

FREEDOM’S ROAD: YOUTH, PAROLE, AND THE
PROMISE OF *MILLER V. ALABAMA* AND *GRAHAM V.*
FLORIDA

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*Ain't nobody gonna stop me, nobody gonna keep me,
From marching down freedom's road.*

Langston Hughes¹

INTRODUCTION

“Eric is free!” On the day before Thanksgiving 2007, jubilant messages bounced across cyberspace as my students in the Rutgers Urban Legal Clinic (ULC) learned that their client had walked out the front door of the Queensboro, New York Correctional Facility and into the waiting arms of his family and friends. With those few steps, he left behind the vast wasteland that was nearly two decades behind bars and, for the first time, faced the future as an independent adult. Convicted of felony murder at the age of fifteen, sentenced to a term of seven years to life in prison, and released on parole at thirty, Eric² understood that true freedom was not yet, and perhaps never would be, his. Still, the moment was sweet.

It also was the culmination of five years of advocacy before an intransigent Parole Board and unsympathetic courts. We litigated the case vociferously. Students submitted letters of support, job offers, psychological risk assessments, and documentation of Eric’s rehabilitation and parole readiness to the Board; prepared Eric for his

¹ JOSH WHITE, *Freedom Road, on THAT’S WHY WE’RE MARCHING: WWII AND THE AMERICAN FOLK SONG MOVEMENT* (Smithsonian/Folkways 1996) (lyrics by Langston Hughes, music by Emerson Harper).

² “Eric Carter” is a pseudonym; all other facts about his case, with the exception of the name of his co-defendant, are accurate. This Introduction is reproduced from Laura Cohen, “I Want In”: *The Story of a Life Redeemed*, in “YOU CAN TELL IT TO THE JUDGE” . . . AND OTHER TRUE TALES OF LAW SCHOOL LAWYERING 103 (Frank Askin ed., 2009).

parole hearings; and filed numerous administrative and judicial appeals. In the face of overwhelming evidence demonstrating Eric's readiness for release, the Board based its repeated denials on two factors: the seriousness of his offense, and the perceived inadequacies of his statements of remorse for his crime. Our efforts to compel Board members to consider these factors within the context of Eric's developmental immaturity at the time he committed the offense, and the relevance of his youthfulness to any assessment of his recidivism risk, were futile. It was not until Eric's fourth parole hearing, after he had served more than double his minimum sentence, that he finally was released.

This Article posits that, in light of *Miller v. Alabama*³ and *Graham v. Florida*,⁴ the manner in which parole boards evaluate inmates who, like Eric, were convicted of serious offenses while still adolescents has gained new significance. In these cases, decided two years apart, the United States Supreme Court held that mandatory life without parole (LWOP) sentences for youth who are under the age of eighteen at the time of offense commission (*Miller*), and LWOP sentences for youth convicted of non-homicides (*Graham*), violate the Eighth Amendment's ban on cruel and unusual punishment. While the *Miller* Court left open the door to a LWOP sentence in homicide cases, it stressed that imposition of "this harshest possible penalty will be uncommon."⁵ Thus, in addition to the thousands of inmates convicted as teenagers who already come before parole boards each year, a substantial number of the 2600 people currently serving juvenile LWOP sentences now will be eligible for parole review.⁶

Both *Graham* and *Miller* spring from an extraordinary epoch in American juvenile justice, in which the question of juvenile culpability has taken statutory and case law developments in opposite directions. Since the mid-1990s, nearly every state legislature has enacted punitive juvenile crime measures, leading more youth to be tried and incarcerated in the adult system than ever before. Paradoxically, however, in the seven years since *Roper v. Simmons* outlawed the juvenile death penalty, the United States Supreme Court has forged a new, more humane jurisprudence of youth.⁷ Erected on a solid foundation of neuroscience and developmental psychology, this still-emergent doctrine makes clear that "youth matters,"⁸ that

³ 132 S. Ct. 2455 (2012).

⁴ 560 U.S. 48 (2010).

⁵ *Miller*, 132 S. Ct. at 2469.

⁶ How many of these already-sentenced youth will become parole-eligible is not yet known, as the retroactive application of *Graham* and *Miller* remains unresolved. See Laurie Levenson, *Retroactivity of Cases on Criminal Defendants' Rights*, NAT'L L. J., Aug. 13, 2012.

⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸ *Miller*, 132 S. Ct. at 2465.

developmental immaturity is a core consideration in determining the constitutionality of certain police⁹ and sentencing procedures.¹⁰ *Miller* and *Graham* are the latest bricks in the wall.

Miller and *Graham* are remarkable for a number of reasons. They engage in proportionality review in a non-capital context and, for the first time, categorically strike down sentencing practices other than the death penalty for an entire class of offenders; as Justice Kagan noted for the *Miller* majority, if “‘death is different,’ children are different too.”¹¹ They embrace and reinforce *Roper*’s central determination that, because the “salient characteristics” of adolescence mean that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,” even those youth convicted of the most serious offenses are less culpable, and more capable of change, than adults.¹² And *Miller*, also for the first time, overtly applies the imperative of individualized consideration to a non-capital mandatory sentencing scheme and finds it wanting.¹³

The entwining of *Graham*’s insistence that incarcerated youth not “die in prison without any meaningful opportunity to obtain release”¹⁴ and the *Miller* mandate of individualized consideration weaves a new thread into the cloth of Eighth Amendment jurisprudence. In doing so, the cases raise significant questions about post-conviction processes as they apply to young offenders.¹⁵

⁹ *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

¹⁰ See *Miller*, 132 S. Ct. 2455; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551. A long line of cases prior to *Roper—Thompson v. Oklahoma*, *Eddings v. Oklahoma*, *In re Gault*, and *Haley v. Ohio*—made clear that youth are a special class of offenders deserving of enhanced procedural protections. These cases were premised on common sense and experience rather than scientific research. *Thompson v. Oklahoma*, 478 U.S. 815 (1988); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *In re Gault*, 387 U.S. 1 (1967); *Haley v. Ohio*, 332 U.S. 596 (1948).

¹¹ *Miller*, 132 S. Ct. at 2470 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991)).

¹² *Graham*, 560 U.S. at 68 (alteration in original) (quoting *Roper*, 543 U.S. at 573) (internal quotation marks omitted).

¹³ E.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁴ *Graham*, 560 U.S. at 79.

¹⁵ In the wake of *Graham* and *Miller*, scholars, advocates, and legislatures around the country have struggled to define and create prospective and retroactive early release mechanisms. Inmates sentenced to life without parole (LWOP) under now-prohibited sentencing schemes have been or may be re-sentenced, often to determinate or parole-eligible terms so lengthy that they have been deemed “de facto” LWOP. Legislation is pending in a number of jurisdictions that would convert certain LWOP sentences to indeterminate terms. Similarly, other legislatures have amended mandatory juvenile LWOP sentences to instead permit discretionary LWOP. See NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2012: DEVELOPMENTS IN POLICY AND PRACTICE 20–23 (Jan. 2013), available at http://www.sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202012.pdf.

My focus is on the somewhat narrow universe of discretionary parole hearings, which remain the only avenue to eventual or early release for a substantial percentage of incarcerated youth. I am concerned not only with those young people who, prior to *Miller* and *Graham*, were or would have been sentenced to LWOP, but also with the many others who, like Eric, already are serving long terms with the possibility of discretionary release. Part I delves more deeply into Eric's story, as it is in many ways typical of the experience of young offenders and illustrative of the overwhelming challenges they face in obtaining parole. Part II summarizes briefly the rich body of social science and neuroscience upon which the Supreme Court relied in these cases and in *Roper*. Part III offers a reading of *Graham* and *Miller*, with a particular focus on the Court's evolving jurisprudence of "individualized consideration" in criminal matters involving youth and the constitutional import of the possibility of parole. Part IV considers the constitutional significance of the possibility of parole. Part V outlines the parole process and reviews the rather sparse literature on parole decision-making, with an emphasis on whether, and how, parole boards consider age and developmental immaturity. Part VI considers several issues with which parole boards often grapple and the unique challenges these pose to inmates convicted as youth, including institutional behavior, offense severity (and its dyadic relationship with developmental immaturity), and acceptance of responsibility and remorse. Finally, Part VII argues that *Graham* and *Miller* compel a more nuanced parole decisional process focused on other, forward-looking factors and offers recommendations for policy and practice reform.

I. ERIC¹⁶

That there was something unique about this case, this client, was clear from the initial referral. The call came indirectly from Claire Bedard, a psychologist who worked as a researcher on James Garbarino's classic book about youth violence, *Lost Boys: Why Our Sons Turn Violent and How We Can Save Them*.¹⁷ She interviewed hundreds of young people incarcerated in New York's juvenile justice system for the study, including Eric. Eric was incarcerated at the McCormick Youth Correctional Facility, near Syracuse, where youngsters who have been convicted of violent felonies in the adult system are held until they turn eighteen. At that point, they can be transferred to adult prisons,

¹⁶ Eric's story, and much of the language in this section, are taken from Cohen, *supra* note 2.

¹⁷ JAMES GARBARINO, *LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM* (1999).

although those who have adapted well to the facility are permitted to remain there and continue attending school until they reach the age of twenty-one.

Eric was among the older boys at McCormick when he met Bedard, and was considered a “model” inmate. He had earned his GED and, until the state legislature de-funded the program, took college courses. He participated in every rehabilitation program offered at the facility, even those for which he clearly had no need—parenting skills, for example. Against all odds, he won the affection and respect of correctional staff and community volunteers. It was hard to understand why he remained incarcerated, unless one knew why he was there in the first place: murder in the second degree, seven years to life in prison.

Bedard interviewed Eric one-on-one, for three hours at a stretch, once a week for nine weeks. Perhaps it was his manners, perhaps his poetry, or perhaps the kindness in his eyes, but of all the “lost” boys, Eric was the only one with whom she maintained contact when the study was completed. She helped him publish some of his poems in a prison anthology, and, when he was denied parole for the first time, enlisted a lawyer from Ithaca to help him file an unsuccessful appeal.

Two years later, after Eric was denied parole again, Bedard was desperate for help. The appellate clock was ticking. I had never handled a parole case before—or, indeed, any adult criminal matter in New York—but the thought of this young man, who committed a horrific but apparently anomalous crime when he was but fifteen years old, spending the rest of his life in prison, was gut-wrenching. I said yes. And so began the odyssey.

Born to a loving Jamaican family, Eric spent his childhood and young adolescence in Bushwick, Brooklyn. His father was a hard-working mechanic who, with his wife, raised four children. Eric, the baby, was a favorite among his teachers and neighbors. From a young age, he was drawn to music and demonstrated a talent for language and rhyming, or rap. He was engaged in school, a young man with a bright future. In the words of one of his teachers,

Eric . . . was not only well behaved and respectful; he was a pillar in a decaying environment. Not only did Eric refrain from getting into altercations with other students, he also acted as a peer mediator. He was the child who would intervene and try to stop the other children from fighting. He was always a peace loving child.¹⁸

And then, when Eric was fourteen years old, his world caved in: His mother died suddenly of a heart attack. The family was devastated, especially Eric. Mrs. Carter was a strong, beloved presence in her

¹⁸ Letter from Gail Tillman to New York State Parole Board (June 1, 2005) (on file with author).

community and the very center of her youngest son's existence. In a song he wrote many years later, Eric cries: "I thought I knew death, but then my mom's gone and died / I ain't prayed in so long."¹⁹ It is a dirge; his pain is palpable.

As Eric tells it, after his mother died, he simply did not want to go home at night. The house was an ocean of grief, and each family member was drowning. He still went to school every day and, on the surface, seemed to be coping. In the evenings, though, Eric met friends at a neighborhood park. They played basketball and worked on rhymes. Often Eric was with his best friend, Omar. The boys had known each other since they were five years old, and neither had ever been in trouble. But during those lonely months after Mrs. Carter's death, subtle changes began to overcome Omar, changes that Eric did not fully understand or acknowledge. He needed to maintain the friendship.

On an early November evening, Omar and Eric were walking in the neighborhood when an older youth, Kevin, approached them and struck up a conversation with Omar. Eric, who did not know Kevin, hung back warily. When Omar returned, Eric's suspicions were confirmed. Kevin had proposed that the three rob a neighborhood bodega. The store was an easy target, he said; the three boys together would have no trouble making off with cash. Was Eric in or out?

Eric looked at his friend, unable to make sense of what he had heard. Bushwick could be a rough neighborhood, but this was not how he, or Omar, behaved. He knew he should walk, or better yet, run, away, but the forces at work in his fifteen-year-old brain were too great.²⁰ His friendship with Omar overcame all the reasons not to go and, besides, Kevin had promised they wouldn't get caught. He shunted aside his well-honed sense of right and wrong and, even as a voice inside his head pleaded with him not to go, Eric followed Omar down the street.

What happened next has, for Eric, taken on the cinematic quality reserved for memories of the truly horrific. The scene is imagistic, film noir—a chilly Brooklyn night, a frightened boy standing watch as his companions enter the store, the gripping terror of gunfire. In a few seconds, the shopkeeper lies dead on the floor, a family is shattered, and three youths scatter in the darkness.

And then—nothing. Although internally Eric was filled with contrition and fear, on the surface life was little altered. He went to school each day and almost began to believe that the nightmare had been simply that.

¹⁹ SPUD!, *Pray Is So Long, on I WANT IN* (Aug. 10, 2009), <http://www.spudbrooklyn.com>.

²⁰ See, e.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1000, 1014 (2003).

In January, however, reality came crashing down. Kevin and Omar were arrested, and Eric knew that the police would soon find him, too. Deeply ashamed of his actions and frightened of what was to come, he was paralyzed; there was no one to talk to, no action to take. Then finally, one afternoon, as he sat in class, he heard his name called over the school's public address system. His heart pounded as he trudged slowly to the principal's office, his book bag slung over his shoulder. There, two police officers were waiting and, in what seemed to be a moment out of someone else's life, he was arrested and charged with murder. By late afternoon, when he would have been leaving school, he was locked in a stationhouse cell. His book bag sat on a nearby bench, a poignant reminder of a life and future that were no longer his.

Eric never fired, or even held, the gun. Because he was fifteen, because his ability to assess risk or exercise independent judgment was not yet fully developed, he had not even considered the possibility that someone might be killed when he followed Omar and Kevin to the store.²¹ And yet, under the felony murder rule, which holds all participants in a felony equally responsible for any deaths that occur during the commission of the crime, intentional or not, Eric was as liable as if he pulled the trigger.²²

Eric spent the next year in the Spofford Juvenile Detention Center, a grim jail for children in the South Bronx. The court process swirled around him, at once controlling and uncontrollable. In another song, he reflects on his powerlessness:

No facial hair, facing murder 2 charges . . . / My lawyer keeps saying
how my chances are shot, at the jury selection all my candidates
dropped / 'You're too young for this' / By the end of the third day /
'You'd better take the plea now' / I see the DA smile.²³

Under the applicable sentencing scheme, the maximum penalty Eric faced was nine years to life in prison.²⁴ As a result of his plea bargain, which required him to forego potentially viable defenses, he was sentenced to seven years to life. Although there was no guarantee of early parole, in persuading Eric to accept the deal, his attorney assured him that he would in fact be released at the end of the minimum term. At the time, this may not have been wildly inaccurate advice; during the first Cuomo administration in New York, approximately 30% of violent

²¹ See *infra* Part II.

²² N.Y. PENAL LAW § 125.25(3) (McKinney 2013); see, e.g., *People v. Giusto*, 99 N.E. 190 (N.Y. 1912).

²³ SPUD!, *Untitled Song*, on FREESTYLE PROMO RECORD (Aug. 10, 2009), <http://www.myspace.com/spudbrooklyn>.

²⁴ See PENAL § 70.05.

felony offenders (VFOs) were released at their first parole hearing.²⁵ Parole policy is, however, largely a political beast, and in 1996, the election of Governor George Pataki brought fundamental changes to the state's parole system. Unable to push a bill eradicating parole through the legislature, the Governor instead systematically replaced Cuomo appointees to the Parole Board with his own commissioners. In one year, the parole rate for VFOs plummeted to less than 3%, and Eric was trapped in the counter-revolution.²⁶

An indeterminate prison sentence is a hell-like limbo, with nothing to mark the passage of time except the distant promise of parole. Brutality reigns; the threat of violence, at the hands of guards and other inmates, is ever-present. This is particularly true among children incarcerated with adults, who are five times as likely to be sexually assaulted, twice as likely to be beaten by staff, 50% more likely to be attacked with a weapon, and eight times as likely to commit suicide as children confined in juvenile facilities.²⁷ The lessons these young people learn are applicable only to survival in prison, or perhaps war: Keep your head down, show no emotion, and always expect the worst from other people. It is not surprising that they are re-arrested more often, and for more serious charges, than those who remain in the juvenile system,²⁸ or that they have difficulty advocating for themselves when they eventually come before the Parole Board.

Despite the hostility surrounding him, Eric maintained his sense of compassion and humanity throughout his years in custody. And, although he grew up in an environment that neither accorded him autonomy nor allowed him to learn from his mistakes, he managed to mature into a responsible adult. He was disciplined just once, an almost unheard-of record in a system bent on rooting out and recording wrong-doing. As one McCormick staff member later wrote to the Parole Board,

I believe he was the only resident on my unit that did not get into a fight. Eric stayed away from the gang involvement and was the

²⁵ See John Caher, 'Dismantling Parole': Parole Release Rates Plunge Under Pataki's Tough Policy, N.Y. L. J., Jan. 31, 2006; see also Brief of Appellee, Chan v. Travis, 770 N.Y.S.2d 896 (App. Div. 2004).

²⁶ Caher, *supra* note 25.

²⁷ See, e.g., JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7-8 (Oct. 2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>; see also JOLANTA JUSZKIEWICZ, BLDG. BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2009), available at http://www.cclp.org/documents/BBY/Youth_Crime_Adult_Time.pdf; MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT [hereinafter ISSUE BRIEF 5], available at http://www.adjj.org/downloads/3582issue_brief_5.pdf.

²⁸ See ISSUE BRIEF 5, *supra* note 27.

resident that set the example to accept the situation that you are in and change yourself for the better. . . . I firmly believe that there is not another convicted inmate that I would write this letter for besides Eric [Carter].²⁹

When Eric turned twenty-one, he was transferred to an adult prison within the New York State Department of Corrections. Soon afterwards, he came before the Parole Board for the first time, nervous but confident that he would be released. He had, after all, done everything that had been asked of him, and more. He also submitted letters from family members and friends, attesting to his character and promising help, employment, and support when he was released. But the three Parole Commissioners who conducted the hearing were overtly hostile, affording him little opportunity to speak, and their decision was devastating:

Parole is denied due to the severity and violent nature of the instant offense, J.O. Murder 2nd wherein you and others, during a robbery, assaulted and shot at victim causing the death of the store owner. We note your generally positive programming but find more compelling your total disregard for the life of another.³⁰

In short, nothing that Eric had done during his seven years of incarceration—fully one-third of his life—affected the Board's decision. The only thing that mattered was the one thing he could not change: a tragic mistake made by a fifteen-year-old boy.

The language of the decision would become all too familiar over the next six years. The Board repeated it *verbatim* in its two subsequent denials, revealing its failure to accord Eric anything approaching individualized consideration. New York, like most states, grants vast (but not unfettered) discretion to its Parole Board. Board members are required to consider certain factors, including seriousness of the offense, institutional adjustment, recommendations of the sentencing court, aggravating and mitigating circumstances, and release plans, as well as agency guidelines for release.³¹ They further are required to exercise their discretion via case-by-case decision-making, rather than blanket determinations regarding particular classes or groups of inmates.³² They are not required, however, to accord equal weight to each of the decisional criterion, and courts have generally upheld Board decisions based solely on offense severity if the hearing transcript and decision

²⁹ Letter from Darrin Schmidt to New York State Parole Board (Aug. 9, 2001) (on file with author).

³⁰ In the Matter of the Parole (Rescission) Appeal of Eric [], NYSID 09546789], DIN No. 00A1320 (quoting Decision of New York State Parole Board (Nov. 6, 2001)) (on file with author).

³¹ See N.Y. EXEC. LAW § 259-i(2)(a)(ii)(c)(A) (McKinney 2013).

³² *Id.*; see also *infra* Part V.

reflect at least some consideration of the other statutory factors.³³ If the Board denies release, it can order that the inmate be held for up to an additional two years before his next parole hearing.³⁴

Rendering the statutory and regulatory framework even more frustrating is the procedural context in which it operates. In New York and across the country, the prison population is overwhelmingly poor, uneducated, and from minority groups.³⁵ Although inmates have a right to counsel on administrative appeal from a denial of parole, they are not permitted to bring an advocate to or call witnesses at parole hearings.³⁶ Thus, people who even on the outside would have difficulty speaking for themselves are forced to face alone Board members who, quite literally, hold their fate and freedom in their hands. Not surprisingly, transcripts from these hearings reveal the impossibility of this task and the utter disregard the Board often has for inmates who attempt to advocate for themselves and to articulate their sense of remorse and readiness for release. With no lawyer present to make a record, later challenges to the Board's decisions are often an exercise in futility.

This was the legal landscape in which we found ourselves, and it was often frustrating for the idealistic and passionate students who worked on the case. They developed cutting-edge legal arguments based on administrative law, theoretical principles of criminal liability, and emergent adolescent development research. Over the course of four years, a total of twelve students wrote two administrative appellate briefs, two petitions for court review of agency decision-making,³⁷ and one appeal from a denial of such petition, which were filed in courts and administrative agencies in Brooklyn, Manhattan, Albany, and Poughkeepsie.³⁸ They prepared Eric for two additional parole hearings by reviewing transcripts of past hearings, speaking with parole advocates, and mooted the hearings with him. They also gathered letters from friends, family, and potential employers to submit to the Board; retained a psychologist who conducted a risk-assessment interview and wrote a highly favorable report to the Board; identified available post-release community-based services and assistance for him;

³³ See, e.g., *Silmon v. Travis*, 741 N.E.2d 501 (N.Y. 2000); cf. *King v. N.Y. State Div. of Parole*, 598 N.Y.S.2d 245 (App. Div. 1993), *aff'd*, 632 N.E.2d 1277 (N.Y. 1994).

³⁴ EXEC. § 259-i(2)(a)(i).

³⁵ See MARC MAUER, *RACE TO INCARCERATE* (2006).

³⁶ See N.Y. STATE DEP'T OF CORRS. & CMTY. SUPERVISION, *NEW YORK STATE PAROLE HANDBOOK* (Nov. 2010) [hereinafter *PAROLE HANDBOOK*], available at https://www.parole.ny.gov/intro_handbook.html.

³⁷ N.Y. C.P.L.R. art. 78 (McKinney 2013).

³⁸ Venue in challenges to agency decision-making in New York lies in either the county in which the determination was made or Albany County, where the executive offices of New York State's administrative agencies are located. N.Y. C.P.L.R. § 506 (McKinney 2013). During the four years in which we represented him, Eric was transferred three times to new prisons and, with each transfer, venue changed.

and obtained information about college admissions and financial aid. Finally, fifteen years and four parole hearings after he was sentenced, the Board granted Eric release.

II. SOCIAL, EMOTIONAL, AND NEUROLOGICAL CONTEXTS

I tell Eric's story in great detail because, tragically, it is typical of the thousands of adolescents who are serving long sentences in American prisons.³⁹ The fateful decisions that Eric made prior to and in the immediate aftermath of the robbery, and the gradual evolution of his insight into those decisions, are a case study in juvenile crime and adolescent development. The offense itself offers a compendium of common characteristics of juvenile crime: an in-concert robbery gone bad, committed on a whim by two friends, instigated by an older youth, perpetrated in the boys' own neighborhood. Considered, as the Supreme Court insists it must be, in its developmental context, Eric's crime arguably was not a legitimate predictor of potential recidivism.⁴⁰ Yet none of the Parole Boards that held his fate in their hands ever even acknowledged his developmental immaturity at the time of his offense or the obvious maturation that occurred during his many years in prison, our advocacy efforts notwithstanding.

As the Court observed in *Roper*,

[A]s any parent knows and as . . . scientific and sociological studies . . . tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."⁴¹

Post-2005 empirical research has re-affirmed and strengthened the developmental science at the core of *Roper* and, as in *Roper*, serves as a central joist in both *Graham* and *Miller*.⁴² Because it has been

³⁹ According to the Campaign for Youth Justice, on any given day in the United States over 7500 youth under the age of eighteen are incarcerated in adult jails and prisons. See CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA (Nov. 2007), available at http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf.

⁴⁰ See Martha Grace Duncan, "So Young and So Untender": Remorseless Children and the Expectations of the Law, 102 COLUM. L. REV. 1469, 1521 (2002) (questioning validity of remorse as a predictor of recidivism in juveniles).

⁴¹ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

⁴² See, e.g., Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211 (2011); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583 (2009).

synthesized and discussed adroitly and in great detail elsewhere, I offer only a brief summary here, focusing on those aspects most relevant to parole decision-making.⁴³ These can be divided into psycho-social and neurobiological factors.⁴⁴

A. Psychosocial Factors

To begin with the obvious, adolescents are developmentally immature and, so, their judgment and decision-making differ from those of adults in several ways. Although young people reach cognitive maturity by their early to mid-teens, they continue to be more likely to engage in risky behaviors, are more impulsive, and are more likely to discount future benefits in favor of short-term gains than are adults well into their twenties.⁴⁵ They also are more easily influenced by even the mere presence of their peers. These characteristics lead young people, even those who have not engaged in serious offending, to make decisions that their mature selves likely would not make.

A large and still-growing body of developmental research has identified three distinct but interconnected measures of psychosocial maturity that help explain these differences: temperance, as determined by impulse control and the suppression of aggression; perspective, as determined by consideration of others and future orientation; and responsibility, as determined by one's resistance to peer influence and sense of personal responsibility for one's actions.⁴⁶

1. Temperance

Numerous studies have recognized that risk-taking is “virtually a normative characteristic of adolescent development.”⁴⁷ These behaviors

⁴³ See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper*, 543 U.S. 551; Brief for the American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621), 2009 WL 2236778 [hereinafter *APA Brief*]; Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006).

⁴⁴ Cf. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2010) (concluding that developmental neuroscience has been less influential in juvenile justice decision-making post-*Roper* than predicted).

⁴⁵ See, e.g., Steinberg & Scott, *supra* note 20.

⁴⁶ Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 DEV. & PSYCHOPATHOLOGY 1073 (2012), available at <http://www.pitt.edu/~adlab/People%20pics%20and%20links/Publications%20page/Arrested%20Development%202012.pdf>.

⁴⁷ Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992), available at <http://jeffreynarnett.com/articles/arnett1992>

range from traffic infractions—teenage drivers are far more likely to speed up at a yellow light than adults, for example—to unprotected sex, binge drinking, and criminal activity.⁴⁸ In fact, several self-report studies indicate that it is “statistically aberrant to refrain from crime during adolescence,”⁴⁹ and that, after peaking in late adolescence, both violent and non-violent criminal activity decrease sharply in young adulthood.⁵⁰

Increased sensation-seeking is tied to, but not coextensive with, young people’s heightened impulsivity and proclivity for risk. Because both impulsivity and sensation-seeking abate throughout late adolescence and early adulthood, risky behaviors decline, as well; in short, young people learn temperance, “the ability . . . to evaluate situations before acting.”⁵¹

Interestingly, young people do not appear to have a deficient understanding of the potential risks posed by their behavior; as noted above, cognitive and rational reasoning abilities appear to reach full maturity at around age sixteen.⁵² Consequently, “adolescents’ greater involvement in risk taking, compared with adults’, does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk.”⁵³ Rather, temperance, or self-regulation, appears to be influenced, at least in part, by emotional factors (or, as one influential research team puts it, *feelings*),⁵⁴ to which adolescents are uniquely susceptible and which affect judgment and decision-making in significant ways.⁵⁵

Although teenage “drama” is a widely-recognized and (among parents) feared phenomenon, most of the studies involving the impact of affect on judgment and decision-making have used adult subjects. This raises the question of whether, notwithstanding accepted wisdom, adolescents’ decisions are even more heavily influenced by psycho-emotional factors than adults’.

Closely related to adolescents’ sensation-seeking is their tendency to be more motivated by potential rewards than by the prospect of

recklessbehaviorinadolescence.pdf.

⁴⁸ See Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 79 (2008).

⁴⁹ Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993) (quoted in *APA Brief*, *supra* note 43, at 8).

⁵⁰ *APA Brief*, *supra* note 43, at 8.

⁵¹ Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 325, 331 (Thomas Grisso & Robert G. Schwartz eds., 2000).

⁵² Albert & Steinberg, *supra* note 42, at 219.

⁵³ Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 194 (2010).

⁵⁴ Albert and Steinberg, *supra* note 42, at 216.

⁵⁵ *Id.* at 216–17.

punishment. In fact, adolescents seem to be “relatively deficient in anticipating and learning from punishment” as compared to adults.⁵⁶ This may be because they lack the depth and breadth of experience that allows one to assess accurately the probability of a particular punishment occurring and the likely impact of that punishment on one’s life. It may also be of physiological etiology: Evidence suggests that the brain functions that govern “harm avoidance in anticipation of adverse outcomes mature later than those that subserve reward-seeking.”⁵⁷

2. Perspective

Regarding perspective, adolescents lack the future orientation of adults. They do not have the same life experience or the same intuitive understanding of the passage of time that informs adult decision-making. As a result, they do not plan for the future effectively and do not factor potential future effects into their decision-making in the same way as those who have reached developmental maturity. According to one study, in fact, “the skills required for future planning continue to develop until the early 20s.”⁵⁸

3. Responsibility

Adolescents also are less likely to make autonomous decisions than adults. According to Jeffrey Fagan, “[d]ecisions by adolescents to engage in crime or violence are shaped through interactions with features of their environments, are contingent on responses emanating from that context, and are filtered through the unique lens of adolescence.”⁵⁹ The social contexts that shape young people’s lives—neighborhood, school, family, and peer groups—also “shape[] [their] decisions to engage in crime through the attributes of settings and the interaction of developmental status with the setting in which developmental processes unfold.”⁶⁰

Among these contexts, peer relationships exert perhaps the strongest sway over youthful decision-making. As one study noted,

⁵⁶ *Id.* at 218.

⁵⁷ Cauffman et al., *supra* note 53, at 194.

⁵⁸ *APA Brief, supra* note 43, at 12 (citing Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 *DEVELOPMENTAL REV.* 1, 28–29 (1991)).

⁵⁹ Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *YOUTH ON TRIAL, supra* note 51, at 371, 372.

⁶⁰ *Id.* at 376.

“observational data point to peer influence as a primary contextual factor contributing to adolescents’ heightened tendency to make risky decisions.”⁶¹ Adolescents are more likely to commit crimes in groups, while adults are more likely to offend alone.⁶² In addition, affiliation with delinquent peers is one of the strongest predictors of delinquency.⁶³ At the same time, adolescents are happiest when among peers and actively seek to conform to peers’ behavioral norms.⁶⁴ These factors, combined with young people’s heightened neural responses to social stimuli, lead to “an exaggerated approach-sensitization effect of peer context on decision making.”⁶⁵ Thus, adolescents embolden each other to take risks—in drinking, driving, sex, and delinquent activity—that they would not dream of taking alone.

4. Transience

Finally, and perhaps most important for purposes of this discussion, youth is a transient state, and children outgrow their own bad judgment. In part due to their ongoing brain development, discussed in the following section, young people mature within each of these spheres throughout adolescence and young adulthood. As this process continues, they become more competent and rational decision-makers, with obvious implications for parole policy. As the Court made clear in *Roper*, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁶⁶

B. Brain Development

As discussed above, differential amenability to risk, greater impulsivity, and an inability to gauge the future implications of their actions leave adolescents less able to self-regulate their behavior than adults. With the advancement of magnetic resonance imaging (MRI) technology, scientists have identified physiological bases for these differences. For our purposes, the relevant sections of the brain are the frontal lobe, the temporal lobes, the parietal lobe, and the amygdalae.

⁶¹ Dustin Albert, Jason Chein & Laurence Steinberg, *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 114, 115 (2013).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 116.

⁶⁵ *Id.*

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

The frontal lobe is responsible for higher-order processes including reasoning, decision-making, judgment, and executive functions, while the temporal lobes on either side of the brain are responsible for, among other functions, emotion. The parietal lobe receives and integrates sensory information. The amygdalae, almond-shaped groups of nuclei located just below the brain's center, or cerebellum, are responsible for split-second decision-making.⁶⁷

All regions of the brain are made up of gray matter, white matter, and liquid. Gray matter enables us to store knowledge, interpret sensory perception, process information, make logical connections, and engage in abstract reasoning. White matter, or myelin, is the fatty sheathing of neurons that allows for the efficient transmission of information to and within the brain, including between the hemispheres and the different regions of the brain.⁶⁸

MRI imaging has enabled scientists to engage in longitudinal observation of brain maturation and to connect those observations to their expanding understanding of adolescents' psychological development. They have learned much through this process. First, we now know that each region of the brain matures at a different rate,⁶⁹ with the frontal lobes, the parietal lobes, and the temporal lobes, all of which are required for abstract reasoning, maturing last.⁷⁰ The prefrontal cortex of the brain, furthermore, which is responsible for the "executive" functions of planning and abstract reasoning, does not develop fully until one's early to mid-twenties.⁷¹

⁶⁷ Abigail A. Baird, *The Developmental Neuroscience of Criminal Behavior*, in *THE IMPACT OF BEHAVIORAL SCIENCES ON CRIMINAL LAW* 81–123 (Nita A. Farahany ed., 2009).

⁶⁸ *Id.* at 99.

⁶⁹ For an interactive map of the teenage brain development, see *Anatomy of a Teen Brain*, PUB. BROADCASTING SERVICE FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/anatomy.html> (last visited Jan. 20, 2014).

⁷⁰ Lucy C. Ferguson, Comment, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 443 (2004) ("Since 2000, numerous brain-scan studies have established that the human brain does not fully mature until an individual is in his or her early to mid-twenties."); Claudia Wallis & Kristina Dell, *What Makes Teens Tick*, TIME MAG., May 10, 2004, available at http://www.cs.ucr.edu/~neal/2006/mentor_mtg3/mtg3_handout3_teenagebrain.pdf (quoting Dr. Jay Giedd, chief of brain imaging in the child psychiatry branch at the National Institute of Mental Health as saying, "[w]hen we started . . . we thought we'd follow kids until about 18 or 20. If we had to pick a number now, we'd probably go to age 25" (internal quotation marks omitted)).

⁷¹ Francine M. Benes, *The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and Their Interactions*, in *HANDBOOK OF DEVELOPMENTAL COGNITIVE NEUROSCIENCE* 79, 89 (Charles A. Nelson & Monica Luciana eds., 2001) (concluding that the development of the prefrontal cortex "includes the early adult period and possibly even beyond"); see also Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 238–39 (2003); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 515 (2003) ("Neurobiological evidence suggests that the human brain does not achieve physiological

Brain maturation involves a process called myelination, in which the neural fibers in the brain, called axons, become sheathed in myelin. As the myelin thickens, it increases the speed and efficiency of communication between different sections of the brain, and, therefore, improves the processing of information.⁷² This allows teens to engage in increasingly complex cognitive operations. At the same time, the brain undertakes a process called pruning, in which gray matter thins. Reduction of gray matter allows the reasoning areas of the brain to develop and function better. The pruning process continues through the early to mid-twenties, while myelin thickens through a person's forties.

In short, adolescents do not think, reason, or process information like adults in part because they physically cannot. As Eric's story so poignantly illustrates, youth are pulled into wrongdoing by friends, are impulsive, and do not adequately consider all the possible consequences of their actions. These physiological and psychological distinctions should be of enormous import to parole boards considering the fate of adults who committed their crimes while still teenagers, and yet they almost always are ignored.

III. INDIVIDUALIZED CONSIDERATION AND "A MEANINGFUL OPPORTUNITY FOR RELEASE": THE *MILLER/GRAHAM* MANDATE

Relying heavily on this still-emergent understanding of adolescent development, the United States Supreme Court has repeatedly insisted over the last eight years that youth matters. With unprecedented focus and alacrity, it has carved out a new jurisprudence based squarely on these distinct characteristics of youth.⁷³ Beginning with *Roper* and through *Graham* and *Miller*, the Court has re-interpreted the Eighth Amendment's ban on cruel and unusual punishment to afford most youth prosecuted as adults a "meaningful opportunity to obtain release," regardless of the severity of their offenses.⁷⁴

maturity until the early twenties and that adolescents simply do not have the same physiologic capability as adults to make mature decisions or to control impulsive behavior."); Ruben C. Gur, Expert Opinion, *Brain Maturation and the Execution of Juveniles: Some Reflections on Science and the Law*, PA. GAZETTE, Jan./Feb. 2005, at 14, available at <http://www.upenn.edu/gazette/0105/0105expert.html> ("[S]ome brain regions do not reach maturity in humans until adulthood. [This has] been confirmed by more recent neuroimaging studies.").

⁷² See Brief for the American Medical Ass'n et al. as Amici Curiae in Support of Respondent at 11–23, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549, at *11–23, available at <http://www.abanet.org/crimjust/juvjus/simmons/ama.pdf>.

⁷³ Even before the recent explosion of adolescent development research and understanding, the Court relied on "common sense" reasoning to accord youth particular due process protections based on developmental immaturity. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *In re Gault*, 387 U.S. 1 (1967); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

⁷⁴ See e.g., *Graham v. Florida*, 560 U.S. 48 (2010). The Court's reliance on developmental

A. *Roper v. Simmons*

In *Roper*, the Court took the extraordinary step of revisiting the juvenile death penalty, which it had upheld (as applied to sixteen- and seventeen-year-olds) a mere fifteen years earlier in *Stanford v. Kentucky*.⁷⁵ In doing so, the Court followed the course charted several terms earlier in *Atkins v. Virginia*,⁷⁶ where it outlawed imposition of the death penalty on mentally retarded defendants after upholding it twelve years before.⁷⁷ *Roper* merits a brief review because it is the foundation upon which *Miller* and *Graham* are built.

As in *Atkins*, the concept of diminished culpability lay at the heart of the Court's conferral of categorical Eighth Amendment protection to a particular class of offenders, in this case juveniles. In his majority opinion, Justice Anthony Kennedy cleaved fairly closely to traditional proportionality analysis, looking first to "evolving standards of decency" to determine whether a national consensus against the juvenile death penalty had emerged in the years since *Stanford*. As it had in *Atkins*, the Court found substantial evidence of such a consensus: Thirty states prohibited the execution of youth, and, in the twenty states that still permitted it, the penalty was rarely imposed.⁷⁸ In addition, the Court noted, "the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects."⁷⁹

The Court next turned to the meat of the matter, the related questions of whether youth who commit homicides are among those "whose extreme culpability makes them 'the most deserving of

and neuro-developmental science is not limited to the sentencing context. In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), the Court held that adolescents' developmental immaturity necessitated the consideration of age as a factor in evaluating whether a young person's waiver of *Miranda* rights is knowing and voluntary.

⁷⁵ 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

⁷⁶ 536 U.S. 304 (2002).

⁷⁷ See *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. 304. *Stanford* and *Penry* were decided on the same day and abandoned within three terms of each other.

⁷⁸ *Roper*, 543 U.S. at 561–65. In a fascinating justification for the Court's turnaround, Justice Kennedy emphatically rejected the *Stanford* plurality's assertion "that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment," *id.* at 563, instead embracing the *Atkins* Court's affirmation that, "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* (quoting *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion))) (internal quotation marks omitted). In other words, determination of "evolving standards of decency" necessarily involves some degree of subjective evaluation and is inconsistent with the notion of delivered law.

⁷⁹ *Roper*, 543 U.S. at 566 (citation omitted). In a somewhat unusual twist, Justice Kennedy also examined and used as persuasive authority international law and practice, observing that the United States was the only country in the world to sanction the juvenile death penalty. *Id.* at 575.

execution,”⁸⁰ and whether the generally-accepted penological justifications for the death penalty apply with equal force to youth and adults. In determining that “juvenile[s] . . . cannot with reliability be classified among the worst offenders,”⁸¹ the Court relied on the vast body of developmental science outlined in Part II above. Three normative characteristics of youth led the Court to conclude that juvenile crimes are less “morally reprehensible” than adults. First, young people’s immaturity and “underdeveloped” sense of responsibility lead them to engage in reckless and ill-considered actions; consequently, they are prohibited from voting, serving on juries, smoking, drinking, and marrying without parental consent, among other activities.⁸² Second, the Court recognized and accorded substantial weight to young peoples’ vulnerability to outside influences, including those of their peers, and the negative effect on autonomous decision-making. In other words, unlike adults, youth cannot be presumed to be fully responsible for their actions and, so, lack the degree of individual culpability that imposition of the death penalty demands.⁸³ Finally, youth are mutable: “[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”⁸⁴ In light of these unique characteristics, young people are necessarily excluded from the ignominious category of “worst offenders,” those whose fully-formed characters render them deserving of the harshest criminal sanctions.

Finally, the Court considered whether, in light of adolescents’ diminished moral culpability, traditional penological considerations justified imposition of the death penalty. Capital punishment did not serve the goal of retribution, the Court concluded, because youths’ lesser culpability rendered it disproportional to their offenses. “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.”⁸⁵ The principle of proportionality, in other words, protects still-unformed youth from the harshest possible punishment.

Similarly, adolescent immaturity rendered the goal of deterrence ill-served by the death penalty. The same developmental characteristics that distinguish youth from adults—impetuosity, impulsivity, risk-receptivity, and lack of future orientation—leave them unlikely to be

⁸⁰ *Id.* at 568 (quoting *Atkins*, 536 U.S. at 319).

⁸¹ *Id.* at 553.

⁸² *Id.* at 569 (citing Arnett, *supra* note 47); *cf.* Steinberg et al., *supra* note 42 (pointing out the alleged inconsistency between these arguments and those supporting adolescent autonomy in the abortion context).

⁸³ *Roper*, 543 U.S. at 569 (citing Steinberg & Scott, *supra* note 20, at 1014).

⁸⁴ *Id.* at 570 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

⁸⁵ *Id.* at 571.

deterred by the remote threat of execution.⁸⁶ Consequently, and in light of the other indicia of disproportionality, a categorical ban was necessary.

B. *Graham v. Florida*

For the first time in *Graham*, the Court declared a categorical ban against a sentencing practice other than the death penalty. Once again making developmental science the cornerstone of his majority opinion, Justice Kennedy applied the two-prong test used in categorical ban capital punishment cases to strike down LWOP sentences for juveniles convicted of non-homicide offenses. First, had a national consensus emerged against the practice? At first blush, things seemed quite the opposite: Thirty-seven states had statutes permitting LWOP sentences for minors charged with crimes other than murder. The Court solved this conundrum by looking beneath the surface at actual practice. At the time *Graham* was argued, a mere 109 inmates were serving juvenile LWOP sentences for non-homicides. Seventy-five percent of these were in Florida, and the remainder were scattered among just ten other states.⁸⁷ In addition, the Court noted that nearly 400,000 juveniles were arrested for serious, non-homicide felonies during the most recent year for which statistics were available, indicating that “life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.”⁸⁸

Justice Kennedy then turned to the second prong of the analysis, weighing culpability against the severity and penological bases of the punishment in question. Not only did the class of offenders before the Court display the same transient, “salient characteristics”⁸⁹ of immaturity that determined the outcome in *Roper*, but they also did not kill, intend to kill, or foresee that someone might be killed in the course of their crimes. They thus presented with “twice diminished moral culpability”⁹⁰ as compared to the adult murderers who frequently are sentenced to LWOP.

Despite his lesser culpability and still-evolving brain and “character,” seventeen-year-old Terrance Graham—who was convicted

⁸⁶ It is interesting that Justice Kennedy chose to ignore the two other commonly-recognized goals of punishment: rehabilitation (obviously not served by the death penalty) and incapacitation (obviously served by the death penalty).

⁸⁷ *Graham v. Florida*, 560 U.S. 48, 63–64 (2010) (citing PAOLO G. ANNINO, DAVID W. RASMUSSEN & CHELSEA BOEHME RICE, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (Sept. 14, 2009), available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf).

⁸⁸ *Id.* at 66.

⁸⁹ *Id.* at 68.

⁹⁰ *Id.* at 69.

of one burglary, sentenced to a three-year probation term, and then found to have violated that probation when he was arrested and charged with a second burglary—received the harshest possible punishment available for juveniles: imprisonment for life with no possibility of eventual release. It was, Justice Kennedy wrote, “[a] *denial of hope*; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days.”⁹¹

There was, moreover, no penological justification for that state-imposed, permanent hopelessness. The goal of retribution was ill-served when the severity of punishment was so obviously disproportionate to the culpability of the offender. For the reasons articulated in *Roper*, the threat of even this harshest of sanctions was unlikely to deter impulsive, rash teenagers from committing crimes. Because youth have a greater capacity for, and likelihood of, change than adults, their permanent incapacitation is not a legitimate punitive goal. Finally, a sentence of LWOP, which by definition negates the goal of rehabilitation and often cuts inmates off from prison counseling, educational, vocational, and substance abuse treatment programs, “forswears altogether the rehabilitative ideal.”⁹²

Thus, although the penalty in question was something other than execution, the traditional bases for a categorical ban on a sentencing practice applied with full force to juvenile LWOP: Death was different no longer. The Court held that youth convicted of non-homicides must be afforded some reasonable opportunity for release.⁹³ Young people’s potential for change, and the possibility of redemption it creates, had assumed constitutional significance.

C. *Miller v. Alabama*

Like *Graham*, *Miller* chisels away at, but does not invalidate, all juvenile LWOP sentences. Instead, it prohibits only those LWOP terms imposed pursuant to a mandatory sentencing scheme.⁹⁴ Nevertheless, it is of substantial doctrinal import and lends force to the arguments in favor of a specialized parole process for juvenile offenders, particularly when considered in synchronicity with *Graham*.

⁹¹ *Id.* at 70 (emphasis added) (quoting *Naovarath v. State*, 779 P.2d 944, 945 (Nev. 1989)) (internal quotation marks omitted).

⁹² *Id.* at 74.

⁹³ *Id.* at 75.

⁹⁴ The majority of the approximately 2600 people sentenced to LWOP as juveniles were sentenced under mandatory schemes. See PORTER, *supra* note 15, at 24.

Justice Elena Kagan's majority opinion centers itself, as did *Roper* and *Graham*, on the qualities that distinguish youth from adults: "transient rashness, proclivity for risk, and inability to assess consequences."⁹⁵ As in *Graham*, none of the traditional penological considerations justified mandatory LWOP sentencing schemes, even in homicide cases:

Because "[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult." Nor can deterrence do the work in this context, because "the same characteristics that render juveniles less culpable than adults"—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but "incorrigibility is inconsistent with youth." And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change.⁹⁶

As noted above, *Miller* intertwines two previously distinct strands of Eighth Amendment doctrine, and it is this weaving that breaks new jurisprudential ground. The first strand is the "categorical ban" cases that prohibit, on proportionality grounds, the imposition of a particular punishment on a particular class of offenders.⁹⁷ Prior to *Graham*, these cases all involved the death penalty. *Graham* made clear, however, that LWOP "deprives the convict of the most basic liberties without giving hope of restoration,"⁹⁸ and, in the wake of *Roper*, is the "ultimate penalty" available for juveniles. Given the severity of this sanction, Justice Kagan declared in *Miller* that

[m]ost fundamentally, *Graham* insist[ed] that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. . . . None of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing.⁹⁹

⁹⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

⁹⁶ *Id.* (citations omitted) (quoting *Graham*, 560 U.S. at 71, 72, 73 (quoting other sources)).

⁹⁷ See, e.g., *Graham*, 560 U.S. 48; *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁹⁸ *Graham*, 560 U.S. at 69–70.

⁹⁹ *Miller*, 132 S. Ct. at 2465.

In other words, the central Eighth Amendment consideration in cases involving children is the offender, not the offense.

The second strand is a line of cases from the 1970s that outlawed statutes mandating the death penalty upon conviction of certain crimes.¹⁰⁰ From these evolved the doctrine of individualized consideration, which requires the sentencer to assess a defendant's mitigating characteristics (including youth) and other factors before imposing a sentence of death.¹⁰¹ In a lovely judicial sleight of hand, Justice Kagan "evoked" this line of precedent. Because juvenile LWOP is, pursuant to *Graham*, akin to the adult death penalty, its mandatory imposition should breed the same societal "aversion" as that generated by automatic death statutes.¹⁰² As the Court made clear in *Woodson v. North Carolina*,

[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹⁰³

It is only through individualized consideration that the harshest sanctions are reserved for the most culpable defendants, and, therefore, satisfy proportionality dictates.

Similarly, mandatory juvenile LWOP "prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. . . . [and] contravenes *Graham's* . . . foundational principle: that imposition of a State's most severe penalties on juvenile offenders *cannot proceed as though they were not children*."¹⁰⁴ Mandatory schemes do not take into account the lesser moral culpability of youth that lies at the center of *Roper* and *Graham*. They prohibit any evaluation of the impact of a young person's age and the "hallmark features" of adolescence—immaturity, impetuosity, and differential risk assessment—on his actions. They brook no consideration of his family environment, level of participation in the crime, and peer influences. In short, they turn a

¹⁰⁰ Had it chosen to locate *Graham* and *Miller* squarely in this line of cases, the Court could have imposed a categorical ban on juvenile LWOP.

¹⁰¹ See, e.g., *Sumner v. Shuman*, 483 U.S. 66 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁰² *Woodson*, 428 U.S. at 296.

¹⁰³ *Id.* at 304.

¹⁰⁴ *Miller*, 132 S. Ct. at 2466 (emphasis added).

blind eye to the developmental factors upon which the Court based its earlier decisions.

This the *Miller* Court would not countenance. “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.”¹⁰⁵ And, while the decision is confined to mandatory sentences—the narrow issue before the Court—Justice Kagan, in a tantalizing aside, suggests that an outright prohibition of juvenile LWOP may be in the offing:

Because [this] holding is sufficient to decide these cases, we do not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.¹⁰⁶

Taken together then, these cases carve out a clear message: Young people, even those who have committed serious crimes, are capable of change. This capacity demands individualized consideration at sentencing and throughout the course of incarceration. Without such

¹⁰⁵ *Id.* at 2469.

¹⁰⁶ *Id.* (citations omitted). Although he did not call for an absolute ban, Justice Stephen Breyer’s concurrence questions whether LWOP should ever be imposed in a felony murder case, where the young person, like Kuntrell Jackson, neither killed nor intended to kill his victim. Drawing on *Graham*’s distinction of homicides from non-homicides, he wrote:

[R]egardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. At base, the theory of transferring a defendant’s intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively. Justice Frankfurter cautioned, “Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State’s duty toward children.” *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion). To apply the doctrine of transferred intent here, where the juvenile did not kill, to sentence a juvenile to life without parole would involve such “fallacious reasoning.”

Id. at 2476–77 (Breyer, J., concurring) (some citations omitted).

ongoing, particularized assessment, youth sentenced to long prison terms, even with the possibility of parole, will continue to be denied the “meaningful opportunity to obtain release” promised by *Graham* and *Miller*.

IV. CONSTITUTIONAL SIGNIFICANCE OF THE POSSIBILITY OF PAROLE

Not surprisingly, a flood of legal scholarship followed in the wake of *Graham*, and scholars are beginning to tackle *Miller*.¹⁰⁷ This work tracks in two directions. Sentencing theorists tend to focus on *Graham*'s place within traditional proportionality doctrine, asserting, as the *Graham* Court did, that it flowed seamlessly from *Atkins* and *Roper*, the two most recent categorical ban cases. For the most part, these commentators view *Graham*, like its predecessors, as concerned primarily with substantive penal considerations. At its most elemental level, the proportionality analysis drills down to what sentence is being imposed, on whom, and why. It further asks whether the first of these factors is out of whack, so to speak, with the others, and what sentences other jurisdictions impose on similar defendants charged with similar offenses. These are static inquiries, in that they examine the appropriateness of the punishment at one moment in time—the point of sentencing—and do not concern themselves with what occurs over the arc of incarceration.

The second trail, blazed by juvenile justice scholars and developmental scientists, considers *Graham* and, in particular, *Miller*, to be Eighth Amendment outliers, only loosely tethered to jurisprudence involving adult sentencing.¹⁰⁸ Instead, they rightly hail the emergence of

¹⁰⁷ See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397 (2013); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1788 (2012); Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263 (2013); Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37 (2013).

¹⁰⁸ See, e.g., Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013) (drawing on *Graham* and *Miller* to argue that deportation based on juvenile adjudications violates the Eighth Amendment); Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79 (2013); Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107 (2013) (calling for inclusion of youth as a mitigating factor in sentencing codes); Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310 (2012); Amy E. Halbrook, *Juvenile Pariah*, 65 HASTINGS L.J. 1 (2013) (calling for *Miller* and *Graham* challenges to lifetime sex offender registration laws); Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 300 (2012); Elizabeth S. Scott, “Children Are Different”: *Constitutional Values and*

a new doctrine of youth, rooted in adolescents' psychological and neuro-biological developmental status. As Elizabeth Scott writes, in one of the earliest reflections on *Miller*:

The Court has created a special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases. In its willingness to find severe adult sentences to be excessive for juveniles, the Court elevated the prominence of proportionality, setting aside the deference to legislatures . . . and molding constitutional doctrine in a new direction. First, the Court applied to the non-capital sentence of LWOP the rigorous proportionality review previously reserved for the death penalty, categorically prohibiting the sentence for nonhomicide offenses and mandating an individualized hearing before it could be imposed for homicide. Moreover, its judgment that LWOP was unconstitutionally harsh as applied to juveniles was not based on substantial evidence of a national consensus supporting this conclusion—the objective measure that aims to preserve legislative prerogative even in death penalty cases. Instead, the Court relied almost exclusively on its developmentally-informed proportionality analysis, brushing aside the complaint by the dissenting Justices in *Graham* and *Miller* that many state statutes authorized the contested sentences.¹⁰⁹

Similarly, Marsha Levick, Jessica Feierman, and their co-authors have observed, “[t]ogether, *Graham* and *Roper* provide the framework for a novel, developmentally driven Eighth Amendment jurisprudence that should force a more rigorous examination of permissible sentencing options for juvenile offenders in the criminal justice system.”¹¹⁰ The undergirding of the Court’s rejection of the juvenile death penalty and of certain juvenile LWOP sentences, then, must be viewed not merely as a slightly awkward outgrowth of established constitutional doctrine but, instead, a *sui generis* jurisprudential stew of developmental science, brain science, and Eighth Amendment case law.

Regardless of their theoretical grounding, *Graham* and *Miller* share one critical distinction from their immediate precedents. Unlike *Atkins*, *Roper*, and the other categorical ban cases,¹¹¹ neither shields a class of defendants from having to pay the ultimate, legally permissible price for

Justice Policy, 11 OHIO ST. J. CRIM. L. 71 (2013); David Siegel, *What Hath Miller Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363 (2013) (arguing that youth facing death-equivalent sentences are entitled to fully-funded, vigorous legal representation).

¹⁰⁹ Scott, *supra* note 108, at 73 (footnotes omitted).

¹¹⁰ Levick et al., *supra* note 108.

¹¹¹ See e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty for non-homicides); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (categorical ban on death penalty for juveniles under the age of sixteen).

their actions.¹¹² To the contrary, “[a] State need not guarantee the offender eventual release” as long as he is afforded a “*realistic opportunity* to obtain release.”¹¹³ Thus, it is not the promise of eventual freedom but, instead, the mere availability of parole or another early release mechanism that is of constitutional significance and salvages an otherwise disproportionate sentence.

But of what import is the possibility of parole, when it does not protect youthful defendants from spending the rest of their days (or, at least, the majority of their lives) in prison? If young people are, indeed, less morally culpable and more likely to grow out of criminality than their adult counterparts, and if their developmental status in fact renders disproportionate sentences found to be valid for adults, should not the determinative factor be the amount of time they spend in prison rather than the vague and often unrealized potential for eventual release? Of what constitutional value is a promise unfulfilled?

Graham and *Miller*'s unitary focus on the possibility of parole, but studious avoidance of questions concerning the operation of the parole system or the likelihood of release, are, unfortunately, consistent with the Court's few prior LWOP proportionality cases. In *Solem v. Helms*,¹¹⁴ for example, the appellant, a predicate but non-violent felon, was sentenced to LWOP for passing a one hundred dollar bad check. In overturning the sentence, the Court distinguished the case from *Rummel v. Estelle*,¹¹⁵ which it had decided a mere three years earlier on virtually identical facts, on the sole ground that the appellant in *Rummel* would be eligible for parole (but not guaranteed release) after serving twelve years of his life sentence. The *Solem* Court also took pains to

¹¹² Cf. *Solem v. Helm*, 463 U.S. 277 (1983) (reversing LWOP sentence on proportionality grounds where defendant was convicted of writing a bad check for one hundred dollars and had three prior, non-violent convictions). Although neither *Graham* nor *Miller* explicitly so states, youth and immaturity work to “bump” the maximum possible penalty for a given offense down a grade. To begin with the obvious, *Roper* and *Miller* together render the maximum possible penalty for a juvenile homicide to be life in prison, although whether an avenue to early release is necessary remains in play. Pursuant to *Kennedy v. Louisiana*, furthermore, the maximum penalty available for a non-homicide offense is LWOP; for juveniles, under *Graham*, the maximum is life with the possibility of early release.

¹¹³ *Graham v. Florida*, 560 U.S. 48, 82 (2010) (emphasis added). *Miller*, of course, addressed only mandatory juvenile LWOP schemes. Given the Court's reasoning and unusually strong dicta, however, I assume for purposes of this Article that the Court ultimately will prohibit juvenile LWOP in homicides as well as non-homicides. While not a prediction, this assumption may not be off the mark, as some commentators have posited that *Graham* (and, by extension, *Miller*) may be the death knell of LWOP for adults as well as youth. See, e.g., Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 1 (2010) (“[I]t is possible that LWOP will undergo a . . . slow, long-term decline, much as has occurred with the death penalty.”).

¹¹⁴ 463 U.S. 277. In a later case, *Harmelin v. Michigan*, 501 U.S. 957 (1991), which upheld LWOP for the possession of 672 grams of cocaine, Justice Scalia disagreed with the reasoning in *Solem*, arguing that a disproportionate punishment was not necessarily cruel and unusual.

¹¹⁵ 445 U.S. 263 (1980).

distinguish parole from executive clemency, the only avenue for early release accessible to an inmate sentenced to LWOP:

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. *Assuming good behavior, it is the normal expectation in the vast majority of cases.* The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. *Thus it is possible to predict, at least to some extent, when parole might be granted.* Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. . . . “Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals.”¹¹⁶

Apart from these broad-brush strokes, however, the Court did not inquire into or evaluate parole rates or parole decision-making in South Dakota, where Rummel was incarcerated. It assumed, and accorded constitutional import to that assumption, that inmates sentenced to parole-eligible life terms would at some point be released. Regardless of whether this was true in 1983, when the Court decided *Solem*, it certainly is not so today. As discussed in Part V, *infra*, parole boards in many jurisdictions operate like the clemency boards of yore. Despite the existence of decisional standards, release guidelines, and actuarial risk assessment instruments, few real constraints rein in executive discretion, and judicial review, where it is available at all, is extraordinarily deferential. Far from creating a “normal expectation” of early release, the parole process often seems a futile, “*ad hoc*” enterprise.

Thus, if the Court assumed that parole eligibility in and of itself constituted a meaningful opportunity for release, that assumption was misplaced. And, if the possibility of parole does not afford an inmate a true expectation of release, why should it render valid an otherwise invalid sentence?

Alice Ristroph, one of the few commentators to grapple with this question, offers an intriguing answer.¹¹⁷ She posits that the significant factor distinguishing a LWOP sentence from life with a possibility of parole, however remote, is hope. “Hope, until now a stranger to sentencing law, has arrived in Eighth Amendment jurisprudence.”¹¹⁸ And, “[f]rom the perspective of the state, it is now impermissible to abandon all hope for a young offender and judge him irredeemable at

¹¹⁶ *Solem*, 463 U.S. at 300–01 (emphasis added) (citations omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)).

¹¹⁷ Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75 (2010).

¹¹⁸ *Id.* at 76.

the outset of his sentence. From the perspective of the offender, the Eighth Amendment prohibition on cruelty provides ground for hope of eventual release.”¹¹⁹ Ristroph roots *Graham*’s emphasis on parole eligibility in philosophical conceptions of hope. Just as St. Thomas Aquinas viewed hope as driving one to “a future good that is arduous and difficult but nevertheless possible to obtain,” so, too, does a “hopeful prisoner” understand that, in the Court’s words, demonstrated “good behavior and character improvement . . . maturity and rehabilitation” may be the path to freedom.¹²⁰ Conversely, hopelessness reduces one to “numbed inaction.”¹²¹ As the Court recognized in *Graham*, “[a] young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.”¹²²

Ristroph’s thesis is enticing, particularly because, since hope of release is closely linked to an inmate’s rehabilitative efforts, it elevates rehabilitation over the other commonly recognized penological goals of incapacitation, retribution, and deterrence. This emphasis on rehabilitation arguably distinguishes *Graham* and *Miller* from other proportionality cases, which engage in what Richard Bierschbach and others have called “penal agnosticism.”¹²³ As long as a given sentence serves one of the “purposes of punishment,” it generally will be upheld, even if it seems unduly harsh; consequently, since virtually any sentence can be justified as serving the ends of incapacitation and retribution, the Court has shunted rehabilitation from the proportionality analysis. Reading the Court’s insistence on the possibility of early release to be an embrace of hope as a constitutional consideration re-introduces the goal of rehabilitation to Eighth Amendment doctrine, at least with regard to youth. This, in turn, tethers *Miller* and *Graham* to the Court’s juvenile justice jurisprudence, making them relevant to issues outside of the sentencing context, such as transfer of youth to adult court.¹²⁴

Of what rehabilitative value, though, is false hope, or hope that is blighted each time an inmate is denied parole? In the months leading up to their first parole hearings, Eric and other clients of my clinic are engulfed in nervous, sometimes desperate anticipation. Having entered prison while still in their teens, they have been incarcerated for as many or more years than they had lived on the outside. They have done

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010) and Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 325 (2007) (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II.40.1 (1947))).

¹²¹ Philip Pettit, *Hope and Its Place in Mind*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 159 (2004).

¹²² Ristroph, *supra* note 117, at 76 (quoting *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

¹²³ Bierschbach, *supra* note 107, at 1754.

¹²⁴ See Arya, *supra* note 108.

everything the system demands of them: participated in prison programming, held down institutional jobs, remained free of disciplinary charges, arranged for post-release housing, obtained offers of employment, and gathered letters of support from family and friends. They know that they have matured and become different people than they were as adolescents, people who would not consider engaging in the acts that led to their imprisonment. They think hard about, and prepare carefully for their hearings, intent on conveying to the Board members their earnest, determined resolve to live law-abiding and productive lives. They believe in redemption and assume that the parole process is predicated on that belief.

The inaccuracy of this assumption, however, quickly becomes evident. As noted above, the average parole hearing, even when the prospective parolee has waited a quarter-century for his chance to address the board, lasts between five and ten minutes.¹²⁵ Inmates generally do not have a right to counsel or the right to call witnesses.¹²⁶ Parole board members are in complete control of the course of the hearings and often spend much of that time drilling deep into the inmate's commitment offense. The following exchange between Eric and a Parole Commissioner, taken from the first page of Eric's 2005 hearing transcript, is all too typical:

Q: . . . You're serving 7 years to life as a JO Murder 2nd. Your initial Parole Board appearance was November 2001, and at which time, you were denied parole and held twenty-four months.

A: Yes.

Q: And each time thereafter, is that right?

A: Yes. . . .

Q: November 6, 1994, you participated in a robbery of a grocery store, it looks like. . . . [I]t looks like the owner of the store got shot and killed, is that right?

A: Yes.

Q: You were a young man. How old were you when you committed this?

A: I was fifteen years of age. . . .

Q: Why would you become involved in such a violent crime?

¹²⁵ See Brief for the Respondents at 9, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979) (No. 78-201), 1978 WL 207286, at *9.

¹²⁶ See PAROLE HANDBOOK, *supra* note 36, at 8.

A: In the past, I managed to answer that question by saying it was a friendship. In reality, I look at it now. Compared to what I was then, it's impossible for me to say—

Q: . . . [S]peak up. . . . We have to hear you. You want us to consider what you have to say?

A: Yes. . . . Excuse me.

Q: No problem, take a deep breath, so for a friendship, you're willing to become involved in someone's killing.¹²⁷

This barrage of accusatory questions would intimidate and subdue even the most articulate and release-ready inmates. By the time the questioning turns to institutional achievements, remorse, and re-entry planning, their confidence has eroded and they are reduced to monosyllables. When the denial comes, as it so often does, the futility of anticipation and preparation renders it all the more crushing. It throws inmates into a state of deep depression and, paradoxically, hopelessness. Hope may seem to mitigate the initial blow of a life sentence, but the despair of repeated parole denials is ongoing and cruel.

The oft-illusory hope for release, then, does not in and of itself ease the experiential severity of a life prison term. Something more than “hope” is necessary to render an otherwise disproportionate sentence constitutional.

As Richard Bierschbach argues in his superb article, *Proportionality and Parole* (which was written prior to *Miller*), *Graham* mandated not just the possibility of early release for juvenile non-homicide offenders but also a “granular, textured, and open-ended sentencing inquiry.”¹²⁸ Bierschbach predicates this assertion on the *Graham* Court's oblique reliance on the “individualized consideration” principle of *Woodson*¹²⁹ and *Lockett v. Ohio*,¹³⁰ which was made explicit in the *Miller* decision two years later. *Woodson* and *Lockett* focus on the “how” of sentencing, rather than the “who” or the “what”; the decisions do not preclude the possibility of capital punishment, regardless of the history and background of the offender and nature of the offense, as long as the sentence is imposed not by legislative fiat but only after a process of fact-finding and discretionary decision-making. “[D]istrust of legislatures' ultimate competence to articulate reliable sentencing judgments in advance—whether through mandatory death-penalty statutes or otherwise—required the final decision on punishment to lie in the hands of the sentencer, who was best positioned to evaluate ‘the

¹²⁷ Transcript of Parole Hearing of E.C. at. 2–3 (2005) (on file with author).

¹²⁸ Bierschbach, *supra* note 107, at 1767.

¹²⁹ 428 U.S. 280 (1976).

¹³⁰ 438 U.S. 586 (1978).

diverse frailties of humankind.”¹³¹ They thus announced rules of constitutional procedure, rather than substantive doctrine.

Similarly, Bierschbach argues that although *Graham* (and, by extension, *Miller*),

[C]ast[s] its doctrinal position in substantive terms, it is closer to a rule of constitutional criminal procedure. *Graham* hinged the constitutionality of punishment on what is essentially a procedural condition. The most severe punishment for juvenile offenders—life in prison—can still be imposed, but only if it is accompanied by the procedural protection of parole. . . . Substantive considerations still matter: “maturity,” “incurability,” “capacity for change,” “depravity,” and other offender characteristics will continue to inform the sentencing determination. But the point is not to foreclose any one sentencing outcome at the outset based on those considerations, but to tailor and individualize punishment by spreading the exercise of sentencing discretion over time and to a larger pool of decisionmakers.¹³²

It is not only adolescents’ developmental immaturity, and the irrational decisions it sometimes breeds, but also their unique vulnerability to procedural shortcomings that require regular reviews of the status of juvenile inmates.¹³³ Young people are less likely to understand and more likely to waive their constitutional rights than adults, are less likely to receive effective assistance of counsel, and are less able to participate in their defense.¹³⁴ In addition, subjecting youth to mandatory sentences may have been unwitting on the part of state legislatures, which over the last fifteen years have expanded the breadth of laws permitting or requiring adult prosecution of juveniles and transferred discretion over the waiver decision from courts to prosecutors. At the same time, they have paid little attention to the sentences waived youth transferred to adult court receive and the need for differential sentencing.

Given the high risk of arbitrariness and inaccurate prediction of recidivism at the front end of sentencing, Bierschbach asserts that *Graham* (and, one would assume, *Miller*) have re-allocated responsibility for determining how much time a youth will serve to the back end. “*Graham* . . . link[ed] the Eighth Amendment’s protection against ‘cruel and unusual punishments’ to a constitutional requirement of back-end sentencing review. . . . *Graham* shifted authority from actors

¹³¹ Bierschbach, *supra* note 107, at 1771 (quoting *Woodson*, 428 U.S. at 304).

¹³² *Id.* at 1766–67 (footnotes omitted) (quoting *Graham v. Florida*, 560 U.S. 48, 74, 75, 117 (2010)).

¹³³ For an examination of the disproportionately high incidence of wrongful conviction of youth, see Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2010).

¹³⁴ See *infra* Part VI.

at the front end—be they legislatures, prosecutors, judges, or juries—to parole boards at the back end.”¹³⁵ Parole boards, in other words, have become the real arbiters of young people’s fates, and it is up to them, not the courts, to ensure that youthful defendants receive the “meaningful opportunity to obtain release” to which they are constitutionally entitled.¹³⁶

This argument contains echoes of *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*,¹³⁷ in which W. David Ball examines parole board decision-making within the context of *Apprendi v. New Jersey*.¹³⁸ Pursuant to *Apprendi*, a sentencing court may not impose a sentence beyond the “statutory maximum” applicable to those facts determined by the jury under the “beyond a reasonable doubt” standard or embodied in the defendant’s guilty plea.¹³⁹ In the context of an indeterminate sentence, Ball argues, the functional “statutory maximum” is the outer limit of the minimum term of years permitted under the applicable sentencing statute, which he also deems the “retributive,” or punitive portion of the sentence.¹⁴⁰ Because “punishment conveys a morally stigmatizing judgment about the commitment offense,”¹⁴¹ fact-finding to support imposition of a punitive sanction lies within the province of the jury, and “the parole board may not extend this punishment.”¹⁴² And, since parole board decision-making is governed in every state by an evidentiary standard substantially lower than “beyond a reasonable doubt,” and is reviewable under an abuse of discretion or arbitrary and capricious standard, a denial of parole based on the commitment offense alone doubly offends *Apprendi*’s principles.

Ball deems the remaining portion of an indeterminate sentence—its outer limit—to be “rehabilitative.” It is forward, rather than backward looking, concerned with public safety and the inmate’s risk of recidivism. It thus no longer is stigmatic, in that it is determined largely by events that occurred subsequent to the commitment offense. When a parole board bases an early release denial solely, or even largely, on its independent assessment of offense severity, it extends the punitive portion of a sentence beyond that authorized by the jury’s verdict and, so, violates the fundamental premise of *Apprendi*. “Rehabilitative”

¹³⁵ Bierschbach, *supra* note 107, at 1799 (emphasis added) (footnotes omitted).

¹³⁶ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¹³⁷ W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893 (2009).

¹³⁸ 530 U.S. 466 (2000).

¹³⁹ *Id.* at 489.

¹⁴⁰ Ball, *supra* note 137, at 938.

¹⁴¹ *Id.* at 898.

¹⁴² *Id.* at 906. Others have suggested reforming the plea bargaining system to incorporate the local community in determining the acceptability of the plea and the severity of the sentence. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010).

factors like prison disciplinary and programming records, substance abuse and mental health needs, and re-entry plans, are the parole board's to determine; aggravating circumstances surrounding the commitment offense are not. In short, "*Apprendi*'s protections are not limited to temporal slices of the judicial process but should apply any time the jury power is infringed, including during the substantial percentage of American sentences that terminate in a parole board's discretionary release decision."¹⁴³

To put it another way, once an inmate has served the minimum term of an indeterminate sentence, each parole board appearance is, in essence, a re-sentencing. If Ball's thesis is correct—if a functional understanding of the *Apprendi* doctrine compels its extension beyond the courtroom and into the parole hearing—then so too must the twin *Graham/Miller* mandates of a "meaningful opportunity to obtain release"¹⁴⁴ and "individualized consideration" govern parole decision-making for juvenile offenders. In light of all that we know about how parole boards function, the mere availability of parole or some other early release mechanism after completion of a long minimum term, through a system governed by decision-makers with virtually unfettered discretion, does not render proportionate an otherwise excessive sentence. Whether *Graham* and *Miller* in fact articulate a rule of constitutional procedure, announce new substantive law, or blend the two, they will be neutered unless parole boards are compelled to evaluate inmates convicted as teenagers in a specialized, developmentally-conscious manner, and courts provide substantive review of parole denials.

V. PAROLE: HISTORY, WORKINGS, AND CURRENT PRACTICE

Not only has legal scholarship largely ignored the parole system, but public perceptions of the process are marked by widespread ignorance of its machinations. A rare parole hearing scene in the American film cannon is illustrative. In *Raising Arizona*, H.I. McDunnough is a recidivist thief caught in a seemingly endless cycle of release and re-incarceration. At one of his parole hearings, he nervously sits in an institutional conference room, across a large wooden table from three taciturn parole board members. His entire parole "hearing" consists of the following exchange:

Parole Board Chairman: They got a name for people like you, H.I.
That name is called "recidivism."

¹⁴³ Ball, *supra* note 137, at 896.

¹⁴⁴ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

Parole Board Member: Ree-peat O-ffender!

Parole Board Chairman: Not a pretty name, is it, H.I.?

H.I.: No, sir. That's one bonehead name, but that ain't me anymore.

Parole Board Chairman: You're not just tellin' us what we want to hear?

H.I.: No, sir, no way.

Parole Board Member: 'Cause we just wanna hear the truth.

H.I.: Well, then I guess I am tellin' you what you wanna hear.

Parole Board Chairman: Boy, didn't we just tell you not to do that?

H.I.: Yessir.

Parole Board Chairman: Okay, then.¹⁴⁵

In spite of the Board members' skepticism, H.I. gains his freedom.

Although obviously humorous, this scene embodies commonly held misperceptions of the parole process. Contrary to the film's suggestion, parole is not conferred lightly; in fact, in this era of mandatory minimums, LWOP sentences, and a general distrust of discretionary decision-makers, it has become increasingly difficult for inmates to obtain release before the end of their terms. Nevertheless, thirty-five of the fifty states retain some form of conditional release from custody with substantial community supervision obligations. This section explores the historical origins, legal underpinnings, and contemporary workings of that system.

A. *History of the American Parole System*

Parole, both the word and the practice, derive from the French phrase "*parole d'honneur*," or word of honor. In medieval times, vanquished knights could disengage from combat by promising that they would walk away.¹⁴⁶ The phrase was first used in the United States during the Civil War, when prisoners of war could obtain freedom by giving their word of honor that they would not rejoin the hostilities, thereby saving the capturing army the expense and trouble of further incarceration.¹⁴⁷ "Parole" thus came to denote circumscribed freedom in exchange for a promise of good behavior.

¹⁴⁵ RAISING ARIZONA (20th Century Fox 1987). Two other examples are Jean Valjean, the hero of Victor Hugo's LES MISÉRABLES (Universal Pictures 2012), and Red, the longtime inmate in THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994), whose experiences before Parole Boards are far more realistic than H.I.'s.

¹⁴⁶ G. LARRY MAYS & L. THOMAS WINFREE, JR., ESSENTIALS OF CORRECTIONS 218 (2009).

¹⁴⁷ *Id.*

Although the word “parole” did not find its way into corrections argot until much later, British and Irish corrections officials created conditional release mechanisms for good behavior in the mid-nineteenth century. Alexander Maconochie, the superintendent of the penal colony on Norfolk Island, in the South Pacific, granted compliant prisoners “marks” which, in turn, served as the basis for early release from custody. Walter Crofton, who oversaw Irish prisons, implemented the “ticket-of-leave,” a four-stage re-entry program in the 1850s. He also appointed an “inspector of released prisoners,” whom one commentator has dubbed the world’s first parole officer.¹⁴⁸

The modern American parole system was born in New York in 1876, when, in keeping with the emergent rehabilitative ideal, lawmakers enacted an indeterminate sentencing scheme.¹⁴⁹ Certain inmates who had served their minimum terms were selected for conditional release and required to report to the Guardians, civilian volunteers who monitored compliance with parole conditions.¹⁵⁰ Later that same year, the Elmira Reformatory began to receive inmates, all of whom (interestingly, for our purposes) were young, first-time male offenders aged sixteen to thirty.¹⁵¹ The prison’s first superintendent, Zebulon Brockaway, spurned traditional inmate control tactics and, instead, instituted vocational, educational, athletic, and work programs. Following the lead of Maconochie and Crofton, Elmira prisoners earned “marks,” which allowed them to progress through the three-tiered classification system and eventually earn parole release. Tensions at Elmira often ran high, however, in part due to the uncertainty caused by indeterminate sentences with no guidelines or clear release criteria.¹⁵²

By the beginning of the First World War, almost every state and the federal prison system had adopted indeterminate sentencing laws and put parole mechanisms in place. As prison populations and costs increased exponentially over the next half-century, so, too, did the number of people under parole supervision. By the 1970s, more than 70% of inmates obtained release via a parole process.¹⁵³

In the late 1970s and early 1980s, however, the political and ideological pendulum began to swing away from rehabilitation to retribution.¹⁵⁴ Three “get tough on crime” trends emerged and converged over the next two decades, leading to disastrous

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 218–19.

¹⁵¹ MITCHEL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA 96 (2006).

¹⁵² *Id.*

¹⁵³ JOAN PETERSILA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 62 (2009).

¹⁵⁴ *Id.* at 63; JEREMY TRAVIS, THE URBAN INST., THOUGHTS ON THE FUTURE OF PAROLE 2 (May 22, 2002), available at <http://www.urban.org/UploadedPDF/410521.pdf>.

consequences for young people caught up in the justice system. First, the “truth in sentencing” movement brought about a return to determinate sentencing, enactment of mandatory minimum terms, the elimination of parole in the federal system and in sixteen states,¹⁵⁵ and an increased use of LWOP sentences: and commentators sounded the death knell of parole. Second, the parole system itself fell victim to political pressures; parole rates plummeted, leaving inmates who previously would have benefitted from conditional release marooned in prison to serve out their maximum sentences, including, in many instances, life.¹⁵⁶ Finally, fears spawned by John DiIulio’s misguided and apocryphal myth of the looming “juvenile super-predator”¹⁵⁷ led nearly every state in the country to pass legislation permitting and, in some cases, mandating the adult prosecution of more youth than ever before.¹⁵⁸ Thus, at the same time that young people began to flood the adult prison system, their chances of early release dwindled or evaporated.

Nevertheless, indeterminate sentencing remains “the most common approach to sentencing in the United States”¹⁵⁹ and parole (either discretionary or mandatory) continues to be the most common avenue of release from custody.¹⁶⁰ In fact, in the wake of the country’s recent economic troubles, some jurisdictions that had abandoned or curtailed their parole systems have reversed course; in part to reduce corrections budgets, several states, including New York, have instituted new or expanded early release procedures.¹⁶¹ At least one commentator, Steven L. Chanenson, has called for reinvigoration of indeterminate

¹⁵⁵ PETERSILIA, *supra* note 153, at 65.

¹⁵⁶ Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES (Oct. 2, 2005), http://www.nytimes.com/2005/10/02/national/02life.html?pagewanted=all&_r=0.

¹⁵⁷ John J. DiIulio, Jr., *Opinion, Defining Criminality Up*, WALL ST. J., July 3, 1996, at A10.

¹⁵⁸ JESSICA SHORT & CHRISTY SHARP, CHILD WELFARE LEAGUE OF AM., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005).

¹⁵⁹ Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 187 (2005); *cf.* TRAVIS, *supra* note 154 (noting a decline in the percentage of inmates released on discretionary parole).

¹⁶⁰ See PETERSILIA, *supra* note 153, at 66–67 tbl. 3.1. According to Petersilia, as of 2002, the parole boards of sixteen states had “full” release powers, and those of an additional nineteen states had retained “limited” release authority. In those states that had curtailed, but not eliminated, parole board authority, most had done so only with regard to inmates convicted of murder, although several had also done so with regard to other violent felonies. Fifteen states and the federal government had eliminated parole altogether. See also THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF STATE PAROLE SUPERVISING AGENCIES 2006, at 4 (Aug. 2006), available at <http://www.bjs.gov/content/pub/pdf/cpsa06.pdf> (parole boards in twenty-six states retained authority to release prisoners, set conditions of parole, and/or revoke parole).

¹⁶¹ See N.Y. CRIM. PROC. LAW § 410.91 (McKinney 2013). After eliminating parole in 1979, Colorado reinstated full paroling authority to its Board in 1985. PETERSILIA, *supra* note 153, at 66–67 tbl. 3.1.

sentencing schemes.¹⁶² And, of course, the Supreme Court's insistence on release mechanisms for youth facing life terms should lead to further increases in the parole-eligible population.¹⁶³ Current parole policy and practice, however, have received remarkably scant attention in legal scholarship,¹⁶⁴ and virtually no consideration in the *Graham/Miller* literature.¹⁶⁵ Without such systemic examination and, ultimately, reform, parole may well prove to be the Potemkin village of *Miller* and *Graham*—a mere façade of relief.

B. Parole Decision-Making: Policy, Procedure, and Practice

1. Evaluation and Assessment

Although each state has unique parole apparatuses and mechanisms, many share similar characteristics. Once inmates have served their minimum terms, they are eligible to be considered for conditional release, or parole.¹⁶⁶ The evaluation process generally includes three components: review of inmate's prison file; a psychological evaluation or risk assessment; and a personal interview, or "hearing."¹⁶⁷ For example, in New York, prior to their interviews, inmates are permitted to submit letters from friends, family members, and other supporters, as well as documentation of release readiness and re-entry plans, to the Board, along with a personal statement.¹⁶⁸ These

¹⁶² See Chanenson, *supra* note 159, at 186–89; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377 (2005).

¹⁶³ That population may well increase further as the courts grapple with the interpretation and application of "meaningful opportunity for release" and "individualized consideration."

¹⁶⁴ Notable exceptions are: Appleman, *supra* note 142; Ball, *supra* note 137; Bierschbach, *supra* note 107; Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 494 (2008); Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573 (2005).

¹⁶⁵ Exceptions: Bierschbach, *supra* note 107; Glynn & Vila, *supra* note 108.

¹⁶⁶ There is a widely-shared misperception about the degree of freedom accorded people on parole. Parolees remain under close supervision and monitoring, including frequent meetings with parole officers, unannounced home visits at any hour of the day or night, random drug and alcohol testing, and, often, electronic bracelets and other monitoring techniques. Parole officer visits to places of employment lead to stigmatization and, sometimes, job loss. Technical violations of the rules can lead to swift revocation and re-incarceration. Parolees are subject to strict restrictions on travel, disenfranchisement, and other collateral consequence. In short, people on parole are no longer incarcerated but not yet free.

¹⁶⁷ See, e.g., PAROLE HANDBOOK, *supra* note 36.

¹⁶⁸ *Id.* This section takes New York as an example for a number of reasons. First and most obviously, it is the state in which Eric was incarcerated and, so, offers a useful frame for the discussion. In addition, the age of criminal responsibility in New York is sixteen (the lowest in the nation), and the State's Juvenile Offender Law further mandates adult prosecution of youth ages thirteen to fifteen charged with certain felony offenses. New York thus incarcerates more young people in adult prisons than any other state. At the same time, however, the Juvenile

materials, together with information regarding the inmate's institutional behavior, work history, and programming collected by correctional staff, are summarized in a single document and provided to the Board members, along with the inmate's file, just before the interviews. Also included, if submitted, are letters from crime victims, prosecutors, and members of the community.¹⁶⁹

During the months preceding expiration of their minimum terms, inmates in New York and elsewhere must undergo one or more assessments intended to determine their likelihood of recidivism, their mental health status, and the level of post-release supervision they might require. Since the 1970s, parole authorities have moved away from traditional "pen and paper" clinical evaluations conducted by correctional or parole personnel toward automated, actuarial-based risk and needs assessments, which are believed to more accurately predict recidivism.¹⁷⁰ At the risk of gross over-simplification, the current generation of these instruments purports to be "evidence-based" and measures the risk of re-offending and criminogenic needs based on both "static" and "dynamic" factors. Static factors are those that are fixed, or

Offender Law (N.Y. PENAL LAW § 70.05 (McKinney 2013)) provides for shorter minimum terms of incarceration for youth under sixteen than those faced by older defendants convicted of the same offenses, meaning that many young inmates, even those convicted of the most serious offenses, come before the Board for the first time when still in their twenties. Consequently, New York offers both a microcosmic view of the parole process as experienced by youth and a petri dish for potential reforms. Second, a recent, unusual class action challenged the New York Parole Board's unwritten policy of denying parole to serious felony offenders. See *Graziano v. Pataki*, 689 F.3d 110 (2d Cir. 2012). Although the lawsuit ultimately was unsuccessful, it focused attention on parole decision-making generally (as opposed to challenges to denials brought by individual inmates, which comprises much of the case law in this area). Third, as noted above, New York recently amended its parole law to compel Board members to take "risks and needs principles" into account in their decision-making, thus inviting examination of the interplay between provisions like this one and the *Miller* "individualized consideration" mandate. See *infra* Part VI.

¹⁶⁹ See N.Y. EXEC. LAW § 259-i(2)(a)(ii)(c)(A) (McKinney 2013). These tend to be accorded inordinate weight in the decision-making process. See, e.g., John Caher, *Group Mounts Campaign to Block Parole*, N.Y. L. J., July 30, 2012.

¹⁷⁰ See Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575 (1996); Stephen D. Gottfredson & Laura J. Moriarty, *Clinical Versus Actuarial Judgments in Criminal Justice Decisions: Should One Replace the Other?*, 70 FED. PROBATION 15 (2006), available at <http://www.uscourts.gov/uscourts/federalcourts/pps/fedprob/2006-09/judgements.html>; Tammy Meredith et al., *Developing and Implementing Automated Risk Assessments in Parole*, 9 JUST. RES. & POL'Y 1 (2007) (evaluating implementation of Georgia Board of Parole risk assessment process). Risk assessment instruments generally are developed and published by independent companies or organizations for purchase by correctional systems. They are statistically normed across several jurisdictions. See, e.g., NORTHPOINTE, COMPAS RISK & NEED ASSESSMENT SYSTEM (2012), available at http://www.northpointeinc.com/files/downloads/FAQ_Document.pdf. Although a more detailed discussion of risk and needs assessment instruments and processes is beyond the scope of this Article, their sensitivity to developmental science and, therefore, appropriateness for evaluating adult inmates convicted of serious offenses as youth merits further study, for reasons discussed in Part II, *supra*.

do not change over time, and generally include age at sentencing or at first offense, offense of conviction, prior probation or parole history, employment history, substance abuse history, and gender.¹⁷¹ Dynamic factors tend to include those reflecting the inmate's current status, such as present age, active gang affiliation, prison programming, prison disciplinary violations, current custody level, and ongoing ties to the outside community.¹⁷² The data is collected and inputted into an automated system, which assigns the inmate to particular risk and needs levels.¹⁷³ The nature of the risk measured varies according to the instrument; some gauge the likelihood of general recidivism, while others assess risk of future violence, non-compliance with parole conditions, or particular types of re-offending (e.g., sex offenses).

In 2010, the New York State Legislature amended its parole statute to require Board members to incorporate into their decision-making "risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision."¹⁷⁴ In response to this amendment, New York's Department of Corrections and Community Supervision abandoned its longstanding pre-parole clinical evaluation procedures and adopted in their place the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) automated risk assessment tool.

Although COMPAS is used in a number of jurisdictions and purports to be "statistically validated," researchers from the University of California at Davis have called into question its reliability as a predictor of recidivism. In a 2007 study, they found that the instrument overemphasizes "risk status," or the static factors, like offense of conviction, that are immutable and measure comparative risk among a cohort of inmates.¹⁷⁵ The study found little evidence, on the other hand,

¹⁷¹ See, e.g., APPLIED RESEARCH SERVICES, INC., ENHANCING PAROLE DECISION-MAKING THROUGH THE AUTOMATION OF RISK ASSESSMENT (Apr. 29, 2003), available at http://www.ars-corp.com/_view/PDF_Files/EnhancingParoleDecisionMakingThroughtheAutomationofRiskAssessment2003.pdf; NORTHPOINTE, *supra* note 170; MARY PERRIEN, RISK ASSESSMENT FOR SEX OFFENDERS PAROLING FROM NEVADA CORRECTIONS (2012), available at [http://parole.nv.gov/uploadedFiles/parolenvgov/content/Meetings/Disclaimer_12C1101\(1\).pdf](http://parole.nv.gov/uploadedFiles/parolenvgov/content/Meetings/Disclaimer_12C1101(1).pdf); *Level of Service Inventory-Revised*, MHS, <http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=overview> (last visited Dec. 29, 2013); and others. Several of these static factors, most notably age at conviction, pose particular challenges to inmates who, like Eric, were convicted of serious offenses as adolescents and seek parole many years later. See *infra* Part VI.

¹⁷² See Gendreau et al., *supra* note 170.

¹⁷³ These instruments generally measure "needs," as well, and are used by both prison and paroling authorities to determine programming and post-release supervision levels. See, e.g., NORTHPOINTE, *supra* note 170.

¹⁷⁴ N.Y. EXEC. LAW § 259-c(4) (McKinney 2013).

¹⁷⁵ JENNIFER L. SKEEM & JENNIFER ENO LOUDEN, ASSESSMENT OF EVIDENCE ON THE QUALITY OF THE CORRECTIONAL OFFENDER MANAGEMENT PROFILING FOR ALTERNATIVE

that COMPAS measured a prospective parolee's "risk state," or current propensity for recidivism.¹⁷⁶ In order to accurately predict re-offending, an evaluation tool must capture dynamic information about criminogenic needs and changes in "risk state" over time. COMPAS failed on both counts.¹⁷⁷ The particular relevance of this finding to Eric and others like him is explored *infra* Part VII.

2. Parole Board Composition

State paroling authorities are an arm of the executive branch, and their members generally are appointed by the Governor.¹⁷⁸ Parole Board members are responsible for all decision-making functions of the Board, including release, parole conditions, and revocation of parole.¹⁷⁹ Because parole board members are gubernatorial appointees, they tend to be politically well-connected and come from law enforcement, rather than social science or advocacy, backgrounds.¹⁸⁰ In New York, for example, the only qualifications for appointment are a degree from an accredited four-year college or university and "at least five years of experience in . . . criminology, administration of criminal justice, law enforcement, sociology, law, social work, corrections, psychology, psychiatry or medicine."¹⁸¹ Of the fourteen current Board members, five previously were law enforcement officers (including the bodyguard of former Governor Elliot Spitzer), three were former probation or parole officers, one is a former prosecutor, one is a real estate attorney, one is a solo practitioner attorney, and one is a public defender and director of a social services agency for female ex-offenders.¹⁸² Only two appear to

SANCTIONS (COMPAS) 11 (Dec. 2007), available at http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/COMPAS_Skeem_EnoLouden_Dec_2007.pdf (report prepared for the California Department of Corrections and Rehabilitation by the Center for Public Policy Research, University of California, Davis).

¹⁷⁶ *Id.* at 28.

¹⁷⁷ *Id.*

¹⁷⁸ N.Y. EXEC. LAW § 259-b(1) (McKinney 2013). Other states are more particular; Colorado, for example, requires a minimum of three years of experience in parole or law enforcement or related field.

¹⁷⁹ EXEC. § 259-c. As Jeremy Travis, the former Chairman of the New York Parole Board, points out, placing parole boards in the executive branch (and having members appointed by the executive) renders their decisions unduly reliant on non-penological factors: "The research showing that release rates often decline closer to election time—and can vary dramatically between gubernatorial administrations—shows that parole board decisions are high [sic] sensitive to the pressures of the political environment. Prison terms should not be determined by shifting political winds." TRAVIS, *supra* note 154, at 2.

¹⁸⁰ See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567 (1994).

¹⁸¹ EXEC. § 259-b(2).

¹⁸² *New York State Parole Board Members*, PAROLE NEWS (Apr. 15, 2012, 4:54 AM), <http://parolenews.blogspot.com/2012/04/new-york-state-parole-board-members.html>.

have social work training or experience, and none is a psychologist, psychiatrist, or specialist in adolescent development or risk assessment.¹⁸³

Nevertheless, this relatively small group of decision-makers—in 2008, there were approximately 325 parole board members nationwide—wields enormous powers. Each year, more than 100,000 inmates are released on parole, and, at any given time, more than 820,000 people are under parole supervision.¹⁸⁴

3. Decisional Standards, Guidelines, and Judicial Review

Despite the substantial stakes involved in the work of parole boards, in most states, the statutory or regulatory standards that govern the release decision are vague, over-broad, or both. Many state codes have adopted portions of the Model Penal Code's parole language, which provides, in pertinent part, that an inmate must be released unless "(a) there is substantial risk that he will not conform to the conditions of parole; or (b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law."¹⁸⁵ Other statutory criteria for granting or denying release include whether there is a "reasonable probability that the [offender] will remain at liberty without violating the law and will conduct himself . . . as a good citizen,"¹⁸⁶ whether the inmate "has failed to cooperate in his or her own rehabilitation,"¹⁸⁷ or whether "there is a reasonable expectation that the inmate will violate conditions of parole."¹⁸⁸ In addition, some jurisdictions permit continued confinement for purposes of what can only be described as preventive detention, cloaked in the language of rehabilitation. The Nebraska statute, for example, appears at first blush to accord parole-eligible inmates a presumption of release, but allows the Parole Board to hold inmates whose "continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his or her capacity to lead a law-abiding life

¹⁸³ *Id.* This law enforcement orientation, or bias, was painfully clear during Eric's parole hearings, when the Board members consistently ignored and refused to consider psychological assessments and other evidence of his readiness for release, instead focusing solely on the statutory definition of his commitment offense.

¹⁸⁴ 1 U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRS., PAROLE ESSENTIALS: PRACTICAL GUIDES FOR PAROLE LEADERS: CORE COMPETENCIES 13 (March 2010), available at <http://static.nicic.gov/Library/024197.pdf>.

¹⁸⁵ MODEL PENAL CODE § 305.9 (1985); see, e.g., NEB. REV. STAT. § 83-1,114 (2013); N.Y. EXEC. LAW § 259-I (McKinney 2013); R.I. GEN. LAWS § 13-8-14 (2013).

¹⁸⁶ N.H. REV. STAT. ANN. § 651-A:6(I)(a) (2013).

¹⁸⁷ N.J. STAT. ANN. § 30:4-123.53(a) (West 2013).

¹⁸⁸ *Id.*; see also NEB. REV. STAT. § 83-1,114.

when released at a later date.”¹⁸⁹

Although many statutes articulate specific criteria that board members must consider in reaching their determinations,¹⁹⁰ such as the prospective parolee’s commitment offense, prison disciplinary record, program participation, release plan, educational background, vocational skills, employment history and prospects, family and community resources, substance abuse and treatment history, mental and physical health, prior criminal record, past experiences on probation or parole, and work release record, these standards remain highly subjective and Board members generally are not compelled to accord equal weight to each of these factors.¹⁹¹ Similarly, while a number of states have adopted parole guidelines, which establish ranges of time to be served depending on the nature of the commitment offense, Board members generally are free to depart from those terms if they determine that aggravating circumstances exist.¹⁹²

Given this broad discretion, what are the most prevalent factors in parole decision-making? As noted above, scant scholarly attention has been paid to this question, and most of the studies were undertaken more than two decades ago.¹⁹³ Nevertheless, two fairly recent reviews of the empirical literature shed some light on this question. A 1999 study of parole decision-making in New Jersey determined that the crime of commitment was the “most influential factor in parole release decisions,” notwithstanding a presumptive parole statute prohibiting Board members from allowing offense type to “influence decision behavior.”¹⁹⁴ The same study found that parole hearing officers “applied

¹⁸⁹ NEB. REV. STAT. § 83-1,114.

¹⁹⁰ See, e.g., N.Y. EXEC. LAW § 259-I.

¹⁹¹ See, e.g., *Rodriguez v. Bd. of Parole*, 953 N.Y.S.2d 740 (App. Div. 2012). Pointedly missing from any state’s compendium of considerations is the inmate’s developmental status at the time of the commitment offense as compared to the time of the parole hearing. This omission is discussed in more detail *infra* Part VI.

¹⁹² N.Y. COMP. CODES R. & REGS. tit. 9, § 8000.3 (2013); STATE OF MO., DEP’T OF CORRS., BD. OF PROB. & PAROLE, PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES 6 (Apr. 2009), available at <http://doc.mo.gov/Documents/prob/Blue%20Book.pdf>. Not all Parole Board members relish this broad discretion. To the contrary, in a 1999 study of board members’ perspectives on the parole process, respondents identified “better developed guidelines for paroling decisions” and “better systems of inmate classification” as among the most needed areas of improvement for the parole process, just behind “better trained parole officers.” Ronald Burns et al., *Perspectives on Parole: The Board Members’ Viewpoint*, 63 FED. PROBATION 16 (1999).

¹⁹³ See, e.g., VERA INST. OF JUSTICE, FINAL REPORT ON PAROLE DECISION-MAKING PROJECT (1977), available at <https://www.ncjrs.gov/pdffiles1/Digitization/77174NCJRS.pdf> (submitted to N.Y.S. Department of Correctional Services) (determining offense severity to be the most influential factor in discretionary parole decision-making); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

¹⁹⁴ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (2007) (citing Carolyn Turpin-Petrosino, *Are Limiting Enactments Effective? An Experimental Test of Decision Making in a Presumptive Parole State*, 27 J. CRIM. JUST. 321, 331–32 (1999)).

a correction” when they deemed a sentence to be too lenient or severe in relation to the underlying crime.¹⁹⁵ Similar results were reached in a 2011 study of parole decision-making in a southern state; inmates sentenced on drug offenses were 2.2 times more likely to be released than those incarcerated for any other type of offense.¹⁹⁶

This emphasis on offense severity—a “static,” immutable factor—belies the assumptions and expectations of inmates. As a group of Colorado researchers observed in a 2000 study:

Parole board members . . . determine if the inmate’s time served is commensurate with what they perceive as adequate punishment. If it is not, the inmate’s institutional behavior, progress in treatment, family circumstances and parole plan will not outweigh the perceived need for punishment. Inmates, believing they understand how the system works, become angry and frustrated when parole is denied after they have met all the stated conditions for release.¹⁹⁷

Other studies have found institutional behavior to be “significantly associated with release decisions.”¹⁹⁸ However, and again contrary to inmate assumptions, the most recent of these studies determined that prison misconduct, rather than participation in programming and good behavior, is the most influential release factor; in other words, disciplinary violations are frequently-cited grounds for parole denials, but positive adjustment does not generally give rise to release.¹⁹⁹ Mental illness and victim participation in parole hearings also have been found to influence parole decision-makers.²⁰⁰

Another factor, which has received remarkably short shrift in the

¹⁹⁵ *Id.* at 18. Compare other studies indicating that, in truly indeterminate sentencing jurisdictions, where courts do not set minimum terms, crime severity is of “relative insignificance.” *Id.* at 17 (citing Susette M. Talarico, *The Dilemma of Parole Decision Making*, in CRIMINAL JUSTICE: LAW AND POLITICS 442, 444–45 (George F. Cole, ed., 1988); John A. Conley & Sherwood E. Zimmerman, *Decision Making by a Part-Time Parole Board*, 9 CRIM. JUST. & BEHAV. 396 (1982); L. Thomas Winfree Jr. et al., *Responding to a Legislated Change in Correctional Practices: A Quasi-Experimental Study of Revocation Hearings and Parole Board Actions*, 18 J. CRIM. JUST. 195 (1990)).

¹⁹⁶ RICHARD TEWKSBURY & DAVID PATRICK CONNOR, RESEARCH NOTES: PREDICTING THE OUTCOME OF PAROLE HEARINGS (June 2012), available at https://www.aca.org/research/pdf/ResearchNotes_June2012.pdf; cf. Caplan, *supra* note 194, at 17 (noting a “relative insignificance of crime severity” in several studies conducted prior to 1990, suggesting a possible shift by parole boards in recent years).

¹⁹⁷ Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 FED. PROBATION 3, 5 (2000).

¹⁹⁸ Caplan, *supra* note 194, at 16 (citing John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315 (1990); Conley & Zimmerman, *supra* note 195; Michael R. Gottfredson, *Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior*, 70 J. CRIM. L. & CRIMINOLOGY 77 (1979); Peter B. Hoffman, *Paroling Policy Feedback*, 9 J. RES. CRIME & DELINQ. 117 (1972); Talarico, *supra* note 195, at 446; Winfree et al., *supra* note 195).

¹⁹⁹ West-Smith et al., *supra* note 197, at 5.

²⁰⁰ Caplan, *supra* note 194.

parole literature, is remorse. Although most states do not include inmate expressions of apology or remorse in their parole statutes or decisional criteria, parole case law suggests that a perceived lack of remorse negatively influences parole board members.²⁰¹ Some parole decisions link the inmate's inadequate sense of remorse to a presumed risk of recidivism; in others, it is cited more generally to support continued incarceration for retributive ends.²⁰² The following excerpt from one of Eric's denials is illustrative:

Despite your receipt of an Earned Eligibility Certification, after a careful review of the record and this interview, it is the determination of this Panel that if released at this time, there is a reasonable probability that you would not live and remain at liberty without violating the law. . . . We note your positive programming and strong community support. However, *we find more compelling your total disregard for the life and well being of others.*²⁰³

Regardless of the precise statutory language and criteria, then, vague and subjective standards and the broad discretion accorded parole board members produce decisions based on a small number of factors (and often the one factor that inmates cannot change). Compounding the problem is the extreme judicial deference accorded parole board determinations. As one commentator has noted,

Parole release decisionmaking has thus suffered, like other phases of the post-conviction process, from judicial neglect and "hands-off-ism." . . . [P]arole boards have been left free to operate with unstructured discretion; even those minimal due process safeguards required when earned "good time" is forfeited in disciplinary proceedings, or when parole is revoked after the inmate has been conditionally released, have not been applied to the parole release decision.²⁰⁴

²⁰¹ See, e.g., *Silmon v. Travis*, 741 N.E.2d 501 (N.Y. 2000); *Phillips v. Dennison*, 834 N.Y.S.2d 121 (App. Div. 2007); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004). Much of the scholarship on remorse has arisen in the context of restorative justice or has focused on victim participation and offender expressions of remorse at sentencing. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 CRIME AND JUSTICE, A REVIEW OF RESEARCH (Michael Tonry ed., 1999); see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007); Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371 (2006); Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335 (2005).

²⁰² See, e.g., *Coaxum v. N.Y. State Bd. of Parole*, 827 N.Y.S.2d 489 (Sup. Ct. 2006).

²⁰³ Decision, Parole Board Reappearance Hearing of E.C. (Nov. 2005) (emphasis added) (on file with author).

²⁰⁴ *Parole Release Decisionmaking and the Sentencing Process*, *supra* note 193, at 815–16 (footnotes omitted).

The leading U.S. Supreme Court case on the issue, *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,²⁰⁵ held that, because there is no constitutional right to parole release, there is no liberty interest in the mere possibility of parole. Instead, courts must examine the relevant statutory language to determine whether such an interest has been created and, if so, what due process protections attach to it.²⁰⁶

In keeping with *Greenholtz* and the separation of powers doctrine, lower courts consistently have deemed parole decisions an exercise of administrative discretion, reviewable, if at all, under the “arbitrary and capricious” or “abuse of discretion” standards. This is true even in those states that appear to create a presumption in favor of parole.²⁰⁷ Thus, the combination of highly subjective decisional standards and limited reviewability affords parole board members virtual *carte blanche* to deny release for almost any reason, as long as they mouth the correct statutory language in doing so.

Eric is an object lesson in these shortcomings. New York law required the Board members to “consider” a host of factors, but did not accord them equal, or any specific, weight, leaving the Board free to deny release based on offense severity alone. His commitment offense, murder in the second degree, was excluded from the parole guidelines. The statute that governed his quest for parole is an amalgam of the standards used across the country:

Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and *that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law*.²⁰⁸

In other words, none of Eric’s accomplishments during his long years—half a lifetime—in custody mattered. Even though he had graduated from high school, earned college credits, participated in every available program, maintained a virtually spotless disciplinary record, and had a home waiting for him, an unproven nexus among a tragically poor decision he made at the age of fifteen, his potential recidivism, and public attitudes towards crime not only permitted, but rendered

²⁰⁵ 442 U.S. 1 (1979).

²⁰⁶ *Id.*; cf. *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987) (holding that Montana statute, which stated that inmates “shall” be released if certain conditions were met, created a constitutionally-protected due process liberty interest in parole) (later abrogated by statutory amendment).

²⁰⁷ See N.J. STAT. ANN. § 30:4-123.53 (West 2013) and interpretive case law, *Allen* notwithstanding.

²⁰⁸ N.Y. EXEC. LAW § 259-i (McKinney 2013) (emphasis added).

unreviewable his continued incarceration.

VI. YOUTHFUL OFFENDERS AND PAROLE: SPECIAL CHALLENGES

As arbitrary as the parole process is generally, its shortcomings are exacerbated when the inmate in question was convicted and incarcerated while still a developmentally immature adolescent. Several factors that are central to parole decision-making pose particular barriers to such inmates when parole board members fail to recognize and take into account their age and developmental status at the time of commitment. These include institutional behavior and release planning, offense severity, and acceptance of responsibility.

A. *Institutional Adjustment and Re-Entry Planning*

Static decisional criteria, such as age at time of offense, are immutable by definition; an inmate who was convicted at sixteen cannot overcome that history through good behavior or prison accomplishments. Even certain “dynamic” factors, furthermore, have a disproportionately negative effect on inmates who were committed at a young age. For example, it is well-documented that youth incarcerated with adults suffer devastatingly high rates of institutional abuse and suicide.²⁰⁹ A less studied, but related, phenomenon is the inverse relationship between inmate age and prison disciplinary violations.²¹⁰ Not only do young people enter prison bearing the hallmarks of developmental immaturity described *supra* Part II—including, impulsivity, differential levels of risk aversion, greater receptivity to peer influence, among others—but they also are extraordinarily vulnerable to abuse at the hands of guards and other inmates. These characteristics combine in an often-explosive emotional cocktail that leads to frequent and sometimes violent disciplinary infractions. The infractions give rise to punishments, including solitary confinement, expulsion from

²⁰⁹ See, e.g., AUSTIN ET AL., *supra* note 27; CAMPAIGN FOR YOUTH JUSTICE, *supra* note 39; EDWARD P. MULVEY & CAROL A. SCHUBERT, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRANSFER OF JUVENILES TO ADULT COURT: EFFECT OF A BROAD POLICY IN ONE COURT (Dec. 2012), available at <http://www.ojjdp.gov/pubs/232932.pdf>; Alison Parker, *Letter to Inter-American Commission on Human Rights: Examine Incarceration of Youth in US Adult Prisons and Jails*, HUM. RIGHTS WATCH (Mar. 11, 2013), <http://www.hrw.org/news/2013/03/11/letter-inter-american-commission-human-rights-examine-incarceration-youth-us-adult-p>.

²¹⁰ See Attapol Kuanliang et al., *Juvenile Inmates in an Adult Prison System: Rates of Disciplinary Misconduct and Violence*, 35 CRIM. JUST. & BEHAV. 1186 (2008). For this reason, correctional officers' unions and corrections administrators have sometimes opposed efforts to expand adult prosecution of youth. See, e.g., JASON ZIEDENBERG, NAT'L INST. OF CORR., YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS (Dec. 2011), available at <http://static.nicic.gov/Library/025555.pdf>.

educational or rehabilitative programs, and denial of phone calls and family visits, that in turn breed increased volatility and additional rule-breaking. As young people mature, they are better able to control their emotions and protect themselves without resorting to violence; many of our clinic's clients, including Eric, incur numerous infractions before they turn twenty-one and none afterwards. Yet their early record of wrong-doing and belated engagement in institutional programming follows them into their parole hearings, where Board members generally fail to consider their records within a developmental context.²¹¹

Similarly, young people who enter prison before turning eighteen have not yet established a foothold in the adult world. Their incarceration instantaneously interrupts their adolescence, preventing them from establishing the relationships and developing the interpersonal and task-oriented skills that are essential to gaining employment, obtaining and maintaining housing, and navigating the world of work.²¹² When they finally near their first parole hearings, many have few contacts in the outside world, no job prospects, and no previously-forged relationships; in other words, they are even less prepared for re-entry than their adult counterparts. They thus come before the Board in a high "risk state,"²¹³ unlikely candidates for release unless their circumstances are considered from an appropriate developmental perspective.

B. Offense Severity

The overwhelming majority of inmates who were younger than eighteen at the time they entered the prison system are serving time for serious offenses; had their crimes been minor, they would have been charged in juvenile court.²¹⁴ As discussed *supra* Part V, however, parole

²¹¹ At best, parole board members make passing reference to a prospective parolee's age.

²¹² Equally striking is their unfamiliarity with the technological innovations that have emerged since they entered prison. Clinic clients who recently have been released after serving long prison sentences have never sent an e-mail, used a cell phone, or seen an iPod.

²¹³ See *supra* Part V.B.1.

²¹⁴ For an overview of state juvenile court jurisdictional age provisions, as well as waiver laws, see PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE TRANSFER TO CRIMINAL COURT PROVISIONS BY STATE, 2009 (2010), available at <http://www.ncjj.org/pdf/JuvenileTransferStateSummaries2009.pdf>. New York and North Carolina are notable exceptions; in these states, all youth age sixteen and over are prosecuted in adult courts. *Id.* at 59–60. In eleven other states, the age of majority for purposes of criminal prosecution is seventeen. See *id.* Many of the more draconian state laws permitting or mandating adult prosecution of youth were the products of late-twentieth century, media-fueled fears of an incipient juvenile crime wave. These fears proved unfounded, and, in several states, recent "Raise the Age" campaigns have led to a contraction of adult prosecution and re-expansion of juvenile court jurisdiction to older youth. See S. 1500, June Spec. Sess. (Ct. 2007), available at <http://www.cga.ct.gov/2007/ACT/Pa/pdf/2007PA-00004-R00SB-01500SS1-PA.pdf> (raising

board emphasis on offense severity places potential parolees in double, or even triple, jeopardy. In those states that utilize parole guidelines, the nature of the offense traditionally was the sole determinant of, and still carries the greatest weight in determining, the guideline range.²¹⁵ In addition, actuarial risk assessment instruments like COMPAS, which are used in individual cases in addition to guidelines, attach substantial weight to the commitment offense.²¹⁶ Finally, as Eric's hearing transcripts and decisions make clear, parole board members, who are heavily influenced by the risk assessment score, tend to place additional stress on offense severity during the parole hearing and in the exercise of their decisional discretion.

Of course, the nature of a prospective parolee's crime has both retributive and rehabilitative significance.²¹⁷ Yet, as discussed above, crime is contextual; the circumstances surrounding an offense, such as the participation of multiple perpetrators, stressors on the offender, or the relationship of the victim to the offender, are highly relevant to the determination of just deserts and, possibly, one's potential for rehabilitation. In other words, the "what" is not enough for these purposes; we must also understand the "why."

While parole board members may, at times, take these ambient details into account, they generally fail to consider offense severity within the context of an inmate's age and developmental maturity at the time he committed the offense in question—the very factors to which the Supreme Court accorded constitutional significance in *Graham* and *Miller*. In the absence of such consideration, *Graham* and *Miller* are essentially nullified, as the mere possibility of parole means nothing in the face of an insurmountable barrier to release.

juvenile court jurisdictional age from sixteen to eighteen); CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS—LEGISLATIVE VICTORIES FROM 2011–2013: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (Oct. 2013), available at <http://www.campaignforyouthjustice.org/documents/ST2013.pdf>.

²¹⁵ See, e.g., New York Parole Guidelines, N.Y. COMP. CODES R. & REGS. tit. 9, § 8001.3 (2013) (offense severity sole factor); 37 TEX. ADMIN. CODE § 145.2 (2013); RHODE ISLAND PAROLE BOARD 2013 GUIDELINES (May 6, 2013), available at <http://www.paroleboard.ri.gov/documents/PB%20GUIDELINES%202013.pdf> (requires Board to consider offense severity in addition to risk assessment score, which also incorporates commitment offense as factor); *Parole Consideration & Eligibility*, GA. ST. BOARD PARDONS & PAROLES, <http://pap.georgia.gov/parole-consideration-eligibility> (last visited Jan. 10, 2014) (Crime Severity Levels Chart and Parole Decisions Guidelines Grid).

²¹⁶ See NORTHPOINTE, PRACTITIONERS GUIDE TO COMPAS 32–33 (Jan. 28, 2013), available at http://www.northpointeinc.com/files/technical_documents/FieldGuide2_012813.pdf (criminal involvement is a "major risk factor" in predicting future behavior).

²¹⁷ According to a 2002 U.S. Department of Justice recidivism study of inmates released in 1994, 1.2% of those convicted of homicide were re-arrested for the same crime within three years, as opposed to 70.2% of those convicted of robbery and 78.8% of those convicted of motor vehicle theft. See PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

Take, for example, Eric's crime: in-concert felony murder. Reduced to its statutory definition, it was murder in the second degree, an A-I felony, punishable by a term of life in prison, and viewed as such by the Parole Board members. Consider, however, the larger context. Eric was fifteen years old, at the height of his vulnerability to peer influence, when he agreed to accompany Omar and Kevin to the grocery store. He describes the walk to the store as an archetypal moral dilemma, with an angel and a demon hovering above his head in bubbles, one exhorting him to stay, the other, to go. He knew right from wrong, but—because impulsivity is also a hallmark of adolescence—could not resist the pressure to accompany his friend.

Eric, furthermore, never held or fired the weapon that killed the storekeeper; in fact, he did not enter the store until after the shooting began and had no gun of his own. Although felony murder is a strict liability crime, he did not (and, the experts would remind us, could not) predict the harm that tragically flowed from that gun because his developmental status warped his ability to assess risk.²¹⁸ Seven years later, when he first appeared before the Parole Board, he was almost twenty-three years old and developmentally mature, so far removed from his mid-adolescent self that it seemed a different person had committed the offense.²¹⁹ To Eric, and to the two psychologists who evaluated him, that offense was so much the product of his own, age-induced poor judgment that it was of no value as a predictor of his potential post-release behavior. To the Parole Board members deciding his fate, however, the moment was frozen in time, and they accorded the offense precisely the same weight it would have received if he had been thirty at the time of its commission.

By no means do I mean to suggest that adolescents who commit serious offenses should not be held accountable for their actions. At the heart of *Miller* and *Graham*, however, is the Court's clear and unwavering conviction that youths' developmental immaturity renders them less morally culpable than adults. The failure of parole boards to distinguish the offenses of adolescents from those of adults violates this fundamental precept of *Miller* and *Graham*. In this failure, boards also fail to deliver on the Court's promise to young offenders: that they will be afforded a meaningful opportunity for eventual release from custody.

²¹⁸ Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule when the Defendant Is a Teenager*, 28 NOVA L. REV. 507, 536 (2004).

²¹⁹ See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (Breyer, J., concurring).

C. *Acceptance of Responsibility: Remorse and Actual Innocence*

1. The Centrality of Remorse

The American penal system, of course, owes much to religious concepts of penance and absolution.²²⁰ A defendant's "acceptance of responsibility" for (or willingness to plead guilty to) her crime is a mitigating factor in sentencing,²²¹ as is, in a number of jurisdictions, "true" remorse. Courts, the media, and the public pay close attention to defendant statements of apology and remorse.²²² Similarly, the restorative justice and victims' rights movements have carved out a role for remorse and forgiveness in the criminal justice system.²²³

Much of the scholarship in this area has focused on sentencing and, to a lesser extent, the decision to transfer youth to adult court, which in most jurisdictions provides the only formal contexts for expressions of remorse and apology.²²⁴ Yet acceptance of responsibility also plays a substantial role in parole decision-making. Although the word "remorse" appears nowhere in the New York parole statute or regulations, for example, both the Parole Board and the courts accord a perceived lack of remorse on the part of an inmate enormous weight. True remorsefulness does not usually affect decision-making, but remorselessness does. In the words of one thoughtful parolee, "[y]ou have to 'own' your crime."²²⁵

²²⁰ MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1977).

²²¹ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013); Michael M. O'Hear, *Remorse, Cooperation, and 'Acceptance of Responsibility': The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997); Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, nn.25-37 and accompanying text (2012).

²²² See Robinson et al., *supra* note 221, at 745-46. Although it is beyond the scope of this Article, a fascinating body of literature explores the role of remorse and apology in criminal law. See, e.g., Bibas & Bierschbach, *supra* note 201; Murphy, *supra* note 201; Szmania & Mangis, *supra* note 201.

²²³ See Bibas, *supra* note 201; Bibas & Bierschbach, *supra* note 201; Braithwaite, *supra* note 201; Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

²²⁴ Duncan, *supra* note 40; Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 310 (1999) (discussing relevance of remorse to transfer decision).

²²⁵ Author conversation with Kathy Boudin, Ph.D., in New York, N.Y. (2007). Of all the poets who have tried to capture the pain of true remorse, perhaps Robert Burns put it best:

"Remorse, a Fragment"

Of all the numerous ills that hurt our peace,
That press the soul, or wring the mind with anguish
Beyond comparison the worst are those
By our own folly, or our guilt brought on:
In ev'ry other circumstance, the mind

The substantial attention that courts and parole boards train on remorse stems, at least in part, from its presumed validity as a predictor of recidivism. The apparently remorseless offender, it is assumed, is immune to the shame of his criminal behavior and, so, more likely to re-offend once released than his remorseful counterpart. Yet, while this theory is attractive in its simplicity, it has not been established conclusively. As Martha Grace Duncan points out, “the law betrays a psychological naiveté in viewing remorse as the only ‘human’ response to having committed a serious crime.”²²⁶ Young people, in particular, respond in idiosyncratic ways to their own wrongdoing, often contrary to what society expects of them.²²⁷

This arguably misplaced emphasis on remorse poses unique challenges to prospective parolees who were adolescents when they committed their crimes. As *Graham* and *Miller* made clear, the salient characteristics of developmental immaturity render young people less morally culpable than adults for their crimes. Lesser moral culpability has both external and internal implications; not only must the legal system account for the transient nature of adolescents’ faulty judgment through differential sentencing, but, if they are indeed less guilty, young people cannot be expected to grasp the full implications of their offenses, or to accept responsibility for them, in the same way as adults. And, if a young person is less culpable at the time he commits his crime—if he is acting with a differential degree of *mens rea*—can or should he be expected to come to the same understanding of the offense, or to feel the same degree of remorse as if he had been an adult who committed the act, even after he reaches full maturity?

Has this to say, “It was no deed of mine:”
 But, when to all the evil of misfortune
 This sting is added, “Blame thy foolish self!”
 Or worsen far, the pangs of keen remorse,
 The torturing, gnawing consciousness of guilt—
 Of guilt, perhaps, when we’ve involved others,
 The young, the innocent, who fondly lov’d us;
 Nay more, that very love their cause of ruin!
 O burning hell! in all thy store of torments
 There’s not a keener lash!
 Lives there a man so firm, who, while his heart
 Feels all the bitter horrors of his crime,
 Can reason down its agonizing throbs;
 And, after proper purpose of amendment,
 Can firmly force his jarring thoughts to peace?
 O happy, happy, enviable man!
 O glorious magnanimity of soul!

6 THE POEMS AND SONGS OF ROBERT BURNS, THE HARVARD CLASSICS (Charles W. Eliot ed., 2001), available at <http://www.bartleby.com/6>.

²²⁶ Duncan, *supra* note 40, at 1472.

²²⁷ *Id.* at 1483–84.

Eric's understanding of his actions and sense of remorse matured as he did. His adolescent statements to the sentencing court and the Parole Board focused on the crime's impact on himself and his family; because he did not carry or shoot the gun, he would not accept responsibility for the suffering of the shopkeeper or his family. In later hearings, a greater degree of empathy emerged; he was sorry for their pain, but still did not view himself as being primarily responsible for the victim's death.

In the months before his final hearing, the students then assigned to the case and I reviewed the transcripts of prior hearings and Eric's statements regarding the robbery. The students, like their predecessors, had developed a profound sense of respect and affection for Eric. They wanted to cling to the notion that Eric was coerced into participating in the robbery, that he played no direct role in the shopkeeper's death, because to acknowledge otherwise would cast a cloud over their view of their client. Yet, their ethical obligation to act as advisors to their client required them to counsel him about the critical importance of remorse.²²⁸

We could not and would not script Eric's upcoming testimony but wanted to encourage him to think hard about it. The students traveled to the Otisville Correctional Facility in Orange County, N.Y., where Eric was then incarcerated, to prepare for the hearing. A short time later, Eric sent us a letter to submit to the Parole Board. He wrote, in part:

When I participated in the . . . robbery, not for a second did I think of the danger I placed on innocent lives. I was so caught up in how I would be seen by peers, my thoughts did not consider the consequences or the outright wrong I was taking part in. Once I shamefully went along with this crime, my actions were just as if I was the shooter myself.²²⁹

Did this statement alone demonstrate that Eric was less likely to re-offend than he had been two or four or six years earlier? I think not, but it was after this hearing that he finally gained release.

2. The Dilemma of the Innocent

Even greater barriers confront those who are actually innocent of the crimes that led to their incarceration. In keeping with the principle of finality of adjudication, parole boards generally assume the guilt of prospective parolees and, as executive branch agencies, do not provide a

²²⁸ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011).

²²⁹ Letter from "Eric Carter" to New York State Parole Board (Sept. 1, 2007) (on file with author).

forum for challenging or re-litigating convictions.²³⁰ As Daniel Medwed and others remind us, however, “The American system for adjudicating criminal cases is far from fail-safe, and it is perilous to rationalize the documented errors wrought by the system as inevitable or incidental, much less assume that the inability of a prisoner to achieve freedom through the courts unequivocally confirms factual guilt.”²³¹ Indeed, according to the National Registry of Exonerations, 1159 people have been granted post-conviction exonerations since 1989,²³² of which 311 resulted from DNA evidence.²³³ And, as the most comprehensive study of exonerations to date notes, “it is certain . . . that many defendants . . . no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated.”²³⁴

The causes of wrongful convictions are legion, including, among others, erroneous eyewitness identification,²³⁵ false confessions,²³⁶ failures of science,²³⁷ ineffective assistance of counsel,²³⁸ law

²³⁰ See Medwed, *supra* note 164, at 548.

²³¹ *Id.* at 530–31 (footnotes omitted).

²³² The National Registry of Exonerations is a joint project of the University of Michigan Law School and the Northwestern University School of Law Center on Wrongful Convictions. See *About the Registry*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited July 6, 2013).

²³³ See INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Jan. 10, 2014).

²³⁴ SAMUEL GROSS ET AL., EXONERATIONS IN THE UNITED STATES 1989 THROUGH 2003, at 3 (Apr. 19, 2004), available at http://www.opensocietyfoundations.org/sites/default/files/exon_report.pdf.

²³⁵ According to the Innocence Project, misidentification played a role in 75% of convictions overturned through DNA testing. *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 10, 2014); see SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 (June 2012), available at https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf; GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 13–14 (2008) [hereinafter THOMAS, SUPREME COURT ON TRIAL]; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 75–82 (2008) (examining DNA exonerations); George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 579–90 (2010).

²³⁶ Approximately 25% of people exonerated through DNA testing falsely confessed to their crimes. *Understand the Causes: False Confessions/Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Jan. 10, 2014); see also GROSS & SHAFFER, *supra* note 235, at 57–63; THOMAS, SUPREME COURT ON TRIAL, *supra* note 235, at 16–19; Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Garrett, *supra* note 235, at 88–91.

²³⁷ The Innocence Project estimates that unreliable scientific methodologies or improperly conducted forensic testing contributed to more than 50% of the wrongful convictions later vacated through DNA testing. *Understand the Causes: Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited Jan. 10, 2014).

²³⁸ See GROSS & SHAFFER, *supra* note 235, at 41–43; Garrett, *supra* note 235, at 114–16; George C. Thomas, III, *When Lawyers Fail Innocent Clients: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 34–44; *Understand the Causes: Bad Lawyering*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited Jan. 10, 2014).

enforcement and prosecutorial misconduct or over-zealousness,²³⁹ and use of unreliable informants.²⁴⁰ Additionally, as a number of scholars have recognized, adolescents' developmental immaturity renders them even more vulnerable than adults to these factors and, as a result, to wrongful convictions.²⁴¹ Young peoples' susceptibility both to peer and to adult influence, differential risk assessment capacities, impulsivity, and lack of future orientation, for example, lead them to accede more quickly than adults to standard police interrogation techniques, severely undermining the reliability of the "confessions" those techniques produce.²⁴² One study that examined the cases of 103 youthful offenders later exonerated through DNA testing determined that 31% of subjects had made false confessions, as compared with 18% of their adult counterparts.²⁴³

Teens also have an immature understanding of the law and the judicial process and, so, need highly skilled defense counsel specializing in the legal representation of children and adolescents to ensure that they understand and engage fully in the proceedings against them. Instead, they generally fall victim to the woeful inadequacies that plague the adult indigent defense system, the dangers of which are greatly exacerbated when a young person is the defendant. Consequently, potential defenses, including those relating to the veracity of confessions, often are not adequately explored or presented at trial, and young people are far more likely than adults to enter false guilty pleas.²⁴⁴

As a result of these and other systemic failings, as of 2010, fully one-third of those exonerated by DNA testing were twenty years old or younger at the time of their convictions.²⁴⁵ By contrast, from 1990–2002, only 6% of those convicted of violent crimes from the seventy-five

²³⁹ See Thomas, *supra* note 238, at 28–33; *Understand the Causes: Government Misconduct, INNOCENCE PROJECT*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Jan. 10, 2014).

²⁴⁰ Informants, often with incentives to testify in support of the prosecution, were witnesses in more than 15% of the trials later overturned through DNA testing. *Understand the Causes: Informants, INNOCENCE PROJECT*, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Jan. 10, 2014).

²⁴¹ The acute vulnerability of young people to police interrogation techniques and the nexus between those techniques and false confessions long has been recognized by the U.S. Supreme Court. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Haley v. Ohio*, 332 U.S. 596 (1948). Moreover, scholars have established that youth falsely confess at rates alarmingly higher than adults. See GROSS & SHAFFER, *supra* note 235, at 59–60; Drizin & Leo, *supra* note 236, at 963–70; Tepfer et al., *supra* note 133, at 904–08.

²⁴² The Reid Technique of Criminal Interrogations and Confessions, the widely-used manual on interrogation practices, acknowledges unique susceptibility of children and teens to standard police interrogation techniques. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2011).

²⁴³ Tepfer et al., *supra* note 133, at 904.

²⁴⁴ Alison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010).

²⁴⁵ Tepfer et al., *supra* note 133, at 904–08.

largest U.S. counties were under the age of eighteen, while 25% were under the age of twenty-one.²⁴⁶ Together, these data sets suggest that inmates who were convicted as adolescents are far more likely than older inmates to be innocent of their crimes of commitment and, therefore, more likely to face the “Sophie’s Choice” of the parole process: falsely acknowledge responsibility before the parole board in order to gain release sooner, or continue to maintain innocence with the hope of eventual exoneration, but in the face of almost certain denial of parole. Daniel Medwed has explored this quandary, which is beyond the scope of this Article, forcefully and cogently,²⁴⁷ but its disproportionate impact on this group of prospective parolees demands particular attention.

VII. MAKING *MILLER* MATTER: RECOMMENDATIONS FOR POLICY AND PRACTICE REFORM

In sum, *Graham* and *Miller*’s promise of a “meaningful opportunity for release” will amount to little more than a pyrrhic victory in the absence of substantial changes in the sentencing of young people who are convicted of serious offenses and in parole decision-making. I thus offer the following suggestions to spark conversation about potential reform, recognizing that each merits its own law review article.²⁴⁸ These suggestions fall within the three categories of sentencing and institutional reforms, the parole process, and judicial review:

A. *Sentencing and Institutional Reform*

- Eliminate all true and de facto juvenile LWOP sentences.
- Amend sentencing statutes to create differential sentencing schemes for youth tried in the adult system, including shorter minimum terms than those faced by adults, and compel courts to consider and weigh defendants’ ages and developmental status both at the time they committed their offenses and at sentencing.
- For youth serving indeterminate sentences, create presumptions in favor of release upon completion of minimum terms, if current dangerousness is not established.

²⁴⁶ BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS, 1990–2002: VIOLENT FELONS IN LARGE URBAN COUNTIES (July 2006), available at <http://www.bjs.gov/content/pub/ascii/vfluc.txt>.

²⁴⁷ See Medwed, *supra* note 164.

²⁴⁸ These suggestions are not yet fully-developed proposals, but nonetheless owe much to Glynn & Vila, *supra* note 108.

- Increase available prison programming—including mental health, substance abuse, educational, vocational, release-preparation, and re-entry programs—for adolescent and young adult inmates.
- Create post-conviction victim-offender mediation or education programs for inmates sentenced as adolescents.

B. *Parole Process*

- Require parole board members who hear cases involving inmates convicted as minors to have expertise in adolescent development and the nexus between developmental science and juvenile offending.
- Require parole board members to receive training in the causes and frequency of juvenile wrongful convictions, and to take these considerations into account, when appropriate, in evaluating inmates who were convicted as adolescents for parole.
- Require annual parole reviews once youth have served their minimum terms of incarceration.
- Require parole boards to consider and afford weight to prospective parolees' age and developmental status at the time of offense and conviction.
- Ensure that actuarial risk assessment instruments are validated for adolescents in adult systems, and require pre-parole clinical interviews as well as actuarial assessments for this population.
- Provide access to counsel at parole hearings and on appeal from denials of parole for inmates convicted as adolescents.

C. *Judicial Review*

- Create new mechanisms for post-conviction review of adolescent sentences (including, for example, judicial early release procedures similar to those that exist in some juvenile courts).²⁴⁹
- Enact less deferential standards of judicial review of parole board determinations.

²⁴⁹ See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

CONCLUSION

When Eric was released, he had spent roughly half his life behind bars. He had never used a personal computer or a cell phone. His father was dead, his siblings were scattered across the country, he had earned only a few college credits, and he wore the anvil of a murder conviction around his neck. He faced seemingly insurmountable barriers to successful re-entry.

The way home was not easy. He could not afford to rent his own apartment, and so he lived with a family friend in her cramped home. His criminal record left him unable to find a job, other than the overnight shift at a laundry for minimum wage. He was under constant scrutiny by his parole officer and, due to parole regulations, could not leave the state or change residences without permission.

And yet, nearly six years later, Eric owns a music production company and is a songwriter in high demand. He travels across New York State, speaking to students, probation officers, youth workers, defense attorneys, and others about the experience of being an adolescent in adult prisons. He is the adoring father of a two-year-old girl, and the community has benefited greatly from his many talents and good heart.

Had the parole commissioners who presided over Eric's last hearing chosen not to exercise their discretion to release him—to afford him a meaningful opportunity for release—he might still be in prison, possibly destined to remain there for the rest of his life, despite his nominal parole eligibility. *Miller* and *Graham* surely must mean more than that.