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A Hopeful Retirement From Prison: The Third Circuit's Evolving Definition of a "Meaningful Opportunity to Obtain Release from Prison" Offers Corrigible Juvenile Offenders a Second Chance in *United States V. Grant*

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A HOPEFUL RETIREMENT FROM PRISON: THE THIRD CIRCUIT'S
EVOLVING DEFINITION OF A "MEANINGFUL OPPORTUNITY TO
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OFFENDERS A SECOND CHANCE IN *UNITED STATES v. GRANT*

MACKENZIE E. BRENNAN*

"Mercy without justice is the mother of all dissolution;
justice without mercy is cruelty."¹

I. AN INTRODUCTION TO MAKING HOPE MEANINGFUL AGAIN
IN JUVENILE SENTENCING

Giving a child a second chance is the right thing to do.² In 2013, Sharon Wiggins, the longest-serving-female inmate in the state of Pennsylvania, died in prison at the age of sixty-two—she was sentenced as a juvenile to life in prison without the opportunity for parole (LWOP).³ As a child, Ms. Wiggins faced persistent poverty, neglect, and abuse—a seemingly forgotten youth.⁴ Despite her unfortunate upbringing, the sentencing judge had no choice but to sentence Ms. Wiggins to an unforgiving LWOP sentence.⁵ Nevertheless, while in prison, Ms. Wiggins rose above her circumstances—she earned a college degree, became a model mentor,

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1. See *Carter v. State*, 192 A.3d 695, 701 (Md. 2018) (citing Randy Lee, *Justice Benjamin Nathan Cardozo and His Two Most Important Questions: Reflections on the Choice of Tycho Brahe*, 34 *TOURO L. REV.* 237, 242 (2018)) (quoting Saint Thomas Aquinas) (disqualifying de facto LWOP sentences and LWOP sentences by name for juvenile offenders on the basis of their merciless nature).

2. See *Graham v. Florida*, 560 U.S. 48, 50 (2010) (asserting that while states are not required to guarantee eventual freedom and release for juvenile nonhomicide offenders, states must impose sentences that provide "meaningful opportunity for release based on demonstrated maturity and rehabilitation").

3. See Dana DiFilippo, *In Memory of Sharon Wiggins, a Child 45 Years Ago Sentenced to Die in Prison*, *JUVENILE LAW CTR.* (Mar. 25, 2013), <https://jlc.org/news/memory-sharon-wiggins-child-45-years-ago-sentenced-die-prison> [<https://perma.cc/V3UE-8BG3>] (discussing life and death of Sharon Wiggins, the longest-serving-female prisoner in Pennsylvania prison system).

4. See *id.* (discussing Wiggins's childhood and treatment in justice system).

5. See *id.* (declaring that although *Miller v. Alabama* declared mandatory juvenile LWOP sentences unconstitutional, Wiggins was one of approximately 500 juvenile lifers in Pennsylvania state prison awaiting her opportunity to demonstrate rehabilitation to parole board).

and tutored her fellow inmates.⁶ Despite her achievements, however, the criminal justice system never afforded Ms. Wiggins the opportunity to demonstrate to either a judge or parole board that she was no longer the same troubled adolescent who committed a terrible crime over four decades prior.⁷ Although Ms. Wiggins will never personally benefit from the promising evolution in juvenile sentencing, her legacy should not endure in vain.⁸

Regrettably, the United States stands alone as the sole country that sentences juveniles, like Ms. Wiggins, to LWOP for crimes they committed before turning eighteen.⁹ Though this state of affairs is relatively bleak, the United States Supreme Court has rapidly amended the juvenile sentencing landscape to offer juvenile offenders increased leniency and hope.¹⁰ Since the early 2000s, the Court not only banned the death penalty for all juvenile offenders, but also categorically banned mandatory LWOP sentences for all corrigible (i.e., rehabilitated) juveniles due to LWOP's inherent similarity to capital punishment.¹¹ Hence, for more than a decade, the Court has taken steps to protect juveniles from the harshest criminal punishments, particularly LWOP.¹²

Despite the Court's progressive shift away from juvenile LWOP sentences, some state and federal courts insist on sentencing juveniles to

6. *See id.* (describing Wiggins's rehabilitation while incarcerated, stating that she earned a college degree and over 10,000 educational certificates, tutored fellow inmates in math, helped peers earn GEDs, and spoke out when young female inmates were allegedly raped by prison guards).

7. *See id.* (stating Wiggins never had the opportunity to demonstrate rehabilitation).

8. *See Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (asserting that given holdings of *Roper* and *Graham*, and childrens' diminished culpability and capacity for rehabilitation, courts should rarely sentence juveniles to LWOP).

9. *See* Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Oct. 13, 2017), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/9RQF-95A2>] (providing national statistics for juvenile LWOP sentencing practices in United States).

10. *See id.* (discussing importance of retroactivity of *Miller* in that states can remedy unconstitutionality of mandatory juvenile LWOP sentences by conducting parole hearings and evaluating corrigibility rather than resentence approximately 2,100 people who received mandatory life sentences). *But see Louisiana Denies Parole to 78-Year-Old Henry Montgomery*, THE SENTENCING PROJECT (Apr. 15, 2019), <https://www.sentencingproject.org/news/7186/> [<https://perma.cc/2ATL-PDVE>] (condemning Louisiana Committee on Parole's decision to deny parole to Henry Montgomery, the petitioner in *Montgomery v. Louisiana*).

11. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (asserting that because *Miller* announced new rule of substantive law, courts must give this holding retroactive effect); *see also Miller*, 567 U.S. at 465 (declaring juvenile mandatory LWOP sentences inherently violate Eighth Amendment's ban on cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 71–72 (2010) (concluding juvenile sentences of LWOP for nonhomicide offenders violate Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding death penalty violates Eighth Amendment for offenders under age eighteen).

12. *See Montgomery*, 136 S. Ct. at 726 (discussing why sentencing judges must treat juvenile offenders with greater leniency).

these severe punishments.¹³ Of particular concern, state and federal courts inconsistently interpret whether the Supreme Court's seminal juvenile sentencing cases, *Graham v. Florida*¹⁴ and *Miller v. Alabama*,¹⁵ unequivocally ban lengthy juvenile term-of-years sentences that, similar to LWOP sentences, prevent rehabilitated juvenile offenders from obtaining release from prison.¹⁶ For example, some state and federal courts continue to impose extensive juvenile term-of-year sentences that either exceed the juvenile's life expectancy or deny the juvenile parole until a severely advanced age.¹⁷ Such lengthy term-of-years sentences are synony-

13. See *Graham*, 560 U.S. at 123 (sustaining that although sentencing courts must provide juveniles with sentences that afford them "a meaningful opportunity to obtain release," this still leaves many unanswered questions: what does "meaningful" mean and when must it occur?). Compare *People v. Caballero*, 282 P.3d 291, 291–92 (Cal. 2012) (holding that sentencing juvenile nonhomicide offender to term-of-years sentence with parole eligibility date falling outside offender's natural life expectancy constitutes cruel and unusual punishment, and further maintaining that *Miller* made clear that *Graham*'s flat ban on LWOP sentences applies to all nonhomicide cases involving juvenile offenders, including term-of-years sentences), and *State v. Null*, 836 N.W.2d 41, 63 (Iowa 2013) (reasoning that parole eligibility date falling within man's late sixties does not comport with *Graham*'s meaningful opportunity to demonstrate maturity and rehabilitation), with *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (holding that 600-month sentence does not fall within *Miller*'s categorical ban on mandatory LWOP sentences because Court in *Miller* did not hold that Eighth Amendment categorically prohibits imposing sentence of LWOP on juvenile offender), and *Lucero v. People*, 394 P.3d 1128, 1130 (Colo. 2017) (asserting that neither *Graham* nor *Miller* apply to aggregate term-of-years sentence because LWOP is a specific type of sentence distinct from term-of-years sentences).

14. See *Graham*, 560 U.S. at 74–75 (announcing sentencing courts may not impose LWOP sentences on persons under age eighteen who are convicted of nonhomicide crimes because that is where society draws line between childhood and adulthood).

15. See *Miller*, 567 U.S. at 470–75 (indicating how holdings from *Roper* and *Graham* imply that mandatory juvenile LWOP sentences are unconstitutional).

16. See generally Rebecca Lowry, *The Constitutionality of Lengthy Term-of-Years Sentences for Juvenile Non-Homicide Offenders*, 88 ST. JOHN'S L. REV. 881, 883 (2014) (positing that justifications for prohibiting LWOP do not simply disappear because sentence is not technically LWOP by name—de facto life sentence).

17. See *Davis v. McCollum*, 798 F.3d 1317, 1321 (10th Cir. 2015) (announcing that because *Miller* addressed only mandatory LWOP sentences, relief may not be granted for sentence imposed under non-mandatory LWOP scheme); see also *Croft v. Williams*, 773 F.3d 170, 171 (7th Cir. 2014) (asserting that *Miller* is inapplicable to *Croft*'s case because *Miller* only considered mandatory LWOP sentences); Laura Cohen, Nicholas Kiriakatos & Patrick Kouyialis, *Making Miller Matter: Youth, Parole, and a Meaningful Opportunity for Release*, 33 CRIM. JUST., Summer 2018, at 34, 35 (contending that some state parole boards have resisted *Miller*'s mandate requiring individualized sentencing hearings considering diminished culpability and immaturity, which makes parole as illusory as ever); cf. *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012) (stating that defendant is not entitled to habeas relief because *Graham* does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to de facto life sentence); *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) (en banc) (commenting that sentence is not unconstitutional simply

mous with de facto LWOP sentences—this is a distinction without a difference.¹⁸

While some states maintain that *Graham* and *Miller* broadly prohibit any sentence that effectively denies a corrigible juvenile parole within their lifetime, other states contend that *Graham* and *Miller* only specifically proscribe LWOP sentences by name for corrigible juveniles.¹⁹ Although *Graham* grants each respective state the autonomy to choose how to afford corrigible juvenile offenders a meaningful opportunity to obtain release from prison, there is a dire possibility that some states infringe upon *Graham* and *Miller*'s fundamental promise of providing rehabilitated juvenile offenders a realistic chance at release from prison.²⁰ Until the Supreme Court explicitly holds that corrigible juvenile term-of-years sentences that exceed the juvenile's life expectancy violate the Eighth Amendment, it appears such sentences may remain constitutionally permissible.²¹

Evidently, the constitutionality of corrigible juvenile de facto life sentences appears far from settled.²² Given that most states have not yet

because it is made up of several sentences that are lengthy in aggregate, even if defendant faces total sentence exceeding normal life expectancy).

18. See Mark T. Freeman, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 968 (2013) [hereinafter Freeman, *Meaningless Opportunities*] (citing Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 425 n.91 (2011)) (asserting that although *Graham*'s holding is "quite narrow—it only applies to actual LWOP sentences for juveniles who commit nonhomicide offenses," in actuality *Graham*'s holding may also apply to de facto LWOP sentences).

19. See Freeman, *Meaningless Opportunities*, *supra* note 18, at 963 (arguing LWOP sentences for juveniles who commit nonhomicide offenses fundamentally violate the Eighth Amendment). A LWOP sentence by name is a sentence that the court explicitly labels as LWOP, whereas a de facto LWOP sentence is a term-of-years sentence that is the "functional equivalent of a life without parole term" and effectively denies a juvenile parole within their lifetime. For a further discussion of whether *Graham* and *Miller* apply specifically to LWOP by name or de facto juvenile life sentences generally, see *infra* notes 72–81 and accompanying text.

20. See *Graham*, 560 U.S. at 76 (asserting that although states ultimately choose how they will comply with affording juveniles "meaningful opportunity for release," states are not required to release juveniles from prison if they are incorrigible). See generally Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 375–76 (2014) (discussing the three elements that comprise *Graham*'s "meaningful opportunity to obtain release"); *id.* at 383–88 (examining that while Iowa Supreme Court held a fifty-two-and-a-half-year sentence without possibility of parole unconstitutional under *Graham* and *Miller*, Arkansas and Missouri courts have upheld similar term-of-years sentences as constitutional under Eighth Amendment).

21. For a discussion of states that held that lengthy term-of-years sentences do not fall within the protections of *Graham* and *Miller*, see *infra* notes 78–79 and accompanying text.

22. Compare *Goins v. Smith*, 556 F. App'x 434, 438–39 (6th Cir. 2014) (emphasizing that because *Graham* did not clearly establish that consecutive, fixed term-of-years sentences were unconstitutional, sentences amounting to practical equivalent of life are constitutional especially when juvenile can apply for parole after forty-five years), with *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (opining that empha-

addressed the issue of these sentences, this ambiguity demands the Supreme Court provide states with clarity to ensure corrigible juvenile offenders receive a genuine chance to attain a meaningful life outside of prison.²³ Without any further guidance from the Court as to what a meaningful opportunity for release actually entails, the rights of thousands of imprisoned rehabilitated juvenile offenders remain vulnerable.²⁴

In the meantime, the Third Circuit has taken a promising step in *United States v. Grant*²⁵ towards protecting corrigible juvenile offenders from LWOP sentences, de facto or otherwise.²⁶ In *Grant*, the Third Circuit utilized a rebuttable presumption that all corrigible juvenile offenders must receive an opportunity for parole before they reach the national age of retirement.²⁷ While the holding in *Grant* may generate hope, it nevertheless may also continue to leave sentencing judges with too much discretion to incarcerate corrigible juveniles for unduly long term-of-years

sis of juvenile's aggregate term-of-years sentence should be on practical consequences, and thus *Miller's* holding broadly applies to lengthy term-of-years sentences that exceed juvenile's lifetime and sentences that amount to practical equivalent of life sentence, regardless of whether juvenile committed multiple or single offense).

23. See generally *Starks v. Easterling*, 659 F. App'x 277, 280 (6th Cir. 2016) (stating that although Court may one day hold fixed-term-of-years sentences for juvenile offenders are functional equivalent of life-without-parole, this court should not predict future outcomes, and because Court has not yet explicitly held that Eighth Amendment extends to juvenile sentences that are functional equivalent of de facto life sentences, Tennessee's judgment was not unreasonable application of clearly established law); cf. *People v. Nuñez*, 125 Cal. Rptr. 3d 616, 624 (Cal. 2011) ("Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.").

24. See *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018) (stating that although "meaningful opportunity for release" is not precisely defined, "*Graham* spoke of the chance to rejoin society in qualitative terms," and thus Court implied more than compassionate physical release from prison shortly before death (quoting *Graham v. Florida*, 560 U.S. 48, 79 (2010))). But see *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1727 (2017) (holding that *Graham* left it to respective states to explore ways to comply with its rule, and therefore Virginia's geriatric release program satisfies *Graham's* requirement of affording juvenile offenders with meaningful opportunity for release based on demonstrated maturity and rehabilitation).

25. 887 F.3d 131, 152 (3d Cir. 2018), *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018) (case listed for rehearing en banc Feb. 20, 2019) (commenting that Third Circuit is adopting only rebuttable presumption and not bright line rule). Despite the Third Circuit vacating the *Grant* opinion, the court's discussion in the case and this Note remain of interest in that both highlight the severe inconsistencies in juvenile LWOP sentencing, and such discrepancies are ripe for review by the United States Supreme Court.

26. See *id.* at 142 (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)) (declaring that Eighth Amendment "prohibits term-of-years sentences for the entire duration of a juvenile homicide offender's life expectancy when the defendant's 'crimes reflect transient immaturity [and not] . . . irreparable corruption'").

27. See *id.* at 153 (holding that sentencing judges should presumptively sentence juvenile offenders below national age of retirement unless other sentencing factors strongly instruct against doing so).

sentences.²⁸ Rather than establishing a rebuttable presumption, the Third Circuit ought to take a more promising step and grant all corrigible juvenile offenders automatic parole eligibility at the national age of retirement or earlier to ensure that these offenders have a genuine opportunity to achieve a meaningful life outside of prison.²⁹

This Note analyzes the Court's connotation of a "meaningful opportunity to obtain release" and concludes that this standard inherently proscribes unduly long term-of-years sentences amounting to de facto LWOP for corrigible juvenile offenders.³⁰ To help dissect the Court's phrasing, Part II of this Note explores the history of juvenile sentencing and its evolution within the American justice system.³¹ Part II also surveys different approaches to defining *Graham's* meaningful opportunity for release, while discussing how these differing approaches may violate juvenile offenders' Eighth Amendment rights.³²

Among these approaches is the Third Circuit's recent case of *United States v. Grant*.³³ Part III of this Note reviews the facts of *Grant*, while Part IV scrutinizes the Third Circuit's rationale in adopting its novel rebuttable presumption.³⁴ Finally, Part V reflects on *Grant's* impact and potential shortcomings.³⁵ Ultimately, this Note demonstrates that Ms. Wiggins's fate is the exception that proves the rule: LWOP deprives corrigible juveniles of a life with hope, and no child should ever be deprived of hope.³⁶

28. See *id.* at 151 (adopting rebuttable presumption that juvenile offenders should receive sentence below national age of retirement). See generally Kellee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130, 163 (2017) (advocating for elimination of LWOP for juvenile offenders and eviscerating sentencing option because courts are left with too much discretion).

29. See generally Stephanie Singer, *A Proposed Solution to the Resentencing of Juvenile Lifers in Pennsylvania Post Montgomery*, 10 DREXEL L. REV. 695, 719 (2018) (discussing automatic parole eligibility as possible solution to injustices inherent in juvenile justice system).

30. For a further discussion of how states and circuits apply divergent interpretations of a "meaningful opportunity for release," see *infra* notes 72–81 and accompanying text.

31. For a further discussion of the evolution of the juvenile justice system within the American legal system, see *infra* notes 37–60 and accompanying text.

32. For a further discussion of the Eighth Amendment cruel and unusual punishment analysis, see *infra* notes 61–71 and accompanying text.

33. For a further discussion of the Third Circuit's analysis in *Grant*, see *infra* notes 96–136 and accompanying text.

34. For a discussion of the Third Circuit's line of reasoning and analysis in *Grant*, see *infra* notes 96–136 and accompanying text.

35. For a complete critical analysis of the Third Circuit's decision and a further discussion of the impact of *Grant*, see *infra* notes 137–62 and accompanying text.

36. See *Graham v. Florida*, 560 U.S. 48, 70 (2010) (rationalizing, in its move toward leniency in juvenile sentencing, that when children are denied hope, they will likely not improve their moral character because doing so would be futile (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989))). See generally Brooke

II. A HISTORY OF JUVENILE SENTENCING PRACTICES

The twenty-first century unleashed a period of hope and reform in juvenile sentencing, beginning with *Roper v. Simmons*,³⁷ which banned the death penalty for all juvenile offenders.³⁸ Following this historic holding, the Court banned LWOP for all nonhomicide juvenile offenders in *Graham*, proscribed mandatory LWOP for all corrigible juvenile homicide offenders in *Miller*, and then, finally, retroactively applied *Miller*'s holding to currently imprisoned corrigible juveniles in *Montgomery v. Louisiana*.³⁹ The Court's holdings in *Roper*, *Graham*, *Miller*, and *Montgomery* together demonstrate a progressive shift towards offering juvenile offenders leniency in sentencing.⁴⁰

The Court has revolutionized juvenile sentencing from a system that condemned juvenile "super-predators" to death to a system that seeks to offer these offenders rehabilitation and a second chance.⁴¹ As aforemen-

Wheelwright, *Instilling Hope: Suggested Legislative Reform for Missouri Regarding Juvenile Sentencing Pursuant to Supreme Court Decisions in Miller and Montgomery*, 82 MO. L. REV. 267, 267–68 (2017) (discussing appearance and importance of hope in juvenile sentencing).

37. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (recognizing differences among juvenile and adult offenders, and how differences counsel against imposing juvenile capital punishment).

38. See generally Andrea Huerta, *Juvenile Offenders: Victims of Circumstance with a Potential for Rehabilitation*, 12 FIU L. REV. 187, 188–200 (2016) (considering recent Supreme Court cases regarding juvenile sentencing and justifications behind Court's rationale).

39. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (announcing that because *Miller* proclaimed new rule of substantive constitutional law, courts must give *Miller*'s holding retroactive effect); *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding that mandatory LWOP sentences for juvenile offenders violate these offenders' Eighth Amendment rights); *Graham*, 560 U.S. at 74 (reasoning that because there is no single penological justification supporting LWOP sentences for nonhomicide juvenile offenders, such sentences violate Eighth Amendment rights for such offenders); *Roper*, 543 U.S. at 564 (prohibiting capital punishment for juvenile offenders where eighteen of thirty-eight states precluded such punishment and twelve states did not permit such punishment within their jurisdiction at all). Of particular importance, for courts to give *Miller* retroactive effect, states do not need to relitigate sentences in which a juvenile offender received a mandatory LWOP sentence—rather, "[a] state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." See *Montgomery*, 136 S. Ct. at 736 (reasoning that rather than resentencing all juvenile offenders under *Miller*, parole boards retain discretion in determining a juvenile's rehabilitation and ultimate release). But see Erica L. Ramstad, *Monster Under the Bed: The Nightmare of Leaving Juvenile Sentences up to the Parole Board*, 64 S.D. L. REV. 126 (2019) (providing overview of severe problems with granting parole boards unchecked discretion in deciding whether to release juvenile offenders).

40. See Carl H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1788 (2016) (examining current revolution in juvenile justice in United States and how *Miller* represents tremendous shift demonstrating Court's intent to treat children differently from adults in justice system).

41. See generally Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 WAKE FOREST L. REV. 727 (1998) (deducing that alleged "super-predator scare" was fictitious after analyzing juvenile crime statistics in 1980s and 1990s).

tioned, despite the Court's movement towards mitigating harsh juvenile sentences, a discordant split has developed among state and federal courts regarding how to interpret *Graham* and *Miller's* call for a meaningful opportunity to obtain release with respect to de facto LWOP sentences for corrigible juvenile offenders.⁴² Regardless of this division, the Supreme Court's reasoning in its seminal juvenile sentencing cases indicates that state and federal courts ought to protect corrigible juvenile offenders from de facto LWOP sentences.⁴³

A. *A Promising Evolution in American Juvenile Sentencing*

American juvenile sentencing practices have evolved to afford leniency to juvenile offenders.⁴⁴ A consensus among psychologists and sentencing courts has emerged deeming juvenile offenders fundamentally different from adults in terms of sentencing considerations.⁴⁵ Nevertheless, the notion that states should sentence juveniles differently than adults took time to develop.⁴⁶

42. See *infra* notes 75–81 and accompanying text (discussing split among states and federal courts as to whether to apply *Graham* and *Miller's* holdings to de facto LWOP sentences).

43. For a discussion of different interpretations of the Court's "meaningful opportunity for release," see *supra* notes 13–20 and accompanying text and *infra* notes 72–81 and accompanying text.

44. See generally Erin Dunn, *Montgomery v. Louisiana: An Attempt to Make Juvenile Life Without Parole a Practical Impossibility*, 32 *TOURO L. REV.* 679, 706–07 (2016) (highlighting that Justice Anthony Kennedy, writer of majority opinion in *Montgomery*, practically prohibited LWOP and is a leader in juvenile sentencing reform and leniency).

45. See *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (stating that youths' "lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions"). Pertinent to *Johnson's* analysis is the fact that the Court required sentencing judges to consider "youth as a mitigating factor" because the fundamental characteristics of youth are inherently transient, in that as youths mature, their recklessness, and impetuosity tend to subside:

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. . . . A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence.

Id. at 367 (providing justification as to why juveniles should receive more lenient punishments); see also *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (recognizing that youths are especially susceptible to negative influences, and therefore deserve leniency because they cannot control their conduct and appreciate the consequences of their actions); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (noting formative qualities of childhood and adolescence that make youths susceptible to criminal behavior); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (declaring differences between juveniles and adults in terms of culpability).

46. See generally *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *AM. PSYCHOLOGIST* 1009, 1014 (2003)) (stating that because juveniles have less control over their environment, they may be more susceptible to outside pressures (e.g., peer pres-

In the nineteenth century, in order to prosecute a minor between the ages of seven and fourteen, the state had to overcome a presumption that the child did not realize the wrongfulness of his or her actions.⁴⁷ Subsequently, a progressive movement in the late 1890s encouraged states and municipalities to establish juvenile courts that would promote the rehabilitation and welfare of juvenile offenders.⁴⁸ Despite this initial trend in promoting juvenile rehabilitation, the tide turned in the late 1960s and early 1970s, when society began to doubt the efficacy of prison as a means of rehabilitation.⁴⁹ For example, in 1974, a prominent American sociologist published an infamous “nothing works” report on prison reform, which stated that “[w]ith a few isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism.”⁵⁰ Despite society’s emerging distrust of juvenile offenders, the Supreme Court was noticeably concerned with these offenders’ vulnerability in the criminal justice system, and, thus, augmented the scope of juvenile offenders’ rights by requiring fair notice, assistance of counsel, privilege against self-incrimination, and the right of appeal.⁵¹

sure, neighborhood influences, and familial influences), which consequently decreases culpability); Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 11–43 (2008) [hereinafter Feld, *A Slower Form of Death*] (examining course of juvenile sentencing in American legal justice system, and highlighting factors that make juveniles different from adults for sentencing purposes).

47. See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510–11 (1984) (discussing that rebuttable presumption of incapacity exists for children between ages of seven and fourteen, who would not inherently realize wrongfulness of their actions); see also *Commonwealth v. Mead*, 92 Mass. (10 Allen) 398, 400 (1865) (affirming new trial for juvenile girl because facts in record did not establish that she knew her actions were unlawful). But see *Willet v. Commonwealth*, 76 Ky. 230, 231–32 (1877) (stating that juvenile’s knowledge of difference between right and wrong is sufficient to demonstrate that juvenile may have appreciated consequences of their actions).

48. See Feld, *A Slower Form of Death*, *supra* note 46, at 15–18 (discussing how progressives created alternative justice system for juvenile offenders, one based on rehabilitation rather than punishment). There is a “rehabilitative ideal” rooted in the juvenile justice system that views juvenile offenders as capable of change and betterment, and this ideology asserts the notion that society ought to intervene to save children from the ills of crime. See Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2480 (2000) (arguing that justice system ought to sentence children differently than adults).

49. See generally Singer, *supra* note 29, at 719 (discussing expansion of juvenile transfer laws under fictitious “super-predator” scare).

50. See *id.* at 707 (describing impetus of criminal justice system’s movement away from rehabilitation and towards retribution).

51. See *In re Gault*, 387 U.S. 1, 33–58 (1967) (procedural requirements of notice, fair hearing, assistance of counsel, opportunity to confront and cross examine witnesses, privilege against self-incrimination, and right to appeal all extend to juvenile offenders); see also *Kent v. United States*, 383 U.S. 541, 564–65 (1966) (requiring that protections afforded to adult offenders in criminal process are also afforded to juvenile offenders). But see *State v. Null*, 836 N.W.2d 41, 53 (Iowa 2013) (arguing that although *Kent* and *In re Gault* valued extension of juvenile

Notwithstanding the Court's concern for juvenile offenders' inalienable rights, an intense fear of dangerous juveniles pervaded the 1980s and early 1990s—a period distinguished by a marked increase in the length of juvenile sentences.⁵² Prominent political scientists endorsed the idea that a group of irredeemable juveniles, possessing no moral compass, would commit atrocious acts of violence.⁵³ The term “super-predator” emerged to denote this predicted surge of juvenile offenders who “fear[ed] neither the stigma of arrest nor the pain of imprisonment,” and were “capable of committing the most heinous acts of physical violence for the most trivial reasons.”⁵⁴ As this sentiment infiltrated society, legislatures in forty-five states enacted laws rendering juvenile offenders eligible for adult sentences.⁵⁵ Additionally, legislatures also expanded the breadth of offenses that either allowed or required states to transfer juveniles to adult prisons and stressed public interests of safety and offender accountability over the value of juvenile rehabilitation.⁵⁶

offenders' criminal rights, cases may have instilled mindset of increasing exposure of youths to adult criminal sentencing).

52. See John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 560–63 (2016) (stating that 1990s saw dramatic increase in number of juveniles sentenced to LWOP).

53. See John Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [<https://perma.cc/E8BG-Q798>] (predicting onslaught of “tens of thousands of severely morally impoverished juvenile super-predators” that would threaten stability of society); see also *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Feb. 13, 2014), <https://eji.org/news/super-predator-myth-20-years-later> [<https://perma.cc/YPL2-U9P7>] (reporting that in 1990s, criminologist James Alan Fox stated “[u]nless we act today, we’re going to have a bloodbath when these kids grow up” (internal quotation marks omitted)).

54. See Dilulio, *supra* note 53 (discussing advent of juvenile “super-predator”); see also *Null*, 836 N.W.2d at 53–54 (discussing how states began to enact laws in 1990s expanding exposure of juveniles to criminal sanctions by encouraging courts to try juvenile offenders in adult rather than juvenile courts); Mills, *supra* note 52, at 560–63 (discussing impact of Princeton Professor John Dilulio’s “super-predator” warning in time of increasing panic of potentially dangerous juvenile offenders); *id.* (discussing impact of 1990’s on juvenile sentencing); *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, SENTENCING OF YOUTH TO LIFE WITHOUT PAROLE, HUMAN RIGHTS WATCH & AMNESTY INT’L (Oct. 11, 2005), <https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states> [<https://perma.cc/6DU2-D5TQ>] (reflecting permeating fear of juvenile predators in nationwide sentencing practices, “in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were *more* likely to enter prison with a life without parole sentence than adult murder offenders” (emphasis in original)).

55. See Mills, et al., *supra* note 52, at 582 (quoting *Clinton Cites Need for Role Models*, CHI. SUN-TIMES, Oct. 18, 1994, at 3) (discussing how super-predator myth “captured popular and political imaginations”).

56. See generally Patricia Torbet & Linda Szymanski, DEP’T OF JUST., *State Legislative Responses to Violent Juvenile Crime: 1996–97 Update*, JUV. JUST. BULL., Nov. 1998, <https://www.ncjrs.gov/pdffiles/172835.pdf> [<https://perma.cc/QKW2-TWBZ>] (reviewing pertinent factors influencing sentencing decisions in 1990s).

The predicted threat of juvenile super-predators, however, never came to fruition.⁵⁷ In the early 2000s, following the 1990's blitzkrieg of increasingly harsh juvenile sentencing practices, developments in psychology and neuroscience reinforced the traditional notion that juveniles and adults are indeed quite different in terms of culpability.⁵⁸ In *Roper*, *Graham*, and *Miller*, the Court relied, in part, on scientific evidence indicating that because the juvenile brain is underdeveloped, courts should sentence juveniles and adults differently.⁵⁹ This difference between children and adults, especially with respect to the ability to make rational choices, led courts, psychologists, and society as a whole, to conclude that juveniles should not receive the most unforgiving sentences.⁶⁰

57. See *Null*, 836 N.W.2d at 56 (discussing how Dilulio's prediction of "super-predator" era had failed to materialize, and how this theory was utterly incorrect); see also *Mills et al.*, *supra* note 52, at 585 (stating how criminologists who predicted endemic of juvenile "super-predators" were incorrect). After conceding that the juvenile "super-predator" era had failed to transpire, both Professor Dilulio and Professor Fox submitted amicus briefs in support of the petitioners in *Miller*, arguing that mandatory LWOP sentences imposed on the fourteen-year-olds violated the Eighth Amendment's prohibition against cruel and unusual punishment. See *id.* (citing Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 37, *Miller*, 132 S. Ct. 2455 (Nos. 10-9647, 10-9646)) (detailing how comprehensive research exists demonstrating that predictions regarding juvenile super-predator era were wrong and admitted that the super-predator myth created an undeserving and excessive juvenile punishment scheme).

58. See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (stating that "as any parent knows and as the scientific and sociological studies respondent and his amici cite 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'" (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993))). In reference to capital juvenile punishment, the Court in *Roper* rationalized that because it is difficult for expert psychologists to diagnose any juvenile under the age of eighteen as possessing an antisocial personality disorder, states cannot seek capital punishment in juvenile cases. See *id.* at 573-74 (citing *Steinberg & Scott*, *supra* note 46, at 1014) (discussing implications of advances in juvenile neuroscience on rendering juveniles less culpable for their crimes).

59. See *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012) (discussing how *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes). While the *Roper* Court cited scientific studies that established that only a small proportion of adolescents who engage in illegal behavior develop an engrained pattern of such problem behavior, the *Graham* Court likewise noted that developments in neuroscience and psychology demonstrate differences between adult and juvenile cognitive capabilities, thereby lessening a juvenile's moral culpability. See *Graham v. Florida*, 560 U.S. 48, 69 (2011) (providing fundamental differences between adult and juvenile brains and why this dissimilarity requires different sentences).

60. See *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569) (establishing that because juveniles have lessened culpability, they are less deserving of most severe punishments); see also *Miller*, 567 U.S. at 461 (affirming how both *Roper* and *Graham* demonstrate that imposing state's harshest penalties, mandatory LWOP, precludes sentencing judges from accounting for all particular characteristics that accompany youth); *Cohen et al.*, *supra* note 17, at 34 (examining national effort to eliminate irrational sentencing practices that sentence children as adults in United States). The most recent studies assessing youth crime and recidivism support the Court's categorical prohibition of the most extreme punishments based on age

B. *A Progressive Expansion of What Constitutes Cruel and Unusual Punishment for Juvenile Offenders Under the Eighth Amendment*

Juvenile offenders' Eighth Amendment rights evolved parallel to juvenile sentencing reform.⁶¹ The Eighth Amendment of the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁶² Traditionally, the Eighth Amendment's ban on cruel and unusual punishment is evaluated against "the evolving standards of decency that mark the progress of a maturing society," and as a result, the Eighth Amendment must adapt to imitate reformed societal values.⁶³ Therefore, the Supreme Court looks to contemporary societal norms to determine which juvenile sentences are so disproportionate as to be considered cruel and unusual.⁶⁴

The Court often measures what society values by determining whether a national consensus against applying a particular punishment exists.⁶⁵ In making this determination, the Court examines legislative enactments and actual state sentencing practices.⁶⁶ For example, in *Roper*

and developmental immaturity. See Cohen et al., *supra* note 17, at 34–35 (explaining that landmark quartet of Supreme Court cases coupled with follow-up studies on youth crime and recidivism rates support contention that certain characteristics of adolescence, diminished culpability and capacity for rehabilitation, render most extreme sentences available under law cruel and unusual as applied to juvenile offenders).

61. See generally Kathryn McEvilly, *Crying Mercy: Life Without Parole for Fourteen-Year-Old Offenders in Miller v. Alabama and Jackson v. Hobbs*, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 231, 234–37 (2012) (analyzing how Eighth Amendment has evolved with juvenile sentencing and Supreme Court jurisprudence in *Miller* and *Graham*).

62. See U.S. CONST. amend. VIII; see also *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that Eighth Amendment guarantees individual right not to receive excessive sanctions, and such right flows from basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense").

63. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (declaring that Eighth Amendment is not static, but rather derives its meaning from societal standards of decorum).

64. See, e.g., *Roper*, 543 U.S. at 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 818–38 (1988)) (reasoning that national standards of decency do not permit execution of any offender under age sixteen at time of crime); see also *Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002) (determining existence of national consensus against death penalty for entire category of offenders with mental disabilities, and therefore capital punishment is limited to narrow category of offenders who commit most serious crimes, whose extreme culpability make them most deserving of execution).

65. See, e.g., *Atkins*, 536 U.S. at 322 (pronouncing that capital punishment of mentally disabled is cruel and unusual punishment due to national consensus among states abrogating such sentences).

66. See *Graham v. Florida*, 560 U.S. 48, 59 (2011) (illustrating that Eighth Amendment analysis begins with consideration of legislation, and then moves to actual sentencing practices); see also *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (announcing that in determining whether national consensus has emerged against particular punishment, Court looks to legislative enactments and actual sentencing practices, as this portrays most objective evidence of societal values).

and *Miller*, the Court evaluated relevant state statistics in determining the emergence of a national consensus against inflicting the death penalty and mandatory LWOP sentences upon juvenile offenders.⁶⁷ Such a consensus demonstrates a compassionate trend against subjecting juveniles to excessively harsh sentences.⁶⁸

In addition to searching for the existence of a national consensus, the Court also considers whether a particular punishment furthers classic penological justifications—such as incapacitation, deterrence, rehabilitation, and retribution.⁶⁹ The Court has repeatedly found that the standard penological justifications applicable to adults may not justify extreme sentences for juvenile offenders who, among other considerations, possess diminished culpability.⁷⁰ The Court's reasoning seemingly applies to both juvenile LWOP sentences by name as well as juvenile de facto LWOP sentences because both punishments seek to imprison the offender until death, and therefore disregard rehabilitation.⁷¹

67. See *Miller v. Alabama*, 567 U.S. 460, 482–85, (2012) (explaining that objective indicia of legislative enactments and actual state sentencing practices counsel against mandatory LWOP sentences); see also *Roper*, 543 U.S. at 564–65 (justifying proscribing juvenile death penalty, especially based on fact that although twenty states have not outlawed practice, such punishment is incredibly rare).

68. See, e.g., *Roper*, 543 U.S. at 563–66 (finding national consensus against imposition of death penalty has emerged for offenders who were under age eighteen at time they committed crime because thirty states prohibit execution of offenders under age eighteen); see also *Mills et al.*, *supra* note 52, at 541–42 (commenting that Court's holdings in *Roper*, *Graham*, and *Miller* demonstrate increased alacrity in protecting juvenile offenders). The Court in *Roper* found a national directional change in its analysis of categorically prohibiting juvenile capital punishment—it is not necessarily the amount of states that is most important, rather it is the unwavering trend of change. See *Roper*, 543 U.S. at 566 (detailing its national consensus analysis).

69. See *Graham*, 560 U.S. at 61 (stating that in making its own independent determination, Court is “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose’” (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008))). If a court finds that the sentence lacks an association to rehabilitation, retribution, incapacitation, or deterrence, then the sentence is inherently disproportionate to the offense. See *id.* at 74 (extrapolating on *Roper*'s analysis that neither incapacitation nor rehabilitation can serve as legitimate rationalizations for imposing harshest sentences on juvenile offenders because it is impossible to make determination that juveniles are incorrigible at outset of adolescence given juvenile offenders' capacity for rehabilitation); see also *Roper*, 543 U.S. at 568 (citing *Atkins*, 536 U.S. at 319) (discussing how neither retribution nor deterrence can serve as sufficient justification for imposing harshest possible sentence on juvenile offenders).

70. See *Graham*, 560 U.S. at 74 (recognizing that LWOP sentence “forswears altogether the rehabilitative ideal,” and although states are not required to guarantee juvenile offender's freedom, states must provide defendant with genuine chance to attain release based on reform and remorse).

71. See Stephanie N. O'Banion, *Dying in Detention: Are Life Without Parole Sentences for Juvenile Non-Homicide Offenders Always Unconstitutionally Cruel and Unusual Under the Eighth Amendment?*, 38 U. DAYTON L. REV. 449, 467 (2013) (discussing how courts have reached inconsistent, and sometimes conflicting, conclusions re-

C. *An Opportunity for Optimism in States' Definitions of "Meaningful Opportunity for Release"*

The period of time following the Court's revolutionary holdings in *Roper*, *Graham*, *Miller*, and *Montgomery* was marked by a newfound hope for thousands of juvenile prisoners;⁷² no longer could states sentence juveniles to death or mandatory LWOP punishments.⁷³ Instead, *Miller* requires states to examine mitigating factors of a juvenile offender's childhood and upbringing in the hope that sentencing judges would reserve grave LWOP punishments for *only* the extremely rare and incorrigible juvenile offenders.⁷⁴ Despite this progressive line of Supreme Court cases, some states still seek to punish juveniles as adults, ignoring data that strongly encourages otherwise.⁷⁵

The conflict arises over whether courts should narrowly apply the holdings of *Graham* and *Miller* to proscribe juvenile LWOP sentences by name, or broadly apply these holdings to prevent juvenile de facto life sentences that intentionally deny or severely delay a corrigible juvenile offender's parole eligibility.⁷⁶ Although the Court mandated in *Graham* and

garding whether to extend Court's penological justification analysis, as seen in *Roper*, *Graham*, and *Miller*, to lengthy term-of-years sentences for juvenile offenders).

72. See generally Alexander J. Wolfe, *Criminal Law—A Denial of Hope: Bear Cloud III and the Aggregate Sentencing of Juveniles*; Bear Cloud v. State, 2014 WY 113, 334 P.3d 132 (Wyo. 2014), 17 WYO. L. REV. 343, 367–70 (2017) (discussing implications of *Miller* and *Montgomery* and how such cases should counsel states towards rehabilitation rather than imposing lengthy term-of-years sentences and LWOP sentences).

73. See *Miller v. Alabama*, 567 U.S. 460, 475–76 (2012) (establishing that because *Graham* likens LWOP sentences to capital punishment, which is unconstitutional following *Roper*, mandatory LWOP sentences are inherently unconstitutional); see also *Roper*, 543 U.S. at 575 (holding that courts cannot impose death penalty on juvenile offenders).

74. *Miller*, 567 U.S. at 476 (stating requirement that capital defendants have opportunity to present mitigating factors to judge or jury in order to make sure that death penalty is reserved for only the most deserving of criminals). The *Miller* court then went on to explain that juveniles possess diminished culpability, which distinguishes them from adults for sentencing purposes, and that sentencing judges miss critical characteristics of youth when deciding to sentence such individuals to mandatory LWOP sentences. See *id.* at 476–78.

75. See *Moore v. Biter*, 742 F.3d 917, 920 (9th Cir. 2014) (delineating several cases that hold that *Graham* does not apply to aggregate term-of-years sentences that resemble Moore's sentence); cf. Meredith Lamberti, *Children Are Different: Why Iowa Should Adopt a Categorical Ban on Life Without Parole Sentences for Juvenile Homicide Offenders*, 63 DRAKE L. REV. 311, 330–37 (2015) (discussing historical surveys and psychological studies that conclude that because juveniles are different from adults for sentencing purposes, states should categorically ban LWOP as sentencing option, whether sentence is LWOP by name or LWOP by way of an aggregate term-of-years sentence).

76. See *Budder v. Addison*, 851 F.3d 1047, 1057 (10th Cir. 2017) (applying *Graham* to all sentences that would effectively deny offenders chance of obtaining release during natural lifetime); see also *Goins v. Smith*, 556 F. App'x 434, 440 (6th Cir. 2014) (holding that because defendant's sentence is not technically LWOP,

Miller that juvenile offenders receive a meaningful opportunity to obtain release and individualized sentencing hearings to examine incorrigibility, the Court did not clarify (1) whether these holdings apply to de facto LWOP sentences, or (2) at what age an offender may still lead a meaningful and productive life outside of prison.⁷⁷ This ambiguity has led some state and federal courts to unapologetically sentence corrigible juveniles to de facto term-of-year sentences (exceeding or closely exceeding the offender's life expectancy) under the reasoning that because the court does not label these sentences specifically as LWOP, such sentences do not fall within the protections of *Graham* and *Miller*.⁷⁸

Several state and federal courts have concluded that term-of-years sentences that afford corrigible juveniles parole at any point within a juvenile's lifetime are constitutional, even if the juveniles are not eligible for parole until their late sixties.⁷⁹ Conversely, other state and federal courts hold that when parole eligibility under a term-of-years sentence occurs close to or exceeds a juvenile defendant's life expectancy, there is an inherent constitutional violation of *Graham* and *Miller*.⁸⁰ Fortunately, the

Graham's categorical rule does not apply); *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018) (stating *Graham* applies broadly to juvenile sentence that in reality acts as de facto life sentence); *Ira v. Janecka*, 419 P.3d 161, 164–65 (N.M. 2018) (stating that *Graham* applies when multiple term-of-years sentences will in all likelihood keep juvenile in prison for remainder of their life because juvenile is deprived meaningful opportunity to obtain release); *cf. McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016) (stating that while *Miller* does not expressly forbid life sentences for juvenile murderers, it expresses great skepticism in exposing juveniles to such sentence, and repeatedly states that courts should save LWOP sentences for only irretrievably incorrigible offenders); *State v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (upholding aggregate sentence of 139.75 years under Eighth Amendment analysis). *But see United States v. Bryant*, 609 F. App'x 925, 927–28 (9th Cir. 2015) (determining aggregate eighty-year sentence does not violate Eighth Amendment).

77. *See, e.g., United States v. Grant*, 887 F.3d 131, 145–46 (3d Cir. 2018), *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018) (case listed for rehearing en banc Feb. 20, 2019) (discussing different circuit approaches to applying *Graham* and *Miller* to de facto term-of-years sentences); *see also id.* at 150–51 (asserting that *Graham* Court failed to answer question of at what age offenders are still capable of living “meaningful” life, in that it is not clear whether age fifty, age sixty, or age seventy is ceiling).

78. For examples of different approaches to whether *Graham* and *Miller* apply to de facto life sentences see *infra* notes 79–81 and accompanying text.

79. *See, e.g., Lucero v. People*, 394 P.3d 1128, 1134 (Colo. 2017) (holding that eighty-four-year sentence was not de facto LWOP sentence because defendant would be eligible for parole at age fifty-seven). *Compare State v. Null*, 836 N.W.2d 42, 70–71 (Iowa 2013) (asserting that an aggregate term-of-years sentence that precludes parole eligibility after fifty-two and a half years violates *Miller* because it is incompatible with hope of rehabilitation and does not account for defendant's diminished culpability), *with Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012) (stating that defendant's sentence did not violate clearly established federal law because *Graham* did not explicitly proscribe lengthy term-of-years sentence).

80. *See, e.g., Moore*, 725 F.3d at 1191–92 (finding sentence of 254 years with no opportunity for parole within defendant's lifetime equivalent to LWOP); *see also People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding 110-year sentence is

Third Circuit has provided an encouraging step towards parsing out the Supreme Court's meaningful opportunity to obtain release by utilizing the national age of retirement as a potential benchmark.⁸¹

III. INCREMENTAL HOPE: THE FACTS OF *GRANT*

Corey Grant was thirteen-years-old when he joined a narcotics ring.⁸² In August 1989, Grant, who was sixteen years old at the time, encountered a group of rival drug dealers while delivering narcotics for his gang.⁸³ Grant warned the group not to operate its drug dealings within his gang's territory, but when one of the rivals refused, Grant ordered his associate to shoot and kill the rival gang member.⁸⁴ Grant's associate did as he was told and fatally shot the rival gang member.⁸⁵

On January 25, 1991, the United States charged Grant under the Racketeer Influenced and Corrupt Organizations Act (RICO) for conspiracy, racketeering, conspiracy to possess with the intent to distribute cocaine, possession of a weapon in relation to a crime of violence and drug trafficking, and first-degree murder.⁸⁶ Although Grant was not yet eighteen years old at the time of his crime, he was tried as an adult in February 1992.⁸⁷ The jury convicted Grant of RICO conspiracy, racketeering, drug

virtually de facto life sentence); *cf.* Springer v. Dooley, No. 3:15-CV-03008-RAL, 2015 WL 6550876, at *7 (D.S.D. Oct. 28, 2015) (stating that when term-of-years sentences come close to or exceed defendant's life expectancy, defendant's Eighth Amendment rights are violated); *see also* Boneshirt v. United States, Nos. CIV 13-3008-RAL, (10-CR-30008-RAL), 2014 WL 6605613, at *8 (D.S.D. Nov. 19, 2014) (concluding that de facto life sentences effectively guaranteeing that juvenile will die in prison without meaningful opportunity to demonstrate rehabilitation violate *Graham* and *Miller*).

81. *See Grant*, 887 F.3d at 153 (discerning that although Third Circuit adopted rebuttable presumption that sentencing, courts ought not to sentence juvenile above national age of retirement, sentencing judges still "retain the discretion to sentence incorrigible juvenile offenders to LWOP and non-incorrigible ones to term-of-years sentences beyond the national age of retirement but below life expectancy").

82. *See id.* at 135 (providing background on E-Port Posse, which is an organized gang of teenagers who operated narcotics network that would buy multi-kilogram amounts of cocaine in New York City and then sell drugs in Elizabeth, New Jersey).

83. *See id.* (providing backdrop for Grant's encounters with independent drug dealers). Prior to Grant's confrontation with Mario Lee, Grant met his brother, Dion Lee, and warned Lee to stay out of the Posse's territory. *See id.* (delineating Grant's encounter with Dion Lee). When Lee refused to stay out of the Posse's territory, Grant struck Lee in the head with a gun and shot Lee in the leg, but Lee survived. *See id.* at 136 (providing background of relationship between Grant and Lee brothers).

84. *See id.* (asserting that Grant ordered Lee's murder).

85. *See id.* (declaring Grant responsible for Lee's murder).

86. *See id.* (enumerating charges against Grant).

87. *See id.* (asserting that Grant was tried as an adult despite being under eighteen).

possession, gun possession, and, most significantly, murder—the judge had no choice but to impose a mandatory LWOP sentence.⁸⁸

After the Supreme Court issued its decision in *Miller* (i.e., that mandatory LWOP sentences for juvenile homicide offenders violate their Eighth Amendment rights) Grant sought leave from district court to file a motion for resentencing.⁸⁹ Grant argued that he received a LWOP sentence without a consideration of his diminished culpability and disadvantaged upbringing.⁹⁰ The district court agreed and ordered Grant's resentencing.⁹¹

At resentencing, the district court determined that Grant's upbringing, youth, and post-conviction record demonstrated that he was corrigible.⁹² Therefore, under *Miller*, a LWOP sentence was inappropriate.⁹³ Nevertheless, the district court imposed a term-of-years sentence of sixty-five years' imprisonment, and explained that the sentence afforded Grant equity and safeguarded the public interest.⁹⁴ Assuming good time credit, Grant would be eligible for parole at age seventy-two, the effective equivalent of his life expectancy.⁹⁵

IV. FORGIVING JUVENILES IN THE THIRD CIRCUIT:
A COMPASSIONATE ANALYSIS THAT JUVENILE DE FACTO LIFE
SENTENCES WITHOUT PAROLE ARE
UNCONSTITUTIONAL

The issue presented in *Grant* is one of first impression: whether the Eighth Amendment prohibits a term-of-years sentence equal to a juvenile

88. *See id.* (explaining that LWOP sentences on two RICO counts arose from then-mandatory sentencing guidelines).

89. *See id.* (declaring that Grant filed motion for resentencing under 28 U.S.C. § 2255, which asserts that second motion for resentencing “must be certified . . . by a panel of the appropriate court of appeals to contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”).

90. *See id.* (reasoning that based on *Miller*'s holding, Grant was eligible for individualized resentencing hearing).

91. *See id.* (agreeing that sentencing court needs to consider Grant's youth before imposing sentence of LWOP).

92. *See id.* at 136–37 (asserting that after evaluating Grant's “upbringing, debilitating characteristics of youth, and post-conviction record,” the court determined that he was corrigible, and therefore LWOP sentence was inappropriate under *Miller*).

93. *See Miller v. Alabama*, 567 U.S. 460, 476 (2012) (explaining that when sentencing juvenile homicide offenders, judge and jury must have chance to assess mitigating factors of youth, to ensure that harshest sentencing punishments—i.e. LWOP—are reserved for only incorrigible juvenile offenders).

94. *See* 18 U.S.C. § 3553(a)(2)(A), (C) (2018) (stating courts shall consider “the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . (C) to protect the public from further crimes of the defendant”).

95. *See Grant*, 887 F.3d at 137 (contending that Grant's new sentence is essentially de facto LWOP).

homicide offender's life expectancy when the crime represents the juvenile's transient immaturity rather than irreparable corruption (i.e., incorrigibility).⁹⁶ More precisely, the Third Circuit had to determine whether Grant's sixty-five-year de facto life sentence was consistent with *Graham's* mandate to provide juvenile offenders a meaningful opportunity to obtain release, *Miller's* directive to confine LWOP sentences to incorrigible juvenile offenders, and the classic penological sentencing justifications.⁹⁷ In approaching this issue, the Third Circuit reasoned that because juvenile de facto life sentences do not promote juvenile rehabilitation or consider juvenile corrigibility, such sentences inherently violate the Eighth Amendment.⁹⁸ The Third Circuit then employed a novel analysis utilizing the national age of retirement as a sentencing factor to standardize *Graham's* meaningful opportunity to obtain release.⁹⁹ The Third Circuit explained that utilizing the national age of retirement as a sentencing factor fulfilled the fundamental decrees of both *Graham* and *Miller*: preventing states from stifling juvenile rehabilitation.¹⁰⁰

A. *Progressive Propositions Arising from Supreme Court Juvenile Sentencing Cases as Revisited in Grant*

The Third Circuit began its analysis with an overview of the Supreme Court's landmark juvenile sentencing cases.¹⁰¹ The Third Circuit deduced that because the Court's holdings in *Graham* and *Miller* seek to ad-

96. See *Miller*, 567 U.S. at 489 (holding that judge and jury must have opportunity to consider mitigating characteristics of youth before imposing harshest possible penalty for juveniles); see also *Grant*, 887 F.3d at 142 (requiring that juveniles convicted of homicide receive LWOP sentences, regardless of age or age-related circumstances, violates Eighth Amendment's prohibition on cruel and unusual punishment); see also *Budder v. Addison*, 851 F.3d 1057, 1058 (10th Cir. 2017) (emphasizing states may not avoid constitutional bar on LWOP sentences by simply not qualifying sentence as LWOP).

97. See *Grant*, 887 F.3d at 135 (stating case presents difficult questions, including establishing more robust framework to present non-incorrigible juvenile offenders with "meaningful opportunity to obtain release").

98. See *id.* at 142 (delineating primary reasons why Grant's term-of-years sentence violates Eighth Amendment: *Miller* reserves LWOP—de facto or otherwise—for only permanently incorrigible juvenile offenders, lack of penological justification rationalizing de facto life sentences, and inconsistency of de facto with *Graham* and *Miller* objectives).

99. See *id.* at 152–53 (defining national age of retirement as rebuttable presumption sentencing factor that lower courts must consider when fashioning term-of-years sentences); cf. *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1046–47 (Conn. 2015) (noting that retirement age is most effective indicator of establishing parole eligibility under presumption that this is time when employment opportunities diminish for most workers).

100. See *Grant*, 887 F.3d at 150–51 (theorizing that because national age of retirement affords corrigible juveniles with "'hope' and a chance for . . . 'reconciliation with society,'" that this sentencing factor will spur offenders' motivation towards rehabilitation and self-actualization).

101. See *id.* at 137–42 (examining most important takeaways from *Roper*, *Graham*, *Miller*, and *Montgomery*, and how each holding interconnects).

vance juvenile rehabilitation and do not turn on whether a court specifically designated the sentence as LWOP, these holdings broadly prohibit any life sentence that precludes a corrigible juvenile offender from attaining parole before, or shortly before, their life expectancy.¹⁰² Therefore, the Third Circuit reasoned that de facto LWOP sentences are analogous to LWOP because de facto life sentences (1) delay parole for the offender's entire life, (2) fail to distinguish between incorrigibility and corrigibility, and (3) conflict with classic penological sentencing justifications.¹⁰³

1. *Why Corrigible Juveniles Deserve Hope Under the Eighth Amendment*

A fundamental realization arising during the Court's era of progressive juvenile sentencing is that juvenile offenders should not receive the most severe punishments because they are innately less culpable than adults.¹⁰⁴ Minors are more susceptible to rehabilitation, and therefore courts should sentence these offenders differently—keeping in mind their

102. *See id.* at 142, 150–51 (holding Eighth Amendment prohibits term-of-years sentence that meets or exceeds juvenile homicide offender's life expectancy when the offender's crime reflects "transient immaturity and not irreparable corruption," and corrigible juvenile offenders presumptively should receive opportunity of release before national age of retirement); *see also* *Miller v. Alabama*, 567 U.S. 460, 474 (2012) (quoting *Graham*, 560 U.S. 48, 70 (2010)) (underscoring that *Graham's* treatment of juvenile LWOP sentences as analogous to capital punishment stresses that harshest punishments available under law are especially extreme when imposed on juveniles); *Grant*, 887 F.3d at 143 (stressing that both formal LWOP sentences and term-of-years de facto life sentences without parole seek to imprison offender until he or she dies (quoting *Miller*, 567 U.S. at 474–75)); *cf.* *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (asserting that 100-year sentence is in fact de facto life sentence, and so rationale behind *Miller* applies—court must afford defendant with individualized sentencing hearing considering mitigating factors of youth before imposing LWOP sentence). *But see* *Lucero v. People*, 395 P.3d 1128, 1133 (Colo. 2017) (emphasizing that multiple sentences for multiple times when aggregated together is not equivalent of LWOP even though defendant is incarcerated for life).

103. *See Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 105 Nev. 525, 526 (1989)) (stating that LWOP sentence eviscerates hope and spirit); *see also Grant*, 887 F.3d at 147 (quoting *Graham*, 560 U.S. at 79) (explaining meaning behind *Graham* and *Miller's* "meaningful opportunity for release"); *cf.* *State v. Zuber*, 152 A.3d 197, 209–10 (N.J. 2017) (stating that because Court did not define "meaningful opportunity," it intended to leave interpretation in given state's jurisdiction to explore means of compliance); *see also* Krisztina Schlessel, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027, 1060–61 (2013) (stating that most provident way to fulfill *Graham's* mandate of providing meaningful opportunity for release is to provide offender chance for parole regardless of sentence's length).

104. *See Roper v. Simmons*, 543 U.S. 551, 568–70 (2005) (explaining that because juveniles lack maturity, are more vulnerable to negative influences, and possess more transient personality than adults, such differences prohibit categorizing juveniles as worst offenders under law); *see also Grant*, 887 F.3d at 138 (citing *Roper*, 543 U.S. at 569–70) (stating that court cannot categorize juvenile offenders with adult offenders).

diminished culpability.¹⁰⁵ The Court reasoned time and again in its juvenile jurisprudence that, relative to adults, juveniles lack maturity, are more susceptible to negative influences, and possess a more transformative personality.¹⁰⁶ Therefore, the Third Circuit acknowledged that the imposition of the most severe punishments on youth is cruel and unjust.¹⁰⁷

Accordingly, the Third Circuit determined that LWOP is an overly severe punishment for juvenile offenders because such sentences fail to appreciate a juvenile's potential for rehabilitation and diminished culpability.¹⁰⁸ The Third Circuit likened LWOP to capital punishment in that both sentences irrevocably alter the offender's life by depriving them of basic liberties without any hope for amends.¹⁰⁹ Critically, the Third Circuit classified juvenile de facto LWOP as unconstitutional under the same considerations supporting the unconstitutionality of LWOP by name—such as disregard for rehabilitation and diminished culpability, and lack of penological sentencing justifications.¹¹⁰ Further, The Third Circuit asserted that although states do not need to guarantee a corrigible offender's eventual release, states must devise a realistic way to afford the

105. See *Graham*, 560 U.S. at 74–75 (asserting that rehabilitation cannot justify juvenile LWOP sentences because sentences do not appreciate juveniles' capacity for change and diminished culpability); see also *Grant*, 887 F.3d at 138 (citing *Roper*, 543 U.S. at 570) (affirming that based on *Roper's* rationale, juvenile offenders are not deserving of most severe punishments because there is greater likelihood that juveniles will be reformed); see also *People v. Contreras*, 411 P.3d 445, 483 (Cal. 2018) (explaining that juveniles sentenced to LWOP have little rehabilitative incentive, and rehabilitation is core value of juvenile justice system).

106. For a discussion of progressive Supreme Court juvenile sentencing cases in the twenty-first century, see *infra* notes 112–24 and accompanying text.

107. See *supra* notes 57–60 and accompanying text (explaining that because juveniles possess underdeveloped understanding of their actions, courts cannot categorize them among worst offenders deserving most severe sentences); see also *Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (stating that adolescence is time in life where one's personality is entirely transient); cf. *Malvo v. Mathena*, 893 F.3d 265, 267 (4th Cir. 2018) (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)) (contending that sentencing judge violates *Miller's* holding any time it imposes discretionary mandatory LWOP sentence on juvenile homicide offender because of transient qualities of youth).

108. See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (declaring LWOP the second most severe penalty under law); see also *Grant*, 887 F.3d at 138 (citing *Graham*, 560 U.S. at 69–70) (concluding that much like *Roper* Court found juvenile capital punishment to violate Eighth Amendment, *Graham* Court found LWOP analogously severe and to also violate Eighth Amendment rights).

109. See *Graham*, 560 U.S. at 69 (stating that although state does not execute offenders sentenced to LWOP, there is similar deprivation of life and liberty); see also *Grant*, 887 F.3d at 138 (quoting *Graham*, 560 U.S. at 69–70) (comparing similarities between LWOP and capital punishment, such as depriving juvenile of fundamental liberties); cf. *Feld, A Slower Form of Death*, *supra* note 46, at 12 (recommending that same juvenile developmental attributes that reduce adolescents' criminal responsibility for purposes of death penalty should similarly counsel against LWOP sentences for nonhomicide and homicide crimes).

110. See *Grant*, 887 F.3d at 143–45 (declaring that reasons underlying unconstitutionality of de jure LWOP sentences apply with equal force to de facto LWOP sentences).

offender hope of release because *Miller* precludes a rehabilitated juvenile's death in prison.¹¹¹

a. *Miller's* Preclusion of LWOP for Corrigible Juvenile Offenders

The Third Circuit emphasized that a sentence that treats a corrigible juvenile offender as incorrigible is inconsistent with *Miller*.¹¹² Although leading psychologists debate whether an expert may deem a juvenile incorrigible at such a young age, a time when their personality may be wholly transient, incorrigible offenders are most usually marked by an antisocial personality disorder leading to irreparable corruption.¹¹³ *Miller* set aside discretionary LWOP sentences for only the rarest incorrigible juvenile, who is incapable of rehabilitation.¹¹⁴ *Miller* implicitly denotes that corrigible juveniles possess a constitutional right to parole, and thus courts may not sentence a juvenile, with the capacity for rehabilitation, to a de facto life sentence without violating the juvenile's Eighth Amendment rights.¹¹⁵ Indeed, the Third Circuit deduced that it would defy common sense if sentencing courts could circumvent *Miller's* mandate—reserving

111. See *Grant*, 887 F.3d at 143–44 (citing *Graham*, 560 U.S. at 75) (stating that crux of what Third Circuit examines in *Grant* is whether de facto life sentences, rather than LWOP sentences by name, inhibit *Graham's* objective of affording juveniles meaningful chance of release).

112. See *Grant*, 887 F.3d at 142 (asserting that because neither LWOP sentences nor de facto term-of-years life sentences for corrigible juvenile offenders appreciate how children are fundamentally different from adults, both sentences violate *Miller*); see also *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015) (arguing it is infeasible to proffer meaningful opportunity of release to defendant who is sentenced to de facto LWOP beyond life expectancy); see also *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (affirming that even if juvenile offender's sentence is labeled as one "with parole," it is equivalent to life sentence without parole, and state has violated offender's Eighth Amendment rights because particular sentence fails to consider juvenile's diminished capacity and potential for reformation).

113. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (delineating attributes of anti-social personality disorder and how such traits are fleeting in juveniles). See generally Vanessa L. Kolbe, *A Cloudy Crystal Ball: Concerns Regarding the Use of Juvenile Psychopathy Scores in Juvenile Waiver Hearings*, 26 DEV. MENTAL HEALTH L. 1, 16–20 (2007) (detailing attributes of psychopathy and why it is difficult to extend such attributes to juveniles).

114. See *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (declaring that it is essential for sentencing judges to distinguish between incorrigible juvenile offenders and juveniles capable of rehabilitation because it is essential to take such differences into account and to not incarcerate corrigible juveniles beyond time in which they can demonstrate rehabilitation).

115. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (declaring that *Miller* forbids court from imposing LWOP upon entire class of rehabilitated juvenile offenders, "whose crimes reflect the transient immaturity of youth."); see also *Grant*, 887 F.3d at 143 (declaring that sentencing courts may only impose LWOP upon corrigible juvenile offender).

LWOP sentences for only the exceedingly rare incorrigible juvenile offender—by regularly imposing extensive term-of-years sentences.¹¹⁶

b. Lack of Penological Justifications for De Facto LWOP Sentences

Supreme Court precedent also required the *Grant* Court to consider fundamental penological justifications for de facto LWOP sentences, which, according to the Court, fail in light of the reduced culpability of juvenile offenders.¹¹⁷ The Third Circuit reasoned that because the Court was unable to find a single penological justification for LWOP sentences in *Graham* and *Miller*, de facto LWOP sentences lack a penological justification because such sentences also shirk rehabilitation and condemn juveniles to imprisonment for an inordinate length of time.¹¹⁸ Of particular significance, the Third Circuit held that there is an irreconcilable ten-

116. See *Grant*, 887 F.3d at 143 (asserting that *Miller*'s holding broadly applies to de facto LWOP sentences); see also *id.* at 145–46 (discussing other circuits' decisions of whether to apply *Miller*'s holding broadly to de facto term-of-years sentences without opportunity of parole); see also *Budder v. Addison*, 851 F.3d 1047, 1056 (10th Cir. 2017) (concluding 155-year sentence violated Eighth Amendment because *Graham* created categorical rule, which says states cannot evade *Graham* and *Miller* by simply not labeling punishment as LWOP); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2014) (holding that state court's failure to apply *Graham* to 254-year sentence was contrary to Supreme Court precedent because *Graham*'s holding did not turn on label of life sentence, both LWOP and de facto LWOP sentences deny juvenile hope of societal reintegration, and de facto LWOP sentence goes against *Graham*'s mandate of providing "meaningful opportunity to reenter society"); cf. *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (applying logic of *Miller* to vacate 100-year sentence imposed on corrigible juvenile offender because court did not consider *Miller*'s mandate of evaluating mitigating characteristics of youth). But see *United States v. Jefferson*, 816 F.3d 1016, 1018–19 (8th Cir. 2016) (determining that *Miller* does not apply to de facto life sentences because Court in *Miller* did not explicitly hold that Eighth Amendment categorically prohibits imposing sentence of LWOP on juvenile offenders).

117. See *Roper*, 543 U.S. at 570–71 (explaining that retribution cannot serve as legitimate penological justification for juveniles when retribution does not account for diminished culpability, youth, and immaturity); see also *id.* at 571–72 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)) (stating that deterrence cannot serve as legitimate penological justification because it is unlikely that juveniles will weigh risks of actions and attach weight to consequences of actions); *Graham v. Florida*, 560 U.S. 48, 72–73 (2011) (asserting that incapacitation cannot serve as legitimate penological justification because juvenile's personality is transient and amenable to rehabilitation, which signifies that most juveniles do not require life incarceration); *id.* at 74 (stating that rehabilitation cannot serve as legitimate penological justification due to juvenile's capacity for change and rehabilitation); cf. *Grant*, 887 F.3d at 144 (quoting *Miller*, 567 U.S. at 472) (affirming what Court has time and again reiterated: that absent penological justification, sentence is by nature disproportionate to offense).

118. See *Grant*, 887 F.3d at 144. The *Grant* court stated: [N]one of what it 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. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

sion between LWOP, regardless of whether it is de facto or by name, and rehabilitation because both sentences reject any hope of societal reintegration.¹¹⁹

2. *Merciful Sentencing: The Third Circuit's Promise That De Facto LWOP Sentences Per Se Violate Graham's "Meaningful Opportunity to Obtain Release"*

After establishing that the mitigating factors accompanying youth recognized by the *Miller* Court and the inapplicability of penological justifications counsel against the imposition of LWOP sentences for juveniles, the Third Circuit proceeded to hold that de facto LWOP sentences for corrigible juvenile offenders are per se unconstitutional.¹²⁰ De facto LWOP sentences cannot conceivably provide a meaningful opportunity for release because such extensive term-of-years sentences relegate juveniles to spend the rest of their life behind bars.¹²¹ Much like a LWOP sentence by name, de facto LWOP sentences are incompatible with *Graham* and *Miller*.¹²² Both sentences strip corrigible juvenile offenders of the hope that with rehabilitation and maturity, a parole board may one day allow them to rejoin society.¹²³ The crux of the problem then, as the Third Circuit alluded, is interpreting the age at which a juvenile can still truly achieve a "meaningful opportunity to obtain release."¹²⁴

Id. (alterations in original) (quoting *Miller*, 567 U.S. at 473) (reasoning that holdings of *Graham* and *Miller* should apply to both de jure and de facto LWOP sentences).

119. *See Grant*, 887 F.3d at 144 (explaining that because juveniles have higher propensity for rehabilitation, it is illogical to prevent them from demonstrating this capacity for change and remorse to parole board by subjecting them to LWOP sentence).

120. *See id.* (citing *Miller*, 567 U.S. at 473) (declaring that due to lack of constitutional justification underlying de facto LWOP sentences, such sentences are unconstitutional under Eighth Amendment).

121. *See Miller*, 567 U.S. at 473 (stating that LWOP is irreconcilable with youth's hopeful ability to change); *see also Grant*, 887 F.3d at 143–45 (concluding that Court's logic in *Graham* applies to de facto LWOP and LWOP sentences by name because *Graham* mandates that incorrigible juvenile offenders must receive meaningful opportunity for release).

122. *See id.* at 145 (arguing that de facto LWOP sentences fail to provide juveniles with hope of meaningful opportunity for release); *see also Wheelwright*, *supra* note 36, at 297 (suggesting that Missouri ought to abolish LWOP sentencing scheme for juvenile offenders, to provide hope that they may one day live as free individuals).

123. *See Grant*, 887 F.3d at 142 (justifying unconstitutionality of de facto LWOP sentences); *see also id.* at 145–46 (citing *Moore v. Biter*, 725 F.3d 1184, 1191–92 (9th Cir. 2013) (asserting that de facto LWOP sentences clearly conflict with *Graham* and federal law)).

124. *See Grant*, 887 F.3d at 146–47 (asserting that after having determined that term-of-years sentence meets or exceeds juvenile offender's life expectancy violates Eighth Amendment, Third Circuit must determine what constitutes meaningful opportunity for release); *see also supra* note 80 and accompanying text (interpreting what *Graham* meant by meaningful opportunity for release, stating that even if

B. *The Third Circuit's Promising Interpretation of
"Meaningful Opportunity for Release"*

The Court in *Graham* stated that a “juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”¹²⁵ The Third Circuit interpreted this to mean that the essence of a “meaningful opportunity for release” is rooted in liberating offenders at a point in time when they may still find “fulfillment outside prison walls,” “reconciliation with society,” and “hope.”¹²⁶ Notably, a compassionate physical release from prison at a point shortly before the offender’s death does not satisfy a meaningful opportunity for release.¹²⁷ The Third Circuit adopted a broad interpretation of what constitutes a meaningful opportunity for release, because the government standard applied in Grant’s case— “[a] hope for some years outside prison walls”—was far too narrow.¹²⁸

The Third Circuit adopted a sentencing framework that it believed would better effectuate the Supreme Court’s holdings.¹²⁹ This framework required sentencing judges to conduct individualized evidentiary hearings that calculate the offender’s life expectancy to avoid the risk that a term-of-years sentence will meet or exceed that age.¹³⁰ These sentencing

offenders’ parole eligibility dates are within their lifetime, if chance of release comes near end of life, this likely would not meet *Graham*’s requirements).

125. See *Grant*, 887 F.3d at 147 (quoting *Graham*, 560 U.S. at 79) (interpreting significance of *Graham*’s meaningful opportunity for release); see also *People v. Contreras*, 411 P.3d 445, 455 (Cal. 2018) (including citations to state legislation demonstrating leniency in juvenile sentencing landscape in light of *Graham* and *Miller*).

126. See *Graham*, 560 U.S. at 79 (“Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”); see also *Grant*, 887 F.3d at 147 (quoting *Graham*, 560 U.S. at 79) (reciting elements that *Graham* Court considers in determining what meaningful opportunity for release denotes). For a further discussion of inconsistent applications of *Graham*’s meaningful opportunity for release, see *supra* notes 75–80, and accompanying text.

127. See *Grant*, 887 F.3d at 147 (stating that *Graham*’s meaningful opportunity for release necessitates more than physical release shortly before death); see also *State v. Zuber*, 152 A.3d 197, 205 (N.J. 2017) (appearing as amicus curiae, Seton Hall University School of Law Center for Social Justice advocated that New Jersey court should adopt thirty-year-maximum period of parole ineligibility as uniform rule for juvenile offenders because this would provide juvenile offenders genuine hope to spend some years outside prison beyond geriatric release); *id.* at 216 n.4 (providing examples of how states have amended juvenile sentencing laws in wake of *Graham* and *Miller*).

128. See *Grant*, 887 F.3d at 148 (arguing that New Jersey’s interpretation of *Graham* does not alleviate grave effects of LWOP).

129. See *id.* (stating that Third Circuit elects to adopt legal framework that effectuates Supreme Court precedent but attempts to go no further).

130. See *id.* at 149–50 (holding that sentencing judges must conduct individualized evidentiary hearings to determine corrigible juvenile offender’s life expectancy before sentencing individual to term-of-years sentence, to avoid sentencing individual at or beyond their life expectancy). The *Grant* Court explains that individualized sentencing hearings “are already a familiar exercise for lower courts,

judges must then fashion an appropriate term-of-years sentence that provides for a meaningful opportunity for release.¹³¹ Nevertheless, the first part of this framework still begs the question: “at what age is one still able to meaningfully reenter society after release from prison?”¹³²

The Third Circuit reasoned that because society accepts the national age of retirement, age sixty-five, as a transitional life stage, juveniles ought to receive an opportunity of release prior to this age.¹³³ The Third Circuit determined that affording a juvenile offender an opportunity for parole before the national age of retirement would provide these offenders with the hope of reconciling with society and achieving hope outside prison—fundamental aims of both *Graham* and *Miller*.¹³⁴ Notwithstanding this framework, the Third Circuit declined to draw a bright line at which a juvenile offender can “meaningfully reenter society after release from prison,” but acknowledged that the age of retirement marks “the simultaneous end of a career that contributed to society in some capacity and the birth of an opportunity for the retiree to attend to other endeavors in life.”¹³⁵ Accordingly, the Third Circuit held that states ought to presump-

which routinely measure life expectancy in various tort, contract, and employment disputes.” *See id.* (citing *Anastasio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988)) (stating that in addition to actuarial tables, lower courts ought to consider evidence that “bears on the offender’s mortality, such as medical examinations, medical records, family medical history, and pertinent expert testimony.”). *See generally* *United States v. Mathurin*, 868 F.3d 921, 932–34 (11th Cir. 2017) (summarizing effectiveness and drawbacks of using life expectancy tables in sentencing).

131. *See Grant*, 887 F.3d at 149–50 (discussing how Third Circuit intends to measure life expectancy without violating offenders’ constitutional rights); *see also* *O’Toole v. United States*, 242 F.2d 308, 309 (3d Cir. 1957) (declining to measure life expectancy based solely on actuarial tables); *cf. Mathurin*, 868 F.3d at 932 (evaluating constitutional issues arising from reliance on actuarial life expectancy tables in sentencing).

132. *See Grant*, 887 F.3d at 150 (reasoning that because society accepts national age of retirement as transitional life stage, that this age could be age at which corrigible juvenile offender could rejoin society); *see also* Alison M. Smith, *Third Circuit Invalidates De Facto Life Sentences for “Non-Incorrigible” Juvenile Offenders*, CONG. RESEARCH SERV. 1, 3 (2018) (stating that while Third Circuit resolved not to establish bright-line rule regarding when juvenile offenders should become eligible for parole, it sought to establish national age of retirement as outer parameter).

133. *See Grant*, 887 F.3d at 150 (citing *Retirement*, BLACK’S LAW DICTIONARY (10th ed., 2014)) (justifying how Third Circuit chose to draw line at national age of retirement as transitional life stage).

134. *See* Megan McCabe Jarrett, *Stifling a Shot at a Second Chance: Florida’s Response to Graham and Miller and the Missed Opportunity for Change in Juvenile Sentencing*, 45 STETSON L. REV. 499, 531 (2016) (promoting abolition of LWOP as sentencing option to promote spirit of *Graham* and *Miller*, proffering juveniles with meaningful chance of release).

135. *See Grant*, 887 F.3d at 150 (emphasizing why Third Circuit chooses to mark *Graham*’s meaningful opportunity for release at national age of retirement). Although the Third Circuit declines to draw a bright line at which lower courts must offer juvenile offenders a meaningful opportunity for release, it offers a reasoned explanation as to why the national age of retirement is a prudent choice. *See*

tively sentence juveniles below the national age of retirement unless other sentencing factors strongly advise against doing so.¹³⁶

V. SUPREME COURT'S LACK OF JUVENILE PROTECTION
BEGETS LACK OF JUVENILE HOPE

Although the Supreme Court has made promising strides in protecting one of the most vulnerable classes of offenders, until the Court expressly holds that juvenile de facto LWOP term-of-years sentences per se violate the Eighth Amendment, state and federal courts must effectuate a framework that absolutely prohibits de facto LWOP sentences for corrigible juvenile offenders.¹³⁷ *Graham* and *Miller* read together afford all corrigible juvenile offenders the opportunity to demonstrate growth and maturity and give such offenders hope of societal reintegration.¹³⁸ Because it seems that certain state and federal courts intentionally circumvent *Graham* and *Miller*'s objectives by sentencing corrigible juveniles to de facto LWOP sentences, there must be uniform protections in place to en-

id. (declaring that there is no "principled basis" as to what age to mark *Graham*'s meaningful opportunity for release).

Is there a principled reason for why, say, a juvenile offender can properly reenter society at age fifty but not age sixty? At age sixty but not age seventy? We believe not. . . . [W]e are not aware of any widely accepted studies to support such precise line drawing on a principled basis in the prison release context.

Id. (explaining reasoning behind marking national age of retirement as age at which juvenile offenders may successfully reenter society).

136. See *Grant*, 887 F.3d at 149–51 (asserting that although juvenile offenders should presumptively receive opportunity for release before national age of retirement, this presumption is not "a hard and fast rule."). The Third Circuit held that although it believed its rebuttable presumption was "necessary to give life to the Supreme Court's holdings in *Graham* and *Miller*," it also wanted to reserve lower courts discretion to "depart from it in the exceptional circumstances where a juvenile offender is found to be capable of reform but the § 3553(a) factors still favor a sentence beyond the national age of retirement." See *id.* at 152–53 (stating that although there may be instances where 28 U.S.C. § 3553(a) sentencing factors favor sentencing juveniles beyond national age of retirement, such sentences will be "rare and unusual" and still may not meet or exceed juvenile offender's life expectancy).

137. See *Graham v. Florida*, 560 U.S. 48, 75 (2011) (stating that ultimate discretion is left with states in determining how its jurisdiction should comply with *Graham* and *Miller*); cf. Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1816–18 (2016) (evaluating different states' responses to sentencing post-*Miller*). See generally JOSHUA ROVNER, THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 2 (2014), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf> [<https://perma.cc/32MQ-24V5>] (listing Hawaii, Massachusetts, Texas, West Virginia, and Wyoming as states that have abolished juvenile LWOP post-*Miller*).

138. See *Grant*, 887 F.3d at 142 (asserting that de facto LWOP sentences violate *Graham* and *Miller*'s objective of affording all corrigible juvenile offenders opportunity to obtain release based on rehabilitation and reform).

sure that these term-of-years sentences do not intrude on a corrigible juvenile's right of attaining a meaningful opportunity for release.¹³⁹

A. *How the Third Circuit Breaks its Promise of Protecting Juvenile Offender Retirement*

Because the Third Circuit's rebuttable presumption permits sentencing judges to sentence corrigible juveniles beyond the national age of retirement, this rebuttable presumption inherently denies corrigible juveniles parole and infringes on *Graham's* requirement affording all corrigible juveniles a meaningful opportunity for release.¹⁴⁰ The Third Circuit stated that it would not intrude on a district court's discretion to impose an appropriate term-of-years sentence on a corrigible juvenile if other sentencing factors favored a lengthier sentence.¹⁴¹ The Third Circuit reasoned that *Miller* did not categorically eradicate LWOP sentences for juvenile offenders.¹⁴² The Third Circuit's inherent caution to abolish de facto LWOP sentences for corrigible juvenile offenders, however, misapplies *Miller's* fundamental holding—the *Miller* Court did in fact categorically proscribe LWOP sentences for all corrigible juvenile offenders.¹⁴³ Following *Miller*, lower courts do not possess the discretion to sentence any corrigible juvenile to LWOP—these courts may only sentence permanently incorrigible youths to such discretionary LWOP sentences.¹⁴⁴

139. See Drinan, *supra* note 137, at 1831 (evaluating different procedural safeguards for children facing LWOP sentences).

140. See *Grant*, 887 F.3d at 152 (asserting that because sentencing judge is more familiar with individual defendant and case, Third Circuit cannot categorically prohibit sentencing judge from sentencing offender beyond national age of retirement).

141. See *Grant*, 887 F.3d at 152–53 (maintaining that because *Grant's* holding establishes “only a rebuttable presumption that a non-incorrigible juvenile offender should be afforded an opportunity for release before the national age of retirement,” lower courts retain discretion to fashion term-of-years sentences beyond national age of retirement for corrigible offenders if other sentencing factors, such as juvenile's background and upbringing, favor such lengthier sentence).

142. See *Grant*, 887 F.3d at 152 (asserting limits on rebuttable presumption of not sentencing juvenile offender to punishment extending beyond national age of retirement).

143. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 724 (2016) (declaring that *Miller* prohibited LWOP sentences for corrigible juvenile offenders); see also *United States v. Sheppard*, No. 96-00085-04-CR-W-FJG, 2017 WL 875484, at *4 (W.D. Mo. Mar. 3, 2017) (quoting *Montgomery*, 136 S. Ct. at 724) (reasoning that because *Miller* forecloses juvenile life sentences for corrigible offenders, Missouri court must resentence Sheppard to more lenient sentence that is more representative of his capability of reform).

144. See *Montgomery*, 136 S. Ct. at 724 (declaring that, after *Miller*, sentencing judges may only sentence permanently incorrigible juvenile offenders to life sentences); see also *Carter v. State*, 192 A.3d 695, 708 (Md. 2018) (illustrating that *Miller* and *Montgomery* stand for proposition that sentencing courts may only sentence incorrigible juvenile homicide offenders to LWOP, de facto or otherwise); Anna K. Christensen, *Rehabilitating Juvenile Life Without Parole*, 4 CAL. L. REV. CIR. 132, 137–40 (2013) (arguing that given *Miller's* restriction of only sentencing rare

Further, the Third Circuit's decision to employ retirement age as merely a sentencing factor is ineffective because lower court sentencing judges may disregard this sentencing factor and continue to relegate juveniles to death by LWOP.¹⁴⁵ These judges may justify such lengthy sentences by broadly stating that other sentencing factors, such as characteristics in the youth's past, simply outweigh sentencing the juvenile below the national age of retirement.¹⁴⁶ There is little, if any, value in the Third Circuit defining *Graham's* meaningful opportunity to obtain release at an age at or near retirement if a sentencing judge can seemingly disregard it.¹⁴⁷

Moreover, although the burden is on the government to demonstrate that a sentencing judge should sentence a juvenile above the national age of retirement, it is clear that sentencing judges within different states and federal courts already utilize their discretion inconsistently, if not arbitrarily.¹⁴⁸ Although the Supreme Court has rallied against imprisoning corrigible juveniles for life, some judges unremittingly continue to impose de facto life sentences upon such corrigible juveniles in disregard of *Graham* and *Miller*.¹⁴⁹ If the Third Circuit truly wishes to protect its youth, it must adopt a stronger check than a rebuttable presumption.¹⁵⁰

incorrigible juvenile offenders to LWOP sentences, Supreme Court should have gone further to provide automatic parole eligibility for all corrigible juvenile offenders).

145. See *Grant*, 887 F.3d at 135 (acknowledging that even after district court resentenced Grant, considering his mitigating factors of youth, he still received sixty-five-year sentence); cf. *Carter*, 192 A.3d at 721–22 (examining Maryland's parole statute and concluding that because the statute did not prohibit de facto life sentences for corrigible juvenile offenders, it was in violation of *Graham* and *Miller* protections).

146. For a discussion of states and federal courts utilizing inconsistent juvenile sentencing schemes in analyzing *Graham* and *Miller* objectives, see *supra* notes 75–80 and accompanying text.

147. See generally *Criminal Law—Sentencing—Colorado Supreme Court Holds that Aggregate Term of Years Sentences Can Never Implicate Eighth Amendment Restrictions on Juvenile Life Without Parole*, Lucero v. People, 2017 CO 49, 394 P.3d 1128, 131 HARV. L. REV. 1187, 1190 (2018) (commenting that *Lucero* court read *Graham* and *Miller* far too narrowly, in seeming disregard of Supreme Court's discussion of special characteristics of juveniles and how this suggests imposing LWOP sentences with extreme rarity).

148. For a discussion of the inconsistencies in applying the *Graham* Court's "meaningful opportunity to obtain release," see *supra* notes 75–80 and accompanying text.

149. See Elizabeth C. Kingston, *Validating Montgomery's Recharacterization of Miller: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23, 50–52 (2016) (providing breakdown of states that continually impose LWOP and states that have categorically banned such punishments).

150. See generally *People v. Contreras*, 411 P.3d 445, 455 (Cal. 2018) (providing examples of state legislation passed in wake of *Graham* and *Miller* that ostensibly account for meaningful opportunity for release).

B. *How the Third Circuit May Offer Juvenile Offenders a Hopeful Retirement from Prison*

To preserve juvenile rights under *Graham* and *Miller*, the Third Circuit ought to be a pioneer and guarantee automatic parole hearings for all corrigible juvenile offenders at or before the national age of retirement.¹⁵¹ Automatic parole eligibility ensures that corrigible juveniles are not deprived of a chance to demonstrate rehabilitation to a parole board—this approach seeks to balance retribution for the offense with a juvenile's inherent diminished culpability.¹⁵² The essential hope is that if juveniles know, without a doubt, that they will become eligible for parole, this hope will incentivize them to work towards rehabilitation.¹⁵³

In the post-*Miller* era, just as all juvenile offenders possess the constitutional right of individualized sentencing hearings to demonstrate corrigibility, all corrigible juvenile offenders must also possess the automatic right to parole at a meaningful age in advocating for their release.¹⁵⁴ If a corrigible juvenile offender has no opportunity to demonstrate reformation and remorse, due to a de facto LWOP sentence, then categorizing the juvenile as corrigible is inherently meaningless.¹⁵⁵ To retain *Miller's* significance, courts should eliminate any possibility that a state or federal court may mandatorily incarcerate a rehabilitated juvenile for life.¹⁵⁶

Automatic parole eligibility by no means guarantees a juvenile offender's release from prison.¹⁵⁷ A neutral parole board still safeguards

151. See Singer, *supra* note 29, at 696 (suggesting that solution to juvenile sentencing post-*Montgomery* is to automatically make juvenile eligible for parole after serving mandatory minimum sentences).

152. See Grant, 887 F.3d 131, 150 (3d Cir. 2018), *reh'g en banc granted, vacated*, 905 F.3d 285 (3d Cir. 2018) (case listed for rehearing en banc Feb. 20, 2019) (explaining that while there is no bright line age at which juveniles are no longer able to reintegrate into society, Third Circuit accepts national age of retirement as transitional life stage where person still has opportunity to engage in substantial life endeavors).

153. See Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole As an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 457 (2013) (theorizing that LWOP is equivalent to death sentence—both foreclose any possibility of redemption or reform despite fact that many juvenile offenders are in fact corrigible and are able to live productive law-abiding lives).

154. See, e.g., Kelly Scavone, *How Long is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3474 (2014) (advocating for affording juveniles with multiple opportunities for release at staggered points throughout sentence to reconcile *Graham* and *Miller's* mandate of meaningful opportunity for release and lengthy term-of-year sentences).

155. See Grant, 887 F.3d at 143 (asserting that sentence treating corrigible juvenile offender as incorrigible makes little sense in light of *Miller*).

156. See Kingston, *supra* note 149, at 52–57 (commenting on *Montgomery* Court's expansion on *Miller* analysis, and discussing *Miller's* categorical prohibition of life sentences, LWOP and de facto, for corrigible juvenile offenders).

157. See Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CON. PUB. INT. L.J. 143, 164 (2013) (affirming that comporting with *Graham* and *Miller's* holdings does not automatically guarantee

against the release of juvenile offenders who have not been rehabilitated.¹⁵⁸ Granting automatic parole at this age, however, reflects fundamental principles upon which the juvenile justice system was founded: rehabilitation and diminished culpability.¹⁵⁹

As the Supreme Court rationalized time and again, there is an increasingly fervent movement towards protecting juveniles from the perils of adult sentencing.¹⁶⁰ Many states passed LWOP sentencing schemes as a result of the fictitious “super-predator” scare, demonstrating the unreasonableness of punitive LWOP sentencing.¹⁶¹ Thus, the Third Circuit ought to proffer juvenile offenders automatic parole at or before the national age of retirement because there is nothing worse than depriving a child of hope, for such deprivation is practically analogous to capital punishment.¹⁶²

release because offenders must still convince parole board that they no longer pose danger to public).

158. See *Graham v. Florida*, 560 U.S. 48, 50 (2010) (assuring that parole board ensures against release of non-rehabilitated juveniles); see also Wheelwright, *supra* note 36, at 268 (declaring that hope is part of Eighth Amendment jurisprudence for juvenile sentencing).

159. See Singer, *supra* note 29, at 737–38 (citing *In re Gault*, 387 U.S. 1, 15–16 (1967)) (arguing that releasing juveniles after having served minimum sentence would comport with rehabilitation, fundamental goal of juvenile justice system).

160. For a further discussion of the rapidly changing landscape of juvenile sentencing, see *supra* notes 37–81 and accompanying text.

161. For a further discussion of Professor Dilulio’s “super-predator” era, see *supra* note 57 and accompanying text; see also Singer, *supra* note 29, at 737–38 (recognizing that LWOP sentences increased during “super-predator” scare).

162. See Feld, *A Slower Form of Death*, *supra* note 46, at 48–49 (arguing that courts should apply justifications used to prohibit juvenile capital punishment to limit LWOP sentences because both punishments deprive juveniles of life).