

Categorically Redeeming *Graham v Florida* and *Miller v Alabama*: Why the Eighth Amendment Guarantees All Juvenile Defendants a Constitutional Right to a Parole Hearing

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The Supreme Court has held that life without parole is an unconstitutional sentence for nearly all juvenile defendants—except for a select few that the criminal justice system deems irredeemable. Though this represents a positive development in the Court’s juvenile sentencing jurisprudence, it has left the case law deeply unsettled. For instance, the Court has held that redeemable juveniles are all entitled to a “meaningful opportunity to obtain release,” but it has failed to explicitly define what that constitutional mandate means in practice. On top of that, the Court has concluded that not even expert psychologists can determine at sentencing whether a juvenile is irredeemable. However, lower courts may still sentence certain juvenile homicide defendants to life without parole if they can somehow make that determination.

This Comment addresses questions left unanswered in the wake of the Court’s recent juvenile sentencing cases. Because the Court has held that conclusively determining whether a juvenile defendant is irredeemable at sentencing is a fraught endeavor, and that a meaningful opportunity to obtain release means more than simply a release immediately before a defendant’s specific life expectancy, this Comment argues that the Eighth Amendment provides a constitutional right to a timely parole hearing with the presumption of release for all juvenile defendants. The ultimate focus of this Comment is to address the question that instituting a constitutional right to a parole hearing for juvenile defendants will inevitably pose: When must that parole hearing occur? Drawing on state legislative enactments, available parole data, and the Court’s analysis in its prior decisions, this Comment argues that juvenile defendants have a constitutional right to a parole hearing before the twenty-sixth year of their respective sentences.

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INTRODUCTION

After his parents kicked him out at the age of sixteen and forced him to live in a shack, Brian Bassett committed a heinous crime: he murdered his mother, father, and brother. Facing mandatory life in prison for each count of aggravated first degree murder, Bassett was convicted and sentenced to three consecutive life terms without the possibility of parole.¹ After the Supreme Court abolished mandatory life sentences for juveniles in *Miller v Alabama*,² the Washington State Legislature gave Bassett a new chance at life by requiring courts to consider a juvenile's diminished culpability during sentencing for aggravated first degree murder convictions.³ At Bassett's appeal, his pediatric psychologist testified that Bassett suffered from an adjustment disorder, and Bassett himself testified that at the time of his crimes he was unable to understand the consequences of his actions.⁴ The now thirty-five-year-old Bassett had also turned his life around in prison: he had no infractions in sixteen years, earned his GED and a spot on his community college's honor roll, and mentored other inmates.⁵ The sentencing judge—despite the state's failure to present evidence rebutting Bassett's arguments—rejected Bassett's evidence and denied his appeal.⁶ It was not until the Washington Supreme Court took his case and held that imposing life without parole on juvenile defendants is unconstitutional that Bassett finally secured an opportunity to escape the mistakes he made as a juvenile.⁷

The Washington Supreme Court's decision follows the United States Supreme Court's steps over the past decade to establish new categorical rules,⁸ which flow from the Eighth Amendment

¹ See *State v Bassett*, 428 P3d 343, 346 (Wash 2018).

² 567 US 460, 479 (2012) (“We therefore hold that the Eight Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”).

³ See Wash Rev Code § 10.95.030.

⁴ *Bassett*, 428 P3d at 346–47.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 360. Though ruling under its own state constitution, the Washington Supreme Court employed the same categorical analysis the Supreme Court uses in its Eighth Amendment jurisprudence. See note 8 and Part I.A for further discussion.

⁸ This Comment often refers to “categorical rules” and “the categorical analysis.” In the Eighth Amendment context, the categorical analysis refers to whether a sentencing practice violates the Eighth Amendment. If the Court finds that a practice does, it will establish a categorical rule barring that sentencing practice. The categorical approach is distinct from the case-by-case approach, in which a defendant challenges her sentence's

and have radically transformed the landscape of juvenile sentencing. The Court first abolished the death penalty for juveniles in *Roper v Simmons*,⁹ then life without the possibility of parole (LWOP) for all juvenile nonhomicide offenders in *Graham v Florida*,¹⁰ followed by mandatory LWOP¹¹ for juvenile homicide offenders in *Miller*. In *Montgomery v Louisiana*,¹² the Court retroactively extended *Miller* and *Graham*'s reach.¹³

In its post-*Roper* jurisprudence, the Court has emphasized two common points. First, "children are constitutionally different from adults for purposes of sentencing."¹⁴ Second, so long as juvenile defendants are not among the rare group who are deemed irredeemable,¹⁵ they deserve a "meaningful opportunity to obtain release."¹⁶ These doctrinal changes presented juvenile defendants like Bassett with a real chance to reintegrate into society.

Despite the Court's recent penchant for mitigating life sentences for juveniles, several unanswered questions remain in the wake of *Graham*, *Miller*, and *Montgomery*. For instance, what did the Court mean when it held that all redeemable juveniles are entitled to a "meaningful opportunity to obtain release"?¹⁷ Does that mandate extend to a term-of-years sentence, or consecutive term-of-years sentences, that lasts for the duration of a juvenile

constitutionality as applied to the specific facts of her case. For a further discussion of both of these approaches to Eighth Amendment challenges, see Part I.A.

⁹ 543 US 551 (2005).

¹⁰ 560 US 48 (2010).

¹¹ This Comment uses the terms "mandatory," "de facto," and "discretionary" to characterize LWOP sentences. Mandatory LWOP is a statutory requirement that sentencing courts automatically impose LWOP for certain offenses without hearing the defendant's mitigating qualities or circumstances. Discretionary LWOP describes when a sentencing court makes its own determination, based on the characteristics of the defendant and the nature of the offense, that LWOP is the appropriate punishment. De facto LWOP constitutes consecutive term-of-years sentences that last for the duration of a juvenile homicide offender's life expectancy. This Comment considers de facto LWOP to be a sentence lasting fifty or more years in prison, pursuant to the Sentencing Project's estimate. See Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences* *17 (The Sentencing Project, May 2017), archived at <http://perma.cc/3CDV-D8SJ>.

¹² 136 S Ct 718 (2016).

¹³ *Id.* at 729.

¹⁴ *Miller*, 567 US at 471 (discussing *Roper* and *Graham*).

¹⁵ *Montgomery*, 136 S Ct at 734. The Court actually uses the term "incorrigible" to describe juvenile defendants that can be assessed LWOP, but this Comment uses "irredeemable" because juvenile corrigibility is also used in the context of juvenile disobedience and immaturity.

¹⁶ *Graham*, 560 US at 75.

¹⁷ *Id.*

homicide offender's life expectancy (de facto LWOP)? Does it apply to nonmandatory life sentences for homicide offenders? These questions are salient for many convicted juveniles. As of 2016, 2,310 individuals were serving LWOP for crimes committed as juveniles, and an additional 2,089 individuals who were convicted of crimes committed as juveniles were serving sentences that amounted to de facto LWOP.¹⁸ But if all juveniles, save those who are deemed irredeemable, ought to be afforded an opportunity for release, how do we determine *when* that opportunity arises?

A more specific question follows this inquiry: Under the Eighth Amendment, what is the *maximum* number of years to which a redeemable juvenile defendant may constitutionally be sentenced before being constitutionally entitled to a parole hearing?¹⁹ Answering this question will not only aid juveniles already sentenced to LWOP and de facto LWOP, but also help the 7,346 juveniles sentenced to life with parole (LWP).²⁰ The answer would also equip sentencing courts with a bright-line rule.

The two federal circuit courts that have grappled with this question—the Third and Eleventh—have failed to provide a clear solution because they have focused on the narrow question of a juvenile defendant's life expectancy. To determine whether a defendant has a meaningful opportunity to obtain release, the Eleventh Circuit affirmed the use of a generic, nonindividualized life expectancy calculation in *United States v Mathurin*,²¹ holding that a defendant could still reduce his total sentence through good-time credit.²² Meanwhile, in *United States v Grant*,²³ the Third Circuit held that sentencing courts should determine a juvenile offender's life expectancy through an individualized sentencing calculation, based on factors like medical records and family medical history, and consider the age of retirement as an

¹⁸ See Nellis, *Still Life* at *17 (cited in note 11). It is worth noting that the United States is the only country in the world that imposes life sentences on its youth. See Katie Rose Quandt, *Why Does the U.S. Sentence Children to Life in Prison?* (JSTOR Daily, Jan 31, 2018), archived at <http://perma.cc/6G7Y-4LRS>.

¹⁹ This Comment often refers to this question as “the ‘when’ question.”

²⁰ Nellis, *Still Life* at *17 (cited in note 11).

²¹ 868 F3d 921 (11th Cir 2017).

²² *Id.* at 933–34. For a lengthier discussion of *Mathurin*, see Part III.A.

²³ 887 F3d 131 (3d Cir 2018), vacd en banc, 905 F3d 285 (3d Cir 2018). Though the en banc hearing has been completed and an opinion has yet to be issued, *Grant*'s basic precepts are worth discussing for the purposes of creating a parole-eligibility age for juveniles. For a lengthier discussion of *Grant*, see Part III.A.

independent sentencing factor when sentencing juvenile defendants.²⁴ Both courts sidestepped the use of actuarial tables, which forecast an individual's life expectancy based on distinguishing factors such as race, income, and geography because such tables might prove constitutionally suspect.²⁵

But the proper method to avoid the constitutional and ethical issues with using actuarial tables is not to disregard a particular individual's life expectancy. Otherwise, a juvenile defendant with a shorter than average life expectancy would not be *guaranteed* a meaningful opportunity to obtain release. And though the retirement age, as a sentencing factor, offers some respite for juvenile defendants, it does not ensure that redeemable juveniles will have a parole hearing. The solution lies instead in creating a new categorical rule: a constitutional right to a parole hearing for all juvenile defendants. Parole hearings would help determine whether a juvenile defendant has been sufficiently rehabilitated from her past misdeeds, or whether her years in prison have shown her to be irredeemable. Even for those juvenile defendants determined to be irredeemable at sentencing under *Miller*, an ex post parole hearing will ensure that ex ante determination of irredeemability was *correct*.²⁶

This Comment proceeds in four parts. Part I examines Supreme Court precedent regarding juvenile sentencing, investigating the evolution from *Graham* to *Miller* to *Montgomery* and the approach that the Court takes in each case. Part II then analyzes the three primary questions left unanswered in the wake of these cases: Does the Eighth Amendment proscribe de facto LWOP? Does it also proscribe discretionary LWOP? And if both of those questions are answered in the affirmative, what does the Court really mean by giving all juvenile defendants a "meaningful opportunity to obtain release"? Looking to contemporary scholarship and state supreme court decisions, this Part shows

²⁴ *Grant*, 887 F3d at 150 (noting that "society accepts the age of retirement as a transitional life stage" and "retirement is widely acknowledged as an earned inflection point in one's life") (emphasis omitted).

²⁵ *Id.* at 151 (noting that employing actuarial tables could result in differential sentencing based on race, gender, socioeconomic status, or a host of other factors that influence actuarial life expectancy, but ought not impact sentencing decisions).

²⁶ *Miller* requires courts to determine whether a juvenile is irredeemable at sentencing (which this Comment describes as "ex ante"). However, this Comment argues that the only way to be certain that a juvenile is in fact irredeemable is to conduct an assessment at a parole hearing when that offender becomes an adult (which this Comment refers to as "ex post"). See Part II.B for further discussion.

why discretionary and de facto LWOP sentences for redeemable juveniles are both unconstitutional, and that a meaningful opportunity to obtain release entails a constitutional right to a parole hearing for a given juvenile defendant significantly before a given defendant's life expectancy. Part III then shifts to this Comment's principal inquiry: After what number of years of incarceration are juvenile defendants constitutionally guaranteed a parole hearing? This Part first examines the Third and Eleventh Circuits' approaches but ultimately concludes that both courts fail to provide a needed bright-line solution. Finally, Part IV provides an answer to that question by utilizing the Eighth Amendment categorical analysis. Under this framework, this Comment explains why juvenile defendants have a constitutional right to a parole hearing before having served twenty-six years of their respective sentences.

I. THE "TRILOGY" AND BEYOND: *GRAHAM*, *MILLER*, *MONTGOMERY*, AND THE QUESTIONS THAT REMAIN

Because the categorical approach has formed the basis for the Court's juvenile sentencing jurisprudence since *Roper*, Part I.A begins with a discussion of the Eighth Amendment and the categorical approach to evaluating Eighth Amendment challenges. Parts I.B, I.C, and I.D then shift to summarizing the Court's decisions in *Graham*, *Miller*, and *Montgomery*, respectively. Part I.E synthesizes important takeaways from the *Graham* line of cases and illustrates how *Miller*'s constitutional rule ultimately belies one of *Graham*'s key holdings.

A. Eighth Amendment Overview: The Categorical Analysis

The Supreme Court's juvenile sentencing jurisprudence flows from the Eighth Amendment. Applicable to the states through the Fourteenth Amendment,²⁷ the Eighth Amendment prohibits the government from imposing excessive punishments on individuals.²⁸ The core aim of the Eighth Amendment is to preserve the dignity of humankind; the state can punish only "within the limits of civilized standards."²⁹ In its analysis, the Court looks to the

²⁷ See *Robinson v California*, 370 US 660, 675 (1962).

²⁸ US Const Amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). See also *Atkins v Virginia*, 536 US 304, 311 (2002).

²⁹ *Trop v Dulles*, 356 US 86, 100 (1958) (Warren) (plurality).

Eighth Amendment's "text, by considering history, tradition, and precedent, [] with due regard for its purpose and function in the constitutional design."³⁰ But the Court's jurisprudence is not rooted in eighteenth-century beliefs about punishment.³¹ The Court has acknowledged that the Eighth Amendment analysis must be "flexible and dynamic."³² As a result, it appraises whether the sentence violates "the evolving standards of decency that mark the progress of a maturing society."³³

A defendant can bring one of two separate challenges under this framework: (1) a case-by-case challenge, arguing her specific sentence is grossly disproportionate to her crime, or (2) a categorical challenge to the punishment itself. For instance, if Bassett were challenging his LWOP sentence as cruel and unusual based on circumstances unique to his case (his difficult upbringing, mental health issues, etc.), he would be making a challenge under the case-by-case approach. However, if Bassett were claiming that LWOP is *always* unconstitutional, meaning that no juvenile defendant under *any* set of facts could receive LWOP, he would be making a categorical challenge to LWOP. Because the Court's jurisprudence has largely centered around the latter approach with respect to juvenile sentencing issues since *Graham*,³⁴ this Comment largely focuses on the categorical analysis.

The Court has crafted categorical rules in two types of cases: those focusing on the characteristics of the punishment and those that turn on the characteristics of the offender and the offense.³⁵ Although the Court does not have a test to decide which approach to follow, recent cases suggest that the categorical approach is

³⁰ *Roper*, 543 US at 560.

³¹ For an originalist perspective of the Eighth Amendment, see generally Justice Antonin Scalia's opinion in *Harmelin v Michigan*, 501 US 957, 961–96 (1991) (upholding an LWOP sentence for a cocaine possession charge after concluding that the Eighth Amendment does not have a strict proportionality guarantee). But as Part I illustrates, the Court has transitioned away from this much stricter interpretation of the Eighth Amendment in cases like *Roper* and *Graham*. See *Graham*, 560 US at 85 (Stevens concurring) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time."). See also *id.* (noting that a strict originalist view of the Eighth Amendment might "not rule out a death sentence for a \$50 theft by a 7-year-old").

³² *Gregg v Georgia*, 428 US 153, 171 (1976).

³³ *Trop*, 356 US at 101.

³⁴ See Michi Momose, Note, *A Case for Hope: Examining Graham v Florida and Its Implications for Eighth Amendment Jurisprudence*, 33 U Hawaii L Rev 391, 394–96 (2010).

³⁵ *Graham*, 560 US at 59–61.

preferable when courts cannot accurately separate defendants deserving the punishment from those who do not.³⁶

When crafting a categorical rule, the Court orients its analysis around two considerations. First, in an effort to estimate national consensus, the Court considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice.”³⁷ In considering objective indicia, the Court often looks to both state statutory schemes and the sentencing practices of state judges and juries.³⁸ National consensus does not require that a majority of states oppose a specific practice because “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”³⁹ Second, the Court shifts to exercising its own judgment about whether the practice violates the Eighth Amendment, allowing it to consider factors such as the Eighth Amendment’s text, history and purpose, precedent, social science research, and the penological goals of the punishment.⁴⁰

B. *Graham v Florida*: A Powerful Change of Course

Representing the first instance in which the Court applied the categorical approach to a non–death penalty case,⁴¹ *Graham* transformed the discourse surrounding juvenile sentencing.

³⁶ See *id.* at 77–79.

³⁷ *Roper*, 543 US at 563.

³⁸ *Id.* at 552. The Court observed:

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as “categorically less culpable.”

Id. at 567, quoting *Atkins*, 536 US at 316.

³⁹ *Atkins*, 536 US at 315. See also *id.* at 316 (discussing how it is not dispositive for the objective indicia analysis that state legislatures have not explicitly outlawed a sentencing practice).

⁴⁰ See *Kennedy v Louisiana*, 554 US 407, 421 (2008); *Roper*, 543 US at 564.

⁴¹ *Graham*, 560 US at 69–70 (noting that although death sentences are unique, LWOP also “alters the offender’s life by a forfeiture that is irrevocable”). Up until *Graham*, the Court had only employed the categorical analysis for death penalty cases. See *id.* at 102 (Thomas dissenting) (“For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach.”). See also *id.* at 103 (Thomas dissenting) (“Death is different’ no longer.”).

Although *Roper* had already distinguished juvenile and adult defendants in its rationale,⁴² *Graham* extended *Roper*'s principles in abrogating LWOP for juveniles convicted for nonhomicide offenses.⁴³ The Court held that such juveniles were entitled to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."⁴⁴ The Court believed that the case-by-case approach was inadequate because it would run the strong risk that courts could nonetheless incarcerate redeemable juveniles for life.⁴⁵

Adhering to its categorical analysis, the Court determined that both considerations of the rule were satisfied. First, the Court established that a national consensus existed against sentencing juvenile nonhomicide defendants to LWOP under the objective indicia analysis. The Court determined that only 109 juvenile offenders nationally were serving life sentences for juvenile nonhomicide LWOP even though 39 jurisdictions at that time allowed for LWOP in such cases.⁴⁶

Next, the Court held that the Eighth Amendment prohibits LWOP sentences for juvenile nonhomicide defendants. Citing the same type of sociological and psychological studies on which it relied in *Roper*, the Court held the following: "[J]uveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"⁴⁷ According to the Court, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects . . . transient immaturity, and the rare juvenile offender whose crime reflects irreparable

⁴² See *Roper*, 543 US at 569–73 (holding that the death penalty, a truly irrevocable punishment, is unconstitutional as applied to juveniles because of their mitigating qualities: their lack of maturity, vulnerability to negative influences, and lack of complete character formation).

⁴³ *Graham*, 560 US at 69–72, 82 (holding that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide").

⁴⁴ *Id.* at 75 (emphasis added).

⁴⁵ *Id.* at 49. This was the same type of logic that *Roper* employed when it abolished the death penalty for juvenile defendants. *Roper*, 543 US at 572–73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."). Indeed, *Graham* built on the distinctions that *Roper* created between juveniles and adults in ending LWOP for nonhomicide defendants.

⁴⁶ *Graham*, 560 US at 62.

⁴⁷ *Id.* at 68 (quotation marks omitted), quoting *Roper*, 543 US at 569–70.

corruption.”⁴⁸ Because “[irredeemability] is inconsistent with youth,”⁴⁹ the Court held that determining that a juvenile defendant is irredeemable *at the outset* without giving him “a chance to demonstrate growth and maturity” renders that judgment, at best, questionable because “it does not follow that he would be a risk to society for the rest of his life.”⁵⁰ For the Court, this preemptive assessment of irredeemability “made at the outset” is what rendered the sentence disproportionate, “[e]ven if the State’s judgment that Graham was [irredeemable] were later corroborated by prison misbehavior or failure to mature.”⁵¹ Because expert psychologists believed that juvenile defendants have the capability of “demonstrat[ing] growth and maturity,” an *ex ante* LWOP sentence unconstitutionally deprived Graham of the opportunity to redeem himself.⁵² This reasoning reflects the Court’s stance that an *ex ante* assessment of a juvenile defendant is insufficient. It is only through an *ex post* redeemability assessment, years after sentencing, that courts can conclusively deem a defendant irredeemable.

Finally, the Court looked to the penological justifications underpinning nonhomicide juvenile LWOP, noting that neither retributive nor utilitarian principles serve as sufficient justifications for such sentences. For the former, it deduced that LWOP is not a proportional punishment for a less culpable juvenile nonhomicide offender.⁵³ With regard to utilitarian justifications, it concluded that because juveniles are not sufficiently mature to fully appreciate the consequences of their actions, LWOP for juvenile nonhomicide offenders would not actually deter future crime.⁵⁴

Although *Graham* does not explicitly define what it means by a “meaningful opportunity to obtain release,” Justice Anthony Kennedy’s opinion for the majority points to a strong reading of the mandate. For instance, the Court observed that LWOP “means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store

⁴⁸ *Graham*, 560 US at 73, quoting *Roper*, 543 US at 573.

⁴⁹ *Graham*, 560 US at 73, quoting *Workman v Commonwealth*, 429 SW 2d 374, 378 (Ky App 1968).

⁵⁰ *Graham*, 560 US at 73.

⁵¹ *Id.*

⁵² *Id.* (“Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”).

⁵³ *Id.* at 71–72.

⁵⁴ See *Graham*, 560 US at 72.

for the mind and spirit of [the convict], he will remain in prison *for the rest of his days.*"⁵⁵ Holding LWOP was effectively tantamount to the death penalty, the *Graham* Court also reasoned that LWOP "gives [juvenile nonhomicide defendants] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."⁵⁶ In the Court's eyes, a categorical ban on LWOP for nonhomicide juvenile defendants afforded juveniles "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."⁵⁷ If *Graham* were solely limited to affording juvenile homicide defendants merely an opportunity to live outside of prison, the Court's additional language about allowing those defendants opportunities to reconcile with society would effectively be rendered meaningless. Thus, "meaningful opportunity to obtain release," contextualized with the rest of the Court's opinion, must mean more than just a release at some point before death.⁵⁸

C. *Miller v Alabama: Graham's Extension to Homicide Offenders*

Graham may have transformed the Court's jurisprudence with respect to juvenile sentencing, but *Miller* signaled that the Court was not stopping with nonhomicide offenders. In *Miller*, the Court held that the Eighth Amendment barred *mandatory* sentences of life without parole for *any* juvenile defendant⁵⁹ because such sentences prevent a sentencing court from considering a juvenile's "mitigating circumstances before imposing the harshest possible penalty."⁶⁰ Chief Justice John Roberts, in dissent, harangued the majority for further extending *Graham's* framework, contending that the majority was "bootstrap[ing] its way to declaring that the Eighth Amendment absolutely prohibits" the imposition of juvenile LWOP because "[t]his process has no discernible end point."⁶¹

⁵⁵ Id at 70 (emphasis added and quotation marks omitted), citing *Naovarath v State*, 779 P2d 944, 945 (Nev 1989).

⁵⁶ *Graham*, 560 US at 79.

⁵⁷ Id.

⁵⁸ See Part II.C for a further discussion of the *Graham* mandate.

⁵⁹ *Miller*, 567 US at 489.

⁶⁰ Id.

⁶¹ Id at 501 (Roberts dissenting).

The *Miller* Court extended *Graham*'s analysis to the context of mandatory LWOP for juveniles convicted of homicide. Observing that "none of what [*Graham*] said about children . . . is crime-specific,"⁶² the Court reasserted two *Graham* principles: (1) LWOP is almost akin to the death penalty in its irrevocable nature;⁶³ and (2) juveniles are "constitutionally different from adults for purposes of sentencing . . . [b]ecause [they] have diminished culpability and greater prospects for reform."⁶⁴ In support of the latter point, the Court again remarked that juveniles' incomplete physiological and psychological development made them less likely to be irredeemable.⁶⁵

With these two conclusions in hand, the Court held that mandatory LWOP for homicide offenses is unconstitutional because it prevents sentencing judges from considering the "mitigating qualities of youth."⁶⁶ The Court identified the following factors for courts to consider (*Miller* factors): the juvenile defendant's (1) "immaturity, impetuosity, and failure to appreciate risks and consequences," (2) family and home environment, (3) relative culpability and the relative effect of familial/peer pressures, (4) challenges in dealing with police officers and counsel as a juvenile, and (5) "possibility of rehabilitation."⁶⁷ Though the Court only ruled on mandatory penalty schemes and did not foreclose LWOP sentences for juvenile homicide defendants entirely, it nonetheless noted that such sentences will necessarily be infrequent given juveniles' diminished culpability and the difficulty in determining if juveniles ought to be deemed irredeemable at sentencing.⁶⁸

D. *Montgomery v Louisiana*: Not Just a Retroactive Extension of *Miller*

The Court's most recent ruling along its *Graham* line of cases, *Montgomery*, addressed the open issue of whether states must apply *Miller* retroactively. The Court held that *Miller* created a new substantive constitutional rule, and it therefore applied to every case in which a juvenile received a mandatory LWOP sentence—

⁶² Id at 473 (Kagan).

⁶³ *Miller*, 567 US at 470.

⁶⁴ Id at 471.

⁶⁵ Id at 471–72.

⁶⁶ Id at 476, quoting *Johnson v Texas*, 509 US 350, 367 (1993).

⁶⁷ *Miller*, 567 US at 477–78.

⁶⁸ Id at 479.

including those that occurred prior to *Miller*.⁶⁹ Because it determined that *Miller* recognized juveniles were fundamentally different from adults for sentencing purposes, the Court in *Montgomery* established that *Miller* created a substantive constitutional rule.⁷⁰ As a result, courts must afford a juvenile defendant the opportunity to show her “crime did not reflect irreparable corruption.”⁷¹

But *Montgomery* did more than retroactively extend *Miller*—it also strongly reemphasized the proposition that LWOP should only be imposed on the rarest of juvenile defendants. First, it concluded that mere consideration of a juvenile’s mitigating qualities is insufficient.⁷² A court must instead make a robust determination that the juvenile defendant’s crime “reflects irreparable corruption” if it is to impose an LWOP sentence.⁷³ Second, it emphasized that discretionary LWOP cannot be imposed on the “vast majority of juvenile offenders.”⁷⁴ The Court did not mince words on either of these points. As Alice Reichman Hoesterey points out, *Montgomery* emphasizes *eight times* that juveniles receiving discretionary LWOP must be irreparably corrupt and *six times* that such sentences ought to be exceedingly rare.⁷⁵ Markedly, despite *Montgomery*’s strong language and his own vociferous dissent in *Miller*, Chief Justice Roberts joined the majority opinion in *Montgomery*.

E. The Tensions That Emerge from *Graham* and Its Progeny

Graham, *Miller*, and *Montgomery* collectively establish three key principles. First, all juvenile nonhomicide defendants (*Graham* defendants) and the vast majority of juvenile homicide

⁶⁹ *Montgomery*, 136 S Ct at 734.

⁷⁰ *Id.*

⁷¹ *Id.* at 736. Though the Court did not explicate exactly how a juvenile defendant would prove her redeemability, *Montgomery* suggests that she could both highlight her “troubled, misguided youth” and show how she has spent her time in prison demonstrating reform. *Id.*

⁷² *Id.* at 734. “Even if a court considers a child’s age before sentencing him or her [to LWOP], that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” *Id.*, quoting *Miller*, 567 US at 479.

⁷³ *Montgomery*, 136 S Ct at 734, quoting *Miller*, 567 US at 479.

⁷⁴ *Montgomery*, 136 S Ct at 734 (“*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent [irredeemability].”).

⁷⁵ Alice Reichman Hoesterey, *Confusion in Montgomery’s Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life without Parole for Juveniles Is the Only Constitutional Option*, 45 Fordham Urban L J 149, 173 n 189, 175 n 201 (2017) (collecting sources).

defendants (*Miller* defendants) are constitutionally entitled to meaningful opportunities for release. Second, conclusively determining that a juvenile defendant is irredeemable *ex ante* is constitutionally suspect because, considering that even expert psychologists cannot rise to the task, such defendants minimally deserve a chance to show capacity for reform. Third, a court sentencing a *Miller* defendant must make a robust determination at sentencing that the defendant is irredeemable to impose LWOP.

Although these principles appear to work together, this Comment argues that *Miller*'s constitutional rule and *Graham*'s underlying analysis are in conflict. *Graham* categorically abrogated juvenile nonhomicide LWOP partially because the Court believed that, if even expert psychologists could not separate redeemable and irredeemable juvenile defendants at sentencing, sentencing courts could not make that determination with any more certainty. In its amicus curiae brief in support of *Miller*, the American Psychological Association reaffirmed its belief in the Court's pronouncement:

To be sure, research has identified certain childhood risk factors, or "predictors," that show a statistically significant association with adult criminality. But such studies do not suggest that anyone could reliably determine, *ex ante*, whether particular juvenile offenders will reoffend. To the contrary, the same research makes clear that such predictions cannot be made with *any accuracy*. Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults.⁷⁶

But *Miller* nonetheless allowed a sentencing court the option of sentencing a *Miller* defendant to LWOP if the court could, after carefully reviewing the defendant's mitigating qualities, determine that she is irredeemable. Thus, when imposing discretionary LWOP on a *Miller* defendant and deeming her irredeemable, a sentencing court is merely making its best guess about her capacity for reform. Because sentencing courts cannot *conclusively* deem a *Miller* defendant irredeemable at sentencing under

⁷⁶ Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *Miller v Alabama*, Nos 10-9646, 10-9647, *22 (US filed Jan 17, 2012) (available on Westlaw at 2012 WL 174239) (APA Brief) (emphasis added) (noting that "such predictions cannot be made with any accuracy").

Graham's reasoning, Part II argues that the doctrinal conflict between *Graham* and *Miller* can only be resolved one way: with both a redeemability assessment *at sentencing* and one year *after sentencing*. That is, the doctrine calls for a constitutional right to a parole hearing for all juvenile defendants.

II. THE LOGICAL CONCLUSION OF *GRAHAM*, *MILLER*, AND *MONTGOMERY*: A CONSTITUTIONAL RIGHT TO A PAROLE HEARING FOR ALL JUVENILE DEFENDANTS

Graham and its companion cases established clear constitutional rules, but opened constitutional questions as well. As Part I.E observes, although *Miller* indirectly established that some sort of redeemability assessment must occur at sentencing, this holding remains in significant tension with *Graham*'s conclusion that making such an assessment while the defendant is still a juvenile is essentially impossible because this assessment cannot be made with any accuracy at sentencing.⁷⁷ If it is impossible for an expert psychologist to definitively deem a juvenile defendant irredeemable at sentencing, surely a sentencing court is, at best, hazarding a guess about a juvenile defendant's capability for reform *ex ante*. If that best guess was constitutionally insufficient in *Graham*, why did it suddenly become permissible in *Miller*? Furthermore, the Court failed to explain whether LWOP incorporates *de facto* LWOP, nor did it define "meaningful opportunity to obtain release" in practice. Perhaps Chief Justice Roberts was right in concluding the Court's *Graham* line of cases has no end in sight.

Though the constitutionality of *de facto* and discretionary LWOP are hotly contested questions at the state-court level, this Comment contends that the analysis underpinning *Graham* and *Miller* requires eliminating both sentencing practices for all juvenile defendants. In effect, this Comment calls for a constitutional right to a parole hearing for all juvenile defendants. Part II.A first addresses why *de facto* LWOP is unconstitutional, analyzing how the sentencing practice thwarts the Court's mandates. Part II.B moves to discretionary LWOP, arguing that even *Miller* defendants deemed irredeemable at sentencing deserve a review of their

⁷⁷ Compare *Miller*, 567 US at 479 (holding a state must consider the mitigating qualities of youth before imposing LWOP), with *Graham*, 560 US at 73 (showing that even expert psychologists cannot, with any certainty, assess a juvenile's capability for rehabilitation at sentencing).

sentencing at a parole hearing. With both of these conclusions in mind, Part II.C expresses the implications of *Graham*'s mandate that all redeemable juveniles be afforded a "meaningful opportunity to obtain release."

A. De Facto LWOP Is Unconstitutional Because It Frustrates the *Graham* Mandate

Although *Graham*, *Miller*, and *Montgomery* focus on express sentences of LWOP, those cases raise questions about the constitutionality of de facto LWOP, which characterizes a sizable number of sentences of those juveniles who will spend the rest of their days in prison. There are 2,089 individuals serving de facto LWOP sentences for crimes committed as juveniles, accounting for 18 percent of the total juvenile lifer⁷⁸ population.⁷⁹

The Court may have failed to explicitly address whether de facto LWOP is unconstitutional, but states have spoken—and they are split. States that have concluded that *Graham* and *Miller* extend to de facto LWOP tend to view the Court's analysis holistically.⁸⁰ For instance, the California Supreme Court relied heavily on *Graham*'s discussion of "meaningful opportunity to obtain release" in holding de facto LWOP violates the Eighth Amendment for juveniles convicted of nonhomicide offenses.⁸¹ In contrast, states that have not extended *Graham* and *Miller*'s holdings have made formalistic distinctions between LWOP and its de facto counterpart. Reading *Miller* and *Graham* narrowly when upholding the constitutionality of a three-hundred-year consecutive sentence, the Missouri Supreme Court concluded that *Miller* does "not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences."⁸²

⁷⁸ The term "juvenile lifers" refers to those juveniles serving life sentences (LWP, de facto LWOP, and actual LWOP).

⁷⁹ See Nellis, *Still Life* at *16–17 (cited in note 11). This calculation is based on the Sentencing Project's figures for de facto LWOP (2,089) and the total juvenile lifer population (11,745). As mentioned in note 11, a de facto LWOP sentence is one that spans longer than fifty years in prison.

⁸⁰ For a comprehensive list of states that have answered this question, see Hoesterey, 45 *Fordham Urban L J* at 195–97 (cited in note 75).

⁸¹ See *People v Caballero*, 282 P3d 291, 295–96 (Cal 2012) (concluding *Graham* entitles nonhomicide juvenile defendants an opportunity for a parole hearing). See also *State v Ragland*, 836 NW2d 107, 121 (Iowa 2013); *State v Null*, 836 NW2d 41, 72 (Iowa 2013); *Carter v State*, 192 A3d 695, 734 (Md 2018). In each of these cases, the defendant's sentence exceeded his individual life expectancy.

⁸² *State v Nathan*, 522 SW3d 881, 891 (Mo 2017).

Ultimately, courts that have ruled de facto LWOP unconstitutional have the better argument because they focus not on the explicit holdings of the Court's *Graham* line of cases, but rather on the analysis underpinning them. *Graham*, *Miller*, and *Montgomery* do more than their respective holdings suggest; for all intents and purposes, they make de facto LWOP unconstitutional for all redeemable juveniles. To hold otherwise would allow courts to essentially impose LWOP because a juvenile defendant facing de facto LWOP still technically has the *possibility* for parole—even though parole eligibility could come decades, even centuries, after her death in prison. In light of *Graham*'s protections, such a holding would frustrate the core principle that all nonhomicide juvenile defendants must be afforded a “meaningful opportunity to obtain release” and cannot receive LWOP. When *Miller* is layered on to the analysis, the substantive and procedural protections afforded to defendants in the mandatory LWOP context should similarly flow to a juvenile defendant sentenced to multiple counts of homicide. *Miller* concluded that because “none of what [*Graham*] said about children . . . is crime-specific. . . . *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.”⁸³ If the same procedural protections *Graham* offers flow to *Miller* defendants, a redeemable juvenile homicide defendant should not be treated any differently than a juvenile homicide defendant: both deserve a “chance for fulfillment outside prison walls.”⁸⁴ It stands to reason that, at least for the vast majority of juvenile offenders who are not deemed irredeemable, de facto LWOP unconstitutionally thwarts those juvenile defendants' opportunities for release under both *Graham* and *Miller*.⁸⁵

⁸³ *Miller*, 567 US at 473.

⁸⁴ *Graham*, 560 US at 79.

⁸⁵ See Mark T. Freeman, Comment, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 McGeorge L Rev 961, 974–79 (2013) (arguing that based on the *Graham* categorical rule analysis, juvenile defendants categorically cannot receive de facto LWOP sentences).

B. Discretionary LWOP Is Categorically Unconstitutional Because It Effectuates the Imposition of LWOP on Redeemable *Miller* Defendants

Although this Comment argues that the de facto LWOP question is resolvable under the Court's precedent, discretionary LWOP presents a difficult dilemma for *Miller* defendants. A key precept of *Miller* was that courts could still sentence a juvenile to LWOP if the juvenile was deemed irredeemable. However, the fact that such sentences are only for those deemed irreparably depraved strongly suggests the state has the affirmative burden to show why LWOP is warranted.⁸⁶ Currently, there are 2,310 individuals who were convicted as juveniles serving LWOP sentences, though a significant number are being considered for resentencing in the wake of *Montgomery*.⁸⁷ Even if most of those juveniles are deemed irredeemable—a notion that *Miller* and *Montgomery* fundamentally reject⁸⁸—the sentencing practice is nonetheless extremely uncommon: the number of defendants convicted as juveniles serving LWOP represents only 1.1 percent of the *total* life-sentenced population.⁸⁹

States are split on this issue, but there is a significant trend toward abrogating discretionary LWOP for redeemable homicide offenders. Seventeen jurisdictions statutorily proscribe discretionary LWOP entirely for all juveniles.⁹⁰ Additionally, some state supreme courts have held that *Miller* and *Montgomery*'s protections extend to discretionary LWOP, though not all states agree.⁹¹ Courts that extend *Miller* to discretionary LWOP for redeemable juveniles focus on the constitutional distinction between juveniles and adults for Eighth Amendment purposes and the role sentencing courts must play in enforcing the burden imposed by *Miller*. For instance, Washington (per *State v Bassett*⁹²) and other states

⁸⁶ Hoesterey, 45 Fordham Urban L J at 175–77 (cited in note 75).

⁸⁷ Nellis, *Still Life* at *17 (cited in note 11).

⁸⁸ Both *Miller* and *Montgomery* held that the vast majority of juvenile homicide defendants are redeemable and deserve a meaningful opportunity for release. See Parts I.C and I.D for further discussion.

⁸⁹ See Nellis, *Still Life* at *16 (cited in note 11).

⁹⁰ Id. See also *State v Bassett*, 428 P3d 343, 352 n 3 (Wash 2018) (collecting the statutes of the twenty-one jurisdictions that have abolished juvenile LWOP).

⁹¹ For a breakdown of the states' respective answers to the constitutionality of discretionary LWOP for juvenile defendants, see Hoesterey, 45 Fordham Urban L J at 194 (cited in note 75).

⁹² 428 P3d 343 (Wash 2018).

have completely proscribed discretionary LWOP for *all* juveniles.⁹³ *Bassett* conducted the same categorical bar analysis that the Supreme Court performed in *Graham*, concluding that “states are rapidly abandoning juvenile life without parole sentences, children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence.”⁹⁴ The Iowa Supreme Court based its decision on the difficulty in making definitive determinations about a defendant’s redeemability at sentencing.⁹⁵ The underlying rationale of these courts is that *Miller*, at minimum, requires a robust determination of redeemability for a juvenile LWOP sentence, whether before or after sentencing.

The states that limit *Miller*’s holding solely to mandatory LWOP cases focus instead on the *Miller* Court’s emphasis on “mandatory” in the opinion. The Indiana Supreme Court, for example, concluded that as long as LWOP is not the only possible sentence for a juvenile defendant, *Miller*’s concerns were satisfied.⁹⁶ The Virginia Supreme Court, though acknowledging that sentencing courts must grapple with a juvenile defendant’s natural immaturity, nonetheless held that “there could be no Eighth Amendment violation” if a court made the determination that LWOP was still appropriate.⁹⁷ The distinction these courts make is thus primarily formalistic: had the *Miller* Court wanted to overrule discretionary LWOP entirely, it would have done so explicitly.⁹⁸

The latter courts’ formalistic distinctions ultimately prove unavailing. Considering the strong language of *Montgomery*, sentencing courts cannot realistically sentence a juvenile to LWOP without also assessing the defendant’s redeemability *ex post*.⁹⁹ Because a juvenile defendant’s relative redeemability cannot be

⁹³ See *Bassett*, 428 P3d at 360; *State v Sweet*, 879 NW2d 811, 839 (Iowa 2016); *Diatchenko v District Attorney for Suffolk District*, 1 NE3d 270, 286 (Mass 2013).

⁹⁴ *Bassett*, 428 P3d at 354.

⁹⁵ See *Sweet*, 879 NW2d at 839.

⁹⁶ See *Conley v State*, 972 NE2d 864, 879 (Ind 2012). See also *Nathan*, 522 SW3d at 891–93.

⁹⁷ *Jones v Commonwealth*, 795 SE2d 705, 721–22 (Va 2017).

⁹⁸ See, for example, *id* at 721 (“[T]he very concept of binding precedent presupposes that courts are bound by holdings, not language. This limiting principle [of only enforcing the Supreme Court’s explicit holdings] exists because words in judicial opinions are to be read in the light of the facts of the case under discussion.”) (quotation marks and citations omitted).

⁹⁹ See Part I.D.

conclusively determined while she is still a juvenile,¹⁰⁰ a sentencing court is *at best* making an educated guess about the defendant's relative redeemability. This solution is constitutionally insufficient because imposing LWOP on a redeemable juvenile constitutes a cruel and unusual punishment under *Graham* and *Miller*. LWOP is a punishment reserved for only those defendants that the sentencing court can conclusively deem irredeemable. Thus, the *Miller* defendant, as an adult, must be afforded a parole hearing to determine if that original conclusion as a juvenile was accurate.

This conclusion can be drawn from three logical extensions of *Roper*, *Graham*, *Miller*, and *Montgomery*. First, *Montgomery* compels courts to evaluate a juvenile defendant's youth as mitigating evidence in sentencing.¹⁰¹ If a judge were to brush aside evidence that the convicted juvenile in front of her is redeemable, she would both be conducting an end-run around *Montgomery*'s requirement of conducting a robust redeemability assessment and ignoring *Miller*'s directive that LWOP only be imposed in the rarest of cases.¹⁰²

Second, sentencing a juvenile defendant to LWOP would require a court to make a *definitive* ex ante determination that a juvenile is irredeemable, even though irredeemability "is inconsistent with youth."¹⁰³ As Hoesterey articulates, *Tatum v Arizona*¹⁰⁴ highlights this tension.¹⁰⁵ There, the Supreme Court vacated and remanded a series of Arizona cases, in which judges merely considered each defendant's mitigating immaturity but nonetheless imposed LWOP.¹⁰⁶ Justice Sonia Sotomayor, in a concurring opinion, explained that the principal fault of these courts was their failure to determine whether the defendants before them were the "rarest of juvenile offenders, those whose crimes

¹⁰⁰ See *Graham*, 560 US at 73.

¹⁰¹ *Montgomery*, 136 S Ct at 733. "*Miller* requires . . . the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to [LWOP]." Id, quoting *Miller*, 567 US at 480. See also Hoesterey, 45 Fordham Urban L J at 177 (cited in note 75) ("*Montgomery* outright *requires* courts to consider age-related mitigating evidence prior to sentencing a juvenile to [LWOP].") (emphasis in original).

¹⁰² Hoesterey, 45 Fordham Urban L J at 177–78 (cited in note 75).

¹⁰³ *Graham*, 560 US at 72–73, quoting *Workman v Commonwealth*, 429 SW2d 374, 378 (Ky App 1968).

¹⁰⁴ 137 S Ct 11 (2016).

¹⁰⁵ See Hoesterey, 45 Fordham Urban L J at 178 (cited in note 75).

¹⁰⁶ See *Tatum*, 137 S Ct at 11–13.

reflect permanent [depravity].”¹⁰⁷ For Justice Sotomayor, under *Montgomery*, “the Eighth Amendment requires more than *mere consideration* of a juvenile offender’s age before the imposition of a sentence of life without parole.”¹⁰⁸ In dissent, Justice Samuel Alito responded that “the Arizona courts will be as puzzled by this directive as [he is]” because each Arizona court explicitly considered *Miller* during sentencing.¹⁰⁹ Furthermore, Justice Alito noted that the juvenile defendants in each of the cases “fall into [the] category” of juvenile offenders whose crimes reflect irreparable corruption because they committed, what he considered to be, heinous crimes.¹¹⁰

Justice Alito is onto something: The mandate that Justice Sotomayor clarifies in her concurrence in *Tatum* puts courts in a double bind. Sentencing judges must make an affirmative determination of redeemability before imposing LWOP on a juvenile, but *Graham* based its conclusion on the notion that making such a determination at sentencing is impossible.¹¹¹

The *Miller* factors alleviate this problem, but it is uncertain what value sentencing judges must assign each factor.¹¹² For instance, should a sentencing court weigh a juvenile defendant’s relative immaturity more than the challenges she has faced in the home? Additionally, it is unclear how a sentencing court can effectively determine if the juvenile defendant’s crimes reflect immaturity or irredeemability. In *Tatum*, Justice Alito posited that the depravity of a juvenile offender’s crime could support an assessment of irredeemability. But *Bassett* offers a powerful counterexample. Bassett committed three heinous murders, and thus might well have been deemed irredeemable under Justice Alito’s view. And yet, in the intervening time, he has surely “redeemed” himself. Bassett turned his life around—a result no one could have been able to predict when he was convicted. Sentencing courts are thus effectively required to make a determination that

¹⁰⁷ See *id.* at 12 (Sotomayor concurring), quoting *Montgomery*, 136 S Ct at 734.

¹⁰⁸ *Tatum*, 137 S Ct at 13 (Sotomayor concurring).

¹⁰⁹ *Id.* (Alito dissenting).

¹¹⁰ *Id.* at 14. See also *id.* (“For example, in *Purcell v. Arizona* . . . a 16-year-old gang member fired a sawed-off shotgun into a group of teenagers, killing two of them, under the belief that they had flashed a rival gang’s sign at him.”).

¹¹¹ See Part I.B for further discussion. For an argument about why the possibility for parole must be the default determination at sentencing, see Hoesterey, 45 *Fordham Urban L J* at 175–77 (cited in note 75).

¹¹² See *Sweet*, 879 NW2d at 838–39.

the Supreme Court has pronounced is impossible.¹¹³ And the preliminary results of the effectiveness of *Miller* hearings suggest that Bassett's case is not an isolated example. As Professor Perry Moriearty notes:

In Michigan, for example, prosecutors continue to seek life without parole in the vast majority of cases involving juveniles convicted of homicide. In Oakland County, prosecutor Jessica Cooper has sought new life without parole sentences for forty-four of the forty-nine juvenile lifers impacted by *Miller*, and in Wayne County, the majority of juvenile lifers have been resentenced to terms of twenty-five, forty, or sixty years before eligibility for parole. Similarly, in Louisiana, a recent review of twenty-three juvenile homicide cases sentenced since 2012 revealed that at least 65% of defendants had received life without parole sentences. Thus, unless and until the Court bans juvenile life without parole, these inmates and those in other jurisdictions that refuse to embrace the spirit of the Court's jurisprudence will never be given the prospect of life outside the prison walls.¹¹⁴

Ultimately, the double bind in which sentencing courts find themselves stems from the tension between *Roper*, *Graham*, and *Miller*—a dilemma of the Court's making. In *Roper*, the Court abrogated the death penalty for juveniles with the knowledge that LWOP remained a potent sentencing alternative.¹¹⁵ When faced with LWOP for nonhomicide offenses in *Graham*, the Court attempted to redraw the line crafted in *Roper* by establishing that a cognizable difference in culpability exists between homicide and nonhomicide juvenile defendants.¹¹⁶ When the Court finally arrived at *Miller*, it had effectively boxed itself in. The Court had to balance its claim in *Graham* that proving redeemability was essentially impossible at sentencing with the notion that LWOP still remained an option for some juvenile homicide defendants. *Miller* thus arrived at a categorical *and* individualized solution: it abolished LWOP for nearly all juvenile homicide defendants,

¹¹³ See *Graham*, 560 US at 68, quoting *Roper*, 543 US at 573 (noting that differentiating between redeemable and irredeemable juveniles is difficult even for expert psychologists).

¹¹⁴ Perry L. Moriearty, *The Trilogy and Beyond*, 62 SD L Rev 539, 558 (2017).

¹¹⁵ See *Roper*, 543 US at 572 (“[I]t is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction . . . for a young person.”).

¹¹⁶ See *Graham*, 560 US at 69 (arguing that defendants who do not murder are categorically less culpable and that nonhomicide crimes are not as morally depraved).

but it provided sentencing courts with the option of LWOP for the rare juvenile defendants deemed irredeemable.¹¹⁷ Tenuous at best, this haphazard solution has opened the door for courts to make incomplete determinations when deeming such defendants irredeemable without the requisite and robust deliberations that *Miller* requires. The Arizona sentencing court's errors in *Tatum* exemplify this problem, and their conclusions are at least somewhat more reasonable in light of the bind that they face.

The third logical extension of *Miller* and *Montgomery* is that a determination about a juvenile's redeemability must be made *both* at sentencing *and* in front of a parole board, years after sentencing, because a definitive ex ante determination of irredeemability is categorically impossible.¹¹⁸ *Miller* commands courts to conduct an individualized hearing to determine a juvenile homicide defendant's relative redeemability prior to sentencing. But because sifting through the juvenile mind is nearly impossible at sentencing, a court is effectively making its best guess as to whether the defendant is irredeemable. An LWOP sentence that denies a "juvenile offender a chance to demonstrate growth and maturity" based on a guess of irredeemability simply cannot be sustained, "lest the Eighth Amendment's rule against disproportionate sentences be a nullity."¹¹⁹ As the Iowa Supreme Court aptly put it, only "after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available" can a judicial body effectively decide if the offender is irreparably corrupt.¹²⁰

Miller defendants sentenced to LWOP at minimum deserve the same ex post parole hearing *Graham* defendants receive, even though the technical contours of that hearing will be different for both sets of defendants. For the *Graham* defendant, a parole hearing will fulfill her constitutional right to a meaningful opportunity to obtain release. For the *Miller* defendant, however, that hearing will serve as an opportunity to rebut the sentencing court's initial best guess as wrong—that through her time served, she has proven she is in fact redeemed. Denying a juvenile defendant an opportunity to revisit that initial guess and thereby

¹¹⁷ *Miller*, 567 US at 479 (emphasizing that LWOP for juveniles should be extremely rare).

¹¹⁸ For a thorough analysis on why this determination is indeed impossible ex ante, see generally Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 Colum L Rev (forthcoming 2019), archived at <http://perma.cc/67FR-V98T>.

¹¹⁹ *Graham*, 560 US at 72, 73.

¹²⁰ See *Sweet*, 879 NW2d at 839.

sentencing a redeemable juvenile to die in prison would, under the Eighth Amendment, be cruel and unusual.

C. The Meaning of “Meaningful Opportunity to Obtain Release”

Having established that neither *de facto* nor discretionary LWOP can survive under *Graham* and its progeny, this Comment now turns to the question of *when* a juvenile defendant must be released. That is, what is the maximum sentence that would satisfy the “meaningful opportunity to obtain release” standard? And what procedural safeguards are required? Despite the Court’s conviction in its holding, neither *Graham* nor *Miller* explicitly defined the contours of a “meaningful opportunity.” To shed further light on this issue, this Comment illustrates why *Graham* and *Miller* entitle juvenile defendants to a parole hearing. But this Part argues that their collective mandate requires more: a constitutional right to a *timely* parole hearing. *Graham* recognized that “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope,” and that redeemable juveniles should not “be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth.”¹²¹ Geriatric releases¹²² and *de facto* LWOP sentences run afoul of these principles because they prevent juveniles from realizing the hope that *Graham* promises.

Reading *Graham*’s precise mandate—a “meaningful opportunity to obtain release”—under its plain language might lead to the conclusion that redeemable juveniles are entitled only to a meaningful *opportunity* to obtain release, rather than an *actual* release. But the rigidity of statutory interpretation is a poor fit for the Supreme Court’s principled approach. Reading this mandate in the context of the rest of the Court’s language suggests that if release is appropriate, then the actual release must be meaningful.

Consider an example: If Bassett were to be released on his seventieth birthday after serving fifty-four years in prison, he would have been incarcerated for longer than most parole-eligible

¹²¹ *Graham*, 560 US at 79.

¹²² Geriatric releases are those close to or immediately preceding a defendant’s life expectancy.

adult homicide offenders.¹²³ Moreover, that release would come far past the date Bassett could realistically start a family and deny him a meaningful “chance for reconciliation with society [or] hope.”¹²⁴ Depending on his actual life expectancy,¹²⁵ Bassett might even be released with only a few years to live, rendering his sentence essentially tantamount to de facto LWOP. Either result would directly contradict *Graham*’s requirement that a redeemable juvenile defendant not “remain in prison *for the rest of his days*.”¹²⁶ Considering Bassett is already well on his way to “achiev[ing] maturity of judgment and self-recognition of human worth and potential,”¹²⁷ any sentence in which he spends nearly all of his life behind bars—explicit LWOP, de facto LWOP, or geriatric release—leaves him without the hope *Graham* promises.

This Comment thus supports a broader interpretation of *Graham* for the same reasons it concludes de facto and discretionary LWOP are unconstitutional sentences for juvenile defendants. An overly literal reading of the Court’s opinion would render the Court’s second underlying principle—juveniles and adults are constitutionally different for sentencing purposes—a distinction without a difference.¹²⁸

Scholarship has also tended to construe a “meaningful opportunity to obtain release” as entitling redeemable juveniles to a *realistic* chance to be released *within their respective life expectancies*.¹²⁹ As Professor Sarah French Russell notes, a geriatric release does not achieve *Graham*’s promise of hope because “[s]uch a sentence means being incarcerated past the typical childbearing

¹²³ See Nazgol Ghandnoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences* *10–11 (The Sentencing Project, Jan 31, 2017), archived at <http://perma.cc/R68X-4KSY>.

¹²⁴ *Graham*, 560 US at 79.

¹²⁵ Incarceration will also likely decrease Bassett’s life expectancy. For a further discussion of this issue, see Part III.B. For a breakdown of life expectancy by race and gender, see generally National Center for Health Statistics, *Life Expectancy at Birth, by Sex, Race, and Hispanic Origin: United States, 2006–2016* (2017), archived at <http://perma.cc/WB46-MBSR>.

¹²⁶ *Graham*, 560 US at 70 (emphasis added and quotation marks omitted), citing *Naovarath v State*, 779 P2d 944, 945 (Nev 1989).

¹²⁷ *Graham*, 560 US at 79.

¹²⁸ See Part I.B for a further discussion of how the *Graham* Court separates juvenile and adult defendants for sentencing purposes.

¹²⁹ See, for example, Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind L J 373, 406–19 (2014); Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 Fed Sent Rptr (Vera) 75, 75–77 (2010); Hoesterey, 45 Fordham Urban L J at 179 (cited in note 75) (“[G]eriatric release . . . cannot be considered a meaningful opportunity.”).

age [and] past the timeframe in which one could start a meaningful career.”¹³⁰ Moreover, Russell contends a necessary component of this mandate is that a juvenile defendant’s opportunity for release be genuine. Courts must guarantee redeemable juvenile defendants not only parole eligibility, but also a parole hearing with a real chance to be heard and a strong presumption of release.¹³¹ Indeed, if parole boards denied parole for 95 percent of juvenile lifers, such an opportunity would be *meaningless*.

This Comment thus embraces Russell’s premise: because de facto and discretionary LWOP for juveniles are unconstitutional, *Graham* and *Miller* entitle all juvenile defendants to a parole hearing with the presumption that the defendant receive a timely, nongeriatric release. A guaranteed parole hearing for juvenile defendants with the presumption of release provides juveniles a much stronger “chance for fulfillment outside prison walls.”¹³² A weaker formulation of the mandate would be inconsistent with the underlying goals of *Graham* and *Miller*. Bassett’s tale of heartbreak and redemption illustrates that even those juvenile offenders who committed the most egregious crimes are redeemable. Bassett’s case also shows that, despite achieving redemption, juvenile offenders can still be capriciously denied a parole hearing.

Pursuant to the Court’s interpretation of the Eighth Amendment, denying that opportunity to a redeemable juvenile offender would otherwise be unconstitutional. Thus, the only question left unanswered is: *When* is the latest date that hearing must take place?

III. THE INEVITABLE QUANDARY: WHAT IS THE CONSTITUTIONAL CEILING TO A JUVENILE’S SENTENCE BEFORE SHE IS ENTITLED TO A PAROLE HEARING?

Having addressed the questions of de facto LWOP, discretionary LWOP, and “meaningful opportunity to obtain release,” Part II established that all juvenile defendants are constitutionally entitled to a timely parole hearing with the presumption of release. Part III confronts this Comment’s principal question:

¹³⁰ Russell, 89 Ind L J at 406–19 (cited in note 129) (arguing that parole eligibility is insufficient because it does not guarantee an actual hearing with sufficient procedural safeguards and a presumption of release).

¹³¹ See *id.* at 412–28.

¹³² *Graham*, 560 US at 79.

What is the maximum number of years that a redeemable juvenile defendant must serve before the government must provide her a parole hearing? Because the antecedent questions this Comment has already addressed remain so contentious among states, and for some states statutory maximums already prescribe the number of years before parole eligibility, the “when” question has not yet been extensively broached by courts. However, the Third and Eleventh Circuits have staked out positions on the question of how sentencing courts ought to determine what a meaningful opportunity to obtain release actually means.

This Part evaluates both approaches. Part III.A first explains the Third and Eleventh Circuit positions on the contours of *Graham*’s mandate. Part III.B then concludes that only the categorical approach sufficiently protects redeemable juveniles from the dangers of LWOP. Part IV ultimately offers an alternative approach based on the Court’s categorical analysis.

A. The Third and Eleventh Circuit Approaches

The Eleventh Circuit in *Mathurin* upheld a fifty-seven year sentence for a *Graham* defendant.¹³³ Though it recognized the split among courts regarding the de facto LWOP question, for the purposes of Mathurin’s arguments, the court assumed that de facto LWOP was unconstitutional under *Graham*.¹³⁴ The court then considered Mathurin’s argument “that a term-of-years sentence that might not effectively constitute a life sentence for a young white or Hispanic defendant could become a life sentence for a young black defendant” because, pursuant to actuarial tables that consider race in estimating life expectancy, black men tend to live shorter lives.¹³⁵ *Mathurin* rejected a sentencing approach that accounted for race, instead holding that such an approach would disadvantage those ethnic groups with longer life expectancies.¹³⁶ *Mathurin* first found that apart from the constitutional problems implicated by determining a defendant’s sentence based partly on their race, such a policy would mean defendants from longer-living ethnic groups would thereby receive longer sentences.¹³⁷ Second, the court noted that because

¹³³ *Mathurin*, 868 F3d at 935–36.

¹³⁴ *Id.* at 932.

¹³⁵ *Id.*

¹³⁶ *Id.* at 932–35.

¹³⁷ *Mathurin*, 868 F3d at 932.

actuarial tables account for “social, economic, medical, and cultural factors,” this approach would fail to account for how incarceration itself would impact those factors.¹³⁸

A pivotal factor for the *Mathurin* court was also that a defendant could reduce the length of her sentence by earning good-time credit, affording her, in the court’s view, the type of meaningful opportunity to obtain release that *Graham* requires.¹³⁹ Because the court believed that “it is totally within [a] [d]efendant’s own power to shorten the sentence imposed,” *Mathurin* held that good-time credit created a sufficient *possibility* for the defendant to meaningfully obtain release by allowing the defendant to reduce his time served.¹⁴⁰

The Third Circuit in *Grant* crafted a different approach. The *Grant* court reviewed the sentence of a juvenile defendant who effectively faced sixty-five years in prison before parole, amounting to a release at age seventy-two, which he purported to be the same age as his life expectancy.¹⁴¹ Embracing the principles of *Graham*, *Miller*, and *Montgomery*, *Grant* held de facto LWOP to be unconstitutional under the Eighth Amendment.¹⁴² But *Grant* did not end there. The court asserted that to effectuate the Supreme Court’s mandate—to provide for the “fulfillment” and “hope” guaranteed to redeemable juvenile defendants under *Graham* and *Miller*—a sentencing judge cannot simply release a prisoner before death.¹⁴³ Instead, juvenile offenders must be provided an “opportunity to meaningfully reenter society upon their release.”¹⁴⁴

Grant determined that this requires lower courts to consider at least two factors in sentencing. First, *Grant* held that courts must consider *individualized* life expectancy, rather than actuarial tables, in order to avoid replicating baked-in racial and gender disparities.¹⁴⁵ Second, “lower courts must consider the *age of retirement* as a sentencing factor, in addition to life expectancy

¹³⁸ *Id.* at 932–33 (noting that incarceration might actually increase the life expectancy of those who hail from disadvantaged backgrounds). This Comment, however, finds this contention dubious at best. See notes 159–161.

¹³⁹ *Mathurin*, 868 F3d at 934–35.

¹⁴⁰ *Id.* at 935.

¹⁴¹ *Grant*, 887 F3d at 137.

¹⁴² *Id.* at 142.

¹⁴³ *Id.* at 148.

¹⁴⁴ *Id.*

¹⁴⁵ *Grant*, 887 F3d at 149 (“[W]e hold that a sentencing judge must conduct an individualized evidentiary hearing to determine . . . life expectancy.”).

and the § 3553(a) factors, when sentencing juvenile offenders.”¹⁴⁶ The court derived this second factor by asking what it considered the ultimate question presented by the problem of de facto LWOP sentences: “[A]t what age is one still able to meaningfully reenter society after release from prison?”¹⁴⁷ Recognizing that such line-drawing is fraught, the court identified the age of retirement as a “widely acknowledged . . . earned inflection point in one’s life, marking the [] end of a career that contributed to society.”¹⁴⁸ *Grant* thus held that the Court’s juvenile sentencing decisions compel judges to consider the age of retirement in setting a redeemable juvenile defendant’s sentence.¹⁴⁹ In the absence of any “widely accepted studies [that would] support [] precise line drawing,” the court instead elected to adopt a “rebuttable presumption that a [redeemable] juvenile offender should be afforded an opportunity for release before the national age of retirement.”¹⁵⁰

In sum, *Grant* and *Mathurin* both support a sentencing approach that rejects the use of actuarial tables, but both have key methodological differences. While *Grant* calls for sentencing courts to conduct an individualized sentencing hearing and consider the age of retirement as a sentencing factor, *Mathurin* upheld an approach that uses a generic life expectancy calculation, which excludes race, and factors in the potential for good-time credit. But, as the next Section addresses, this Comment rejects both approaches because they do not *guarantee* the hope that *Graham* and *Miller* promise juvenile defendants.

B. Circumvention and the Categorical Analysis: Why
Mathurin’s and *Grant’s* Approaches Do Not Safeguard
Juvenile Defendants

Mathurin and *Grant* broke new ground in their analyses of the Court’s precedents. They evaluate juvenile sentencing in a world in which de facto LWOP is unconstitutional and actively consider what a meaningful opportunity to obtain release means in the context of lengthy sentences. But both courts ultimately miss the mark.

¹⁴⁶ *Id.* at 151, citing 18 USC § 3553(a).

¹⁴⁷ *Grant*, 887 F3d at 150.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 150–52.

¹⁵⁰ *Id.* at 150, 152.

In offering a one-size-fits-all life expectancy framework, *Mathurin* provides for some individualization and judicial discretion while allowing for clearer benchmarks for judges and avoiding the constitutional problems plaguing race-based sentencing schemes. In addition, because juvenile defendants can always earn good-time credit, they are in theory granted several meaningful opportunities for release across their sentence.

However, *Mathurin* does not effectuate the principles of the Court's juvenile sentencing jurisprudence. Failing to account for race and socioeconomic factors in sentencing would imperil a defendant with a lower-than-average life expectancy, such as black men.¹⁵¹ Just as those juvenile defendants with longer life expectancies should not be punished with longer sentences, juvenile defendants with shorter life expectancies should not be forced to live out their remaining years in prison.¹⁵² Furthermore, the court's reliance on good-time credit would not provide for an effective solution because it assumes that the defendant is the only driver of her ability to receive that credit. A constitutional right to a parole hearing for juvenile defendants with the presumption of release corrects that deficit because it shifts the burden away from the defendant to affirmatively prove she has rehabilitated. As Basset's case highlights, even a juvenile defendant who completely turns her life around can still face institutional barriers that prevent her from securing parole.¹⁵³ Moreover, this approach would not be a suitable nationwide solution because of varying good-time credit policies across jurisdictions.¹⁵⁴ For instance, in California, a defendant can reduce up to 83 percent of her sentence through the state's good-time credit policy.¹⁵⁵ In contrast, in

¹⁵¹ See *Mathurin*, 868 F3d at 932.

¹⁵² This Comment agrees with *Mathurin's* concern that sentencing factors with baked-in racial biases are constitutionally suspect. But *Mathurin's* approach is also not race-neutral because it punishes defendants who are of races with lower life expectancies by not guaranteeing them earlier parole hearings. That is why this Comment's solution strives to protect those with lower life expectancies without hurting those who live longer on average through race-neutral means. See Part IV for further discussion.

¹⁵³ Prisoners' actual receipt of good-time credit is also subject to the whims of prison administrators, a point with which *Mathurin* fails to grapple.

¹⁵⁴ Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies* *9 (National Conference of State Legislatures, June 2015), archived at <http://perma.cc/2UH7-9EY9> ("State laws vary considerably in the amount of credits that can be earned."). See also, for example, *Earned and Good Time Policies: Comparing Maximum Reductions Available* (Prison Fellowship, Mar 2018), archived at <http://perma.cc/KB34-JG5J>.

¹⁵⁵ See *Earned and Good Time Policies* at *1 (cited in note 154).

Iowa an inmate can only reduce up to 16.5 percent of her sentence.¹⁵⁶ States like Missouri, Louisiana, and Pennsylvania have no good-time credit policies at all.¹⁵⁷

Unlike *Mathurin*, *Grant* attempts to solve the shortcomings of *Graham* and *Miller* by creating an individualized framework for sentencing judges. *Grant* recognizes the constitutional, ethical, and practical concerns of both employing life expectancies based on actuarial tables and establishing a precise cutoff point. Moreover, this framework creates a presumption that juvenile defendants can leave prison with an opportunity to live life and contribute to society. It recognizes that a release close to the age of death is not actually a meaningful opportunity to obtain release. Sentencing judges must at least maneuver around this presumption to craft longer sentences for juvenile defendants.

But *Grant* too deviates from the Court's juvenile sentencing jurisprudence because it prescribes a case-by-case determination of juvenile sentences, which will deny some juveniles the chance to fully and meaningfully reenter and contribute to society. The Supreme Court departed from its longstanding precedent of reserving the categorical analysis for death penalty cases in *Graham* because of the fear that redeemable juveniles would nonetheless be sentenced to LWOP. The *Grant* approach fails to redress that fear. A sentencing judge could sentence an otherwise redeemable juvenile past the age of sixty-five because the retirement age is merely a factor.¹⁵⁸

Even if a sentencing judge adheres to *Graham*'s mandate, she could nonetheless be sentencing a juvenile defendant to a geriatric release because of the impact incarceration has on life expectancy. For every year in prison, a prisoner on average loses two years of her life expectancy.¹⁵⁹ If the median life expectancy is 78.6,¹⁶⁰ a bright line of age sixty-five would mean forty-eight years in prison for a seventeen-year-old defendant. This suggests that a seventeen-year-old would lose around twenty-four years of her life—placing her life expectancy around the mid-to-late fifties.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See Hoesterey, 45 *Fordham Urban L J* at 186–87 (cited in note 75), citing *Graham*, 560 US at 77–79.

¹⁵⁹ See Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 *Am J Pub Health* 523, 526 (2013).

¹⁶⁰ Kenneth D. Kochanek, et al, *Mortality in the United States, 2016* (National Center for Health Statistics, Dec 2017), archived at <http://perma.cc/E8KS-LUDJ>.

Even a more conservative estimate would likely fail to provide a meaningful opportunity for release but rather a geriatric one.¹⁶¹

A meaningful solution must account for individual variances in life expectancy while cabining sentencing discretion, ensuring only those juveniles who are truly irredeemable remain in prison for life. Furthermore, a solution must ensure that juvenile defendants receive the same opportunities for parole eligibility as their similarly situated adult defendant counterparts. Because *Grant* and *Mathurin* fail to afford all juvenile defendants those guarantees, they do not rise up to this Comment's clarification of the *Graham* mandate. Only a solution that creates a uniform sentencing practice across all jurisdictions can provide the requisite bright-line rule.

IV. THE CATEGORICAL ANALYSIS: A "DISCERNIBLE END POINT" TO THE PAROLE-ELIGIBILITY PROBLEM FOR JUVENILE DEFENDANTS

Ultimately, the answer to the "when" question lies with the Court's decision in *Roper* and *Graham*: the Eighth Amendment categorical analysis. As discussed in Part I.A, the Court's shift from the case-by-case approach to the categorical analysis for juveniles in *Roper* and *Graham* suggests the Court strongly prefers crafting uniform rules for juvenile defendants as opposed to handling individual sentences on a case-by-case basis, whenever possible. The difficulty in separating redeemable and irredeemable juveniles for courts underlies this presumption. The Court has restricted LWOP as a sentencing practice for juvenile defendants to protect the redeemable from spending the rest of their lives behind bars.

This Comment thus argues that the categorical analysis should be applied to determine the maximum number of years a juvenile defendant can receive before being entitled to a parole hearing. As opposed to a case-by-case determination of an individual's life expectancy, the categorical analysis would set a

¹⁶¹ See, for example, William Alex Pridemore, *The Mortality Penalty of Incarceration: Evidence from a Population-Based Case-Control Study of Working-Age Males*, 55 *J Health & Soc Behav* 215, 221 (2014) (noting that those incarcerated men were more than twice as likely to die a premature death).

benchmark that would apply to all juvenile defendants across all states.¹⁶²

As Part I.A explains, when deciding to create categorical rules under the Eighth Amendment, the Court considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to estimate national consensus.¹⁶³ The Court also considers its own interpretation of the Eighth Amendment, which includes (but is not limited to) controlling precedents, social science research, and the text and history of the Eighth Amendment.¹⁶⁴ With respect to “objective indicia,” Part IV.A looks to state legislative enactments and data estimating the average number of years before a defendant is paroled and argues that the national consensus on the maximum number of years before parole eligibility is twenty-six years. To fulfill the second part of the categorical analysis, Part IV.B follows in *Graham*’s footsteps: it looks to social science studies and analyzes the penological justifications for establishing twenty-six years as the categorical rule.

A. Objective Indicia: Estimating National Consensus

Estimating national consensus on a maximum number of years before parole eligibility for juveniles is a difficult endeavor. Not all states mandate that juveniles are entitled to a parole hearing, meaning that judges can nonetheless impose discretionary or de facto LWOP. Moreover, when it comes to actual state practice, not all states have produced sentencing and parole data specifically for defendants who were incarcerated as juveniles.

Crafting a perfectly representative bright-line rule based solely on existing juvenile sentencing data and state sentencing practices may be impossible, but it does not follow that no constitutional line should be drawn at all. *Graham* indicated that national consensus can be estimated by *both* legislative enactments *and* actual sentencing practices. Because a combination of legislative enactments and state sentencing patterns is the best measure in the absence of available data solely of the former or the latter across states, this Part follows a combined approach: a model that incorporates states with built-in statutory maximums

¹⁶² Of course, states could continue to maintain statutory maximums lower than the national maximum. They simply could not maintain a statutory maximum above the constitutional maximum.

¹⁶³ *Roper*, 543 US at 563.

¹⁶⁴ See *Kennedy v Louisiana*, 554 US 407, 421 (2008).

for juvenile defendants and states that have sufficient data showing average length of sentences (ALOS) for all parole-eligible defendants with murder convictions.

1. Methodology.

This Section first looks to the fifteen states that have statutory schemes that impose parole eligibility after a certain time period because those statutory enactments represent the maximum number of years a juvenile defendant can be sentenced to prison before becoming parole eligible in those states. Most of these legislative enactments came as a direct response to the Court's *Graham* line of cases and represent what each state believes to be the upper bound of a proportional sentence for a juvenile defendant.

Unfortunately, not all those states that still permit discretionary LWOP have produced sentencing and parole data for their juvenile lifers. As a result, this Section looks to the average time served for all parole-eligible defendants—both adult and juvenile at the time of their offense—convicted of murder since 2000.¹⁶⁵ Using the raw data collected by Nazgol Ghandnoosh in *Delaying a Second Chance*, a weighted average for each state was calculated by ensuring that each year's parole data was proportional to the number of defendants released that year.¹⁶⁶

In the absence of data showing the average parole-eligibility date for defendants convicted of crimes as juveniles, data showing ALOS for all defendants with murder convictions comfortably establishes the *absolute maximum* amount of time the state can sentence juvenile defendants before granting them a parole hearing.¹⁶⁷ This Comment establishes a constitutional ceiling in its methodology by only incorporating additional data that would skew the maximum *higher* than the true national average. After all, juvenile defendants ought to be minimally entitled to the rights of their similarly situated adult counterparts.

¹⁶⁵ This Comment uses the year 2000 because of available data. See generally Ghandnoosh, *Delaying a Second Chance* (cited in note 123).

¹⁶⁶ For instance, if State X's average for 2010 was 25 years served for 10 defendants, and its average for 2011 was 26 years served for 20 defendants, State X's weighted average across both years would be 25.67.

¹⁶⁷ Even juvenile defendants convicted of especially heinous homicides and preemptively sentenced to LWOP deserve an ex post redeemability assessment. Bassett provides a prime example of how such juveniles can turn their lives around during incarceration. See notes 1–5 and accompanying text. After all, a parole hearing does not guarantee release; it simply provides a meaningful opportunity for one.

In calculating this average, each state's data was treated equally and not based on its proportional number of defendants.¹⁶⁸ There are, naturally, methodological objections to this Comment's approach. For instance, it overrepresents states with smaller juvenile defendant populations by treating states like Montana and California equally. Additionally, one might wonder why the state with the highest parole average or statutory maximum should not set the "maximum" for the country. But those methods are not aligned with the Court's approach. As discussed in Part I.A, the goal of the objective indicia analysis is to estimate the trends and practices across jurisdictions while still treating individual states as discrete data points.¹⁶⁹ A nationally weighted analysis would not adhere to the Court's methodology because it would overrepresent states with larger juvenile defendant populations like California. Conversely, an approach that picked the state with the highest average or statutory maximum would overrepresent states with lower juvenile defendant populations like Montana. Both California and Montana are thus sufficiently accounted for by treating all states equally in the analysis.

No methodology is perfect, particularly when existing data is incomplete. Consequently, this Comment's methodology, in using indicia across jurisdictions, seeks to incorporate states' practices regardless of their populations while remaining faithful to the Court's categorical analysis framework. Given that juvenile defendants are serving life sentences across the country,¹⁷⁰ this analysis treats all states the same.

Moreover, this Comment's proposed rule is represented by the same type of data the Court has relied on in its categorical analysis jurisprudence: legislative enactments and sentencing practices. Relying solely on legislative enactments would render the analysis incomplete because it would only account for the fifteen jurisdictions that have statutory maximums. An approach that relies only on actual state practice—ALOS for all parole-eligible convicted murderers—would not adjust for those

¹⁶⁸ In cases involving a sentencing practice that is permitted but rarely used, such as *Graham*, the Court does consider the total number of sentences nationwide. However, that approach is impractical in measuring the constitutional maximum for juvenile defendants because the analysis seeks to identify an average across jurisdictions as opposed to a specific number of defendants.

¹⁶⁹ For instance, in *Atkins v Virginia*, the Court, considering a categorical challenge to the use of the death penalty against the mentally ill, treated each state equally for its objective analysis of state practice. 536 US 304, 314–17 (2002).

¹⁷⁰ See Nellis, *Still Life* at *16 (cited in note 11).

legislatures that have created legislative maximums personalized for juvenile defendants. By combining data that accounts for both legislative enactments and state practice, this Comment's methodological approach more accurately forecasts national consensus. Additionally, the inclusion of ALOS data for paroled adult defendants with murder convictions, to the extent that it presents error, only skews the nationwide maximum upwards. Though this Comment's proffered limit might extend the sentences of those like Bassett by a year or two if sentencing courts chose not to depart downwards from the constitutional maximum, the alternative is simply *no rule at all*: the perpetuation of discretionary LWOP sentences for otherwise redeemable juvenile defendants.

Because the goal of incorporating ALOS data is to more accurately reflect state practice, this Comment only includes states that have sufficiently representative data. Specifically, this analysis includes only thirty-one states. The states that were excluded (1) permit discretionary LWOP, (2) do not have a statutorily required parole-eligibility term, and (3) did not have ALOS data for parole-eligible convicted murderers after 2000 *or* had fewer than two offenders released off parole.¹⁷¹

Even though some states are excluded from this analysis, not all states are required to establish a national consensus. "Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime,"¹⁷² the fact that fifteen states have instituted sentencing maximums for juvenile defendants¹⁷³ indicates a consensus toward the type of rule this Comment calls for below.¹⁷⁴

¹⁷¹ For a fifty-state survey of juvenile sentencing practices, along with references to specific state statutes, see Kallee Spooner and Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 Va J Crim L 130, 145–55 (2017).

¹⁷² *Atkins*, 536 US at 315.

¹⁷³ See the Appendix for a list of the states with statutory maximums for sentencing juvenile defendants.

¹⁷⁴ The *Atkins* Court, which established a categorical rule that prohibited the use of the death penalty for the mentally ill, found the fact that "a significant number" of states had adopted legislation repealing that same sentencing practice to be a significant factor weighing in favor of establishing the rule. *Atkins*, 536 US at 315–16. This Comment uses ALOS data and state statutory schemes to similarly illustrate what it believes to be the national maximum in the parole-hearing context, drawing its line in a manner that only makes the ceiling higher for states and their juvenile defendants. Moreover, even if ALOS is increasing for adult defendants, juvenile defendants remain constitutionally distinct for sentencing purposes and still deserve an ex post redeemability assessment. Considering that available parole data is limited, and not all states have specifically responded to *Miller* and *Graham* by creating statutory maximums themselves, this Comment makes the best use of available information.

2. Data, results, and the proposed bright-line rule.

This Comment uses Professors Kallee Spooner and Michael S. Vaughn's fifty-state survey¹⁷⁵ to analyze states' statutory schemes for sentencing juvenile defendants.¹⁷⁶ States have taken varying approaches, but those that have explicitly created some form of sentencing regime fall into four general categories.¹⁷⁷ First, several states have clear-cut statutory maximums for sentencing juvenile defendants.¹⁷⁸ The second group of states have sentencing schemes with different maximums based on the nature of the juvenile defendant's offense. These include Arkansas, California, Connecticut, and Massachusetts. The third category of states, which includes Delaware, the District of Columbia, and Florida, offer juvenile defendants some form of judicial review after their initial sentence. Because this form of review effectively serves the same function as the type of ex post redeemability assessment that this Comment calls for, these states are included in the analysis as statutory maximum states. The fourth category of states generally have statutory maximums for juvenile defendants, but have very small, infrequently invoked exceptions. These states are included because their statutory exceptions for LWOP are so narrow such that they apply to an extremely small category of juvenile defendants. These states include New Jersey,¹⁷⁹ New York,¹⁸⁰ and Nevada.¹⁸¹

¹⁷⁵ See generally Spooner and Vaughn, 5 Va J Crim L 130 (cited in note 171).

¹⁷⁶ See the Appendix.

¹⁷⁷ All of these states are denoted as "statutory maximum" states in the Appendix.

¹⁷⁸ Oregon is an example of such a state.

¹⁷⁹ The maximum sentence a juvenile defendant can receive is thirty years, except when a victim is under eighteen and the victim was killed during the commission of a sex crime. NJ Rev Stat § 2C:11-3 (1)(b). However, it does not appear that any juvenile defendant in New Jersey is serving an LWOP sentence under this limited exception. See *Juvenile Life without Parole Sentences in the United States* *11 (Juvenile Sentencing Project, June 2017), archived at <http://perma.cc/YMH9-D7U6>.

¹⁸⁰ New York follows an indeterminate sentencing system whereby the maximum sentence for juvenile homicide offenders is life imprisonment and the minimum is fifteen years. But since parole remains an option for juveniles, they become parole eligible after serving the minimum sentence. See NY Penal Law § 70.05. Although technically juvenile defendants can receive LWOP for committing terrorism under NY Penal Law § 490.25, no juvenile defendant has been charged for terrorism in New York. *Juvenile Life without Parole Sentences in the United States* at *11 (cited in note 179). See also Spooner and Vaughn, 5 Va J Crim L at 149 (cited in note 171).

¹⁸¹ The maximum punishment any juvenile defendant can receive in Nevada is LWP. Nev Rev Stat § 176.025. The maximum sentence a *Graham* defendant can receive is fifteen years before parole eligibility, and the maximum sentence a *Miller* defendant who has killed one victim can receive is twenty years before parole eligibility. Nevada retains a longer sentence option, up to LWP, for when *Miller* defendants have multiple victims.

For states that either allow for discretionary LWOP or allow for de facto LWOP by not specifying a statutory maximum, this Comment turned to available ALOS data.¹⁸² Some of these states are excluded from this analysis;¹⁸³ those states are denoted as “N/A” in the Appendix.¹⁸⁴

By averaging of this data set, encompassing states that have either minimum required ages for parole eligibility or ALOS for homicide offenders, rounded up, this Comment proposes that the maximum sentence that a juvenile offender may serve before a parole hearing is *twenty-six years*.¹⁸⁵ For example, for a juvenile sentenced to LWP when she turns seventeen, a sentencing court would have to guarantee that she receives a parole hearing on or before her forty-third birthday.¹⁸⁶ This is relatively in line with a recent study in California, which has the highest juvenile lifer population in the country,¹⁸⁷ that found that the average age juvenile lifers were *released* from prison was 40.7.¹⁸⁸

* * *

Creating a constitutional ceiling using parole data and statutory maximums, this Comment’s proposed bright-line rule would be novel within the Court’s Eighth Amendment and juvenile sentencing jurisprudence.¹⁸⁹ But it would not be unprecedented under the Court’s jurisprudence writ large. The Court has employed a similar rule-setting approach when it is impractical to leave doctrinal ambiguity for case-by-case resolution.

Nev Rev Stat § 213.12135. See also Spooner and Vaughn, 5 Va J Crim L at 149 (cited in note 171).

¹⁸² See the Appendix for a list of these states and their respective relevant state codes.

¹⁸³ See note 171 and accompanying text.

¹⁸⁴ To see states not included in the Appendix and their relevant statutory provisions, see Spooner and Vaughn, 5 Va J Crim L at 145–55 (cited in note 171).

¹⁸⁵ The exact figure, rounded to the nearest tenth, is 25.6. However, this Comment uses twenty-six to create a clean categorical rule and equip sentencing courts and parole boards with a more flexible upper bound.

¹⁸⁶ States can continue having statutory maximums underneath the constitutional ceiling this Comment calls for. However, this Comment’s proposed rule would render unconstitutional any state statute with a statutory maximum above twenty-six years.

¹⁸⁷ Nellis, *Still Life* at *16 (cited in note 11).

¹⁸⁸ Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California’s New Youth Offender Parole Hearings*, 40 NYU Rev L & Soc Change 245, 274 (2016).

¹⁸⁹ That is, though the Court crafts bright-line prohibitions in the Eighth Amendment context through the categorical analysis, like in *Graham*, it has not yet crafted a numerical bright-line rule like the one this Comment proposes.

For instance, the Court has also relied on crafting a numerical bright-line rule as a method of resolving the conflict between the Fifth Amendment's Due Process Clause¹⁹⁰ and an interpretation of an immigration statute. In *Zadvydas v Davis*,¹⁹¹ the Court confronted the question whether the Attorney General could indefinitely detain an undocumented immigrant who a court has determined to be unlawfully in the United States.¹⁹² When a court has ordered an undocumented immigrant to be removed, the law requires the Attorney General to remove her within a period of ninety days.¹⁹³ If the Attorney General is unable to remove the undocumented immigrant within ninety days, the statute allows the Attorney General to, if certain conditions are met, detain her "beyond the removal period," but it does not specify how long that removal period could last.¹⁹⁴ The Court ultimately concluded that indefinite detention under § 1231(a)(6) violated the Fifth Amendment's Due Process Clause.¹⁹⁵ But the Court then had to face the question of *how long* an unlawful immigrant could be detained. Believing it to be "practically necessary to recognize some presumptively reasonable period of detention," and "for the sake of *uniform administration in the federal courts*," the Court crafted a bright-line rule of six months.¹⁹⁶ The Court found six months to be appropriate simply because it had some evidence that "Congress previously doubted the constitutionality of detention for more than six months."¹⁹⁷

In *Edwards v Arizona*¹⁹⁸ and in *Maryland v Shatzer*,¹⁹⁹ the Court, like its juvenile sentencing jurisprudence, grappled with a Sixth Amendment problem of its own making. The *Edwards* Court interpreted the Sixth Amendment²⁰⁰ to mandate that after a suspect invokes her right to counsel, any subsequent waiver of

¹⁹⁰ US Const Amend V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

¹⁹¹ 533 US 678 (2001).

¹⁹² *Id.* at 682.

¹⁹³ 8 USC § 1231(a)(1)(A).

¹⁹⁴ 8 USC § 1231(a)(6).

¹⁹⁵ *Zadvydas*, 533 US at 689–90.

¹⁹⁶ *Id.* at 701 (emphasis added).

¹⁹⁷ *Id.*

¹⁹⁸ 451 US 477 (1981).

¹⁹⁹ 559 US 98 (2010).

²⁰⁰ US Const Amend VI ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.").

that right under police interrogation is presumed involuntary.²⁰¹ The *Shatzer* Court then faced the natural next question of when that presumption of involuntariness would lapse.²⁰² It concluded that the presumption ends after fourteen days, upon which police officers can resume interrogation of the suspect.²⁰³ *Shatzer* recognized that leaving the question unresolved would be impractical for police officers seeking to eventually restart interrogation with a suspect who invoked her right to counsel, particularly because a case-by-case determination would create inconsistent standards across jurisdictions.²⁰⁴

The Court's juvenile sentencing jurisprudence has created a similar problem in the Eighth Amendment setting: the lack of a bright-line rule has allowed sentencing courts to impose de facto life sentences on nonhomicide juvenile defendants and LWOP on redeemable homicide defendants. Like police officers handling the involuntariness presumption in the Sixth Amendment context, and like federal courts managing unlawful detention cases prior to *Zadvydas*, sentencing courts are left to parse the mandates of *Graham* and *Miller* without clear direction. As discussed in Part III.A, *Grant's* and *Mathurin's* approaches to enforce *Graham's* mandate will result in outcomes in which defendants receive parole hearings past their estimated life expectancies—or are barred from parole eligibility altogether. A bright-line rule avoids that problem and guides sentencing courts in making their respective determinations. This Comment's proposed rule of twenty-six years is also congruent with *Shatzer*, when the Court concluded that fourteen days was enough time for a suspect to “consult with friends and counsel.”²⁰⁵ It grounds itself in the type of objective evidence the Court routinely employs in the categorical analysis. Moreover, both *Zadvydas* and this Comment's proposed bright-line rule provide peace of mind to those detained or imprisoned while ensuring consistent administration across courts.

Perhaps, however, the strongest rationale for employing a bright-line rule is the same reason why the Court distinguished

²⁰¹ *Edwards*, 451 US at 484–85. See also *Shatzer*, 559 US at 104–06 (noting that *Edwards* established this presumption).

²⁰² *Shatzer*, 559 US at 98.

²⁰³ *Id.* at 110.

²⁰⁴ See *id.*

²⁰⁵ *Id.*

between adults and juveniles for sentencing purposes in the first place. As Justice Kennedy plainly put in *Roper*:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, *a line must be drawn*.²⁰⁶

This Comment also has shown why a line must be drawn to guarantee juvenile defendants a parole hearing. Based in objective evidence of state practice and legislative enactments, this Section has illustrated why a constitutional ceiling of twenty-six years is the proper line to draw. The next Section shows how the categorical analysis's second consideration, the Court's own judgment and interpretation of the Eighth Amendment, also provides strong support for the proposed bright-line rule.

B. Social Science and Penological Justifications for a Mandatory Parole Hearing after Twenty-Six Years Served

A constitutional right to a parole hearing after serving twenty-six years fulfills the core tenets of the Court's Eighth Amendment jurisprudence: it enables an ex post parole hearing when both *Graham* and *Miller* defendants can show they have been redeemed. For those *Miller* defendants originally sentenced to LWOP in particular, this hearing will ensure that the sentencing court's original assessment was correct. Such a categorical rule is more likely to ensure that only those irreparably depraved serve LWOP and prevent an arguably unconstitutional geriatric release, outweighing the potential strain that such a hearing would have on the parole system.

To show why LWOP for redeemable juveniles runs afoul of the Eighth Amendment, *Graham* relied significantly on social science and neurological research to solidify the constitutional distinction between juveniles and adults, the lack of penological justifications for imposing LWOP on redeemable juvenile offenders, and the lack of more availing alternative options. Though this Section does not independently justify a twenty-six-year benchmark, it does justify drawing a bright-line rule. Moreover, this

²⁰⁶ *Roper*, 543 US at 574 (emphasis added).

Section employs *Graham*'s framework to show why all juvenile defendants are constitutionally entitled to a parole hearing that enables a timely, nongeriatric release.

1. Social science: juveniles require an ex post assessment.

Looking to social science research, *Graham* constitutionally enshrined three conclusions about juveniles: (1) they possess a "lack of maturity and an underdeveloped sense of responsibility"; (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed."²⁰⁷ The Court cited studies showing that parts of the brain, specifically those involved in executive function and impulse control, are still developing throughout adolescence. For the Court, this meant that juveniles were less likely to be irredeemable.²⁰⁸

Studies since *Graham* also highlight powerful physiological differences between adults and juveniles. Teens "take bad risks and make bad bets. They engage in actions for the wrong reasons, and to impress the wrong people. And . . . they frequently fail to bring to bear relevant . . . information that they already know."²⁰⁹ Because their brains cannot always logically connect the relevant facts to a particular situation when making a decision in the moment, juveniles are less likely "to assess . . . a good versus a bad risk, to inhibit impulses, and to silence the inner roar of concerns about what their peers think of them."²¹⁰ Juveniles may know that a course of action is wrong but may not be able to control their impulsive and aggressive inclinations.²¹¹

Juvenile lifers' developmental environments further complicate this narrative. A significant number experienced extremely difficult upbringings: 79 percent witnessed violence in their homes regularly, 32 percent grew up in public housing, and

²⁰⁷ *Graham*, 560 US at 68 (quotation marks omitted), quoting *Roper*, 543 US at 569–70.

²⁰⁸ *Graham*, 560 US at 68, quoting *Roper*, 543 US at 570 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character.'").

²⁰⁹ Michael N. Tennison and Amanda C. Pustilnik, "And If Your Friends Jumped Off a Bridge, Would You Do It Too?": *How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 *Ind Health L Rev* 533, 557 (2015) (citations omitted).

²¹⁰ *Id.*

²¹¹ *Id.* at 563.

47 percent were physically abused.²¹² Furthermore, a considerable number had substantially diminished educational achievement. Fewer than half were attending school at the time of their offense, and 40 percent had been enrolled in special education classes.²¹³

Particularly because of their difficult upbringings and lack of physiological and psychological development, juvenile defendants minimally deserve an ex post evaluation of their relative redeemability and culpability. A parole hearing, at most after twenty-six years of incarceration, will allow parole boards to better separate a juvenile lifer's state of rehabilitation from her prior juvenile mindset. A federal sentencing study found that inmates from ages forty to forty-four had a rearrest rate of 46.5 percent, while twenty-one to twenty-four-year-olds had a rearrest rate of 66.6 percent.²¹⁴ Under this Comment's framework, a fifteen-year-old sentenced to the constitutional maximum would still receive a parole hearing by the age of forty-one. The bright-line rule this Comment offers thus maps well onto these recidivism statistics.

While social science and psychological studies helped the Court separate juvenile defendants from their adult counterparts for its constitutional analysis, *Graham* also offered several penological justifications when it crafted its categorical rule. Applying those same principles, the following Section likewise concludes that they support this Comment's bright-line rule.

2. Penological justifications for a mandatory parole hearing.

Graham held that “the purposes and effects of penal sanctions are [relevant] to the determination of Eighth Amendment restrictions” because “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”²¹⁵ Under any mainstream penological theory—utilitarianism, retributivism, incapacitation, rehabilitation—there simply exists no justification or benefit from imprisoning an otherwise redeemable juvenile until the end of her life or even a few years before her estimated life expectancy.

²¹² Josh Rovner, *Juvenile Life without Parole: An Overview* *3 (The Sentencing Project, Oct 22, 2018), archived at <http://perma.cc/4URH-AYWM>.

²¹³ *Id.*

²¹⁴ *The Effects of Aging on Recidivism among Federal Offenders* *23 (United States Sentencing Commission, Dec 2017), archived at <http://perma.cc/AJ9L-JHLQ>.

²¹⁵ *Graham*, 560 US at 71.

First, the utilitarian theory of deterrence does not justify geriatric release for the same reasons it does not justify juvenile LWOP: juveniles are simply less amenable to deterrence. Because they are more impetuous and impulsive in their decision making, juveniles “are less likely to take a possible punishment into consideration when making decisions . . . [especially] when that punishment is rarely imposed.”²¹⁶ Similarly, having a constitutionally guaranteed parole hearing before juvenile defendants have served twenty-six years of their respective sentences will not substantially diminish deterrence. Juvenile lifers are simply too far removed from their actions to provide a general deterrence benefit to future juvenile defendants. Empirical studies that have evaluated the effect of laws that treat juvenile defendants like adults for sentencing purposes have found that such laws have no measurable effect on deterring juvenile crime.²¹⁷

Retributive rationales likewise do not justify geriatric release under the Eighth Amendment. *Graham* found retribution to be an insufficient justification to impose LWOP because “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender,” and juveniles are themselves less culpable for their actions because of their lack of brain and psychological development.²¹⁸ This same precept extends to the analysis for the national parole hearing requirement. Considering the mitigating factors of age and the lack of significant behavioral control for juveniles, a geriatric release is undoubtedly not proportional to the original crime because a redeemable juvenile did not necessarily act willfully to commit that violent act. She is simply less culpable. Especially considering juvenile defendants serving LWOP will inherently spend a larger proportion of their lives behind bars than their adult defendant counterparts, juvenile LWOP potentially punishes adolescents even more than adults. While a forty-year-old homicide defendant sentenced to LWOP has at least experienced a substantial portion of her life outside of prison, a fourteen-year-old facing LWOP—or even the prospect of release

²¹⁶ *Id.* at 72.

²¹⁷ APA Brief at *34 (cited in note 76), citing Simon I. Singer and David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 *L. & Society Rev.* 521, 526–32 (1988); Eric Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96, 100–02 (1994).

²¹⁸ *Graham*, 560 US at 71 (quotation marks omitted), quoting *Tison v Arizona*, 481 US 137, 149 (1987).

ten years before her expected life expectancy—will be afforded no such opportunity. Twenty-six years of incarceration is thus more than enough time to absolve a redeemable and inherently less culpable juvenile defendant.

Turning next to incapacitation, this penological principle requires that juvenile defendants have the *opportunity* for an early parole. *Graham* noted that redeemable juveniles are less dangerous to society because their transient immaturity is an underlying cause of their offenses.²¹⁹ *Graham* was incapacitated for some time to prevent him from escalating his conduct, but the *Graham* Court held that justification for incapacitation did not warrant imprisoning him for the rest of his life.²²⁰ *Miller* and *Montgomery* largely extended that analysis for juvenile homicide offenders because a vast majority are redeemable. That same logic extends to geriatric release. There simply is no reason to incapacitate juveniles until their late sixties or seventies. As this Comment has already noted, recidivism substantially declines as incarcerated people age. The punitive effectiveness of incapacitation thus substantially decreases as a defendant ages into later adulthood.²²¹ Minimally, juvenile offenders should not be incapacitated longer than their adult defendant counterparts convicted of the same underlying offenses. Of course, incapacitation—like the other penological theories proffered so far—does not independently justify a twenty-six-year bright-line rule specifically, or any specific numerical threshold for that matter. But it does support the principle of a threshold—and it supports that twenty-six years is more than enough time to ensure society’s goals of incapacitating juvenile defendants until they have outgrown their tendencies for criminal behavior.

Finally, rehabilitation fails to independently justify a geriatric release because the redeemable juvenile offender has likely already been rehabilitated earlier in her sentence. Just like LWOP or de facto LWOP, a late-stage geriatric release “forfeits altogether the rehabilitative ideal[] [b]y denying the defendant the right to reenter the community.”²²² This reasoning is even more salient for juvenile defendants, a group of “offenders who are far

²¹⁹ *Graham*, 560 US at 72–73.

²²⁰ See *id.* at 73.

²²¹ See generally Alex R. Piquero, J. David Hawkins, and Lila Kazemian, *Criminal Career Patterns*, in Rolf Loeber and David P. Farrington, eds., *From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention* 14 (Oxford 2012).

²²² *Graham*, 560 US at 74.

more likely than any others to reform as both their character and their physical brain structure mature into adulthood.”²²³ That is, juvenile defendants’ lack of substantive brain development actually turns in their favor: they have a much stronger probability of and a longer period of time to achieve rehabilitation.

This Comment’s bright-line rule is grounded in this principle. Determining redeemability much earlier will allow juveniles the opportunity to show that they have been rehabilitated. The judicial safeguard of a timely parole hearing also incentivizes juvenile defendants—with the knowledge of a parole hearing in their future—to take substantive steps toward rehabilitation. Without a meaningful opportunity to obtain release, juvenile defendants will never know for certain if the fruits of their labor will ever materialize into an actual release.

Furthermore, failing to guarantee a constitutional right to a timely parole hearing would also have a disproportionately negative effect on those with lower life expectancies. For example, the average life expectancy for black men is 72.2.²²⁴ The makeup of life-sentenced and de facto life-sentenced youth is 55.1 percent black.²²⁵ A geriatric release of a black male into even his late sixties would therefore, on average, offer him little time to reintegrate. Considering that a prisoner loses two years of her life expectancy for every year incarcerated,²²⁶ this analysis does not even account for the reduced life expectancy associated with prison sentences generally.²²⁷ As Professor Christopher Wildeman highlights, increases in mass incarceration are negatively associated with population health, and “increases in the incarceration rate in the United States over the last 25 years may have done even more to push the United States to the back of the pack in terms of population health than the models including only a main effect of incarceration imply.”²²⁸ Accounting for the effects of prison on life expectancy, a nationwide requirement that parole hearings for juvenile defendants occur by or before twenty-six years of incarceration preserves the opportunity for release for

²²³ APA Brief at *34 (cited in note 76).

²²⁴ M. Jermaine Bond and Allen A. Herman, *Lagging Life Expectancy for Black Men: A Public Health Imperative*, 106 Am J Pub Health 1167 (2016).

²²⁵ Nellis, *Still Life* at *17 (cited in note 11).

²²⁶ Patterson, 103 Am J Pub Health at 526 (cited in note 159).

²²⁷ *Grant’s* and *Mathurin’s* solutions also neglect to account for the negative effect of incarceration on life expectancy. See Part III.B for a further discussion on this point.

²²⁸ Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies*, 54 Criminology 360, 376 (2016).

all. Assuming they have taken steps to rehabilitate while incarcerated, all juvenile lifers should have the opportunity to reenter and contribute to society.

3. Alternative methods prove unavailing.

Because a case-by-case approach insufficiently cabins judicial discretion in sentencing and states cannot accurately make an ex ante determination that a juvenile is permanently depraved, a categorical rule is necessary. *Graham* rejected Florida's alternative approaches for mitigation, which required prosecutors to charge juveniles only for certain serious felonies and that "prosecutors may not charge nonrecidivist [juvenile] offenders as adults for misdemeanors."²²⁹ The provisions did not absolve the constitutional concerns at play because the courts could nonetheless make the subjective determination that a juvenile was "irretrievably depraved."²³⁰ Even if sentencing courts consider a juvenile's relative redeemability during sentencing, this Comment has already shown why it is *effectively impossible* to make an ex ante determination that a juvenile is irredeemable. It follows that only an ex post judgment at a parole hearing after sentencing and time served can sufficiently address the Eighth Amendment concerns *Graham* presents. For *Miller* defendants, the ex ante determination only serves as the sentencing court's best guess. Without an ex post assessment, some redeemable juveniles will be forced to live out the rest of their days behind bars.

A twenty-six-year benchmark would avoid the pitfalls the *Grant* and *Mathurin* courts highlighted while accounting for the deficiencies in their solutions.²³¹ Actuarial tables undoubtedly have baked-in racial disparities, and sentencing individuals based on their race presents significant constitutional quandaries.²³² Establishing a constitutional right to a parole hearing after twenty-six years served mitigates those concerns by avoiding the oversentencing of defendants who belong to races that live longer on average and affords those with lower life expectancies a genuine—and not a geriatric—opportunity for release. It also cabins judicial discretion in sentencing by imposing a bright-line

²²⁹ *Graham*, 560 US at 75.

²³⁰ *Id.* at 76, quoting *Roper*, 543 US at 572.

²³¹ See Part III.B for a further discussion of the problems of *Grant* and *Mathurin*.

²³² See note 145 and accompanying text.

rule and guarantees an ex post redeemability assessment, following the framework *Graham* created.

Though a constitutional right to a parole hearing will undoubtedly benefit juvenile lifers like Bassett, courts might be uncomfortable with the idea of recognizing a constitutional ceiling at twenty-six years.²³³ Sadly, parole boards have also been increasingly less willing to grant parole across jurisdictions.²³⁴ This can be attributed to an array of policy and legislative choices, from delaying initial parole consideration to narrowing the rights of incarcerated defendants during a parole hearing, along with the lack of oversight and checks against parole boards' determinations.²³⁵ It follows that a constitutional right to a parole hearing might shift the constitutional issues surrounding juvenile sentencing downstream to parole boards themselves, even if juveniles have a presumption of release. That is, parole boards could nonetheless deny redeemed juvenile defendants like Bassett parole.

But this runs counter to even a plain reading of *Graham's* mandate. If all redeemable juvenile defendants deserve a meaningful opportunity to obtain release, it cannot follow that parole boards can artificially deny parole ex post. The parole hearings themselves must be meaningful opportunities for a juvenile defendant to prove her case for release. This Comment argues that *Graham's* mandate must mean that the presumption for all juvenile defendants at the parole hearing is release.²³⁶ If courts adopt this Comment's bright-line rule, parole boards will consequently know that because only the rarest of juvenile offenders are deemed irredeemable, the ones sitting before them are more than likely able to reenter society. Denying a redeemed defendant like Bassett the right to release would otherwise be unconstitutional.

But pivotally, without a constitutional right to a parole hearing, a juvenile defendant may never have the opportunity to plead

²³³ Admittedly, employing the Eighth Amendment categorical analysis to establish a numerical bright-line rule is unconventional. See Part IV.A.2 for a further discussion on this point.

²³⁴ Ghandnoosh, *Delaying a Second Chance* at *3 (cited in note 123). This might suggest that parole hearings are not that much better than the type of good-time credit policies discussed in Part III.B. However, a centralized system of parole hearings across states is more transparent than varying good-time credit policies and is still within the scope of the Court's *Graham* line of cases and their constitutional rules. But even if parole hearings suffer from similar problems, that problem only suggests that juvenile defendants might be entitled to even more than just a parole hearing.

²³⁵ *Id.* at *4.

²³⁶ See Part II.C.

her case in front of a parole board. While the structures of parole boards can be statutorily amended,²³⁷ the constitutional presumption that a juvenile is redeemable and is entitled to a meaningful opportunity to obtain release can be effectuated only through a categorical rule. Even though each decision did not resolve all of the issues surrounding juvenile sentencing, *Roper*, *Graham*, and *Miller* crafted categorical rules that rejected unconstitutionally disproportionate sentencing practices against juveniles. A constitutional ceiling to a juvenile defendant's life sentence naturally follows the Court's juvenile sentencing jurisprudence: it both enshrines the presumption that juvenile defendants are inherently redeemable and provides juvenile defendants what *Graham* promised them—a "chance for fulfillment outside prison walls."²³⁸

CONCLUSION

Graham, *Miller*, and *Montgomery* revolutionized the landscape and framework for evaluating juvenile sentencing, but they nonetheless manufactured a constitutional dilemma. The Court concluded that all redeemable juveniles are entitled to a meaningful opportunity for timely release and that sentencing courts can only guess whether a *Miller* defendant is redeemable ex ante. There then must be some point in time when the Eighth Amendment requires that an incarcerated juvenile have an opportunity to show that she has redeemed herself.

The Eighth Amendment categorical analysis offers a resolution to this quandary. First, objective indicia, based on legislative enactments and average time served for all parole-eligible defendants convicted of murder, suggest that a juvenile defendant is constitutionally entitled to a parole hearing before having served twenty-six years in prison. Though imperfect, this Comment's methodological approach crafts a bright-line rule using the best data available while remaining faithful to the Court's precedent. Second, *Graham* and *Miller*'s core principles—social science showcasing juveniles' transient immaturity and impulsivity, the lack of substantive penological justifications for imposing LWOP on redeemable juveniles, and the lack of reasonable alternatives—also favor a constitutionally protected ex post redeemability assessment. Without such a determination, a

²³⁷ See Ghandnoosh, *Delaying a Second Chance* at *4, 34–36 (cited in note 123).

²³⁸ *Graham*, 560 US at 79.

seemingly redeemable juvenile defendant will be left to languish in prison either until death or close to it.

A categorical right to a parole hearing after twenty-six years served would also solve the deficiencies of *Grant* and *Mathurin*. It would simultaneously avoid the impermissible sentencing of a juvenile defendant based on her race while still protecting those with lower life expectancies. A constitutional ceiling to a juvenile defendant's sentence offers individualization through a parole-hearing with the procedural and structural benefits of a categorical rule. A "discernible end point" to the process that began with *Roper* and *Graham*, this Comment's proposed rule is a clearer and more robust framework for juvenile sentencing that avoids geriatric release.

After committing an extreme wrong as a juvenile, Brian Bassett turned his life around. He became a model prisoner and a model citizen. But the system that was seemingly built to recognize his rehabilitation failed him. It is only through a constitutional right for a parole hearing that the criminal justice system can, at least with respect to sentencing juvenile defendants, begin to redeem itself. Brian Bassett now has a meaningful opportunity to obtain release. It is time to categorically extend that opportunity to *all* juvenile defendants.

APPENDIX: STATUTORY SENTENCING MAXIMUM BEFORE PAROLE ELIGIBILITY FOR JUVENILE DEFENDANTS AND AVERAGE LENGTH OF SENTENCE FOR PAROLE-ELIGIBLE CONVICTED MURDERERS

State	Years ²³⁹	Data Source	Code and Explanation
AL			N/A
AK			N/A
AZ			N/A
AR	30	Statutory Maximum	With sentencing enhancements, the highest sentence a juvenile defendant can receive for any murder is thirty years before parole. Ark Code Ann § 16-93-621.
CA	25	Statutory Maximum	Under Cal Penal Code § 3051, (1) those convicted of offenses committed at age twenty-five or younger and sentenced to a determinate sentence are eligible after fifteen years; (2) those convicted of offenses committed at age twenty-five or younger and sentenced to less than twenty-five years to life are eligible after twenty years; and (3) those convicted of offenses committed at age twenty-five or younger and sentenced to twenty-five years to life will be eligible after twenty-five years. Individuals sentenced to life without parole for offenses committed under age eighteen are eligible after twenty-five years. Cal Penal Code § 3051.
CO	40	Statutory Maximum	Colo Rev Stat § 18-1.3 401(4)(b)(I).

²³⁹ ALOS data is rounded to the nearest tenth.

State	Years ²³⁹	Data Source	Code and Explanation
CT	30	Statutory Maximum	For juvenile offenders currently serving sentences of more than ten years, juveniles are eligible for parole after serving 60 percent of the sentence or twelve years, whichever is greater. Those serving more than fifty years are eligible for parole after thirty years. Conn Gen Stat § 54-125a(f)(1).
DE	30	Statutory Maximum	Life sentences are possible sentencing options for juvenile defendants, but they have the right to petition courts for sentence modification after serving the following terms: thirty years for first-degree murder convictions and twenty years for all other convictions. Del Code Ann § 4204A.
DC	20	Statutory Maximum	Juvenile defendants in DC are entitled to judicial review of their sentences after twenty years. DC Code § 24-403.03.
FL	25	Statutory Maximum	Florida has no parole, but individuals sentenced as juveniles have the opportunity to have their sentences reviewed after fifteen, twenty, or twenty-five years served depending on the crime. Fla Stat § 921.1402.
GA	25.9	ALOS Data	Ga Code Ann § 17-10-30.
HI	15.2	ALOS Data	The maximum punishment juvenile defendants can receive in Hawaii is LWP, but the parole board has discretion to decide when defendants become

State	Years ²³⁹	Data Source	Code and Explanation
			parole eligible. See Hawaii Rev Stat § 706-656.
ID			N/A
IL			N/A
IN			N/A
IA	28.6	ALOS Data	Although Iowa Code § 902.1(2)(a)(1) allows <i>Miller</i> defendants to receive LWOP, the Iowa Supreme Court declared this provision unconstitutional. <i>State v Sweet</i> , 879 NW2d 811, 839 (Iowa 2016). However, the court held that the remainder of sentencing options under Iowa Code § 902.1(2)(a), including LWP, is constitutional. <i>State v Zarate</i> , 908 NW2d 831, 856 (Iowa 2018).
KS			N/A
KY			N/A
LA			N/A
ME			N/A
MD			N/A
MA	30	Statutory Maximum	Massachusetts has a three-tiered system in which juvenile defendants are eligible for parole after twenty to thirty years in prison, depending upon the nature of the offense. Mass Ann Laws ch 119, § 24.
MI	31.9	ALOS Data	Michigan allows prosecutors to petition for LWOP for <i>Miller</i> defendants. Mich Comp Laws Ann § 769.25.
MN			N/A
MS			N/A
MO	24.1	ALOS Data	LWOP remains an option for <i>Miller</i> defendants in Missouri.

State	Years ²³⁹	Data Source	Code and Explanation
			See Mo Rev Stat §§ 565.020, 565.033.
MT	25.3	ALOS Data	Montana implicitly allows for discretionary LWOP. See Mont Code Ann §§ 45-5-102, 46-18-222, 46-23-201. See also <i>Steilman v Michael</i> , 407 P3d 313, 318–19 (Mont 2017) (“[S]entencing judges [must] adequately consider the mitigating characteristics of youth . . . when sentencing juvenile offenders to [LWOP], irrespective of whether the life sentence was discretionary.”).
NE	17.2	ALOS Data	Neb Rev Stat §§ 28-303, 28-105.02.
NV	20	Statutory Maximum	Nev Rev Stat § 176.025; Nev Rev Stat § 213.12135.
NH			N/A
NJ	30	Statutory Maximum	NJ Rev Stat § 2C:11-3 (1)(b).
NM			N/A
NY	15	Statutory Maximum	NY Penal Law § 70.05.
NC			N/A
ND			N/A
OH	22	ALOS Data	Ohio’s laws have not been revised to respond to <i>Graham</i> and <i>Miller</i> . As a result, discretionary LWOP for <i>Miller</i> defendants remains an option under the laws. See Ohio Rev Code Ann §§ 2929.03, 2971.03. See also <i>State v Long</i> , 8 NE3d 890, 896 (Ohio 2014) (“Ohio’s sentencing scheme does not fall afoul of <i>Miller</i> , because the sentence of life without parole is discretionary.”).

State	Years ²³⁹	Data Source	Code and Explanation
OK			N/A
OR	30	Statutory Maximum	Or Rev Stat §§ 161.620, 163.105(1)(a).
PA			N/A
RI	20.7	ALOS Data	Courts have discretion to impose LWP/LWOP sentences. See RI Gen Laws § 12-19.2-1.
SC	24.7	ALOS Data	Life without parole remains a sentencing option for juvenile defendants. SC Code Ann § 16-3-20. But see <i>Aiken v Byars</i> , 765 SE2d 572, 575 (SC 2014) (noting that although a sentencing court could still technically sentence a <i>Miller</i> defendant to LWOP, <i>Miller</i> made it clear that LWOP should still be rare), citing <i>Miller</i> , 567 US at 478–79.
SD			N/A
TN			N/A
TX	40	Statutory Maximum	Tex Penal Code Ann § 12.31; Tex Govt Code Ann § 508.145.
UT	25	ALOS Data	The maximum sentence a juvenile defendant can receive is LWP, but the statute does not specify by what age a parole hearing must happen. The minimum sentence is twenty-five years. Utah Code Ann § 76-3-206.
VT			N/A
VA			N/A
WA	25.3	ALOS Data	The maximum sentence juvenile defendants can receive is LWP, but no maximum is specified under Washington State law. See Wash Rev Code § 10.95.030; <i>Bassett</i> , 428 P3d

State	Years ²³⁹	Data Source	Code and Explanation
			at 360 (ruling that LWOP is an unconstitutional sentence for juvenile defendants).
WI	25.3	ALOS Data	Wisconsin gives courts discretion to sentence juveniles to LWOP. See Wis Stat § 973.014. See also <i>State v Barbeau</i> , 883 NW2d 520, 531 (Wis 2016) (“[I]t is not unconstitutional to sentence a juvenile to [LWOP] for intentional homicide if the circumstances warrant it.”).
WV	15	Statutory Maximum	W Va Code § 62-12-13c.
WY	25	Statutory Maximum	Wyo Stat § 6-10-301.
Average 25.6			