 (2004) (noting that between 1992 and 1995, 40 states and the District of Columbia passed laws making it easier to try people under age 18 in adult court, and that many of these laws provided for automatic transfer); PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTONE, U.S. DEP’T OF JUST., *TRYING*

adult criminal justice systems increased the prevalence of mandatory minimum sentences, reduced opportunities for early release under a Truth in Sentencing model, abolished parole in many states, and, generally, increased the penalties imposed.<sup>11</sup> And many parole boards across the country reformed their approach to parole during this era, changing decision-making criteria and procedures for people serving life sentences in ways that drastically reduced release rates.<sup>12</sup>

Thus the nation began to condemn young people to die in prison in staggering numbers and with racially disparate effect.<sup>13</sup> Between 1985 and 1994, the number of people tried as adults for crimes committed under age 18 increased by 71%, and black youth were more likely than white youth to be transferred to the adult criminal justice system.<sup>14</sup> By the year 2000,

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JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (Sept. 2011), <https://www.ojp.gov/pdffiles1/ojdp/232434.pdf> (“In the 1980s and 1990s, legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts.”); Katie Rose Quandt, *Why Does the U.S. Sentence Children to Life in Prison?*, JSTOR DAILY (Jan. 31, 2018), <https://daily.jstor.org/u-s-sentence-children-life-prison/> (“[B]etween 1990 and 1996, forty states passed laws making it easier for juveniles to be prosecuted as adults.”) (citing “a 1999 report [finding] that when juveniles were transferred to adult court and convicted of murder, they received, on average, longer sentences than adults convicted of the same crime”); ASHLEY NELLIS, SENT’G PROJECT, YOUTH SENTENCED TO LIFE IMPRISONMENT (2019), <https://www.sentencingproject.org/fact-sheet/youth-sentenced-to-life-imprisonment/> (describing the changes in crime policy after the crime wave of the late 1980s, including mandatory minimum sentences that limited judicial discretion in the adult system).

<sup>11</sup> Nellis, *supra* note 10; see also Mauer, King & Young, *supra* note 11, at 3 (noting that between 1992 and 2003, the lifer population in United States prisons increased by 83%); DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21<sup>ST</sup> CENTURY: SETTING THE STAGE FOR THE FUTURE 12 (2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf> (“Two-thirds of the States established truth-in-sentencing laws under the 85-percent test. To satisfy the 85-percent requirement, States limited the power of parole boards to set release dates, the power of prison managers to award good-time, or earned-time, or both.”); TIMOTHY A. HUGHES, DORIS JAMES WILSON & ALLEN J. BECK, U.S. DEP’T OF JUST., TRENDS IN STATE PAROLE, 1990–2000 (2001), <https://bjs.ojp.gov/content/pub/pdf/tsp00.pdf> (“By the end of 2000, 16 States had abolished discretionary release from prison by a parole board for all offenders. Another four States had abolished discretionary parole for certain violent offenses or other crimes against a person.”).

<sup>12</sup> For example, between 1993 and 2005, Michigan rehailed its Lifer Parole processes with the explicit purpose of “making more criminals serve more time and keeping many more locked up for as long as possible.” CITIZENS ALL. ON PRISONS AND PUB. SPENDING, NO WAY OUT: MICHIGAN’S PAROLE BOARD REDEFINES THE MEANING OF “LIFE” 10 (2004), <https://static.prisonpolicy.org/scans/cappsmi/fullliferreport.pdf> (citing, too, comments made on behalf of the state’s parole board members in 2001 that “[t]he parole board believes a life sentence means life in prison”). Changes during this period included increasing the minimum amount of time served before parole eligibility, new decision-making guidelines, eliminating the right to appeal denial of parole, and eliminating the requirement that the board provide written reasons for denial. *Id.* at 10–11. These changes, and the resulting increase in the lifer population in the state, tracked national trends; the nation’s lifer population doubled from 1984 to 1992, and then grew by an additional 83% from 1992 to 2003. *Id.* at 17.

<sup>13</sup> E.g., Mills, *supra* note 8, at 579–80 (describing the racial inequities and noting “[n]on-whites are overrepresented among the JLWOP population in ways perhaps unseen in any other aspect of our criminal justice system” and that “[t]his kind of disparity harkens back to the inequitable sentencing practices that developed during the Jim Crow Era.”).

<sup>14</sup> CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, THE ORIGINS OF THE SUPERPREDATOR: THE CHILD STUDY MOVEMENT TO TODAY (2021), <https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf>; see also HUM. RTS. WATCH & AMNESTY INT’L, *supra* note 10 (noting that from the early 1980s to the mid-1990s, the relative percentage of black youth admitted to prison grew steeply, while declining for white youth).

estimates suggested that 250,000 children annually were charged as adults in the United States.<sup>15</sup> Many of these children faced life- or life-like sentences, and remained behind bars years later, even as sentencing practices affecting young people began to change, albeit with persistent racial disparities.<sup>16</sup>

Youth crime was in decline by the mid 1990s,<sup>17</sup> undermining the superpredator theory, which DiIulio himself soon repudiated.<sup>18</sup> Acknowledging the misguided approach to sentencing young people in that era, at least one court has since found that a sentencing court's reliance on the "materially false" superpredator theory required resentencing, citing the "dehumanizing racial stereotypes" underlying the theory and noting that "[b]y labeling a juvenile as a superpredator, the very characteristics of youth that should serve as mitigating factors in sentencing . . . are treated instead as aggravating factors justifying harsher punishment."<sup>19</sup>

And at the turn of the century, a new understanding of psychosocial and neurological development began to emerge that contradicted the then-prevailing narratives. New research made clear that the brain does not fully develop until a person is in their early-to-mid 20s; before this time, the undeveloped frontal cortex affects judgment and behavior in important ways.<sup>20</sup> Moreover, psychosocial and behavioral studies demonstrated that, as compared to adults, young people are more impulsive, less capable of weighing risks and rewards or understanding the consequences of their actions, and more susceptible to negative influence and peer pressure.<sup>21</sup> In this context, researchers posited, crimes committed by immature young people typically reflect the transient qualities of youth, rather than

<sup>15</sup> MARCY MISTRETT, THE SENT'G PROJECT, *YOUTH IN ADULT COURTS, JAILS, AND PRISONS* 1 (2021), <https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf>.

<sup>16</sup> See, e.g., HUM. RTS. WATCH & AMNESTY INT'L, *supra* note 10 (noting that rates of JLWOP for black youth were ten times greater than for white youth).

<sup>17</sup> Shay Bilchik, U.S. Dept. of Just., *Challenging the Myths*, 1999 NAT'L REP. SERIES, at 2 (Feb. 2000), <https://www.ojp.gov/pdffiles1/ojdp/178993.pdf> (noting that by 1995, juvenile violent crime had returned to its traditional level, contrary to the superpredator crime wave predictions); see also Butts & Travis, *supra* note 2, at 10 ("Whatever forces combined to produce the drop in violent crime after 1994, they appear to have had their strongest effects on young people, the very demographic group that some experts believed would overwhelm American society by the end of the 1990s with alarmingly high levels of violence. The juvenile 'super predators' did not appear as predicted.").

<sup>18</sup> E.g., Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-youngsuperpredators-bush-aide-has-regrets.html>.

<sup>19</sup> State v. Belcher, 268 A.3d 616, 628–29 (Conn. 2022).

<sup>20</sup> SCOTT & STEINBERG, *supra* note 9, at 13–16.

<sup>21</sup> See, e.g., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 43 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013), <https://nap.nationalacademies.org/catalog/14685/reforming-juvenile-justice-a-developmental-approach>; Brief for the American Psychological Ass'n, American Psychiatric Ass'n, National Ass'n of Social Workers & Mental Health America as Amici Curiae Supporting Petitioners at 3–4, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

intractable bad character, because most young people will outgrow criminal behavior in adulthood.<sup>22</sup>

But the damage wrought by changes to youth prosecution and sentencing had been done and continued. By 2013, there were more than 10,000 people serving life or life without parole sentences for crimes they had committed under age 18.<sup>23</sup> Moreover, a 2005 report found that black children received life without parole sentences at ten times the rate of white children,<sup>24</sup> and a 2009 report estimated that of the 6,807 people serving life or life without parole sentences for crimes committed under age 18, 77% were people of color.<sup>25</sup>

## II. U.S. SUPREME COURT JURISPRUDENCE: EIGHTH AMENDMENT LIMITS ON SENTENCES FOR CRIMES COMMITTED UNDER AGE 18

In a series of decisions beginning in 2005, the United States Supreme Court made clear that youth matters in sentencing and that the Eighth Amendment's prohibition on "cruel and unusual punishments"<sup>26</sup> limits the sentences that may be imposed on people convicted of crimes committed under age 18. These decisions reflected the emerging understanding of neurological and psychosocial development and sparked changes to the sentencing landscape for young people across the country.

The Court first addressed the issue in 2005 in *Roper v. Simmons*, which held that the Eighth Amendment prohibited the imposition of the death penalty as punishment for crimes committed under age 18.<sup>27</sup> Looking to the emerging developmental research, in a majority opinion by Justice Kennedy, the *Roper* Court reasoned that "juvenile offenders cannot with reliability be classified among the worst offenders," citing their "comparative immaturity and irresponsibility," heightened susceptibility "to negative influences and outside pressures," and transitory personality traits, which "render suspect any conclusion that a juvenile falls among the worst offenders."<sup>28</sup> Ultimately, the Court concluded that because it is impossible to accurately distinguish "between the juvenile offender whose crime reflects unfortunate yet transient immaturity," for whom the death penalty would be a disproportionate sentence, and "the rare juvenile offender whose crime

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<sup>22</sup> Brief for the American Psychological Ass'n at 4, *Graham*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

<sup>23</sup> See ASHLEY NELLIS, SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA (2013), <https://www.sentencingproject.org/reports/life-goes-on-the-historic-rise-in-life-sentences-in-america/>.

<sup>24</sup> HUM. RTS. WATCH & AMNESTY INT'L, *supra* note 10, at 1.

<sup>25</sup> ASHLEY NELLIS & RYAN S. KING, SENT'G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (2009), [https://www.sentencingproject.org/app/uploads/2023/01/inc\\_NoExit\\_Sept2009.pdf](https://www.sentencingproject.org/app/uploads/2023/01/inc_NoExit_Sept2009.pdf).

<sup>26</sup> The Eighth Amendment, applicable to the states through the Fourteenth Amendment, reads, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>27</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>28</sup> *Id.* at 569–70.

reflects irreparable corruption,” the sentence could not constitutionally be imposed.<sup>29</sup>

In 2010, in *Graham v. Florida*, the Court held that life without parole sentences violated the Eighth Amendment when imposed on people under the age of 18 convicted of nonhomicide crimes.<sup>30</sup> Citing the “twice diminished moral culpability” of a young person who did not kill or intend to kill,<sup>31</sup> Justice Kennedy again wrote for the Court, and explained that “[l]ife without parole is an especially harsh punishment for a juvenile,” who is likely to serve more time and a greater percentage of his or her life than an adult.<sup>32</sup> Ultimately, the Court concluded that although a state need not “guarantee eventual freedom,” it must provide “some [realistic and] meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>33</sup> That is, a state cannot at the time of sentencing determine that a person who committed a nonhomicide crime under age 18 will never be able to demonstrate fitness to reenter society; it must therefore offer a realistic and meaningful opportunity for release, which it might opt to do through a parole process that enables the person to show that they have rehabilitated.<sup>34</sup>

Two years later, in *Miller v. Alabama*, the Court, in an opinion by Justice Kagan, held that a life without parole sentence is an unconstitutional penalty for people who commit homicide under age 18.<sup>35</sup> The Court noted that such crimes most often “reflect[] the transient immaturity of youth,” and such an extreme penalty may constitutionally be imposed only on “the rare juvenile offender whose crime reflects irreparable corruption,” and only after the sentencer has accounted for “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>36</sup> Under this holding, a *mandatory* life without parole sentence imposed for a homicide crime committed under age 18 violates the Eighth Amendment because it precludes the requisite consideration of the mitigating circumstances of youth.<sup>37</sup> Instead, a sentencer must consider in mitigation the person’s age and its hallmark features, including: immaturity, impetuosity, failure to appreciate risks and consequences, family and home environment, circumstances of the offense including extent of participation and familial and peer pressures, and the incompetencies of youth and their effect on the investigation and judicial proceedings.<sup>38</sup> After such

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<sup>29</sup> *Id.* at 573–74, 578–79.

<sup>30</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>31</sup> *Id.* at 69.

<sup>32</sup> *Id.* at 70.

<sup>33</sup> *Id.* at 75, 82.

<sup>34</sup> *Id.*

<sup>35</sup> *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

<sup>36</sup> *Id.* at 479–80 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

<sup>37</sup> *Id.* at 489.

<sup>38</sup> *Id.* at 477–78.



consideration, the Court reasoned, “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>39</sup>

In *Montgomery v. Louisiana*, in 2016, the Court confirmed that *Miller*’s prohibition on mandatory life without parole sentences for offenses committed under age 18 applied retroactively to all persons serving such sentences.<sup>40</sup> Justice Kennedy’s majority opinion explained that such sentences could be remedied in resentencing proceedings, after which life without parole could be reimposed only after adequate consideration of the mitigating factors of youth, or by “consider[ation] for parole . . . ensur[ing] that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”<sup>41</sup> Parole eligibility in this context must provide the requisite “opportunity for release . . . to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.”<sup>42</sup>

Finally, in *Jones v. Mississippi*, in 2021, the Court held that a sentencer need not make a factual finding of permanent incorrigibility nor provide an on-the-record sentencing explanation with an implicit incorrigibility finding before imposing a discretionary life-without-parole sentence.<sup>43</sup> Instead, in an opinion written by Justice Kavanaugh, the *Jones* Court confirmed that *Miller* and *Montgomery* require a discretionary sentencing regime that permits “the sentencer to consider the defendant’s youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant’s age.”<sup>44</sup> The Court re-emphasized language from *Montgomery* to make clear that it was limiting the procedural reach of its jurisprudence while keeping the substantive requirement—that life without parole is a disproportionate sentence for “a child whose crime reflects transient immaturity”—intact.<sup>45</sup> Though the *Jones* decision reflected a changed Court and the new conservative majority’s circumscription of this line of cases, *Miller* and *Montgomery* remain good law. Justice Sotomayor emphasized in her dissent that “[s]entencers are thus bound to continue applying those decisions faithfully,” either through the robust procedures states have implemented “to give effect to *Miller* and *Montgomery*” or through the responsibility “on individual sentencers to use their discretion to ‘separate those juveniles who may be sentenced to life without parole from those who may not.’”<sup>46</sup>

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<sup>39</sup> *Id.* at 479.

<sup>40</sup> *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016).

<sup>41</sup> *Id.* at 212.

<sup>42</sup> *Id.*

<sup>43</sup> *Jones v. Mississippi*, 593 U.S. 98 (2021).

<sup>44</sup> *Id.* at 111–12.

<sup>45</sup> *Id.* at 106 n.2 (quoting *Montgomery*, 577 U.S. at 211).

<sup>46</sup> *Id.* at 145 (quoting *Montgomery*, 577 U.S. at 210).

In sum, under the Supreme Court’s Eighth Amendment jurisprudence, life without parole sentences imposed for crimes committed under age 18 should be rare—for the “vast majority”<sup>47</sup> of people who commit such crimes, including anyone whose crime reflects transient immaturity rather than irreparable corruption, a sentence must offer a realistic and meaningful opportunity for release.

### III. PAROLE-ELIGIBLE SENTENCES ON THE RISE AFTER *GRAHAM* AND *MILLER*

In the wake of this Supreme Court jurisprudence, the total number of people serving juvenile life without parole sentences has decreased significantly, from a peak of 2,800 to 542, a number that includes people awaiting resentencing, people resentenced to life without parole after *Miller*, and new cases since *Miller* (of which there are fewer than 100).<sup>48</sup> And as of 2023, twenty-eight states and the District of Columbia outlaw the penalty entirely.<sup>49</sup> But the number of people serving life *with* parole sentences for crimes committed under age 18 has increased, from 5,054 in 2009<sup>50</sup> to nearly 7,000 in 2021,<sup>51</sup> even as the total prison population declined by nearly 25% during that same period.<sup>52</sup>

The prevalence of life with parole sentences derives at least in part from legislative reform and judicial relief intended to remedy sentences that violated *Graham* and *Miller*. Many states implemented so-called “*Miller*-fix” statutes to preclude mandatory life without parole for homicide crimes and life without parole for non-homicide crimes committed under age 18.<sup>53</sup> In so doing, several states relied on parole to “cure” sentences that would otherwise run afoul of the Eighth Amendment. For example, a 2013 Wyoming statute provided parole eligibility to all people in the state then serving a sentence of life without parole for a crime committed under age

<sup>47</sup> *Id.* at 144–45 (quoting *Montgomery*, 577 U.S. at 209).

<sup>48</sup> *Sentencing Children to Life without Parole: National Numbers*, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH (May 6, 2024), <https://cfsy.org/sentencing-children-to-life-without-parole-national-numbers/>. The percentage of black children sentenced to life without parole since *Miller* introduced more discretion, however, has increased from 61% to 73%. *Id.*

<sup>49</sup> *More Than Half of All US States Have Abolished Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, <https://cfsy.org/map2023/>.

<sup>50</sup> NELLIS & KING, *supra* note 25, at 3.

<sup>51</sup> ASHLEY NELLIS, SENT’G PROJECT, NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE SENTENCES (2021), <https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/>.

<sup>52</sup> RICH KLUCKOW & ZHEN ZENG, U.S. DEP’T JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 — STATISTICAL TABLES 4, <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf> (showing a 24.7% decrease in the nation’s prison population between 2010 and 2020).

<sup>53</sup> For an overview of much of the legislation enacted during this era and its effect on people serving life-without-parole or other life-long sentences for crimes committed as children, see *Legislation Elimination Life Without Parole Sentences for Juveniles*, JUV. SENT’G PROJECT (2024), <https://juvenilesentencingproject.org/legislation-eliminating-lwop/>; *JLWOP Data*, JUV. SENT’G PROJECT (May 2021), <https://juvenilesentencingproject.org/data/>. Most of the referenced legislation is also available at <https://clearinghouse.net/resource/4071/>.

18.<sup>54</sup> Similarly, in 2017, Arkansas passed a statute eliminating life without parole for juveniles and instead providing for parole after a period of years determined by the crime of conviction.<sup>55</sup> Indeed, as of 2021, at least ten states had granted parole eligibility *en masse* to people serving life-without-parole sentences for a crime committed under age 18.<sup>56</sup> In at least one instance, this was a judicially mandated fix: in 2016, Minnesota's Supreme Court ordered that any person serving a life-without-parole sentence for a crime committed under age 18 that was final before *Miller* would receive a sentence of life *with* the possibility of parole.<sup>57</sup> Other states provided individual resentencing proceedings at which life with parole was a possible alternative sentence to life without parole for homicide crimes, as in North Carolina<sup>58</sup> and Alabama.<sup>59</sup> Such reforms were intended to remedy *Graham* and *Miller* violations and to prevent future constitutional violations.

In addition to these *Graham* and *Miller* fixes, a handful of states extended parole or parole-like relief much more broadly. For example, in 2014, West Virginia abolished life without parole, instituting parole eligibility after, at most, 15 years for *all* persons serving sentences for crimes they committed under age 18 in the state.<sup>60</sup> Similarly, in addition to abolishing life without parole for people under age 18 at the time of the offense, Connecticut in 2015 also extended parole eligibility beyond that cohort, to all persons serving sentences of 10 years or more for crimes they committed under age 18 (extended to age 21, with exceptions, in 2024), with parole eligibility after the greater of 12 years or 60% of the sentence.<sup>61</sup> These states apparently recognized that the sentencing regimes of the 1980s, 1990s, and early 2000s produced sentences widely out of step with what we now understand about young people, and initiated broader reforms to more fully account for, and address, the missteps of this earlier era.

Such sweeping reform was limited, however, and in most states, people serving parole-eligible life, or life-like, sentences were left out of reforms altogether. This sometimes led to an incongruous regime in which people serving harsher sentences for more serious crimes were eligible for relief while people serving sentences for less serious crimes remained incarcerated with no apparent path to release. For example, Michigan's *Miller*-fix statute

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<sup>54</sup> WYO. STAT. ANN. §§ 6-2-101(b) (2021); WYO. STAT. ANN. 6-10-301(c) (2013).

<sup>55</sup> ARK. CODE ANN. § 5-4-104 (2017).

<sup>56</sup> See, e.g., JLWOP Data, *supra* note 53.

<sup>57</sup> See *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016).

<sup>58</sup> See *State v. Perry*, 794 S.E.2d 280, 281–82 (N.C. 2016) (requiring resentencing); N.C. GEN. STAT. §§ 15A-1340.19A, 15A-1340.19B(a)(2) (2012) (permitting a sentence of life without parole or life with parole eligibility after 25 years).

<sup>59</sup> Now, people in Alabama convicted of nonhomicide crimes committed under age 18 for which the penalty would otherwise be life without parole are sentenced to life with parole, and people sentenced for homicide crimes committed under age 18 may either be sentenced to life without parole or life with parole. See ALA. CODE §§ 13A-5-2(f), 13A-5-39(1), 13A-5-43(e), 13A-5-43.1, 13A-6-2-(c).

<sup>60</sup> W. VA. CODE § 61-11-23(a)(b) (2018).

<sup>61</sup> See CONN. GEN. STAT. § 54-125a(f) (2023); 2023 Conn. Acts 5 (Reg. Sess.) (Pub. Act. No. 23-169).

provided resentencing to everyone serving juvenile life *without* parole in the state, resulting in new term-of-years sentences, and release, for most people serving the sentence.<sup>62</sup> But people serving life *with* parole sentences for crimes committed as children, often sentences imposed pursuant to plea deals that avoided life without parole, faced a lifer parole review process that offered limited opportunity for review and under which few were ever released.<sup>63</sup> In 2022, the Michigan Supreme Court cited this incongruity in holding that life with parole sentences imposed for crimes committed under age 18 violated the state constitution.<sup>64</sup> Similarly, Florida reformed its sentencing procedures for juvenile life *without* parole sentences in 2014, but did not concomitantly change the parole review processes for people serving life *with* parole for crimes committed as youth, including homicide.<sup>65</sup> Under the statute, people serving life without parole sentences receive resentencing hearings at which the court is required to consider youth, maturity, and rehabilitation, among other factors,<sup>66</sup> and to modify the sentence if the person has rehabilitated.<sup>67</sup> For a two-year period, before the Florida Supreme Court changed course, it extended relief under the statute to people serving life *with* parole sentences—during that period, 78% of those resentenced were released, and only three were resentenced to life with parole.<sup>68</sup> After a changed Florida Supreme Court foreclosed further consideration under the statute,<sup>69</sup> more than 170 people serving life with parole sentences for crimes committed under age 18 were condemned to await parole review under a system that has released only 24 people serving such sentences in more than ten years.<sup>70</sup> Their challenge to this parole process is currently on appeal before the Eleventh Circuit.<sup>71</sup>

Ultimately, reforms that expanded access to parole without concurrently reforming parole review criteria and procedures merely

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<sup>62</sup> MICH. COMP. LAWS §§ 769.25, 769.25a (2014); Lindsey Smith, *About Half of Michigan's "Juvenile Lifers" Now Free from Prison*, MICH. PUBLIC (Dec. 7, 2023), <https://www.michiganradio.org/criminal-justice-legal-system/2023-12-07/about-half-of-michigans-juvenile-lifers-now-free-from-prison> (stating that of the 378 people who had been serving juvenile life without parole in the state, 182 have been released and another 131 have been resentenced to terms of years less than life—only 22 have been resentenced to life without parole).

<sup>63</sup> See *People v. Stovall*, 987 N.W.2d 85 (Mich. 2022) (holding that parolable life sentence imposed for crimes committed under age 18 violated the state constitution because it failed to provide the requisite opportunity for release based on demonstrated maturity and rehabilitation).

<sup>64</sup> *Id.* at 91–93.

<sup>65</sup> See *Howard v. Coonrod*, No. 6:21-cv-62-PGB-EJK, 2023 WL 2077489, at \*3 (M.D. Fla. 2023), <https://clearinghouse.net/doc/138249/>.

<sup>66</sup> FLA. STAT. § 921.1402(6) (2024).

<sup>67</sup> *Id.* § 921.1402(7).

<sup>68</sup> Appellants' Opening Brief at 28, *Howard v. Coonrod*, No. 6:21-cv-00062-PGB-EJK, No. 23-10858 (2023) (ECF No. 24), <https://jlc.org/sites/default/files/attachments/2023-07/D0024%202023.07.10%20Appellant%27s%20Brief.pdf>.

<sup>69</sup> *Franklin v. State*, 258 So. 3d 1239, 1241 (Fla. 2018) (per curiam).

<sup>70</sup> Appellants' Opening Brief at 29, *Howard*, No. 6:21-cv-00062-PGB-EJK, No. 23-10858 (2023) (ECF No. 24).

<sup>71</sup> See *Case: Howard v. Coonrod*, C.R. LITIG. CLEARINGHOUSE, <https://clearinghouse.net/case/44178/> (Mar. 11, 2024).

funneled people into parole systems that were not only ill-suited and unaccustomed to considering youth, maturity, and rehabilitation, but, in some jurisdictions, were statutorily or administratively prohibited from taking such characteristics into account.<sup>72</sup> Unsurprisingly, release is often an exceptional outcome.<sup>73</sup> Parole systems designed for adults may not be up to the task of accounting for youth at the time of the crime or discerning suitability for release based on demonstrated maturity and rehabilitation.<sup>74</sup> They may also lack the procedural protections necessary for accurate and thorough consideration, especially given the particular needs and challenges of this cohort.<sup>75</sup> Moreover, people serving life *with* parole sentences face diminished chances of early release against a backdrop of tougher parole policies for so called “lifers” in many states.<sup>76</sup>

Recent litigation illustrates these challenges. For example:

- In Florida, a recent lawsuit challenged the state’s parole process for juveniles serving life with parole sentences, pursuant to which, according to one study, only five of the more than 100 people subject to this parole process were released between 2016 and 2020.<sup>77</sup> The lawsuit alleged that the Parole Commission routinely heard more than 40 cases in a single day, spent an average of 10 minutes on each case, and never spoke with or saw the parole candidates before issuing a decision.<sup>78</sup> Parole candidates had no opportunity to correct factual inaccuracies in the record, and no right to counsel or expert assistance in the parole process.<sup>79</sup> Once denied parole, most individuals were set back another seven years before their eligibility for release would be considered again. The suit alleged violations of the

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<sup>72</sup> See, e.g., *Hayden v. Keller*, 134 F. Supp.3d 1000, 1009 (E.D.N.C. 2015), <https://clearinghouse.net/doc/85664/> (describing, and ultimately finding inadequate, existing parole review processes pursuant to which “[t]he most important information found in the summaries has been noted as: the official crime version (narrative of events of crime of conviction; prison infraction history; gang membership; psychological evaluations; custody level history; visitation history; and a home plan. There is no information about one’s status as a juvenile offender. There is no specific information about maturity or rehabilitative efforts. There is no special process for one convicted as an adult before the age of 18, and the commissioner are unaware of that status. Absolutely no consideration is to be given for that status by the commissioners.”); see also sources cited in note 99, *infra*.

<sup>73</sup> See, e.g., notes 76 and 81 and accompanying text.

<sup>74</sup> See, e.g., Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1204–08 (2021) (discussing these required considerations and how they differ from typical parole criteria, and citing relevant cases).

<sup>75</sup> See *id.* at 419–28 (explaining how and why existing procedures fail to meet the unique needs of this cohort); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 398–406 (2014) (describing then-existing parole board procedures, based on the results of a national survey).

<sup>76</sup> NAZGOL GHANDNOOSH, SENT’G PROJECT, *DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES* 7 (2017), <https://www.sentencingproject.org/app/uploads/2022/08/Delaying-a-Second-Chance.pdf> (“Over the years many legislators, governors, and parole boards have toughened lifer parole policies and practices, effectively increasing prison terms for these individuals.”).

<sup>77</sup> Class Action Complaint at 7, *Howard v. Coonrod*, 546 F. Supp. 3d 1121 (M.D. Fla. 2021) (No. 6:21-cv-62).

<sup>78</sup> *Id.* at 30.

<sup>79</sup> *Id.* at 54.

Eighth Amendment.<sup>80</sup> The district court granted summary judgment to the Florida parole board; plaintiffs' appeal to the U.S. Court of Appeals for the Eleventh Circuit is pending.<sup>81</sup>

- In Maryland, a lawsuit challenging life with parole sentences for people who committed crimes under age 18 alleged that no juvenile lifer had been paroled in the state in more than two decades, with issues that included reliance on risk assessment tools that were not designed to assess people who committed crimes as children, and no opportunity to correct errors in parole files.<sup>82</sup>

- In North Carolina, a lawsuit challenging a life with parole sentence imposed for a crime committed under age 18 noted that the plaintiff, who had been denied parole 12 times, had never been so much as interviewed by a member of the parole commission, had no knowledge of the information upon which the commission relied in denying him parole, and had never been given an opportunity to demonstrate maturity and rehabilitation.<sup>83</sup>

Thus, although parole was explicitly recognized by the Supreme Court as a crucial remedy in the post-*Graham* and *Miller* landscape, existing parole criteria and procedures lag behind the constitutional mandate and in many instances actually thwart that mandate.<sup>84</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> See Case: *Howard v. Coonrod*, C.R. LITIG. CLEARINGHOUSE, (last visited Oct. 15, 2024), <https://clearinghouse.net/case/44178/>.

<sup>82</sup> Complaint for Declaratory and Injunctive Relief, and Attorney's Fees at 38, 60, Maryland Restorative Just. Initiative v. Hogan, No. 1:16-cv-01021-ELH (D. Md. 2016).

<sup>83</sup> First Amended Complaint at ¶¶ 57–60, *Hayden v. Butler*, No. 5:10-ct-2272-BO (E.D.N.C. 2013).

<sup>84</sup> Note that after *Graham* and *Miller*, several states opted to revise their sentencing regimes by implementing processes for judicial review and modification of sentences, rather than through parole eligibility. For example: In Washington DC, a person who has served at least 15 years for a crime committed under age 25 may file an application for sentence modification and will receive a hearing. Courts are directed to consider the diminished culpability of youth and post-offense maturity and rehabilitation, among other factors, and “shall reduce” the term of imprisonment upon a finding that the petitioner “is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.” D.C. CODE § 24-403.03(a) (2021); In North Dakota, a person serving a sentence for a crime committed under age 18 may petition for a sentence reduction after serving 20 years. The governing statute directs the reviewing court to consider factors including the diminished culpability of youths as compared to adults. N.D. CENT. CODE § 12.1-32-13.1 (2023); In Florida, people serving life without parole for crimes committed under age 18 receive a resentencing hearing after 15 or 25 years, depending on the circumstances of the offense, at which youth and post-crime maturity and rehabilitation must be considered. FLA. STAT. § 921.1402(6) (2015). The court must modify the sentence if it finds that the person has been rehabilitated and is reasonably fit to enter society. *Id.* § 921.1402(7). Counsel is provided for sentencing and resentencing hearings, and the defendant may hire experts, present evidence, cross-examine witnesses, and appeal. See *Id.* §§ 921.1401, 921.1402; Class Action Complaint at ¶ 6, *Howard v. Coonrod*, No. 6:21-cv-62 (M.D. Fla. Jan. 8, 2021) (No. 1). While this article focuses on *parole* processes and procedures, it looks to some of these sentence modification statutes as instructive in requiring a release decision based on consideration of youth and post-crime maturity and rehabilitation, and in providing procedures to support robust, meaningful, and accurate review.

#### IV. CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS FOR PAROLE REVIEW

As states turned to parole to address *Graham* and *Miller* deficiencies, courts across the country were asked to consider whether and how this jurisprudence extended to life or long sentences carrying parole eligibility.

As a threshold matter, courts have assessed whether these cases apply to life or life-like sentences *with* parole eligibility such that anyone serving such a sentence for a nonhomicide crime committed under age 18, and the vast majority of people convicted of homicide crimes committed under age 18, whose crimes reflected transient immaturity rather than irreparable corruption, must have a realistic opportunity for release grounded in consideration of youth, maturity, and rehabilitation.<sup>85</sup> When parole is the mechanism for ensuring a constitutionally mandated opportunity for release, as the Massachusetts Supreme Judicial Court has explained, “the parole hearing acquires a constitutional dimension.”<sup>86</sup> Some courts have therefore concluded that parole must provide a realistic and meaningful opportunity for release, under *Graham*, and ensure that no person whose crime reflected the transient immaturity of youth spends a lifetime in prison, which would be a disproportionate and unconstitutional sentence under *Miller*.<sup>87</sup> Courts that have held to the contrary seemingly fail to recognize that an anemic

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<sup>85</sup> See cases cited in notes 82–84, *infra*.

<sup>86</sup> *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 27 N.E.3d 349, 365 (Mass. 2015), <https://clearinghouse.net/doc/139101/>.

<sup>87</sup> See, e.g., *Howard v. Coonrod*, No. 6:21-cv-62, 2023 WL 2077489, at \*8 (M.D. Fla. Feb. 17, 2023), <https://clearinghouse.net/doc/138249/> (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)) (holding that the Eighth Amendment applies to life with parole sentences as “a necessary extension of the Supreme Court’s recognition in *Montgomery* that while ‘[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole,’ the parole process must be one that ‘ensures that juveniles whose crimes reflected only transient immaturity and who have since matured—will not be forced to serve a disproportionate sentence.’”); *Wershe v. Combs*, 763 F.3d 500, 505–06 (6th Cir. 2014) (vacating dismissal of Eighth Amendment claim alleging a parole board’s denial of a meaningful and realistic opportunity for release); *Flores v. Stanford*, No. 18 CV 2468 (VB), 2019 WL 4572703 (S.D.N.Y. Sept. 20, 2019), at \*9, <https://clearinghouse.net/doc/108054/> (“[T]he Eighth Amendment right in question attaches at the parole stage.”); *Funchess v. Prince*, No. 142105, 2016 WL 756530, at \*5–6 (E.D. La. Feb. 25, 2016) (concluding that state’s two-step parole process doesn’t provide the meaningful opportunity for release required under *Miller*); *Greiman v. Hodges*, 79 F. Supp.3d 933, 943–44 (S.D. Iowa 2015), <https://clearinghouse.net/doc/83265/> (holding that *Graham* applied outside the sentencing context because the state “must” give juvenile offenders a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” which could only be determined by the parole board who alone had authority to grant release); *Diatchenko*, 27 N.E.3d at 365 (“[T]he parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile’s mandatory life sentence constitutionally proportionate.”); *Hayden v. Keller*, 134 F. Supp.3d 1000, 1009 (E.D.N.C. 2015), <https://clearinghouse.net/doc/85664/> (holding that the failure to consider diminished culpability and heightened capacity for change during parole process failed to provide petitioner with any meaningful opportunity for release).

parole system that fails to account for youth or post-crime growth and change disembowels the substantive requirements of *Graham* and *Miller*.<sup>88</sup>

This section describes some of the judicial decisions that have considered what is constitutionally required for (1) the timing of the opportunity for release on parole, (2) the substance of a parole decision grounded in youth, maturity, and rehabilitation, and (3) the procedures necessary to support comprehensive, accurate, meaningful review. The Supreme Court's Eighth Amendment jurisprudence offers a starting point for this analysis, but this section also considers if and how other constitutional considerations might apply. Finally, informed by case law and, especially, recent legislative reform, this section previews specific policies and practices that can support robust constitutional compliance and meaningful parole review.

#### *A. Timing of a Meaningful Opportunity for Release on Parole*

*Graham* and its progeny suggest that to pass constitutional muster, the opportunity for release on parole must come at a time in the person's life that allows some chance to rejoin and reconcile with society,<sup>89</sup> to reenter the community, and to demonstrate rehabilitation.<sup>90</sup> Under this metric, a sentence may violate the Eighth Amendment if it fails to provide a chance for release at a meaningful time in an individual's life. Many courts have thus concluded that sentences that preclude parole consideration until old age violate the Eighth Amendment. For example, the California Supreme Court, in *People v. Contreras*, rejected as unconstitutional sentences of 50 years to life and 58 years to life imposed for nonhomicide offenses committed under the age of 18.<sup>91</sup> The court reasoned that to comply with the Eighth Amendment, a sentence imposed for a nonhomicide crime must offer a "chance for fulfillment outside prison walls, and . . . reconciliation with society," as well as an "incentive to become a responsible individual."<sup>92</sup> The New Jersey Supreme Court similarly rejected sentences requiring minimum terms of 55 years and 68 years, as violative of the Eighth Amendment, reasoning that release "in [the defendants'] seventies and eighties" was not sufficiently meaningful and explaining that courts must focus on the "real-

<sup>88</sup> See, e.g., *Brown v. Precythe*, 46 F.4th 879, 885–86 (8th Cir. 2022), <https://clearinghouse.net/doc/138965/> (declining to extend *Miller* to parole hearings or to life with parole sentences, finding no violation after analysis of state parole process assuming Eighth Amendment applied); *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197 (4th Cir. 2019) (same). Note, too, that most courts that have declined to extend *Graham* and *Miller* to parole hearings have done so with respect to sentences carrying parole eligibility imposed after *Miller*-compliant resentencing proceedings, or in the context of challenges to parole systems already modified, post-*Graham* and *Miller*, to require consideration of youth, maturity, and rehabilitation. E.g., *United States v. Sparks*, 941 F.3d 748, 753–54 (5th Cir. 2019); *Bowling*, 920 F.3d at 194–95, 198–99; *United States v. Morgan*, 727 F.App'x. 994, 995–96 (11th Cir. 2018); *Brown*, 46 F.4th at 887.

<sup>89</sup> E.g., *Graham*, 560 U.S. at 79.

<sup>90</sup> *Id.* at 74.

<sup>91</sup> *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018).

<sup>92</sup> *Id.* at 453 (citing *Graham*, 560 U.S. at 130).



time consequences” of a sentence.<sup>93</sup> These courts and others recognize that a meaningful opportunity for release must come at a time in a person’s life that enables a productive life outside of prison.<sup>94</sup> Note, though, that some courts to consider the issue have rejected challenges to sentences that seemingly preclude release within a person’s lifetime, concluding either that lengthy sentences imposed pursuant to a discretionary sentencing regime necessarily comply with the Eighth Amendment under *Jones*,<sup>95</sup> that *Graham* and *Miller* apply to life without parole sentences only,<sup>96</sup> or that the possibility of release even in old age complies with the Supreme Court’s dictates.<sup>97</sup>

The model policies that follow in Section V below do not propose a specific timeframe for initial parole review, a determination that will vary by state. Note, though, that parole consideration must be realistic and meaningful from the outset, that is, if a sentencer or legislature (or some combination) has determined that parole eligibility begins at a particular date, then parole consideration *from that date forward* should provide comprehensive review and a realistic opportunity for release. If a person demonstrates the requisite maturity, rehabilitation, and fitness for release then parole should be granted.<sup>98</sup>

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<sup>93</sup> *State v. Zuber*, 152 A.3d 197, 212–13 (N.J. 2017).

<sup>94</sup> *See State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (rejecting a sentence, imposed for juvenile homicide and non-homicide crimes, that precluded parole eligibility for 52.5 years, until age 69, reasoning that “[t]he prospect of geriatric release” does not provide a meaningful opportunity “to obtain release and reenter society” as the Eighth Amendment requires); *State v. Kelliher*, 849 S.E.2d 333, 350 (N.C. Ct. App. 2020) (applying *Graham* and *Miller* to consecutive life sentences resulting in 50 years’ parole ineligibility, reasoning, *inter alia*, that “[t]o release an individual after their opportunity to contribute to society—both through a career and in other respects, like raising a family—‘does not provide a “meaningful opportunity” to demonstrate the “maturity and rehabilitation” required to obtain release and reenter society as required by *Graham*” (citations omitted)). And, of course, sentences precluding parole consideration during a person’s lifespan fail to pass constitutional muster. *See Budder v. Addison*, 851 F.3d 1047, 1056 (10th Cir. 2017) (concluding that an aggregate sentence resulting in parole eligibility at age 131 was barred by *Graham*: “we cannot read the Court’s categorical rule as excluding juvenile offenders who will be imprisoned for life with no hope of release for nonhomicide crimes merely because the state does not label this punishment as ‘life without parole’”); *State v. Boston*, 363 P.3d 453 (Nev. 2015) (concluding that an aggregate sentence requiring 100 years in prison before parole eligibility, imposed for nonhomicide crimes committed as a juvenile, violated *Graham*).

<sup>95</sup> *E.g.*, *United States v. Grant*, 9 F.4th 186, 193 (3d Cir. 2021) (en banc) (rejecting challenge to 60-year sentence because, per *Jones*, *Miller* entitles a person to a certain sentencing process, not a particular sentencing outcome).

<sup>96</sup> *E.g.*, *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) (declining to apply *Miller* to sentence precluding parole consideration for 60 years, exceeding life expectancy, because *Miller* applies to life without parole sentences only).

<sup>97</sup> *E.g.*, *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018) (reasoning that *Graham* may apply to lengthy, aggregate term-of-years sentences, but nonetheless denying relief because the defendant’s sentence provided for parole eligibility after 46 years, the “outer limit” of a constitutionally permissibly meaningful opportunity to obtain release).

<sup>98</sup> *See, e.g.*, Harrington, *supra* note 74, at 1204–05 (discussing the requirement of release upon a demonstration of maturity and rehabilitation).

*B. Criteria for a Release Decision Grounded in Consideration of Youth, Maturity, and Rehabilitation*

Many courts and legislatures across the country have recognized that under *Graham* and *Miller*, a parole board must consider a person's youth at the time of the crime and must ground the parole decision in assessment of post-crime maturity and rehabilitation.<sup>99</sup> Several courts have emphasized that parole review for people who were under 18 at the time of the crime must necessarily be different than typical parole review in order to ensure consideration of these factors, and have rejected parole decisions or processes that failed to adequately account for youth, maturity, and rehabilitation.<sup>100</sup>

Along these lines, some courts have concluded that denial of parole based principally on the nature of the offense, a consideration properly accounted for at sentencing, may violate the Eighth Amendment. For example, a federal court in Iowa has denied a defendants' motion to dismiss an Eighth Amendment challenge to a parole process pursuant to which the parole candidate alleged he had been denied parole based solely on the seriousness of the offense and without consideration of his youth at the time of the crime or his subsequent maturity and rehabilitation.<sup>101</sup> Other courts have denied motions to dismiss similar challenges to parole processes alleged to rely exclusively or primarily on the crime committed or juvenile criminal history,<sup>102</sup> rather than on the required considerations of youth,

<sup>99</sup> See *supra* notes 100–03 and accompanying text.

<sup>100</sup> *E.g.*, *Hawkins v. Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S.3d 397, 398 (N.Y. App. Div. 2016) (explaining that "[t]he Board [of Parole], as the entity charged with determining whether petitioner will serve a life sentence, was required to consider the significance of petitioner's youth and its attendant circumstances at the time of the commission of the crime before making a parole determination" and holding that petitioner was entitled to a *de novo* parole release hearing), <https://clearinghouse.net/doc/139092/>; *Hayden v. Keller*, 134 F. Supp.3d 1000, 1009 (E.D.N.C. 2015) (concluding that the failure to distinguish parole review for juvenile offenders and to consider children's diminished culpability and heightened capacity for change "wholly fails to provide [petitioner] with any 'meaningful opportunity'" for parole); *State v. Young*, 794 S.E.2d 274, 279 (N.C. 2016) (explaining that the sentence review statute at issue failed to address the "central concern" of *Miller*, that a sentencing court cannot treat minors like adults, because, *inter alia*, nothing in the statute required consideration of maturation or other youth-related factors); see also *Greiman v. Hodges*, 79 F. Supp.3d 933, 944 (S.D. Iowa 2015) (denying motion to dismiss based in part on allegation that board of parole failed to take into account plaintiff's youth and demonstrated maturity and development); *Geer v. Dep't of Prob., Parole, and Pardon Serv.*, No. 2015-002522, 2018 WL 2338201 (S.C. Ct. App. May 23, 2018) (summarily affirming administrative law court's reversal of denial of parole, citing "no evidence that [defendant's] youth was taken into account before he was deprived of the possibility of parole"); see also *In re Perez*, 7 Cal. Rptr.3d 441, 463 (Cal. Ct. App. 2016), *as modified on denial of reh'g* (Jan. 4, 2017) (remanding for new parole hearing, citing, *inter alia*, state parole board's repeated failure to account for youth at time of the offense, noting: "[h]ere, although the commissioners, as well as the evaluating psychologist, gave lip services to the need to afford 'great weight' both 'to the diminished culpability of juveniles as compared to adults,' and to 'any subsequent growth and increased maturity' of petitioner . . . the record plainly reflects that they did not take this requirement seriously").

<sup>101</sup> *Greiman*, 79 F. Supp.3d at 944.

<sup>102</sup> See, e.g., *Flores v. Stanford*, 18 CV 2468 (VB), 2019 WL 4572703, at \*9 (S.D.N.Y. Sept. 20, 2019), (denying motion to dismiss Eighth Amendment challenge to New York's parole system based

maturity, and rehabilitation.<sup>103</sup> However, some courts have declined to recognize any Eighth Amendment constraints on parole review, effectively gutting the requirements of *Graham* and *Miller*.<sup>104</sup>

Nevertheless, post-*Graham* and -*Miller* legislative reforms enacted in a dozen states across the country have uniformly required consideration of youth, maturity, and rehabilitation in the parole release decision.<sup>105</sup> Following these examples, the model policies in Section V include provisions requiring consideration of post-crime growth and change, incorporating *Miller*'s mitigating factors of youth, and limiting reliance on the circumstances of the offense to inform the release decision.

### *C. Procedures to Support Thorough and Accurate Review of Youth, Maturity, and Rehabilitation*

A parole system must have certain procedures in place to support the requisite realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and in consideration of the mitigating factors of youth. Thus, although parole is usually considered a discretionary “act of grace” outside the protections of due process,<sup>106</sup> some courts have recognized that parole for this cohort necessitates a different inquiry. State sentencing regimes that rely on parole to comply with the Eighth Amendment dictates of *Graham*, *Miller*, and their progeny are not simply providing parole as an “act of grace”; parole must offer a meaningful opportunity to demonstrate maturity and rehabilitation, and the process must ensure release upon such a demonstration.<sup>107</sup> A system in which parole is intended to remedy an otherwise unconstitutional sentence creates a liberty

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on allegations that “[i]nstead of basing parole determinations on juvenile lifers’ demonstrated maturity and rehabilitation, defendants allegedly ‘have denied, and continue to deny, juvenile lifers release to parole supervision based *only* on the crime committed or juvenile criminal history’ and ‘*despite* clear evidence of rehabilitation and maturity”).

<sup>103</sup> King v. Landreman, No. 19-cv-338, 2019 WL 2355545, at \*1 (W.D. Wisc. June 4, 2019) (determining upon initial review that juvenile offenders challenging Wisconsin’s parole process could proceed on their claims that the state parole board had violated the Eighth Amendment and Due Process Clause of the Fourteenth Amendment by failing to provide a meaningful opportunity for release based on “the factors required by the Supreme Court”), <https://clearinghouse.net/doc/145541/>.

<sup>104</sup> See sources cited in note 83, *supra*, and accompanying text.

<sup>105</sup> See sources cited in notes 123 and 125, *infra*.

<sup>106</sup> See, e.g., Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008) (noting that parole is often viewed as “an act of grace” or “dispensation of mercy”); Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1190–94 (2021) (describing the judicial understanding of parole as wholly discretionary and outside of due process protections).

<sup>107</sup> See, e.g., Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 533–34 (2019) (“Parole-release is a fundamental and vested right for a person who is serving a life sentence for a juvenile crime and who has demonstrated rehabilitation as an adult. Where such an individual has in fact demonstrated rehabilitation as an adult, the decision to deny parole and subject her to continued incarceration violates the Eighth Amendment.”).

interest, or “protectible expectation of parole,”<sup>108</sup> to which due process protections may apply to require particular procedures to support meaningful review.<sup>109</sup>

In view of the procedural dimensions of constitutional parole reform, some courts have properly concluded that certain minimum procedures are required. These courts have cited not only the weighty constitutional implications of parole in this context, but also the “unique characteristics of juvenile offenders” and the “potentially massive amount of information [that] bears on these issues.”<sup>110</sup> In light of these considerations, the Supreme Judicial Court of Massachusetts held that parole review for people serving mandatory life sentences for crimes committed under age 18 necessitated appointment of counsel, payment of expert fees, and limited judicial review.<sup>111</sup> And the Iowa Supreme Court has similarly held that “access to the file and a right to provide information to the Board” represent “the minimum due process protections.”<sup>112</sup> Of course, not all courts considering the issue agree, and ultimately, few have recognized any due process dimension.<sup>113</sup> And others have approved bare-bones parole processes under which, e.g., the parole decision-makers “attest they consider these [required] factors [and] they have demonstrated their application from time to time.”<sup>114</sup> Such decisions miss the mark. As legislatures across the country have recognized, certain procedures are essential to meaningful parole review for this cohort. To that end, several states have implemented a wide range of procedural reforms to support robust parole review, ensure consideration of youth, maturity, and rehabilitation, and promote success in the parole

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<sup>108</sup> *Greenholtz v. Inmates*, 442 U.S. 1, 11–12 (1979).

<sup>109</sup> *See, e.g., Bonilla v. Bd. of Parole*, 930 N.W.2d 751, 775–78 (Iowa 2019), <https://clearinghouse.net/doc/139049/> (holding that juveniles have a liberty interest in the requirement of a meaningful opportunity to demonstrate maturity and rehabilitation, and thus are entitled to due process, under federal and state law, in asserting that interest; ultimately denying relief in facial challenge to parole procedures, however, finding that Board’s policies passed constitutional muster); *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 27 N.E.3d 349, 357 (Mass. 2015) (“In this context, where the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender’s mandatory life sentence to the requirements of art. 26, the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility.”); *Flores v. Stanford*, 18 CV 2468 (VB), 2019 WL 4572703, at \*10 (S.D.N.Y. Sept. 20, 2019) (declining to dismiss due process challenge to parole system because “juvenile offenders serving a maximum term of life have a cognizable liberty interest in obtaining parole upon demonstrating maturity and rehabilitation”).

<sup>110</sup> *Diatchenko*, 27 N.E.3d at 360.

<sup>111</sup> *Id.* at 353.

<sup>112</sup> *Bonilla*, 930 N.W.2d at 780.

<sup>113</sup> *E.g., Heredia v. Blythe*, 638 F. Supp. 3d 984, 997, 1000 (W.D. Wisc. 2022), <https://clearinghouse.net/doc/137941/> (rejecting the assertion that “juvenile offenders are different from adult offenders in the context of a parole decision” and concluding that absent a showing “of a uniform practice by defendants to give juvenile offenders de facto life sentences or of any policy or practice that would prevent offenders from asking the commission to consider facts relevant to youth,” there is no Eighth Amendment violation).

<sup>114</sup> *Howard v. Coonrod*, No. 6:21-cv-62-PGB-EJK, 2023 WL 2077489 at \*21, \*23 (M.D. Fla. Feb. 17, 2023) (noting, also, that the governing criteria permits lower baseline potential parole date for crimes committed at a young age; granting defendant’s motion for summary judgment and finding no Eighth Amendment or due process violation).

process and upon release.<sup>115</sup> The model policies that follow draw principally from these reforms to propose policies for: access to rehabilitative programming and services; in-person parole hearings including the opportunity to make statements and answer questions; access to counsel and expert evaluation; ability to examine and correct the record; written parole decisions with reasons given for denial; judicial review; training for decision-makers; and oversight of the parole process.

#### V. MODEL POLICIES: PAROLE PROCEDURES FOR PEOPLE SERVING SENTENCES FOR CRIMES COMMITTED UNDER AGE 18

The following model policies are intended to support thorough and accurate parole review and to ensure that people serving sentences for crimes committed under age 18 have a realistic and meaningful opportunity for release. They encompass substantive considerations, such as criteria for release and appropriate bases for the release decision, as well as procedures to support comprehensive review and to ensure that this cohort is well supported in navigating the parole process and reentry. Indeed, it is essential that everyone involved in the parole process works toward a shared goal of preparing people to be released and to succeed upon release.

These policy recommendations derive from relevant litigation documents, judicial decisions, and recent legislation implemented in states across the country in the wake of *Graham*, *Miller*, and their progeny. Indeed, this is an area of the law where litigation in tandem with other forms of advocacy has been crucial to bring about change.<sup>116</sup> Lawsuits across the country have shed light on the inadequacies of existing parole systems to meet constitutional and practical requirements.<sup>117</sup> The complaints, briefing, expert reports, and other supporting documents are instrumental in illustrating the problems and their stakes. As described here, judicial decisions have helped shaped the contours of what is—or may not be—required under the Eighth Amendment, due process, or state constitutions. And settlement agreements and other injunctive relief, though rare, offer a model for possible paths forward. For example, in Maryland after the district court denied in relevant part the state’s motion to dismiss a lawsuit challenging its parole processes for people serving life with parole for crimes committed under age 18, the parties engaged in negotiations resulting in a settlement agreement that required changes to the state Parole Commission’s

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<sup>115</sup> See sources cited in notes 135, 143, 158, 164, 174, and 181 and accompanying text.

<sup>116</sup> Sometimes, litigation has apparently catalyzed changes on the ground even in the absence of legislative overhaul. For example, at the time a lawsuit was filed in 2019 challenging Wisconsin’s parole process for people serving life sentences for crimes committed as children, plaintiffs alleged that “[o]n information and belief, fewer than 6 parole-eligible juvenile lifers from a population of more than 120 have been released from prison in the past 15 years.” Class Action Complaint at 17, *King v. Landreman*, No. 19-cv-338 (W.D. Wisc. 2019), ECF No. 1, <https://clearinghouse.net/doc/130345/>. By the time the court issued its decision granting the defendants’ motion for summary judgment in 2022, 88 people from that cohort had been released. *Heredia*, 638 F.Supp.3d at 990.

<sup>117</sup> See lawsuits discussed *supra* Section III.

decision-making criteria and procedures.<sup>118</sup> Often, however, change in this area has resulted from legislative reforms that build on the requirements of *Graham*, *Miller*, and cases that followed. For example, after the Connecticut Supreme Court held that *Miller* applied retroactively to preclude life without parole or lengthy term-of-year sentences for crimes committed as juveniles, the state legislature passed a statute eliminating life without parole for juveniles in the state and providing for parole for any person sentenced to 10 years or more for a crime committed under age 18 (later extended, with some exceptions, 21).<sup>119</sup> Indeed, some of the most expansive reforms in this area are the result of legislative advocacy and reform.<sup>120</sup>

Note, as discussed in Part IV(A), that we do not offer recommendations for the timing of parole consideration—which will necessarily vary from jurisdiction to jurisdiction—although ensuring an opportunity for a productive life outside of confinement is crucial to the constitutional adequacy of any parole system intended to cure a *Graham* or *Miller* violation.<sup>121</sup> Note, too, that given all we know about youth, criminality, and reform, it seems prudent, if not constitutionally required,<sup>122</sup> to ensure more robust parole consideration for any person serving a sentence for a crime committed under age 18, regardless of sentence length. That is, as some states have enacted,<sup>123</sup> parole for this cohort should always give mitigating effect to youth, be grounded in assessment of post-crime growth and change, and include procedures to support meaningful consideration of these factors. Moreover, these recommendations need not be limited to people under 18 at the time of the crime, and should be considered for broader application, including to emerging adults. Research shows that the developmental characteristics underpinning *Graham* and *Miller* is now understood to

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<sup>118</sup> See *Case: Maryland Restorative Justice Initiative v. Hogan*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, <https://clearinghouse.net/case/15371/> (last visited Sept. 6, 2024); see also *Hayden v. Keller*, 134 F. Supp. 3d 1000 (E.D.N.C. Nov. 2, 2017) (No. 5:10-ct-03123), ECF No. 96, <https://clearinghouse.net/doc/94305/> (granting plaintiff's request for injunctive relief, ultimately adopting the defendant's proposed plan to reform the state's parole system).

<sup>119</sup> See Conn. Gen. Stat. § 54-125a(f) (2023). In post-*Miller* litigation in Connecticut, the Connecticut Supreme Court held that a fifty-year sentence invoked *Miller*'s protections and encouraged the legislature to act to bring state statutes into compliance with the U.S. Supreme Court's decisions. See *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) (“[W]e have every reason to expect that our decisions in *Riley* and in the present case will prompt our legislature to renew earlier efforts to address the implications of the Supreme Court's decisions in *Graham* and *Miller*.”). Legislation eliminating life without parole for crimes committed under age 18 and reforming parole followed. See Act of June 23, 2015, Pub. Act No. 15-84, (concerning lengthy sentences and certain felonies committed by a child or youth).

<sup>120</sup> For an overview of these reforms, see sources cited in note 53, *supra*.

<sup>121</sup> See Section IV(a), *supra*.

<sup>122</sup> See Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 419 (2014) (noting that given the unique challenges that people sentenced as children may face in presenting an effective case for relief, and given the weighty interest at stake when facing a lifetime in prison, due process protections may apply with more force to this cohort).

<sup>123</sup> See legislation cited *infra* notes 130, 132, 142, 150, 165, 171, 181, 183, and 189.

extend beyond the age of 18, into the early 20s.<sup>124</sup> During this period of “emerging adulthood,” young people demonstrate similar heightened impulsivity, susceptibility to peer pressure, and riskier behavior, all of which they are likely to outgrow.<sup>125</sup> Thus for this group, too, “the ability to predict future criminal behavior based on prior behavior is tenuous at best.”<sup>126</sup> In view of this, some state courts and legislatures have recently extended similar policies to emerging adults.<sup>127</sup>

Indeed, these model policies are intended to promote accurate, thorough, and rehabilitation-focused review that could benefit parole boards and parole candidates, regardless of age at the time of the crime, supporting a meaningful opportunity for release for any person ready to return and contribute to society outside of prison.<sup>128</sup>

The policies may be integrated into statutes governing state parole processes, parole board guidelines, or some combination of the two. Implementation of these policies will necessarily differ based on the

<sup>124</sup> E.g., B.J. Casey, C. Simmons, L.H. Somerville, & A. Baskin-Sommers, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, ANN. REV. OF CRIMINOLOGY 322 (2022).

<sup>125</sup> *Id.* at 326.

<sup>126</sup> *Id.* at 337.

<sup>127</sup> For example, California extends its youthful offender parole to all people under age 26 at the time of the crime. *Youth Offender Parole Hearings*, CAL. DEP’T OF CORR. AND REHAB., <https://www.cdcr.ca.gov/bph/youth-offender-hearings-overview/> (last visited Aug. 28, 2024). Connecticut recently extended its “second look” parole reform from people under 18 to people under 21 at the time of the crime, with limited exceptions. 2023 Conn. Acts 23-169(g)(1) (Reg. Sess.). The Supreme Judicial Court of Massachusetts cited the neurological similarities between juveniles and emerging adults to hold that life without parole for crimes committed under age 21 violated the state constitution. *See Commonwealth v. Mattis*, 224 N.E.3d 410, 415, 420–21 (Mass. 2024) (holding that life without parole sentences imposed for crimes committed at age 18, 19, or 20, violate article art. 26 of the state’s constitution, which prohibits cruel or unusual punishments, citing neurological similarities between juveniles and emerging adults as well as contemporary standards of decency). Michigan’s Supreme Court recently held that life without parole sentences imposed on 18-year-olds violated the state constitution. *See People v. Parks*, 987 N.W.2d 161, (Mich. 2022) (extending to this cohort the legislative remedy for people serving JLWOP for crimes committed under age 18); *People v. Poole*, No. 352569, 2024 WL 201925, at \*12–13 (Mich. Ct. App. Jan. 18, 2024) (holding that *Parks* applies retroactively). And Washington’s Supreme Court held that mandatory life without parole was unconstitutional under the state constitution as applied to people between the ages of 18 and 21 at the time of the crime. *In re Monschke*, 482 P.3d 276, 278 (Wash. 2021) (among other similar decisions and reforms).

<sup>128</sup> Although mostly outside the scope of this paper, problems with parole systems are myriad, including marked racial disparities in release rates, e.g., Michael Winerip, Michael Schwirtz & Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html> (describing an analysis of thousands of parole decisions demonstrating that fewer than one in six Black or Hispanic men were released at first parole hearing, compared with one in four white men) (last updated Mar. 13, 2017), and problems with understaffing, limited consideration or review, and political influence, e.g., Carol Shapiro & Beth Schwartzapfel, *I Joined the Parole Board to Make a Difference. Now I Call It ‘Conveyer Belt Justice.’*, THE MARSHALL PROJECT (June 17, 2022), <https://www.themarshallproject.org/2022/06/17/i-joined-the-parole-board-to-make-a-difference-now-i-call-it-conveyor-belt-justice>. Indeed, the most recent Model Penal Code, promulgated by the American Law Institute, recommended eliminating indeterminate sentences in favor of determinate sentences, citing broad agreement that parole boards shouldn’t retain the prison-release discretion that they have historically held after “more than a century of demonstrated failure.” *See* MODEL PENAL CODE: SENTENCING § 6.06 cmts. a, n (AM. L. INST., Proposed Final Draft 2017), <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017>.

particular characteristics and capacities of the states and parole systems that might seek to implement them. To that end, these policies are written so that they can be easily copied and pasted into a document that refines and adapts them for a particular system, including by referring to the parole decision-making entity, generally, as “[Parole Board]”.<sup>129</sup>

*1. Meaningful Opportunity for Release Based on Demonstrated Maturity and Rehabilitation*<sup>130</sup>

a. When a person serving a sentence imposed as the result of an offense or offenses committed when the person was less than eighteen years of age becomes eligible for parole pursuant to applicable provisions of law, the [Parole Board] shall ensure that the person has a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

b. After considering the factors described in (2), the [Parole Board] shall apply a presumption that a person considered for parole under this [statute] is to be released, and must order release if it determines that the person has demonstrated maturity and rehabilitation since the time of the offense(s), that there is a reasonable probability that the person will live and remain at liberty without violating the law, and that the benefits to such person and society that would result from release substantially outweigh the benefits to such person and society that would result from continued incarceration.<sup>131</sup>

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<sup>129</sup> The policies are available at <https://clearinghouse.net/resource/4071/> in a word processing text format (without footnotes) to facilitate such copying and tailoring. CLEARINGHOUSE, LEARNING FROM CIVIL RIGHTS LAWSUITS: CRITERIA AND PROCEDURES FOR MEANINGFUL PAROLE REVIEW FOR PEOPLE SENTENCED AS YOUTH (Word Processing Version, May 2024).

<sup>130</sup> See, e.g., CAL. PENAL CODE § 4801(c) (2018); CAL. CODE REGS. tit. 15 § 2446 (2020); CONN. GEN. STAT. § 54-125a(f)(4) (2023), 13 R.I. GEN. LAWS § 13-8-14.2(a) (2021); see also D.C. CODE § 24-403.03(a) (2021) (judicial sentence modification); FLA. STAT. § 921.1402(7) (2024).

<sup>131</sup> See, e.g., WASH. REV. CODE § 9.94A.730(3) (permitting people serving sentences of twenty years or more for crimes committed under age 18 to petition for indeterminate sentence review; upon such review, the statute directs that the board “shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released”) (2024); FLA. STAT. § 921.1402(7) (2024) (in the context of sentence modification hearings, providing that “[i]f the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence”); Commonwealth v. Batts, 163 A.3d 410, 459 (Pa. 2017) (holding that, under Pennsylvania law, there is a presumption against imposing a sentence of life without parole for a crime committed under age 18 and that, to overcome the presumption at sentencing, the Commonwealth must rebut the presumption against permanent incorrigibility beyond a reasonable doubt); COLO. REV. STAT. § 17-34-102(8) (2023) (creating a special program for, *inter alia*, people sentenced to adult prison for crimes committed under age 18, completion of which enables consideration for early parole pursuant to which, “unless rebutted by relevant evidence, it is presumed” that the person “has met the factual burden of presenting extraordinary mitigating circumstances” and “release to early parole is compatible with the safety and welfare of society”).



*2. Evaluation of Maturity, Rehabilitation, and the Mitigating Factors of Youth*<sup>132</sup>

a. In assessing a person's overall maturity and rehabilitation since the time of the offense(s), the [Parole Board] shall consider:

- i. *the person's demonstrated emotional maturity and reflection, including insight into past conduct;*
- ii. *the person's demonstrated maturity of judgment, including but not limited to improved impulse control, the development of pro-social relationships, and independence from negative influences;*
- iii. *the person's participation in rehabilitative, treatment, and educational programs while in prison, as applicable and to the extent those programs have been made available, including any use of self-study for self-improvement;*
- iv. *the person's history of employment in prison, if opportunities have been available;*
- v. *obstacles that the person may have faced as a youth entering the adult correctional system;*
- vi. *the person's institutional conduct, with greater weight given to more recent conduct occurring after the person has had time to mature and to adjust to prison;*
- vii. *the person's ability to progress to and succeed at lesser security levels, if the ability to progress is available;*
- viii. *the person's occupational skills, and job potential, as well as ability and readiness to assume obligations and undertake responsibilities;*
- ix. *the person's reentry plan, including residence plans; and*

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<sup>132</sup> See, e.g., ARK. CODE ANN. § 16-93-621(b)(2) (2024); CAL. PENAL CODE § 4801(c) (2018); CONN. GEN. STAT. ANN. § 54-125a(f)(4) (2023); MD. CODE REGS. 12.08.01.18(A)(4)–(5) (2023); MO. ANN. STAT. § 558.047(5) (West 2016); W. VA. CODE ANN. § 62-12-13b(b) (West 2014); N.M. STAT. ANN. § 31-21-10.2(C) (West 2023); OHIO REV. CODE ANN. § 2967.132(E)(2) (West 2023); OR. REV. STAT. ANN. §§ 144.397(5)–(6) (West 2019); 13 R.I. GEN. LAWS § 13-8-14.2(a) (2021); VA. CODE ANN. § 62-12-13b(b); see also D.C. CODE § 24-403.03(c) (2024) (judicial sentence modification).

- x. *any other information relevant to the person's maturity and rehabilitation.*

b. In reaching a release decision, the [Parole Board] shall give substantial mitigating weight to the following factors:

- i. *the diminished culpability and heightened capacity for change of youths as compared to that of adults;*
- ii. *the hallmark features of youth, including immaturity, impetuosity, and limited ability to assess or appreciate risks and consequences;*
- iii. *the young age of the person at the time of the offense(s);*
- iv. *the immaturity of the person at the time of the offense(s);*
- v. *whether and to what extent peer or adult pressure was involved in the offense(s);*
- vi. *the person's family and community circumstances at the time of the offense(s), including any history of abuse, trauma, poverty, and involvement in the child welfare system; and*
- vii. *lack of ability of the person to extricate themselves from criminogenic circumstances.*  
*Under no circumstances shall the [Parole Board] consider the person's age at the time of the offense(s) as an aggravating factor.*

c. The [Parole Board] shall not deny parole based in any part on factors outside of the person's demonstrated ability to change, such as nature or effects of the offense.

#### *A. Commentary to Policies 1 and 2*

The U.S. Supreme Court has made clear that anyone convicted of a nonhomicide crime committed under age 18 and most people convicted of a homicide crime committed under age 18, whose crimes reflected transient immaturity rather than irreparable corruption, must have a realistic opportunity for release grounded in consideration of youth, maturity, and rehabilitation.<sup>133</sup> For a parole system to meet this constitutional requirement, the release decision must be based on assessment of post-crime growth and change, considered in the context of the person's youth before, during, and

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<sup>133</sup> See discussion *supra* Section II.

after the crime. The release decision must *not* be centered on the seriousness of the offense or victim impact—such considerations are reflected in the original sentence and do not bear on assessment of post-crime maturity and rehabilitation except insofar as they might inform a baseline from which to measure change or offer context for behavior.<sup>134</sup> Recognizing this, states that have reformed their parole systems to better serve this cohort have uniformly required some consideration of youth as well as post-crime maturity and rehabilitation.<sup>135</sup>

Note that the mitigating considerations of youth bear on several aspects of the parole release decision. For example, parole decision-makers must consider the effect of youth and related challenges for the person adapting to the adult correctional system when assessing early institutional behavior<sup>136</sup>. Some states even preclude consideration of any disciplinary tickets incurred before a certain age,<sup>137</sup> or limit consideration to infractions committed within a fixed, recent period of time.<sup>138</sup> Policies concerning prison discipline might also distinguish between serious infractions and minor ones that should have little or no relevance to the release decision.<sup>139</sup>

Furthermore, because crimes committed by young people are typically the result of transient immaturity rather than irreparable corruption, and the “vast majority”<sup>140</sup> of people in this cohort will outgrow criminal behavior,<sup>141</sup> parole boards should apply a presumption in favor of release, ordering

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<sup>134</sup> Indeed, *Roper* and *Graham* explain that it is near-impossible to discern irreparable corruption from transient immaturity at the time or from assessment of the circumstances of the crime. See *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“It 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.”); *Graham*, 560 U.S. 48, 68 (2011) (quoting *Roper*, 543 U.S. at 573).

<sup>135</sup> See sources cited *supra* notes 123 and 125.

<sup>136</sup> For discussion of the harms associated with incarcerating young people, including description of research finding that incarceration slows psychological maturation and exacerbates trauma, contributing to behavior challenges, see *Why Youth Incarceration Fails: An Updated Review of the Evidence*, The Sentencing Project (Dec. 2022), at 20–21.

<sup>137</sup> E.g., New Mexico, which precludes giving weight to infractions incurred before age 25. Interview with Callie King-Guffey, Digit. Commc’ns. & Advoc. Manager, and Rebecca Turner, Assoc. Legal Dir., The Campaign for the Fair Sent’g of Youth (Oct. 5, 2023).

<sup>138</sup> For example, Virginia’s parole board only considers the most recent two years of institutional infractions for this cohort. *Id.*

<sup>139</sup> See, e.g., Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1276–77 (2011) (discussing evaluation of disciplinary infractions in parole process, noting that delaying parole release for a minor infraction for which the individual has already been sanctioned may raise double punishment concerns, and suggesting a distinction between “isolated or inadvertent violations” and persistent, willful, or violent misconduct).

<sup>140</sup> *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016).

<sup>141</sup> See, e.g., Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014–16 (2003); Laura S. Abrams, Kaylyn Canlione & D. Michael Applegarth, *Growing Up Behind Bars: Pathways to Desistance for Juvenile Lifers*, 103 MARQ. L. REV. 745, 773 (2020) (studying cohort of people sentenced in California for crimes committed under age 20 and finding that “despite the odds, and without a great deal of formal rehabilitation,” people found pathways to desistance).

release unless the evidence demonstrates that the person has not sufficiently matured or rehabilitated or otherwise doesn't meet the criteria for release.<sup>142</sup>

### 3. Access to Rehabilitative Programming and Services<sup>143</sup>

a. Within the first year of incarceration for a person eligible for parole under this [statute], the [Parole Board or Department of Corrections] shall conduct an assessment of the person and identify programming and services that would be appropriate to prepare the person for return to the community. Such assessment shall happen at least every five years during the person's incarceration.

b. At least five years before first parole eligibility, a representative from the [Parole Board] shall meet with the person to provide information about the parole hearing process and individualized recommendations regarding work assignments, rehabilitative programs, and institutional behavior, including any programming required to be completed before parole can be granted. The representative shall also advise the person on the importance of trying to collect and retain records relating to their youth, including official records, educational records, and other records that might be pertinent to parole consideration.

c. To the extent possible, the [Department of Corrections] shall make the programming that has been identified in (b) available in time for it to be completed prior to the person's parole hearing.

### B. Commentary to Policy 3

Access to rehabilitative programming is essential not only to promote growth and rehabilitation, but also to offer hope for, and facilitate, a productive life outside of prison.<sup>144</sup> Often, people serving life sentences are

<sup>142</sup> See CLEARINGHOUSE, *supra* note 122. For an argument that, given the constitutional nature of the inquiry in this context, parole boards should presume maturity and rehabilitation and, therefore, release unless there is clear and convincing evidence to the contrary; see also Harrington, *supra* note 100, at 1204–15.

<sup>143</sup> CAL. PENAL CODE § 3041(a)(1) (2018); 730 ILL. COMP. STAT. § 5/5-4.5-115(d) (2024); WASH. REV. CODE § 10.95.030(2)(e) (2024); WASH. REV. CODE § 9.94A.730 (2) (requiring department of corrections to assess persons eligible for sentence review five years before eligibility to recommend and make available whenever possible “programming and services that would be appropriate to prepare” for return to society); see also Class Settlement Agreement, *Hill v. Whitmer* at 3–4, No. 2:10-cv-14568, (E.D. Mich. Sept. 28, 2020), ECF No. 342-2, <https://clearinghouse.net/doc/111511/> (requiring Michigan Department of Corrections Program Centralization Unit to complete a file review and propose programming recommendations for all class members—people previously serving juvenile life without parole but eligible for resentencing under the state's *Miller*-fix statute—awaiting resentencing, for review by the Michigan Parole Board, and requiring placement in or on the waitlist for recommended programming based on earliest release date as soon as possible after final recommendations enter).

<sup>144</sup> See *Graham v. Florida*, 560 U.S. 48, 70; see also *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018), *modified* (Apr. 11, 2018) (“[I]n underscoring the capacity of juveniles to change, *Graham* made

given lowest priority for rehabilitative programs and services, or are excluded from eligibility entirely.<sup>145</sup> But courts and legislatures alike have recognized that access to such programs “is vital, especially for juvenile offenders, to enhance their growth and rehabilitative potential,”<sup>146</sup> to support success in the parole process and, especially, upon reentry into the community. Therefore, several states encourage, if not require, collaboration between parole boards and departments of corrections to increase access to rehabilitative programming. For example, Washington requires that the state’s Department of Corrections, at least five years before certain juvenile parole hearings, “conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community,” and make such programming available “to the extent possible.”<sup>147</sup> California similarly directs its parole board to meet with people six years prior to their minimum parole eligibility date and provide “information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior.”<sup>148</sup> And the Iowa Supreme Court has held that if the state, through the parole board, wishes to condition release upon completion of certain programming, the Department of Corrections cannot unreasonably withhold such programming.<sup>149</sup> Along these lines, too, the settlement agreement in the *Maryland Restorative Justice Initiative v. Hogan* lawsuit includes a new regulation for the Department of Corrections and a modification to the Department’s case management manual directing case managers and the Commissioner to give “significant weight” or “serious consideration” to Parole Commission requests or recommendations related to security classifications and programming.<sup>150</sup>

Pre-parole assessments and resulting programming recommendations—by individual(s) with the necessary expertise from either the Department of Corrections or parole board or both, as appropriate in a particular system—can support rehabilitation and help ensure access to

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clear that a juvenile offender’s prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward.”).

<sup>145</sup> *E.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015) (describing allegation that department of correction’s policy excluding participation in rehabilitative programming because plaintiff did not have a defined release date, effectively precluding parole, presented plausible claim of de facto life without parole sentence in violation of *Graham*); *see also* People v. Stovall, 987 N.W.2d 85, 94 (Mich. 2022), <https://clearinghouse.net/doc/139094/> (noting that “prisoners who receive parolable life sentences are given lower priority when it comes to educational and rehabilitative programming”).

<sup>146</sup> *Stovall*, 987 N.W.2d at 94.

<sup>147</sup> WASH. REV. CODE § 10.95.030(2)(f) (2024).

<sup>148</sup> CAL. PENAL CODE § 3041(a)(1) (2018).

<sup>149</sup> *Bonilla v. Bd. of Parole*, 930 N.W.2d 751, 786 (Iowa 2019).

<sup>150</sup> Attachment 1 Amicus Opposition to Plaintiffs’ Rule 41 Stipulation at 23, *Maryland Restorative Justice Initiative v. Hogan*, No. 1:16-cv-01021 (D. Md. Mar. 24, 2021), ECF 260-2 (providing draft DOC Regulations).

programming for people serving life or long sentences. Pre-parole interaction with the parole board can also offer a touchpoint to demystify the parole process, set expectations, and help people to better navigate and prepare for parole and, ultimately, release.

#### *4. In-Person Parole Hearing with Counsel*<sup>151</sup>

a. At least six months before a person becomes eligible for parole pursuant to this subsection, the [Parole Board] shall hold an in-person hearing to determine the person's suitability for parole release.

b. At least twelve months prior to the hearing, the [Parole Board] shall notify the [Public Defender], the appropriate [State's Attorney], and [Victim Services] of the person's eligibility for parole release pursuant to this subsection. The [Public Defender] shall assign counsel if the person is indigent.

c. At the hearing, the [Parole Board] shall permit the person eligible for parole and the person's counsel to make statements. The parole candidate shall answer the [Parole Board's] questions, which may pertain to growth, maturity, rehabilitation, and reentry plans, among other topics.

d. The hearing shall be conducted before more than one member of the [Parole Board]. Release shall be ordered if a majority of the members presiding over the hearing vote in favor of release.

e. The hearing shall be recorded and the recording retained by the [Parole Board] until the conclusion of the person's next parole hearing and any appeal, or until the person is released on parole, whichever occurs first.

#### *C. Commentary to Policy 4*

Most states that have implemented parole reform now provide for in-person or live-by-video hearings, and many statutes make clear that parole

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<sup>151</sup> See, e.g., ARK. CODE ANN. § 16-93-621(b)(3) (2024) (permitting, though not providing, attorney representation at parole hearings); CAL. PENAL CODE § 3041.5(a)(2) (West 2023) (providing for a hearing to review parole suitability and permitting the juvenile offender "to be present, to ask and answer questions, and to speak on his or her own behalf"); CONN. GEN. STAT. § 54-125a(f)(3) (2023) (providing for appointment of counsel at least twelve months prior to parole hearing); 730 ILL. COMP. STAT. § 5/5-4.5-115(e) (2024); N.M. STAT. ANN. § 31-21-10.2(D) (2023); OHIO STAT. § 2967.132(E)(1),(H); OR. REV. STAT. § 144.397(12); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 27 N.E.3d 349, 361 (Mass. 2015) (construing MASS. GEN. LAWS ch. 211D § 5 (2024) to include provision of counsel for juvenile parole hearings, as determined to be required to ensure a meaningful opportunity for parole under the state constitution); Defendant's Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 3, *Hayden v. Butler*, 5:10-CT-3123 (E.D.N.C. Oct. 24, 2016), <https://clearinghouse.net/doc/94303/>; MD. CODE REGS. 12.08.01.18(C)(4) (2023); see also D.C. CODE § 24-403.03(b)(2) (2024) (judicial sentence modification).

candidates may speak at their hearings.<sup>152</sup> These kinds of parole hearings, permitting real-time exchange between parole candidates and decisionmakers, allow parole decisionmakers to ask questions directly and to more accurately assess insight and maturity. Live hearings also permit parole candidates to address questions, provide context and perspective, and correct or rebut any inaccurate information. When possible, in-person hearings may avoid the potential for technological difficulties, enable fuller assessment of the parole candidate (via body language or other non-verbal clues), and support connection and an enhanced sense of fairness of process.<sup>153</sup> But any kind of live hearing is preferable to written submissions, which may be especially ill-suited to this purpose for people sentenced as youth, who “‘will often lack the educational attainment necessary to write effectively,’ and are likely to be much more capable of expressing themselves orally.”<sup>154</sup>

Counsel is an important part of the parole process for this cohort for many reasons. People who have been incarcerated since they were youths may face unique challenges in marshalling the requisite evidence to provide the youth-related context for their crimes as well as to demonstrate post-crime growth and change.<sup>155</sup> Young people who commit crimes are often an especially vulnerable population—more likely to have experienced abuse and trauma, to require psychological and other professional services, to have experienced educational disruption, and to lack connections and support

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<sup>152</sup> See, e.g., CAL. PENAL CODE § 3041.5(a)(2) (West 2023); CONN. GEN. STAT. § 54-125a(f)(3) (2023).

<sup>153</sup> See, e.g., David Peplow & Jake Phillips, *Remote Parole Oral Hearings: More Efficient, But at What Cost?*, CRIMINOLOGY & CRIM. JUST. 9 (Apr. 7, 2023), <https://journals.sagepub.com/doi/epub/10.1177/17488958231163278> (noting some potential challenges to remote hearings, including technology issues, inability to assess non-verbal body language, and difficulties establishing rapport, and suggesting that such challenges ought to be considered, in addition to efficiency and other advantages of in-person hearings).

<sup>154</sup> Russell, *supra* note 116, at 423 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)); see also ASHLEY NELLIS, SENT’G PROJECT, *THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3* (March 2012) (noting that two in five respondents had been enrolled in special education classes and that fewer than half had been attending school at all at the time of the offense) [hereinafter *The Lives of Juvenile Lifers*].

<sup>155</sup> E.g., Russell, *supra* note 116, at 419–21 (“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. Many had limited education prior to incarceration and have not had opportunities within prison to develop critical skills. Some were victims of trauma and abuse before their arrests and have been further victimized in prison. Some suffer from depression or other mental illnesses. 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. 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. . . . Yet a prisoner detained since childhood cannot be expected to muster the resources for a thorough investigation and mental health evaluation on his or her own.”).

outside prison, among other vulnerabilities.<sup>156</sup> Counsel, among other procedural supports, may be essential to enable this cohort to navigate the parole process and to prepare for successful release, including developing a release plan.<sup>157</sup> In addition, these kinds of parole hearings require inquiry into the circumstances of youth and subsequent efforts toward rehabilitation, which necessitates “a potentially massive amount of information . . . including legal, medical, disciplinary, educational, and work-related evidence.”<sup>158</sup> In this context, counsel is crucial to ensuring that the parole board is presented with all relevant information, which may require extensive investigation into background, evaluations from mental health experts, and procurement of other records and testimonies.<sup>159</sup> Full, adequate presentation of relevant evidence permits the parole board to make an informed, accurate assessment of maturity and rehabilitation and to avoid erroneously incarcerating people who should otherwise be released.<sup>160</sup> Presence of counsel can further support the parole decision-makers by directing focus on the proper factors, especially in a context that differs from typical parole consideration in light of the characteristics of the parole candidates, the lengthy sentences that they may be serving, and the nature of the crimes of conviction, which are often more serious than the kinds of crimes that parole boards are accustomed to reviewing.<sup>161</sup> In addition, counsel can correct or dispute aspects of the record, or provide youth-related

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<sup>156</sup> See, e.g., Nellis, *The Lives of Juvenile Lifers*, *supra* note 146154, at 2–3 (concluding from survey results that juvenile lifers experienced high levels of exposure to violence in their homes and their communities and faced significant educational challenges); AM. C.L. UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 26 (Nov. 29, 2016), <https://www.aclu.org/publications/report-false-hope-how-parole-systems-fail-youth-serving-extreme-sentences> [hereinafter False Hope] (“Several studies show that [juvenile offenders] tended to be raised in poor neighborhoods, had limited education, had mental disabilities, and were themselves subject to physical and sexual violence.”).

<sup>157</sup> See, e.g., Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of* *Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1079 (2014) (“When they finally near their first parole hearings, many [juvenile offenders] have few contacts in the outside world, no job prospects, and no previously-forged relationships; in other words, they are even less prepared for reentry than their adult counterparts. They thus come before the Board in a high ‘risk state,’ unlikely candidates for release unless their circumstances are considered from an appropriate developmental perspective.”); Russell, *supra* note 116, at 421 (noting the role that counsel can play in helping develop a release plan and the challenges that might otherwise face this cohort in doing so).

<sup>158</sup> *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 27 N.E.3d 349, 360 (Mass. 2015) (explaining that “[a] parole hearing for a juvenile homicide offender . . . involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources”).

<sup>159</sup> See generally Russell, *supra* note 116, at 420–21.

<sup>160</sup> See, e.g., Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363 (2011) (finding in the context of removal proceedings that counsel was one of the two most important variables affecting outcome), [http://www.cardozolawreview.com/content/denovo/NYIRS\\_Report.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf); Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419, 420 (2001) (finding that tenants with representation did “significantly” better in housing court than tenants that did not have representation).

<sup>161</sup> Interview with Richard Sparaco, former Executive Director of the Connecticut Board of Pardons and Paroles, in his personal capacity (Oct. 3, 2023).



context to the crime, so that these important functions can occur without potentially casting the parole candidate as combative or as failing to accept responsibility.<sup>162</sup> Counsel can also help navigate the process after any denial of parole, including accessing a record of the hearing and decision and providing support in the judicial review process.

Participation of counsel can support parole candidates and decision-makers alike, without transforming the process into an unduly adversarial one. For example, in Connecticut, counsel prepares a written submission focused on offering context for consideration of maturity and rehabilitation and other statutory factors, supports the parole candidate in preparing for the hearing, and makes a statement at the hearing, without cross examination or sustained back and forth with the Board or with counsel for the state (who is also permitted to make a statement but not to cross-examine).<sup>163</sup>

Some involvement by counsel in the parole process is not unusual—in a survey conducted in 2014, 39 states reported considering input from counsel in the release decision.<sup>164</sup> Of course, in order to effectively serve this essential role, any appointed counsel must be properly trained and supported in performing their duties, including with compensation that affords sufficient time devoted to these matters.<sup>165</sup> Of course, there is a cost associated with providing counsel in this context. If such an expense is not yet feasible, systems ought to consider how best to otherwise support people in preparing for and navigating the parole process and in ensuring a comprehensive and accurate record for review, for example through access to social work or similar support independent from departments of corrections or parole systems.

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<sup>162</sup> Interview with Deborah LaBelle, Attorney (Sept. 14, 2023); Russell, *supra* note 116, at 421 (“[I]t 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.”).

<sup>163</sup> CONN. GEN. STAT. § 54-125a(f)(3) (2023); Interview with Alexandra Harrington, Associate Professor, Director of the Criminal Justice Advocacy Clinic, Director of the Innocence and Justice Project, Univ. of Buff. Sch. of L. (Sept. 7, 2023); Interview with Richard Sparaco, *supra* note 153.

<sup>164</sup> Russell, *supra* note 116, at 402.

<sup>165</sup> *E.g.*, Bell, *supra* note 101, at 488 (in assessing California’s juvenile lifer parole decisions, noting “substantial differences” between appointed counsel and retained counsel, with higher parole grant rates for people with retained counsel, attributable in part to the additional time that retained counsel can devote to helping people understand and navigate the parole process).

*5. Examination by Psychiatrist or Psychologist with Relevant Expertise*<sup>166</sup>

a. The [Parole Board] may, before holding the hearing described in subsection (4), provide the parole candidate the opportunity to undergo examination by a psychiatrist or psychologist, at state expense if the person is indigent.

b. Within 60 days of any such evaluation, the psychiatrist or psychologist shall file a written report of findings and conclusions with the [Parole Board] and must also provide a certified copy of the report to the person and the person's counsel.

*D. Commentary to Policy 5*

Independent psychological evaluations and reports from experts, including those with special training in psychosocial development, may support a parole board in adequately accounting for youth and assessing maturity, rehabilitation, and fitness for release. While these expert reports may not be required in the ordinary course, the opportunity for expert assessments or evaluations should be available, and funded, for people who might benefit from such assessment, including, for example, in cases involving mental illness or sex crimes.<sup>167</sup> Experts trained in adolescent psychology, for example, can help the board understand an individual's circumstances and motivations at the time of the crime, post-crime development, and conduct in prison. Massachusetts's highest court has explained that assistance of a psychologist or other expert witness "may be crucial to [a] juvenile's ability to obtain a meaningful chance of release."<sup>168</sup> The court construed a relevant statute to authorize courts to permit payment of experts to assist with parole proceedings "in certain limited contexts—specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending."<sup>169</sup> Access to specially trained

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<sup>166</sup> CAL. PENAL CODE § 3051(f)(1) (2023); 730 ILL. COMP. STAT. 5.5-4.5-115(h) (2024); OR. REV. STAT. § 144.397(4) (2019); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 27 N.E.3d 349, 363 (Mass. 2015) (construing MASS. GEN. LAWS ch. 261 §§ 27A-27G (2024) to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts); ARK. CODE ANN. § 16-93-621(b)(2)(I) (2024) (directing consideration of "[t]he results of comprehensive mental health evaluations conducted by an adolescent mental health professional . . . at the time of sentencing and at the time the person becomes eligible for parole"); LA. STAT. ANN. § 15:574.4(D)(2) (2024) (requiring that "each member of the panel . . . be provided with and . . . consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior").

<sup>167</sup> Interview with Alexandra Harrington, *supra* note 155.

<sup>168</sup> *Diatchenko*, 27 N.E.3d at 362.

<sup>169</sup> *Id.* at 362–63.

psychological experts may also be important because there is a higher prevalence of mental impairments among young offenders than among those not involved with the justice system; lack of access to experts increases the risk that parole is denied based on undiagnosed psychiatric or cognitive impairments, which may go untreated in prison.<sup>170</sup> Note, though, that just as typical parole procedures may be ill-suited to people serving sentences for crimes committed as children, so, too, may typical experts, untrained in adolescent development or mental health, be unable to sufficiently evaluate the particular characteristics and needs of this cohort.<sup>171</sup> Accordingly, some states require parole boards in cases involving juvenile offenders to consider reports from experts in adolescence.<sup>172</sup>

#### 6. *Use of Risk Assessment Tools*<sup>173</sup>

a. Upon request of the parole candidate or determination by the [Parole Board] that sufficient cause supports requiring assessment of risk, a risk assessment may be performed.

b. Any risk assessment or similar evaluation considered for purposes of the parole release decision shall include dynamic risk factors, shall account for the mitigating features of youth, shall have been validated to be free of racial bias, and shall permit the professional administering the tool to exercise independent clinical judgment in assessing risk.

c. The parole candidate and/or counsel shall have access to any risk assessment performed under subsection (b) as well as the opportunity to review for accuracy, including in scoring, underlying facts, and conclusions, and to present any corrections to the [Parole Board].

d. Any assessment performed under subsection (b) shall be completed in sufficient time so as not to postpone the parole hearing required in 4(a) or otherwise delay release.

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<sup>170</sup> See generally Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, 13 INT. J. ENVIRON. RES. & PUB. HEALTH 228 (2016); EQUAL JUSTICE INITIATIVE, ALL CHILDREN ARE CHILDREN: CHALLENGING ABUSIVE PUNISHMENT OF JUVENILES 12 (2017), <https://eji.org/sites/default/files/AllChildrenAreChildren-2017-sm2.pdf>.

<sup>171</sup> See, e.g., Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (2022) at 45 (recommending that “[b]ehavioral health professionals likely to conduct forensic evaluations, provide forensic expert testimony, or provide clinical testimony . . . strive to be currently informed of relevant research domains” and noting that “[s]tandard clinical training is ordinarily insufficient to provide proficiency in working with younger offenders, and, in any event, the continuing development of research in this area requires an ongoing process of professional development and learning”).

<sup>172</sup> E.g., ARK. CODE ANN. § 16-93-621(b)(2)(I) (2023).

<sup>173</sup> MD. CODE REGS. 12.08.01.18(A)(7) (2023) (“Any risk assessment tool used by the Commission for determining the risk of an inmate shall include dynamic risk factors as a method for assessing risk and shall require the healthcare professional administering the tool to exercise independent clinical judgment in assessing risk.”).

### *E. Commentary to Policy 6*

The risk assessment tools typically used to support parole board decision making are ill-suited to people who commit crimes as youths, have not been validated for people who spend a long time in prison, risk reinforcing racial stereotypes and exaggerating risk based on systemic disadvantage, and may lend a clinical imprimatur to what ought to be legal and administrative considerations.<sup>174</sup> Many of the static factors that inform evaluation of risk implicitly situate youth as aggravating, rather than mitigating. For example, people who did not graduate from high school, are not married, and/or who have never held a job outside of prison may be deemed more risky, even though these factors are usually true for any person who was first incarcerated as a child.<sup>175</sup> Moreover, the tools may assign a higher risk score to people who committed crimes at younger ages, as all in this cohort will have done,<sup>176</sup> notwithstanding evidence of lower rates of recidivism for this population.<sup>177</sup> To combat this skew, any risk assessment tool must include consideration of dynamic factors that account for post-crime growth and change, and should enable exercise of independent judgment that allows the assessor to, for example, downgrade assessment of risk to account for youth.<sup>178</sup> Moreover, assessors must have context for how prisons operate, and must be willing and able to consider collateral sources other than prison authorities.<sup>179</sup> For example, in the settlement agreement in the *Maryland Restorative Justice Initiative v. Hogan* litigation, the parties modified the existing parole statute to provide that risk assessments must include dynamic factors and permit exercise of independent judgment, and also modified the Department of Corrections' case management manual to

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<sup>174</sup> For an argument that the psychological evaluation/risk assessment processes in California are more prejudicial than probative in parole hearings, see generally Jeremy Isard, *Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, 105 CAL. L. REV. 1223 (2017).

<sup>175</sup> Interview with Alexandra Harrington, *supra* note 155; Megan Annitto, Graham's *Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of Graham and Miller*, 80 BROOK. L. REV. 119, 160–61 (2014).

<sup>176</sup> Annitto, *supra* note 166, at 158–60 (2014) (describing this phenomenon, and noting that “[o]n the one hand, the offender's youth makes him less blameworthy and less culpable for his actions because he has a greater potential for change; on the other hand, data driven risk assessment instruments are based upon empirical evidence suggesting that early onset of criminal or delinquent activity correlates with a greater likelihood of future criminal behavior.”).

<sup>177</sup> See, e.g., TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 2 (2020) (finding a 1% recidivism rate among the 174 juvenile lifers released on parole in Philadelphia, as compared to a 30% recidivism rate within 2 years nationally for people convicted of homicide), <https://www.msudecisionmakinglab.com/philadelphia-juvenile-lifers>; Presentation of Sukhmani Singh & Joshua Adler, Connecticut Sent’g Comm’n September Meeting (Sept. 28, 2023), at 41:00–42:05, <https://ct-n.com/ctnplayer.asp?odID=22169> (noting “incredibly low” 11% rate of recidivism among 108 people released on parole under Connecticut’s juvenile parole statute, compared to rates of 50–65% for comparable adult populations).

<sup>178</sup> Interview with Sonia Kumar, Senior Staff Att’y, ACLU of Maryland (Sept. 20, 2023). Attorney Kumar emphasized her general skepticism of the utility of risk assessment tools and concerns about the errors that they can introduce.

<sup>179</sup> *Id.*

make clear that case managers are to consider youth in security classification decisions as well as in preparing pre-parole summaries.<sup>180</sup> Parole decision-makers, too, must be educated about the efficacy of risk assessment tools for this particular population.<sup>181</sup> Finally, parole candidates and their counsel must have the opportunity to review any risk assessment for error.<sup>182</sup>

*7. Access to the Record; Ability to Contribute to and Correct the Record*<sup>183</sup>

a. At least 30 days, and ideally 60 or more days, in advance of the parole hearing, the [Parole Board] shall permit the person and the person's counsel to review information that the [Parole Board] will consider in determining the person's suitability for release, including any statements concerning the circumstances of the offense(s) and any risk or psychological assessment conducted.

b. In advance of the parole hearing, the [Parole Board] shall permit the person to submit materials to the [Parole Board] including, but not limited to, letters of support, court records, expert reports, and records relating to the person's childhood and efforts at rehabilitation, and any corrections to the existing record.

c. The [Parole Board] shall permit persons with knowledge of the parole candidate before the offense(s), or the parole candidate's growth and maturity since the time of the offense(s), to submit statements for review in advance of the parole hearing. This may include, but is not limited to, family members, friends, school personnel, faith leaders, community representatives, and others with relevant knowledge.

*F. Commentary to Policy 7*

People eligible for parole for crimes committed as youth must have access to all information used by the parole decisionmakers, and an ability to correct or rebut that information. Otherwise, parole candidates cannot dispute or correct inaccuracies or provide alternative accounts or reports that may be helpful to the release decision. Permitting access and opportunity to correct the record helps ensure that the parole release decision rests on accurate information. Indeed, at least one court has recognized that this is

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<sup>180</sup> Appendix to DOC Case Management Manual, *Maryland Restorative Justice Initiative v. Hogan*, No. 1:16-cv-01021 (D. Md. 2016) (ECF 260-2) at 26.

<sup>181</sup> Interview with Sonia Kumar, *supra* note 169.

<sup>182</sup> See, e.g., Brief of the ACLU of Maryland et al. as *Amici Curiae* in Support of Petitioner, Michael Farmer at 22–25, *Farmer v. Maryland*, No. 31 (Md. Ct. App. Dec. 6, 2021) (describing errors found in risk assessments of juvenile lifers in Maryland).

<sup>183</sup> CAL PENAL CODE §§ 3041.5(a)(1) (West 2023), 3051(f)(2) (2020); CONN. GEN. STAT. § 54-125a(f)(3) (2023) (permitting prospective parolee to make statement at hearing and counsel to submit reports and other documents); 730 ILL. COMP. STAT. § 5/5-4.5-115(f) (2024).

not just good policy but a constitutional imperative, holding that access to parole files and the ability to provide information and correct misinformation is a due process requirement.<sup>184</sup>

#### 8. Release Decisions and Judicial Review<sup>185</sup>

a. If the [Parole Board] denies release, it shall provide a written statement of the reasons supporting its decision, including the youth-related factors and evidence of maturity and rehabilitation that it considered and the evidence found to overcome the presumption of release. Denial that relies in whole or in part on the result of any risk assessment performed pursuant to 6(a) shall provide detail as to the specific aspects of the risk assessment supporting denial. The [Parole Board] shall also offer guidance as to what will improve the person's likelihood of release upon subsequent consideration, including, for example, any specific educational or rehabilitative programs that the person must complete.

b. If the [Parole Board] determines that continued confinement is necessary, the [Parole Board] shall reassess a person's suitability for parole at a hearing no more than two years after any decision denying parole.

c. Decisions of the [Parole Board] shall be subject to judicial review under an abuse of discretion standard.

#### G. Commentary to Policy 8

Judicial review helps ensure that the parole decision complies with constitutional and statutory requirements. As the Massachusetts Supreme Judicial Court has explained, the "purpose of judicial review" is to discern "whether the board has carried out its responsibility to take into account the [required] attributes or factors"<sup>186</sup>—a determination that may have constitutional significance.<sup>187</sup> To support meaningful judicial review, parole boards should provide a statement of reasons for the denial and guidance for

<sup>184</sup> *Bonilla v. Bd. of Parole*, 930 N.W.2d 751, 780–81 (Iowa 2019) (ultimately denying relief in facial challenge to parole procedures, however, finding that Board's policies passed constitutional muster).

<sup>185</sup> CAL. CODE REGS. tit. 15 § 2445(d) (2020) ("If a hearing panel finds a youth offender unsuitable for parole, the hearing panel shall articulate in its decision the youth offender factors present and how such factors are outweighed by relevant and reliable evidence that the youth offender remains a current, unreasonable risk to public safety."); CONN. GEN. STAT. § 54-125a(f)(5) (2023) ("After such hearing, the board shall articulate for the record its decision and the reasons for its decision. If the board determines that continued confinement is necessary, the board may reassess such person's suitability for a new parole hearing at a later date to be determined at the discretion of the board, but not earlier than two years after the date of its decision."); MD. CODE REGS. 12.08.01.18(E)(3) (2023); OHIO STAT. § 2967.132(G) (2019); Defendant's Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 4, *Hayden v. Butler*, 5:10-CT-3123-BO (E.D.N.C. Oct. 24, 2016).

<sup>186</sup> *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 27 N.E.3d 349, 365 (Mass. 2015).

<sup>187</sup> See Harrington, *supra* note 100, at 366.

the person to improve the likelihood of parole release in the future. A complete statement of reasons for the parole decision may also minimize use of improper bases for denial, as requiring explanation on the record can reduce some forms of cognitive bias.<sup>188</sup> A statement of reasons may also prepare the parole candidate for future parole review by pointing to programs or treatments that could best prepare the person for release. Review under an arbitrary and capricious or abuse of discretion standard aligns with majority practice of states permitting judicial review.<sup>189</sup> Finally, permitting parole re-review after two years offers an opportunity for the person to complete additional programming, solidify reentry plans, and otherwise prepare for rehearing, without unduly extending their period of incarceration.

#### *9. Data, Monitoring and Review*<sup>190</sup>

a. The [Parole Board] shall annually conduct a review of all people currently serving sentences for crimes committed under age 18 to ensure that parole eligibility hearings are timely and appropriately conducted.

b. The [Parole Board] shall collect and maintain data, including how many parole review hearings are held annually under [this statute] and the results, as well as a statistical breakdown on the basis of age, race, ethnicity, gender, type of offense, and any categorization based on risk assessment or similar evaluation.

c. The [Parole Board] shall also put in place mechanisms for reviewing and improving parole processes, including upon annual review conducted under (a).

#### *10. Qualifications and Training*<sup>191</sup>

a. All [Parole Board] members and relevant staff shall receive training at initiation of the position, and at least annually thereafter, in: adolescent psychology, development, and decisionmaking, and how it relates to the applicable parole considerations; low rates of recidivism for people released post-Graham and Miller; the application of risk assessment tools to this

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<sup>188</sup> Annitto, *supra* note 166, at 166.

<sup>189</sup> See Harrington, *supra* note 100, at 1197 (“Twenty-two states provide for general review of the parole board’s decision under some variation of an arbitrary and capricious or abuse of discretion standard.”).

<sup>190</sup> N.M. STAT. ANN. § 31-21-10.2(F) (2023); Defendant’s Proposed Plan in Response to 25 September 2016 Order [D.E. 58] at 4, *Hayden v. Butler*, 5:10-CT-3123-BO (E.D.N.C. Oct. 24, 2016); Interview with Richard Sparaco, *supra* note 154 (describing planning, research, and development unit that gathered data on parole hearings conducted under Connecticut’s Public Act 15-84).

<sup>191</sup> See, e.g., Exhibit 2 to Plaintiff’s Response to Defendants’ Plan for Compliance, Expert Opinion of Heidi L. Rummel, at 4, 14, *Brown v. Precythe*, No. 2:17-cv-04082-NKL (W.D. Mo. Jan. 10, 2019), ECF No. 166-2 (noting the importance of a parole board trained in adolescent brain development and the relevant legal issues).

population; the requirements of this [statute], including appropriate and inappropriate bases for the release decision, and the meaning of key terms, including maturity and rehabilitation, in this context; and the role of parole in the broader sentencing and punishment scheme.

b. Whenever possible, [Parole Board] members and supporting staff shall have some relevant background in adolescent development, and should reflect a diversity of experiences and perspectives, with greater emphasis on people reflective of the communities most affected by mass incarceration, and people whose orientation is towards social work and services, rather than law enforcement and corrections.

#### *H. Commentary to Policy 10*

Training upon assumption of duties and annually thereafter ensures that all parole decisionmakers remain informed about relevant topics, even as membership changes. Decisionmakers should be trained in adolescent development and related issues, and in why and how the parole release decision for this cohort is to be grounded in assessment of youth, maturity, and rehabilitation. Other relevant training topics may include: the impact that psychosocial development and trauma may have on institutional conduct during early incarceration; the effect of youth on navigating criminal proceedings;<sup>192</sup> age-crime desistance;<sup>193</sup> low rates of recidivism for people released post-*Graham* and *Miller*;<sup>194</sup> juvenile crime and remorse;<sup>195</sup> and the superpredator myth and related sentencing trends in the 1990s and early 2000s. Direct engagement, including with people currently incarcerated or people who have been released on parole after serving sentences for crimes committed under age 18, can also be beneficial.<sup>196</sup>

#### CONCLUSION

In sum, parole processes for people serving long sentences for crimes committed as youth must ensure a realistic and meaningful opportunity for release that is grounded in consideration of youth, maturity, and rehabilitation. In the wake of *Graham*, *Miller*, and their progeny, more people than ever are serving life-long sentences with parole eligibility for crimes committed as young people. Robust parole review—centering the proper factors, with procedures to support accurate, comprehensive review

<sup>192</sup> Interview with Callie King-Guffey & Rebecca Turner, *supra* note 137.

<sup>193</sup> Interview with Alexandra Harrington, *supra* note 163.

<sup>194</sup> See sources cited *supra* note 163.

<sup>195</sup> See generally Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. & SOC. CHANGE 99 (2014).

<sup>196</sup> The Campaign for the Fair Sentencing of Youth can be a resource in training parole boards and in connection decisionmakers with people serving long sentences for crimes committed as children who people have been released on parole in the wake of *Graham* and *Miller*. Interview with Callie King-Guffey & Rebecca Turner, *supra* note 137.



and success upon release—is essential to ensure that such sentences do not violate the Eighth Amendment or raise due process or other federal and state constitutional concerns. It also offers an opportunity to further correct course in light of what we now know about juvenile psychosocial and neurological development. Meaningful parole consideration for this cohort promotes the rehabilitative ideal and offers an opportunity to support people sentenced as youth in achieving productive lives outside of prison.