Notes

Cruel and Unusual Parole*

Introduction

In *Graham v. Florida*,[1] the Supreme Court categorically barred life-without-parole sentences for juvenile defendants convicted of nonhomicide crimes.[2] Likening the severity of life without parole to the death penalty when applied to juveniles, the Court held that states must give such juvenile defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[3]

However, the Court did not make clear whether it was applying a new constitutional rule to state parole systems or merely directing states to open their existing systems, such as they are, to defendants like Graham.[4] Did the case announce "a rule of constitutional criminal procedure" for parole proceedings,[5] or as state officials think, did the ruling simply touch sentencing schemes, with no new requirements for parole systems?[6]

It is possible to read *Graham* merely as requiring states to open their existing parole systems to previously ineligible prisoners. But suppose a state complied with *Graham* by converting prisoners' sentences to life with parole eligibility, and its parole system then gave each prisoner only infrequent, cursory reviews. With no investigation, this parole board issued perfunctory

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* University of Texas, J.D. and Master's of Public Affairs, 2017. I owe thanks to Joey Fishkin for his thoughtful guidance, to Jordan Steiker and Michele Deitch for useful discussions, and to my friends and loved ones for their patient understanding. I owe particular gratitude to the editors of the Texas Law Review for their perceptive feedback and diligent editing. All failures of accuracy or analysis that remain despite their wonderful efforts are my own.

1. 560 U.S. 48 (2010).
2. *Id.* at 74.
3. *Id.* at 69, 75.
4. Justice Thomas did raise these questions in dissent. *Id.* at 123 (Thomas, J., dissenting) ("But what, exactly, does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years."). Justice Roberts raised a similar practical question at oral argument. Transcript of Oral Argument at 7, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412) ("What about – what if it's . . . pursuant to the usual State parole system, and it turns out that grants parole to 1 out of 20 applicants?").
5. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1748 (2012).
6. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 396 (2014); *see, e.g.*, Defendant-Appellant's Opening Brief at 21–28, Hayden v. Butler, No. 15-7676 (4th Cir. Aug. 1, 2016) (arguing that "parole consideration or its equivalent alone would suffice" to protect an offender's Eighth Amendment rights, and that *Graham* did not "establish . . . that the 'meaningful opportunity' requires additional, specific parole procedures for juvenile offenders convicted of nonhomicide offenses").

denials based on the severity of the offense and did so, year after year, with no member of its *Graham* population ever gaining release. Alternatively, suppose that it simply evaluated the severity of prisoners' offenses and, on that basis, delayed their earliest possible release dates until the next century.[7] It is difficult to imagine the Supreme Court agreeing that such unfair parole review complies with its decision in *Graham*.

Litigation has now begun to bear that out.[8] Prisoners serving life sentences for nonhomicide crimes committed as juveniles are now suing their parole boards, arguing that the boards' procedures and decisions fail to afford them a meaningful opportunity to obtain release. Through these cases, the shape of the basic *Graham* parole claim has emerged—unfair parole review is unconstitutional because it transforms an otherwise constitutional sentence into the functional equivalent of life without parole.[9]

This Note analyzes that new litigation. Part I sets the background—the history of parole and the pre-*Graham* standards for due process claims against parole boards, set by *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*.[10] *Greenholtz* offers prisoners minimal relief from parole's status quo, in which cursory decisions are the norm and the severity of the original offense is the overriding concern. Part I then analyzes *Graham v. Florida* and two subsequent cases, *Miller v. Alabama*[11] and *Montgomery v. Louisiana*,[12] in which the Supreme Court offered suggestive new language about the importance of rehabilitation and parole release in its juvenile sentencing jurisprudence.[13]

Part I also makes sense of *Graham*'s logic. Different readings of the decision could yield different types of constitutional claims. If life without parole is unconstitutionally severe for depriving prisoners of hope, the fairness of parole release determinations should be the focus of constitutional litigation. But if it is unconstitutionally severe for undermining the process of personal development, the availability of prison rehabilitative opportunities also becomes significant. Read this way, *Graham* seems to imply a right to rehabilitative treatment for the prisoners within its holding.

Part II then discusses four cases that exemplify the new litigation against parole systems, which Part III then analyzes. Prisoners' claims based on *Graham*, which have survived tests of their legal validity, have concentrated

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7. *See* Atwell v. State, 197 So. 3d 1040, 1041–43 (Fla. 2016) (considering a challenge to the Florida Commission on Offender Review by Angelo Atwell, who was convicted as a juvenile in 1990 of first-degree murder and armed robbery, and whose presumptive parole release date was set by the commission to be 2130).

8. *See infra* subparts II(A)–(D).

9. *See infra* subpart III(A).

10. 442 U.S. 1 (1979).

11. 132 S. Ct. 2455 (2012).

12. 136 S. Ct. 718 (2016).

13. 136 S. Ct. at 734–35; 132 S. Ct. 2469; 442 U.S. 15–16.

on parole systems' procedures and decisions, rather than the availability of rehabilitative opportunities. Part III offers reasons to conclude that *Graham* will give rise only to claims focusing on the former and not the latter. Finally, noting that courts have not settled on a framework for analyzing *Graham* parole claims, Part III suggests adapting the standard procedural due process framework, taking cues from *Graham*.

Part IV argues that the logic of *Graham* parole claims extends naturally to juvenile defendants convicted of homicide offenses, but the Court's adult sentencing jurisprudence[14] bars comparable challenges by adults. Until that jurisprudence evolves, only limited categories of prisoners will be able to bring Eighth Amendment parole challenges. In the interim, the adjudication of those claims can at least begin to model fairer parole decision making that focuses not on the severity of the original crime but on the prisoner's maturation since its commission.

I. The Context for the New Challenges

A. The Evolution of Parole

Parole has two distinct components: release determinations and field supervision.[15] Parole boards serve the former function, managing the release of prisoners under either mandatory or discretionary release schemes.[16] Mandatory release occurs when prisoners are sentenced under "determinate" sentencing statutes that set specific terms of imprisonment and permit the parole board little or no discretion in the timing of release.[17] Discretionary release, by contrast, occurs when prisoners are sentenced under "indeterminate" sentencing statutes, which leave the timing of release to the board.[18]

The first state to adopt discretionary release was New York in the 1870s, and all states and the federal government had parole systems by 1930.[19] In this period, parole's perceived virtues were the incentives that it gave prisoners to behave well and the flexibility that it offered administrators to manage prison crowding.[20] Into the 1960s, a "rehabilitative ideal" guided the

14. Lockyer v. Andrade, 538 U.S. 63, 77 (2003); Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

15. Joan Petersilia, *Parole and Prisoner Re-entry*, *in* THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 925, 928 (Michael Tonry ed., 2011).

16. *Id.*

17. *Id.* at 928, 932.

18. *Id.* at 928.

19. *Id.* at 929. Of course, there were dramatic, essentially incommensurable regional differences in prison systems. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

20. Petersilia, *supra* note 15, at 929–30.

operation of parole boards, which understood that their role was "to change the offender's behavior rather than simply to punish."[21]

Sentencing and parole in that era were vastly different from today. *Connecticut Board of Pardons v. Dumschat*,[22] which dealt with the parole system of Connecticut in the mid-1970s, furnishes an illustration. Connecticut's Board of Pardons could commute prisoners' sentences, including life sentences, by reducing the minimum term that the prisoner had to serve before the Board of Parole—a separate body—could consider releasing the prisoner.[23] Three-quarters of prisoners serving life sentences received a commutation before finishing the minimum term,[24] which was twenty-five years.[25] Ninety percent of that group was then released by the Board of Parole within the first year of eligibility.[26] Overall, less than fifteen percent of Connecticut prisoners with life sentences served up to the minimum term.[27]

This norm was not limited to New England. In the 1950s, a prisoner sentenced to life in prison in North Carolina served only fourteen years on average.[28] In Texas, the average was only eleven years; in Kentucky, it was ten.[29]

However, in the 1970s, vigorous criticism emerged. There was "rapid disillusionment and a corrosive loss of confidence" in the rehabilitative mode that then prevailed in parole systems.[30] In part, Robert Martinson's *What Works?* article, a meta-analysis of correctional programs' effects on recidivism, created doubt that prison-rehabilitative programs actually helped prisoners to reintegrate and that parole-board members could accurately identify the successfully rehabilitated.[31] Meanwhile, a coalition of the left and right united in criticizing indeterminate sentencing—the left, concerned

21. *Id.* at 930.
22. 452 U.S. 458 (1981).
23. *Id.* at 460 & n.3.
24. *Id.* at 461.
25. *Id.* at 460 n.1.
26. *Id.* at 461 n.4.
27. *Id.*
28. MARIE GOTTSCHALK, CAUGHT 357 n.33 (2015).
29. *Id.*
30. Edward E. Rhine, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 627, 627–28 (Joan Petersilia & Kevin R. Reitz eds., 2012); *see also* Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 388 (2015) (describing rehabilitation's "rapid decline into near irrelevance" in this period).
31. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 25; *see also* Flanders, *supra* note 30, at 397 (describing Martinson's article as "hugely influential").

by parole boards' hidden racial and class biases, and the right, concerned by their leniency.[32]

Consequently, sentencing grew more standardized, then more punitive. Efforts to standardize sentencing and release decisions from the mid-1970s to mid-1980s yielded guidelines for judges and parole-board members.[33] Numerous states, beginning with Maine in 1975, abolished parole in this period.[34] From the mid-1980s, laws proliferated that raised minimum criminal sentences, that created sentencing enhancements for repeat offenders, or that required a greater portion of the sentence to be served before parole eligibility.[35] Life-without-parole sentences grew much more common,[36] and the population serving them ballooned. By 2008, there were over 41,000 such prisoners, more than triple the number in 1992.[37] The impact of this policy shift on parole systems was similarly dramatic. Before the shift, three-quarters of prison releases were discretionary.[38] By 2000, discretionary release accounted for only one-quarter.[39]

According to a 2008 survey, the typical parole board would have gubernatorial appointees serving five-year terms.[40] Its state's sentencing laws would set minimum percentages of the sentence that the prisoner must serve, which would be particularly high for violent and sex offenses.[41] The board would use risk assessments to anticipate recidivism[42] and would rely

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32. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 72 (Jeremy Travis et al. eds., 2014) [hereinafter COMMITTEE] (describing shifts in attitudes about parole); Petersilia, *supra* note 15, at 932.

33. COMMITTEE, *supra* note 31, at 72–73.

34. *Id.* at 76. Nineteen states had done so by 2002. Petersilia, *supra* note 15, at 932.

35. COMMITTEE, *supra* note 32, at 73.

36. *See id.* (describing life-without-parole laws as a mechanism for increasing the harshness and certainty of criminal convictions). Among other causes, death penalty opponents supported life without parole as a sufficiently-severe-but-nevertheless-preferable alternative to the death penalty. *Id.* at 73 n.2; *see also* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008) (attributing the rise of life-without-parole sentences partly to "the alliance of the abolitionist left and tough-on-crime right," due to the former's search for a "workable and humane alternative to the death penalty").

37. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9 fig.2 (2009) (illustrating the increase from 12,453 prisoners in 1992 to 41,095 prisoners in 2008).

38. Petersilia, *supra* note 15, at 930 (72% in 1977).

39. *Id.* at 932 (24% in 2000).

40. SUSAN C. KINNEVY & JOEL M. CAPLAN, CTR. FOR RESEARCH ON YOUTH AND SOC. POLICY, UNIV. OF PA., FINDINGS FROM THE APAI INTERNATIONAL SURVEY OF RELEASING AUTHORITIES 7 (2008), http://www.apaintl.org/resources/documents/surveys/2008.pdf [https://perma.cc/YS3A-X9J7]. The survey reached all states except for Indiana, Mississippi, and California. *Id.* at 6.

41. *Id.* at 19.

42. *Id.* at 12.

on case summaries and recommendations by analysts.[43] The board members would interview the prisoner, and they would also be required by law to hear in-person testimony from victims or their survivors.[44] The board members would find this in-person testimony the most compelling.[45] They would weigh crime severity, victim impact, and the prisoner's offense history most heavily.[46] Considerably less importance would be given to the prisoner's age, circumstances at the time of the crime, or indications of maturation since that time.[47] The board frequently would delay release decisions because inadequate funding for rehabilitative programs prevented prisoners from completing prerequisites for release.[48]

In modern parole systems, political appointment of board members yields a heightened concern for public safety and an emphasis on the severity of the offense, in order to protect governors against political risk.[49] Parole systems ostensibly tasked with gauging a prisoner's rehabilitation and readiness for release focus instead on the original crime's shock value.[50] Because parole board decisions are subject only to the most deferential judicial review in state courts, if at all, they have virtual "carte blanche" to deny release.[51]

B. Due Process Challenges to Parole Boards

The Supreme Court decided on the framework for due process challenges to parole boards during the period of changing attitudes about parole. In 1979, Nebraska prisoners argued that Nebraska's procedures for discretionary parole release violated the Due Process Clause.[52] Success in the lower courts yielded an order requiring the Nebraska Parole Board to

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43. *See id.* at 14 (discussing the role played by case officers in the risk assessment).

44. *Id.* at 15, 17.

45. *Id.* at 18.

46. *See id.* at 19 (listing crime severity, offender's criminal history, crime type, number of victims, and age of victims as the most impactful factors).

47. *Id.*

48. *Id.* at 21; *see also* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC. REV. 33, 58 (2011) (noting that "correction departments often condition early release to parole . . . on the completion of required programming").

49. *See* Bierschbach, *supra* note 5, at 1782 (noting that parole-board commissioners are frequently appointed by governors and that new offenses by parolees are politically harmful); JONATHAN SIMON, GOVERNING THROUGH CRIME 161 (2007) (discussing Gray Davis, former Governor of California, whose parole-board appointees granted vanishingly few releases, thereby "plac[ing] the governor on the side of victims and potential victims," and in opposition to courts and other political actors).

50. *See* Bierschbach, *supra* note 5, at 1751 (describing the change in sentencing aims from rehabilitation to retribution and the corresponding focus on "dangerousness" for parole).

51. Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1077 (2014).

52. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 3–4 (1979).

conduct "full formal hearings" (and to no longer bar the prisoner from hearing adverse testimony or cross-examining witnesses); to give the prisoner precise notice of the hearing's timing (and not just the month in which it would occur); to permit in-person hearings; to produce a written record of the proceedings (and not merely a videotape); and to give the prisoner a full statement of reasons and evidence after parole denials (and not the curt explanation it then issued).[53]

In *Greenholtz*, the Supreme Court's reversal of that order was based on its generally applicable procedural due process jurisprudence,[54] and it had three important elements. First, the Court set the constitutional baseline: there was "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence," and states were under no obligation to operate a parole system at all.[55] Second, a prisoner had a protected liberty interest at stake in parole proceedings only if the statute used mandatory language that bound the parole board to release him under specified circumstances.[56] Third, the liberty interest that Nebraska's statute created in this instance imposed a minimal burden on the parole system, and Nebraska's existing procedures met that burden.[57]

The Court's reversal of the lower court's detailed order reflected a dismissive view of parole systems' ability to forecast risk and control recidivism. Chief Justice Burger's majority opinion upholding Nebraska's existing procedures rested on the view that additional procedures "would provide at best a negligible decrease in the risk of error."[58] In part, that was because the Court viewed the parole determination as an ineffable inquiry—a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become."[59] But it was also because—channeling Robert Martinson's *What Works?*—the Court doubted whether parole boards were any good at their jobs: "anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago."[60] That Chief Justice Burger felt the need to say states should not necessarily "abandon hopes for those objectives" was a suggestion that

53. *Id.* at 4–5 (status quo procedures); *id.* at 6 (court-ordered procedures).

54. *See id.* at 7 (relying on the "legitimate claim of entitlement" test of *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) to conclude that parole eligibility did not confer a "protectible right"); *id.* at 13 (citing the framework of Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

55. *Id.* at 7.

56. *Id.* at 11–12 (quoting the Nebraska statute's command that the board "shall order [the prisoner's] release unless" certain conditions were met).

57. *Id.* at 16.

58. *Id.* at 13 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976), for the applicable standard); *id.* at 14 (applying the standard).

59. *Id.* at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

60. *Id.* at 13.

the states should at least consider it.[61] Given prison rehabilitation's "disappointing" results, additional parole procedures seemed pointless.[62]

This due process framework, built by *Greenholtz* on a foundation of skepticism and disappointment, remains good law. In 2011, the Supreme Court reiterated that there is no constitutional right to conditional release, that states are not obligated to offer parole, and that the procedures required to protect whatever liberty interests that state law might create remain "minimal."[63]

C. Graham v. Florida

In *Graham v. Florida*, the Supreme Court complicated the rule that states are never obligated to offer parole. Holding that the Eighth Amendment prohibits life-without-parole sentences for juveniles convicted of nonhomicide offenses,[64] the Court required states to deal differently with those defendants. Shorter term-of-years sentences could satisfy *Graham*, but if states complied by conferring parole eligibility, the Court's reasoning suggested that, contra *Greenholtz*, the Constitution in fact requires parole systems to offer a meaningful chance at release.

Terrance Graham was sixteen years old when he received probation for attempted robbery and seventeen years old when he violated that probation by participating in two more robberies.[65] Concluding that Graham had no hope of rehabilitation, the trial court gave him a life sentence; Florida's abolition of its parole system some years earlier rendered it a sentence of life without parole.[66]

Conducting an Eighth Amendment proportionality analysis of Graham's sentence, the Court made a novel move. Rather than apply its proportionality framework for noncapital sentences, the Court followed its framework for capital sentences.[67] This decision—based on the questionable

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61. *Id.*

62. *Id.*

63. Swarthout v. Cooke, 562 U.S. 216, 220 (2011) (per curiam). There once was an alternative viewpoint. *See* Bd. of Pardons v. Allen, 482 U.S. 369, 373 n.3 (1987) (stating that four justices—Justices Powell, Brennan, Marshall, and Stevens—believe the requirement of due process in parole proceedings should not depend solely on state statutory language and putting forth the principle that "liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause"). However, that view never commanded a majority.

64. Graham v. Florida, 560 U.S. 48, 74 (2010).

65. *Id.* at 53–55.

66. *Id.* at 56–57.

67. *Id.* at 60–62; *see* Ewing v. California, 538 U.S. 11, 23–24 (2003) (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)) (stating that in noncapital cases, the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime"); *infra* subpart IV(B) (discussing the difficulty of having a prison sentence invalidated under the Eighth Amendment).

distinction between challenges to "a particular defendant's sentence" and "a sentencing practice itself"[68]—allowed the Court to follow its earlier decision in *Roper v. Simmons*,[69] in which it banned the death penalty for defendants under the age of eighteen and began developing its "new doctrine of youth."[70]

In noncapital proportionality analysis, the Court defers to state legislatures on sentence length, declines to favor any one penological goal over another, and acts only in instances of "gross disproportion[ality]."[71] Under this approach, the Supreme Court has invalidated no sentences since 1983.[72] By contrast, in capital proportionality analysis, the Court considers "evolving standards of decency" and engages in "[t]he judicial exercise of independent judgment."[73]

Engaging in that exercise of judgment, the Court emphasized the distinctive attributes of youth that had controlled the result in *Roper*: juveniles' "lack of maturity" and "underdeveloped sense of responsibility"; their vulnerability to "negative influences and outside pressures, including peer pressure"; and their characters that are not yet fully formed.[74] Each of these features weakens the penological justifications for harsh punishment. Deterrence is less effective against a less mature, less responsible defendant; retribution is less appropriate against a less culpable defendant.[75]

Likewise, the rationales of incapacitation and rehabilitation counsel against life-without-parole sentences. In *Graham*, Justice Kennedy noted the same difficulties of prediction that Chief Justice Burger had emphasized in *Greenholtz*. Life-without-parole sentences are based on "a judgment that the juvenile is incorrigible," but "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

68. *Graham*, 560 U.S. at 61. Initial responses to the case doubted the soundness of this distinction. *See, e.g.*, Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 49–50 (2010); Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 80–81 (2010).

69. 543 U.S. 551 (2005).

70. *Id.* at 578; *see* Cohen, *supra* note 51, at 1057 (arguing that *Roper*, *Graham*, and subsequent cases should be understood as developing "a *sui generis* jurisprudential stew of developmental science, brain science, and Eighth Amendment case law").

71. *Ewing*, 538 U.S. at 23–24 (citing Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring)); *Harmelin*, 501 U.S. at 997, 999, 1001 (Kennedy, J., concurring).

72. *See infra* subpart IV(B). That invalidation occurred in: *Solem v. Helm*, 463 U.S. 277, 281, 284 (1983) (invalidating a life-without-parole sentence for passing a bad check worth $100).

73. *Graham*, 560 U.S. at 58, 67.

74. *Id.* at 68 (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)). Later, the Court added that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Id.* at 78.

75. *Id.* at 71–72.

irreparable corruption."[76] But where difficulties of prediction weighed against greater protections for prisoners in *Greenholtz*, here they weighed in favor.

Similarly, recall Chief Justice Burger's skepticism of rehabilitative programs, which inclined him to dismiss the value of additional parole procedures.[77] Where Burger was pessimistic, saying that rehabilitative programs had "fallen far short of expectations,"[78] Kennedy took a different tone. Kennedy was at least moderately hopeful about the prospects of rehabilitative efforts, characterizing them as "the subject of a substantial, dynamic field of inquiry and dialogue."[79] Whichever programs are available,[80] Kennedy suggested that they have some measure of constitutional significance: "[T]he absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident."[81]

Concerning parole release, the Court emphasized that states are "not required to guarantee eventual freedom" to defendants like Graham.[82] However, states do have an obligation to "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[83] Relatedly, the Court suggested that prisons bear an obligation to increase their rehabilitative efforts. In the Court's view, "the system itself becomes complicit in [a prisoner's] lack of development" when it "withhold[s] counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[84]

Justice Kennedy drew on two amici for these ideas.[85] The Sentencing Project had explained that rehabilitative programs often are unavailable to juveniles serving long sentences.[86] Prison systems, having limited resources, understandably prioritize prisoners nearing release.[87] But the deprivation of

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76. *Id.* at 72–73 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)). *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 8 (1979) (characterizing the parole release determination as "a predictive judgment" based on weighing facts, observations, and personal experience "that cannot always be articulated in traditional findings").

77. *Greenholtz*, 442 U.S. at 13–14.

78. *Id.* at 13.

79. *Graham*, 560 U.S. at 73; *see also* Flanders, *supra* note 30, at 387 (analyzing Justice Kennedy's attention to rehabilitation against the backdrop of the preceding decades' "anti-rehabilitative trend") (emphasis omitted).

80. Kennedy allowed that this was a policy judgment for legislatures. *Graham*, 560 U.S. at 73–74.

81. *Id.* at 74.

82. *Id.* at 75.

83. *Id.*

84. *Id.* at 79.

85. *Id.* at 74.

86. Brief of the Sentencing Project as *Amicus Curiae* in Support of Petitioners at 11–13, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

87. *Id.* at 12.

rehabilitative opportunities is important, because research shows that these opportunities matter.[88] According to a group of scholars who study adolescent behavior and development, "rehabilitation in adolescents is highly effective," even for youth that "repeatedly violate[] basic social rules" who were once thought "impervious to treatment."[89] But rather than require specific rehabilitative opportunities, the Court hedged, letting legislatures "determine what rehabilitative techniques are appropriate and effective."[90]

D. Graham*, Rehabilitation, and Release*

The logic of *Graham*, as it pertains to rehabilitation and release, can be developed along two nonexclusive lines, offering different bases for litigation against prisons and parole systems. First, if a state complies with *Graham* by granting parole eligibility rather than shortening sentences, the state must allow prisoners like Graham a meaningful chance to demonstrate their personal development in parole proceedings that are fair and sensitive to the considerations of youth.[91] Second, the Court's declaration that states are complicit in prisoners' lack of development may create new obligations concerning their rehabilitation. That statement may be read as an instruction for states to enable prisoners like Graham actually to *experience* maturation and rehabilitation. Read expansively, *Graham* might even imply a right to rehabilitative treatment for prisoners within its scope, resuscitating an idea that briefly had life in some lower courts in the 1970s and early 1980s.[92]

The validity of extending *Graham*'s logic in these ways depends on why, exactly, the Court chose to declare life-without-parole sentences unconstitutional. At bottom, *Graham* is a decision based on the Eighth Amendment's proportionality principle; it is a judgment that, in some circumstances, a life-without-parole sentence is too severe. Aaron Sussman notes that *Graham* seems to be concerned both with prisoners' "opportunity for release" and their "opportunity for reentering the community," and these

88. *See Graham*, 560 U.S. at 74 (citing Brief of *Amicus Curiae* J. Lawrence Aber et al. at 28–31, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter Aber Brief] (summarizing research that demonstrates rehabilitation programs are effective, "even for the most difficult adolescents")).

89. Aber Brief, *supra* note 88, at 28, 30.

90. *Graham*, 560 U.S. at 73–74.

91. Sarah French Russell suggests that *Graham* has three requirements: "(1) individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood of being released, and (3) the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard." Russell, *supra* note 6, at 375–76.

92. Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381, 385 n.33 (2012) (collecting district and circuit decisions from 1976 to 1983); Andrew D. Roth, Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286, 290–92 (1985) (analyzing these cases).

distinct ideas have different implications.[93] For Alice Ristroph, the emphasis is on Sussman's former consideration—hope of release.[94] Life without parole is distinctively severe, second only to death, because of the deprivation of hope.[95] A defendant sentenced to a term of years may remain in prison just as long, but if he is parole eligible, he avoids that "bleakness of beliefs that would reduce [him] to numbed inaction."[96] On this view, the experience of incarceration is more severe when no hope of release is possible.[97] Ristroph acknowledges that it also is cruel to have one's hope crushed. To avoid that prospect, there must be some nontrivial chance that the hope is realized.[98] Indeed, there is a suggestion in *Graham* that parole systems must attain some minimal release rate to be constitutional. Justice Kennedy rejected the idea that executive clemency can mitigate the hopelessness of life without parole because clemency happens too rarely.[99]

For Michael O'Hear, the emphasis is on the latter consideration raised by Sussman—rejoining one's community.[100] The chance at rehabilitation and release matters because it is linked to "a moral–relational . . . human flourishing."[101] Life without parole is unconstitutionally severe because it excludes a person from society not just physically but also morally. There is no opportunity for reconciliation; there is no recognition of the prisoner's atonement; there is no way to develop "moral relationships with others."[102] Separation and exclusion stunt the moral development of the prisoner and

93. Sussman, *supra* note 92, at 386.

94. Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 75–76 (2010).

95. *Id.* at 76 (citing *Graham*'s discussion of the "denial of hope," 560 U.S. at 69–70); *see also* Marsha A. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 395 (2013) (quoting a juvenile lifer: "I gave up all hope of ever having an opportunity to ever see life outside of these walls. . . . [B]ecause of that lack of hope our minds began to deteriorate, and with no rehabilitation taking place for us . . . our stress, anger, confusion, and frustration would lash out.").

96. Ristroph, *supra* note 94, at 76 (quoting Philip Pettit, *Hope and Its Place in the Mind*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 159 (2004)).

97. *Id.* at 77.

98. *Id.*

99. *Graham*, 560 U.S. at 69–70; *see* Bierschbach, *supra* note 5, at 1761–62 (proposing this interpretation of Justice Kennedy's statement).

100. Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1104 (2013).

101. *Id.*

102. *Id.* at 1103.

society alike.[103] In this reading, *Graham* treats rehabilitation as "moral reform."[104]

These differing interpretations of *Graham* produce the different types of constitutional claims noted above. If Ristroph is right that *Graham* is concerned with the punitive severity of incarceration without hope of release, then the parole release determination stands out as the significant moment. Not only must the consideration given to the prisoner in that moment be fair, but the parole system must also grant release at nontrivial rates, so that prisoners are not given false hope.

However, if O'Hear is correct that *Graham*'s deeper concern—that the experience of incarceration inhibits maturation and moral development—is central to its holding, then the logic of *Graham* may support more far-reaching claims about the availability of prison rehabilitative opportunities and perhaps even about prison conditions.[105] But there is reason to be skeptical. Claims based on this more expansive reading would sweep far more broadly, creating substantially larger costs for states.[106] Moreover, *Graham*'s discussion of rehabilitation may be an outlier among the Court's recent decisions, with the Court expressing skepticism elsewhere about the possibility of rehabilitation in the prison environment.[107] Part III returns to these interpretive questions, drawing insight from the new *Graham* parole litigation.

E. Miller *and* Montgomery

Whatever *Graham*'s logical implications, its holding applies only to a small, narrowly defined group. The decision reached only juveniles, not adults; concerned only life-without-parole sentences, not all lengthy prison terms; and dealt only with nonhomicide crimes, for which juvenile life-without-parole sentences are rare. One estimate suggests that as few as 123

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103. *Id.* at 1103–04. Richard Bierschbach likewise suggests that it is "the permanent exclusion of an offender as hopelessly outside the moral community . . . that tips the severity balance." Bierschbach, *supra* note 5, at 1765. In this vein, consider Justice Kennedy's statement that the "juvenile should not be deprived of the opportunity to achieve . . . self-recognition of human worth and potential." *Graham*, 560 U.S. at 79.

104. Flanders, *supra* note 30, at 420.

105. *Cf.* Levick & Schwartz, *supra* note 95, at 403 ("[D]enying juveniles correctional programming increases the chances that they will misbehave while in prison, prevents them from building evidence of rehabilitation, increases the chances that they will be a risk if released, and almost certainly reduces any chance they will have for parole.").

106. Sussman, *supra* note 92, at 385, 399–404 (describing the considerable mental health, educational, and social needs of incarcerated juveniles and the developmental difficulties that they face in the prison environment).

107. Flanders, *supra* note 30, at 403, 411–12 (discussing the "pronounced hostility" to the rehabilitative ideal shaping the Court's decisions in Tapia v. United States, 564 U.S. 319 (2011) and Pepper v. United States, 562 U.S. 476 (2011)).

prisoners met these criteria at the time that *Graham* was decided.[108] However, two years after *Graham*, the Supreme Court brought another class of defendants within its new juvenile-sentencing jurisprudence.

In *Miller v. Alabama*, the Court held that mandatory life-without-parole sentences for juvenile defendants convicted of homicide offenses violate the Eighth Amendment.[109] *Miller* drew on the same salient characteristics of youth that had shaped the outcomes of *Graham* and *Roper*.[110] For defendants who receive parole eligibility as a result of *Miller*, the Court said that they too must receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[111]

Though *Miller* still permits life without parole for juvenile defendants convicted of homicide offenses, the Court said that this sentencing choice should be "uncommon."[112] The distinctive features of youth should significantly influence sentencing, because only "the rare juvenile offender" should receive the harshest punishment available.[113] This language effectively creates a presumption that juvenile defendants should not receive life-without-parole sentences, and it is the state's burden to rebut that presumption.

Miller is important for this Note's discussion of rehabilitation and parole release because the population of *Miller* defendants and prisoners is significantly larger than the *Graham* population; nearly 2,500 prisoners were serving *Miller* sentences at the time the case was decided.[114] The extension of *Graham*'s parole and rehabilitation logic to the *Miller* population would mark a substantial expansion of its scope.[115]

The Court addressed the question of *Miller*'s retroactive application to those 2,500 people in *Montgomery v. Louisiana*.[116] Holding that *Miller* applied retroactively,[117] the Court robustly affirmed *Miller*'s holding, stating it as the principle that life without parole is an unconstitutional sentence for "all but the rare juvenile offender whose crime reflects irreparable corruption."[118] Significantly, *Montgomery* entrusted the effectuation of *Miller* to state parole systems: "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather

108. O'Hear, *supra* note 100, at 1099. The Court in *Graham* suggested that there may have been only 109. 560 U.S. at 62–63.

109. 132 S. Ct. 2455, 2469 (2012).

110. *Id.* at 2468.

111. *Id.* at 2469 (quoting Graham v. Florida, 506 U.S. 48, 75 (2010)).

112. *Id.*

113. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

114. *Id.* at 2477 (Roberts, J., dissenting).

115. *See infra* subpart IV(A).

116. 136 S. Ct. 718 (2016).

117. *Id.* at 736.

118. *Id.* at 734 (citations omitted).

than by resentencing them."[119] It is parole systems that must act against the "grave risk" that many juvenile defendants "are being held in violation of the Constitution."[120] The Court even advised parole boards on the factors that ought to determine their release decisions.[121] To the extent *Graham* imposes new obligations on states, *Montgomery* indicates that those obligations are now owed to another, considerably larger set of prisoners.

II. The New Challenges

This Part collects four cases that have raised the question of whether *Graham* imposes a new constitutional mandate on parole boards. The cases demonstrate how the new *Graham* parole challenges intersect with the pre-*Graham* framework of *Greenholtz*, and they suggest how *Graham* may be used to challenge the practices of prisons and parole systems that concern rehabilitation and release. Though this litigation is piecemeal, it nevertheless clarifies the nature and scope of parole claims based on *Graham* and suggests the course of future development. Part II describes the cases, with analysis following in Part III.

A. Hill v. Snyder

Seven months after *Graham*, Michigan prisoners serving life without parole for first-degree murders committed as juveniles challenged the constitutionality of their sentences.[122] They argued that because the Michigan Parole Board could not consider the salient differences between juveniles and adults, their sentences and the parole statute violated the Eighth Amendment principles articulated in *Graham*.[123]

These plaintiffs had anticipated *Miller*. *Graham* did not apply to them directly because they had been convicted of homicide. They nevertheless recognized the ramifications of *Graham*'s reasoning, and their case eventually raised the question of parole reforms needed to ensure meaningful consideration. Once *Miller* was decided, the district court held that *Miller* rendered the state's parole statute unconstitutional as applied,[124] thereby setting up two questions: first, which of these plaintiffs should be made

119. *Id.* at 736.

120. *Id.*

121. *Id.* (describing the petitioner's prison employment, activities, and record of behavior as examples of the "kind[s] of evidence that prisoners might use to demonstrate rehabilitation").

122. Complaint for Declaratory and Injunctive Relief at 29–30, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Nov. 17, 2010) (No. 10-14568).

123. *Id.*

124. Opinion & Order Granting in Part & Denying in Part Plaintiffs' Motion for Summary Judgment & Denying Defendants' Cross-Motion for Summary Judgment at 5–6, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013) (No. 10-14568).

eligible for parole; and second, whether the board needed reforms to ensure that it considered potential parolees fairly.[125]

The plaintiffs' response was the first indication of the demands that prisoners have started to make of their parole systems. Arguing that "dumping them into the existing parole review system . . . [would] deprive them of the meaningful and realistic opportunity for release mandated by *Graham*," they argued that the parole board's exercise of discretion was not subject to meaningful guidelines or judicial review.[126] Moreover, only one in six parole-eligible prisoners serving a life sentence for a crime committed as a juvenile had even received a hearing.[127] Even model prisoners were denied consideration with no hearing or explanation.[128]

The plaintiffs then demanded numerous procedural and substantive changes to the board's release determinations.[129] Their procedural proposals were in-person public hearings that the board could not avoid by declaring "no interest"; hearings every three years, starting after ten years of incarceration; explanations of parole denials and expectations for the prisoner to work on; and judicial review of parole denials.[130] They also requested that board members undergo training in brain science and adolescent development and use decision criteria based on *Miller*, sensitive to the experience of young prisoners (e.g., their heightened vulnerability in prison—and hence their higher likelihood of disciplinary infraction).[131]

In response,[132] Michigan chose the path that each state has so far taken in *Graham* parole litigation—arguing that *Graham* concerned only sentencing and that *Graham*'s "meaningful opportunity" language did not alter the constitutional standards for parole boards from *Greenholtz*.[133] State law had to create a liberty interest for constitutional analysis of parole procedures, and Michigan's parole statute was not such a law.[134]

However, the question of *Graham*'s impact on state parole boards was never reached. The then-unresolved issue of *Miller*'s retroactive application

125. *Id.* at 5–6.

126. Plaintiffs' Briefing in Compliance with this Court's Order of January 30, 2013 at 3–4, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Mar. 1, 2013) (No. 10-14568).

127. *Id.* at 12.

128. *Id.* at 13–14 (describing Anthony Jones, the lone Michigan prisoner serving life without parole to obtain a sentence modification after *Graham*, who was denied release despite being convicted only of felony murder, having "substantial community support," and having a clean disciplinary record).

129. *Id.* at 15–16.

130. *Id.*

131. *Id.*

132. Defendants' Supplemental Brief in Compliance with This Court's Order of January 30, 2013 at 6, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Mar. 22, 2013) (No. 10-14568).

133. *Id.* at 6–7 (citing Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

134. *Id.* at 15.

came to dominate the case. The court's next order to the board, which dealt solely with *Miller* compliance,[135] was stayed by the Sixth Circuit,[136] and the case progressed no further.[137]

B. Wershe v. Combs

Another case soon allowed the Sixth Circuit to address whether *Graham* supported an Eighth Amendment claim against parole boards.[138] Richard Wershe, arrested at seventeen for possessing over 650 grams of cocaine, was sentenced to life without parole.[139] After the statute under which he was sentenced survived Eighth Amendment challenge in *Harmelin v. Michigan*,[140] the Michigan Supreme Court invalidated it on state-constitutional grounds, converting the sentences of defendants like Wershe to life with parole.[141] In 2012, Wershe received notice of an interview with the parole board, but the interview never occurred.[142] Instead, the board told Wershe that it had no interest in his case and would reconsider him five years later, thereby prompting Wershe's Eighth and Fourteenth Amendment claims.[143]

Significantly, the Sixth Circuit allowed Wershe's Eighth Amendment "meaningful opportunity" claim based on *Graham* to proceed, while dismissing his due process claim because it was unsupported by a protected liberty interest.[144] Noting the "novelty" of Wershe's Eighth Amendment claim, the court recognized that it presented questions of first impression.[145] It then remanded the case for consideration of the Eighth Amendment claim in the first instance.[146]

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135. Order Requiring Immediate Compliance with *Miller*, Hill v. Snyder, 2013 WL 364198 (E.D. Mich. Nov. 26, 2013) (No. 10-14568).

136. Order at 4–5, Maxey v. Snyder, No. 13-2661 (6th Cir. Dec. 23, 2013).

137. After a two-year wait, the decision in *Montgomery* led the Sixth Circuit to vacate the district court's orders and remand the case, essentially instructing the district court to start over. Hill v. Snyder, No. 13-2661/2705 (6th Cir. May 11, 2016).

138. *See* Wershe v. Combs, 763 F.3d 500, 504–06 (6th Cir. 2014) (vacating the district court's dismissal of Wershe's Eighth Amendment claim, reasoning that the district court considered only pre-*Graham* case law but not the implications of *Graham* for parole procedures).

139. For more on Wershe's unusual personal history, see Vince Wade, *Is Cocaine Legend White Boy Rick Serving Life for Busting Crooked Cops?*, DAILY BEAST (Nov. 29, 2015, 12:00 AM), http://www.thedailybeast.com/articles/2015/11/29/is-cocaine-legend-white-boy-rick-serving-life-for-busting-crooked-cops.html [https://perma.cc/5EZM-4SCA].

140. 501 U.S. 957, 996 (1991). For more on *Harmelin*'s significance, see *infra* subpart IV(B).

141. *Wershe*, 763 F.3d at 502 (citing People v. Bullock, 485 N.W.2d 866, 875–77 (Mich. 1992)).

142. *Id.* at 503.

143. *Id.* at 503–04.

144. *Id.* at 505–06 (citing the circuit's cases based on *Greenholtz*: Crump v. Lafler, 657 F.3d 393, 404 (6th Cir. 2011); Sweeton v. Brown, 27 F.3d 1162, 1164 (6th Cir. 1994)).

145. *Wershe*, 763 F.3d at 505–06.

146. *Id.* at 506.

On remand, Wershe asked the board to explain its "no interest" denials over the years, to give weighty consideration to his youth at the time of his crime, and to provide detailed expectations so he could work toward release.[147] However, Wershe was not the ideal candidate for parole release. In 2006, he had been convicted for racketeering, apparently for conduct in prison; unsurprisingly, the district court upheld the board's denial of release.[148] In the process, the court expressed a narrow view of *Graham*, stating that "*Graham* was not intended to upend parole systems" and "does not allow courts to undertake a full review of the State's parole procedures and substitute its own judgment for the State's."[149] While the court clarified that it was finding the board in compliance with *Graham* only in Wershe's case,[150] its statements indicated a dim view of any future plaintiff, even one with more favorable facts, seeking changes to parole procedures.

C. Greiman v. Hodges

Greiman v. Hodges[151] presented an Eighth Amendment challenge to the Iowa Board of Paroles (IBOP) that withstood the State's motion to dismiss.[152] In 1982, at the age of sixteen, Blair Greiman received life without parole for first-degree kidnapping, the mandatory sentence at the time.[153] Following *Graham*, the Iowa Supreme Court declared that statute unconstitutional, and Greiman's sentence was altered to life-with-parole eligibility after twenty-five years.[154] Having already served twenty-five years, Greiman was immediately eligible, but despite *Graham*'s emphasis on demonstrated post-conviction maturation and rehabilitation, the IBOP denied release due to "the seriousness of the crime."[155]

Responding to the State's motion to dismiss, Greiman advanced two theories based on *Graham*'s interpretation of the Eighth Amendment. First, Greiman alleged that the IBOP's failure to consider his youth at the time of the crime and subsequent maturation deprived him of a meaningful

147. Plaintiff's Objections to Magistrate's Report and Recommendation at 5–8, Wershe v. Combs, 2016 WL 1253036 (W.D. Mich. Jan. 18, 2016) (No. 1:12-CV-1375).

148. Order Adopting Report and Recommendation at 2, 8, Wershe v. Combs, 2016 WL 1253036 (W.D. Mich. Mar. 31, 2016) (No. 1:12-CV-1375).

149. *Id.* at 7 (quoting the statement in *Graham* that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance," 560 U.S. 48, 75 (2010)). This likely misreads that passage from *Graham*. The Court was discussing how a state would determine sentence modifications for prisoners serving unconstitutional life-without-parole sentences, not how a state would ensure its parole system functions fairly.

150. *Id.* at 8.

151. 79 F. Supp. 3d 933 (S.D. Iowa 2015).

152. *Id.* at 944–46.

153. *Id.* at 935.

154. *Id.* at 935–36.

155. *Id.* at 936 (citation omitted).

opportunity to obtain release.[156] This claim tracked the arguments of the *Hill* plaintiffs and Richard Wershe, discussed above. Second, Greiman alleged that the state denied him participation in a treatment program for prisoners with sex offense convictions that was a prerequisite for release, "thereby *de facto* eliminating [a] meaningful opportunity for parole."[157] Relying on the *Graham* opinion's discussion of prison policies that keep juvenile defendants out of rehabilitative programs,[158] Greiman argued that prison policies made it impossible for him to obtain release.[159] He had to complete the treatment program to be considered for release, but he could not enroll in it until he had a discharge date.[160] This catch-22 consigned him to life without parole.[161]

The court had numerous bases on which to reject Greiman's claims. The court could have accepted Iowa's argument that *Graham* applied only to sentencing and placed no burden on state parole systems.[162] It could have relied on *Greenholtz* and held that Greiman had no protected liberty interest at stake in parole proceedings.[163] Regarding Greiman's claim that the prison's policies were an obstacle preventing parole review, the court could have agreed with Iowa that there is no cognizable interest in participating in rehabilitative programs, even those bearing on parole release.[164] More generally, it could have invoked the federal courts' customary deference to prison administrators.[165]

Instead, the court distinguished *Greenholtz* and explained that *Graham* changed the constitutional analysis of parole.[166] *Graham* made Greiman the bearer of a new "categorical entitlement"[167] and assigned the IBOP a new constitutional mandate: "the responsibility for ensuring that Plaintiff receives his constitutionally mandated 'meaningful opportunity to obtain release

156. *Id.* at 938.

157. *Id.*

158. Plaintiff's Brief in Resistance to Defendants' Rule 12(b)(6) Motion to Dismiss at 19, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB) (citing Graham v. Florida, 560 U.S. 48, 74, 79 (2010)).

159. *Id.*

160. *Id.* at 19–20, 29.

161. *Id.* at 19.

162. Brief in Support of Motion to Dismiss at 7–8, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB).

163. *Id.* at 10 (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

164. *Id.* at 9 (citing Stewart v. Davies, 954 F.2d 515, 516 (8th Cir. 1992) and Wishon v. Gammon, 978 F.2d 446, 450 (8th Cir. 1992) in which the Eighth Circuit rejected prisoners' constitutional arguments about exclusion from rehabilitative programs).

165. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (recognizing that "internal problems of state prisons involve issues so peculiarly within state authority and expertise").

166. *Greiman*, 79 F. Supp. 3d at 945 ("The present case is distinguishable [from *Greenholtz*] because although *Graham* stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a *possibility* of parole or a mere hope of parole . . . .") (citations omitted).

167. *Id.*

based on demonstrated maturity and rehabilitation' lies squarely with IBOP and the other State-actor Defendants."[168] Then, in an apparent narrowing of circuit precedent, the court recognized that Greiman presented "at least a plausible" argument that exclusion from rehabilitative programs violated *Graham* by condemning him to a "*de facto* life without parole sentence."[169] Contrary to federal courts' typical reluctance to interfere with prison administration, the court's holding suggested that *Graham* brings such prison policies under federal court review.

However, *Greiman* would not be the case to prove the point conclusively. Soon after the court denied the motion to dismiss, Greiman moved to continue the trial date, explaining that the board was granting him review.[170] Citing favorable settlement discussions, he wished to hold off on further proceedings.[171] The IBOP also let Greiman into the required treatment program, a concession that mooted Greiman's second claim.[172]

D. Hayden v. Keller

Hayden v. Keller[173] went further than *Greiman*, taking a hard look at the operations of the North Carolina Parole Commission.[174] Shaun Hayden was sixteen when he pled guilty to first-degree burglary, a first-degree sexual offense, and other charges.[175] He was sentenced to "a term of his natural life" in 1983, and since becoming eligible for parole in 2002, the Commission denied his parole at the initial stage of review each year.[176]

At summary judgment, Hayden argued that the lack of meaningful parole review in North Carolina gave him the functional equivalent of that prohibited sentence.[177] The court agreed: "[i]f a juvenile offender's life sentence . . . is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands."[178] Following *Greiman*, it acknowledged *Greenholtz*'s principle that there is generally no right to release before the

168. *Id.* at 943.
169. *Id.* at 944.
170. *See* Motion to Extend Time for Discovery, Dispositive Motions, & Continue Trial Date at 1–2, Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (No. 4:13-cv-00510-RP-CFB) (explaining that Greiman was "tentatively scheduled for a file review hearing before the Board . . . with a personal interview with the Board likely to follow several weeks later").
171. *Id.*
172. Email from John Whiston, Univ. of Iowa Coll. of Law, to author (April 14, 2016, 9:36 AM CST) (then Greiman's attorney).
173. 134 F. Supp. 3d 1000 (E.D.N.C. 2015).
174. *Id.* at 1009–11.
175. *Id.* at 1001.
176. *Id.* at 1001–02.
177. *Id.* at 1007.
178. *Id.* at 1009 (citing Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015)).

expiration of a valid sentence,[179] but it recognized that *Graham* imposed a new requirement on states vis-à-vis prisoners convicted for juvenile nonhomicide offenses.[180]

Central to the case was a detailed analysis of the North Carolina Parole Commission.[181] The court looked beneath the surface of North Carolina's parole statutes and scrutinized whether the state's actual practices granted each eligible prisoner meaningful and fair consideration.[182] It considered case analysts' and commissioners' workloads—4,338 prisoners per analyst, and ninety-one votes per day for each commissioner on whether to give prisoners a full review for parole release.[183] The court noted that from 2010 to 2015, around 500 inmates received full review each year, but typically ten or fewer received release.[184] Often none were juvenile offenders.[185]

The Commission's particular failing was not considering that Hayden was a youth at the time of the crime.[186] Analysts did not note which prisoners had been convicted for juvenile crimes and did not attend to prisoners' maturation or rehabilitation.[187] Instead of demonstrated rehabilitation, the "brutality" of the prisoner's original offense predominated in the release determination.[188] Hayden's prison disciplinary violations were heavily frontloaded to his early years in prison, but that seemingly did not matter.[189] Crucially, the court also emphasized the Commission's low release rate.[190] While acknowledging that *Graham* did not guarantee release, the court found that the low release rate "raise[d] questions about the meaningfulness of the process as applied to juvenile offenders."[191]

The Commission's procedures were also flawed. The Commission gave victims notice and the opportunity for in-person testimony, but gave neither

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179. *Id.* at 1006 (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).

180. *Id.* at 1008–09 (citing Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015), and *Graham v. Florida*, 560 U.S. 48, 79 (2010)).

181. *See id.* at 1002–05 (facts); *id* at 1008–09 (analysis).

182. *Greiman* suggested that this type of functional analysis would be necessary, but that case did not progress far enough for the court to take that step. *See* Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (concerning the state's claims about its official procedures, "the Court cannot simply presume that such procedures were actually employed by the IBOP").

183. *Hayden*, 134 F. Supp. 3d at 1002.

184. *Id.* at 1005. Excluding 2010, an outlier, the Commission released only 1.2% to 2.7% of those considered. *Id.* The state contested these numbers, arguing that the court overlooked a conditional work-release program. Defendant–Appellant's Opening Brief at 15, 28, Hayden v. Butler, No. 15-7676 (4th Cir. Aug. 1, 2016). It is unclear from the filings how many prisoners who received conditional work-release obtained actual release.

185. *Hayden*, 134 F. Supp. 3d at 1005.

186. *Id.* at 1009.

187. *Id.*

188. *Id.*

189. *Id.* at 1010.

190. *Id.*

191. *Id.*

to the prisoner or anyone supporting his release.[192] These procedures rendered him "an entirely passive participant" in the parole review proceeding.[193] The court also called into question the Commission's very structure. Noting the small staff and huge workloads, the court questioned whether the "sheer volume of work may itself preclude" fair consideration.[194] This line of analysis raises fairness considerations for all prisoners, not just juveniles convicted of nonhomicide offenses.

However, though the court read *Graham* expansively to warrant a close examination of state-government operations, it read the case narrowly in another respect. Noting *Graham*'s statement that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance," the court granted Hayden's motion for summary judgment only in part; it denied his requested relief and ordered the parties to negotiate a plan for compliance with *Graham*.[195] In and of itself, a federal court ordering a state to negotiate parole reforms with a prisoner is momentous, particularly when it follows on a critique of the system's entire structure. In this instance, however, the process slowed amid ineffectual appeals and stalled negotiations,[196] so the shape of the reform to come remains unclear.[197]

III. The Nature and Scope of the New Challenges

A. Understanding the Graham *Claim*

The cases addressing whether *Graham* imposes new obligations on parole boards allow us to begin answering the questions posed in the introduction to this Note. The first insight to draw from them is that the courts consistently have understood *Graham* to create a new rule for parole boards. No court accepted the argument that *Graham* is purely a sentencing case with no impact on parole systems, and none considered *Greenholtz*'s due process framework to be controlling. This development is particularly significant for prisoners in states with purely discretionary parole release,

192. *Id.* at 1009–10.

193. *Id.* at 1009–11.

194. *Id.* at 1009.

195. *Id.* at 1011 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

196. *See* Notice of Appeal, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 21, 2015) (No. 5:10–CT–3123–BO). In August 2016, the Fourth Circuit dismissed the appeal. Hayden v. Butler, No. 15-7676, 2016 WL 4073275, slip op. at 4 (4th Cir. Aug. 1, 2016) (per curiam). Because North Carolina refused to negotiate with Hayden, the district court never ordered any injunctive relief, and there was no final judgment for the appellate court to review. *Id.* at 3–4.

197. As of this writing, negotiations were unsuccessful, and the parties' competing plans for compliance were pending before the district court. *See* Memorandum in Support of Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham* at 4–10, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO); Defendant's Response in Opposition to Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham*, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO).

who are completely incapable of challenging their parole systems under *Greenholtz*.

A second insight is their crystallization of the basic *Graham* parole claim—unfair parole systems turn otherwise constitutional sentences into the functional equivalent of life without parole. The parole challenge therefore is tied to the constitutional sentencing analysis. A prisoner can bring this claim only if it would be unconstitutional for him to receive life without parole. Only then does the deprivation of a meaningful opportunity to obtain release become an Eighth Amendment violation.

As suggested in Part II, *Graham*'s discussion of rehabilitation and release could be developed in two ways, depending on one's interpretation. If life without parole's deprivation of hope makes it unconstitutionally severe, then the fairness of parole proceedings should be the focus of constitutional claims. But if life without parole is unconstitutionally severe also because of how it undermines a person's moral development, then *Graham* claims may reach the availability of rehabilitative opportunities and even basic prison conditions.

The former type of claim has predominated in the cases. Prisoners who have directly experienced parole denial have sought reforms of parole boards' procedures and substantive criteria in order to reduce the rate of denials. They have demonstrated the deprivation of a meaningful opportunity to obtain release largely through inference, by showing the system's procedural deficiencies. Low or nonexistent release rates have been crucial evidence. The Michigan plaintiffs in *Hill* drew attention to them, as did the North Carolina plaintiff in *Hayden*. If all prisoners struggle to obtain release, denials likely result from systemic problems requiring systemic changes rather than from reasonable assessments of individuals' worthiness.

Only *Greiman* presented an alternative to the straightforward *Graham* claim, arguing that the state's policies—requiring completion of a treatment program but barring him from enrolling—functioned to block him from reaching parole review. How should we think of this claim? Is it just a variation on the theme that unfair parole review processes are unconstitutional, or is it the distinct argument that rehabilitative opportunities must be made available for the sake of the prisoner's personal development? If it is the former, it may be remedied by eliminating the requirement. If it is the latter, states may face much more robust demands.

Greiman's out-of-court settlement means that it will not provide a clear answer. That said, there are good reasons to think that this alternative is just a variation on the straightforward *Graham* claim, that it does not herald a larger push for the right to rehabilitative treatment, and that *Graham* likely cannot support such a push. First, the court in *Greiman* construed the claim in the former, narrower fashion, as an arbitrary and therefore unfair

procedural obstacle.[198] Second, the broader construction of Greiman's claim—that the treatment program must be provided, not just eliminated as a barrier to review—would enlist federal courts in imposing much more burdensome requirements if applied to the rest of the country. Suppose a state had no treatment programs for its parole-eligible prisoners convicted of sex offenses. If *Graham* requires such programs to be available, it would obligate those states to create programs that do not yet exist. This is a much more substantial undertaking than the narrower interpretation requires. Third, the narrower interpretation is consonant with *Graham*'s statement that it "is for legislatures to determine what rehabilitative techniques are appropriate and effective."[199] Admittedly, *Graham* did also state that "the system itself becomes complicit in the lack of development" when rehabilitative programs are withheld,[200] but that general statement can be true without being enforceable through the courts. It should not be read to trump the more specific grant of deference to legislatures. Fourth, and finally, institutional-reform litigation against prisons, even in its 1970s and 1980s heyday, generally has not managed to alter the rehabilitative programming available to prisoners.[201] Against that status quo and *Graham*'s deference to legislatures, it is best to read Greiman's second claim as a variation on the standard *Graham* claim, rather than as a sign that *Graham* will soon cause the recognition of the right to rehabilitative treatment.

B. Adjudicating the Graham *Claim*

None of the cases has yet yielded a full remedial order. Consequently, it remains to be seen how courts will turn *Graham*'s "meaningful opportunity" requirement into a tractable framework for analyzing cases and determining the requisite reforms.[202] *Hayden*'s order to the parties to

198. Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2016) ("Plaintiff, however, does not claim that he is directly deprived of a constitutional right by virtue of being denied sex offender treatment; rather, Plaintiff claims that the IDOC's policy results in a *de facto* denial of his right to a 'meaningful opportunity to obtain release' pursuant to *Graham*.").

199. Graham v. Florida, 560 U.S. 48, 73–74 (2010).

200. *Id.* at 79.

201. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 563–64 (2006).

202. State courts, it should be said, are not limited to ordering such reforms. They can solve the problem of unfair parole review by ordering resentencing and enabling the challenger to avoid parole review altogether. *See, e.g.*, Atwell v. State, 197 So. 3d 1040, 1041–43 (Fla. 2016) (ordering the resentencing of a prisoner whose release had been postponed by the Florida parole system until 2130). Federal courts, by contrast, can provide relief only in the form of procedural changes, at least when the parole challenges are brought via § 1983. A prisoner's request for resentencing via § 1983 would in effect be a challenge to the "fact or duration of his confinement," for which the writ of habeas corpus furnishes the exclusive remedy. *See* Wilkinson v. Dotson, 544 U.S. 74, 78 (2005) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)). Each of the cases discussed in this Note were § 1983 claims. For any such challenges in the future, state courts have a powerful remedial option that federal courts do not.

negotiate reforms is not a solution to this problem. The court would still need some standard by which to decide whether the resulting reforms passed constitutional muster and, if it retains jurisdiction to ensure that the reforms are implemented, to measure the state's progress. Sarah French Russell suggested that courts might either treat parole challenges like Fourteenth Amendment procedural due process cases, as *Greenholtz* did,[203] or develop new procedural requirements out of the Eighth Amendment itself, as occurred in the capital-sentencing context.[204] Rather than developing some new *sui generis* framework, adapting the familiar principles of procedural due process is the more sensible course.[205]

One reason is that the analogy to procedural due process is more intuitive. In both *Greiman* and *Hayden*, the judges apparently were thinking in due process terms. Though both courts recognized that the claimed injury was substantive and rooted in the Eighth Amendment, they used the language of due process to discuss that injury and potential remedies. In *Greiman*, the court said, "Plaintiff has adequately stated a plausible due process claim."[206] Likewise, in *Hayden*, the court relied on *Greenholtz*'s statement that "due process is flexible and calls for such procedural protections *as the particular situation demands*."[207]

Moreover, the *Graham* opinion can be mapped onto the standard due process framework, provided that appropriate adjustments are made. The canonical procedural due process analysis from *Mathews v. Eldridge*[208] has three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[209]

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203. Russell, *supra* note 6, at 417.

204. *Id.* at 416 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978), as well as Bierschbach, *supra* note 5, at 1749, who suggested this possibility).

205. As this Note was being finalized for publication, Hayden employed the approach proposed here, filing a brief replete with citations to the procedural due process case law. Memorandum in Support of Plaintiff's Proposed Plan for North Carolina's Compliance with *Graham* at 4–10, Hayden v. Butler, 134 F. Supp. 3d 1000 (E.D.N.C. Oct. 24, 2016) (No. 5:10–CT–3123–BO). Whether this court and others will follow the same framework remains to be seen.

206. Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

207. Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015) (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979)).

208. 424 U.S. 319 (1976).

209. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

Justice Kennedy made clear that the private interests are substantial. The Eighth Amendment's prohibition of cruel and unusual punishment is at stake.[210] That prohibition is protection against a particularly acute form of suffering: "depriv[ation] of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[211] By contrast, governmental interests are diminished. The traditional penological goals of deterrence, retribution, and incapacitation have less purchase where juvenile defendants are concerned, while rehabilitation joins with the prisoner's private interest in justifying more fair, robust procedures.[212]

As to the risk of erroneous deprivation from insufficient procedure, *Graham* seems agnostic about the particular procedures that states should employ. Notably, the Court expressed doubt that sentencing authorities "could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[213] That statement concerned the difficulties of forecasting risk at sentencing. However, its contrasting of the "few" with the "many" may be read to suggest that most members of the *Graham* population might well be deserving of release and that parole boards should work hard to identify them. The Court's reiteration in *Miller* and *Montgomery* that only the "rare" juvenile defendant actually deserves life without parole[214] lends further support to that interpretation, as does the absence of the despair and futility that characterized *Greenholtz*.[215] These aspects of *Graham* do not necessarily imply that additional procedures will enhance the accuracy of parole-board determinations, per the second *Eldridge* factor, but they at least imply that releases of *Graham* prisoners should be common, denials should be viewed with suspicion, and parole boards should make their decisions carefully. Thus, in the *Eldridge* framework, *Graham* indicates strong private interests, diminished public interests, and the expectation that release should regularly be granted, all of which weigh in favor of robust procedural protections.[216]

Additional advantages of adapting the *Eldridge* framework, rather than crafting novel Eighth Amendment standards, are harmonization with

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210. Graham v. Florida, 560 U.S. 48, 58–59 (2010) (laying out the Eighth Amendment standards); *id.* at 74–75 (stating the Court's holding).

211. *Id.* at 79.

212. *Id.* at 71–74.

213. *Id.* at 77.

214. *See supra* notes 119, 124 and accompanying text.

215. *See supra* notes 64–66 and accompanying text.

216. For discussion of reforms that parole systems should adopt to comply with *Graham*, see Megan Annitto, Graham*'s Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 BROOK. L. REV. 119, 161–67 (2014); Cohen, *supra* note 51, at 1087–88; and Russell, *supra* note 6, at 406–33.

precedent and familiarity. Not only is *Greenholtz* a branch off the 1970s procedural due process tree; parole revocation—the process by which parolees are returned to prison for technical violations or new offenses—is governed by a contemporaneous due process case, *Morrissey v. Brewer*.[217] Adapting *Eldridge* to *Graham* parole claims would bring a measure of order to the doctrine. Likewise, procedural due process is a familiar mode of analysis for judges, and the vast decisional law can supply comparators for the myriad factual questions that *Graham* parole claims will likely raise.

But the analytical framework should not end there. In due process analysis, "the procedures [must] be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'"[218] That principle, coupled with the Supreme Court's reiteration of youth's distinctive characteristics, requires that the attributes of youth are central to punishment decisions. As such, enhanced procedures must be accompanied by a change in the substantive criteria that determine parole release. No longer should the severity of the original offense be the overriding concern.[219] To ensure compliance with *Graham*, courts must see to it that youth informs parole boards' evaluations of the original crimes and that maturation in the intervening decades receives its appropriate weight.[220] The effective application of these standards to the *Graham* population then can help to develop better parole decision making that points the way to a fairer system for all prisoners.

IV. The Next Challenges

The cases discussed in this Note have revealed problems of fairness for all parole-eligible prisoners, regardless of their age at the time of the crime. For example, the brief, superficial consideration given to each parole-eligible North Carolina prisoner, as described in *Hayden*,[221] hardly offers a meaningful chance at release to any prisoner. Given that, the *Graham* parole challenge makes an odd fit with the existing constitutional jurisprudence of parole. A relative handful of prisoners seemingly can make substantial demands of state parole systems, while the vast majority have either the minimal *Greenholtz* due process claim or none at all, depending on whether the phrasing of their state's parole statute happens to create a protected liberty

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217. 408 U.S. 471, 481–84 (1972). Russell does not see this harmonization as a virtue because of how weak the procedural due process framework has been when applied to parole systems in the past. Russell, *supra* note 6, at 418–19.

218. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970)).

219. Annitto, *supra* note 216, at 163.

220. Recall the Court's suggestion in *Montgomery* that a prisoner's status as a model member of the prison community was "one kind of evidence that prisoners might use to demonstrate rehabilitation." Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

221. *See supra* notes 185–189 and accompanying text.

interest. Under this jurisprudence, if two high-schoolers commit a crime together—one shortly before his eighteenth birthday, the other shortly after—only one can make this new constitutional claim.

Whether the logic of *Graham* will extend to *Miller* defendants and, beyond them, to adults, will determine the fate of this odd state of jurisprudential affairs. Juvenile defendants convicted of homicide who later become parole eligible should be able to challenge ineffective parole review, just like juvenile defendants convicted of nonhomicide offenses. However, the Eighth Amendment-noncapital-sentencing jurisprudence must evolve before adults will be able to do the same.

A. Extending Graham *Parole Claims to* Miller

Miller v. Alabama called for all but the rare juvenile offender to receive a sentence less severe than life without parole.[222] States can comply either through sentences shorter than the term of a natural life or through life sentences with parole eligibility. *Montgomery v. Louisiana* encouraged states to remedy *Miller* violations through the latter option,[223] reiterating that these once-juvenile defendants should have a fair opportunity to demonstrate their maturation and should have "their hope for some years of life outside prison walls . . . restored."[224] Thus, if *Graham* supports a claim for the deprivation of the opportunity to obtain release, it stands to reason that *Miller* and *Montgomery* do as well.[225]

The reasoning underlying the *Graham* parole claim transfers naturally to the *Miller* population. The basic *Graham* parole claim—that ineffective parole review transforms the prisoner's sentence into the functional equivalent of life without parole—would require only a small alteration. A plaintiff would argue that *Miller* requires juvenile defendants convicted of homicide crimes to be sentenced only after full consideration of youth and its salient characteristics. Because *Miller* barred life without parole for "all but the rarest juvenile offenders," a decision to confer parole eligibility should carry constitutional significance. Unfair parole review would negate that decision, converting a parole-eligible sentence into the functional equivalent

222. 132 S. Ct. 2455, 2469 (2012).

223. 136 S. Ct. at 736.

224. *Id.* at 736–37.

225. For initial validation of this reasoning, see *Diatchenko v. Dist. Attorney for Suffolk*, 27 N.E.3d 349, 353 (Mass. 2015) (finding that the state parole board's handling of juvenile homicide cases violated both the U.S. Constitution as well as the Massachusetts Declaration of Rights and ordering the appointment of counsel, the provision of funds, and the opportunity for judicial review); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Sup.*, 30 N.Y.S.2d 397, 401 (N.Y. App. Div. 2016) (annulling the denial of parole to a once-juvenile defendant convicted of second-degree murder and instructing the parole board to conduct a new hearing focusing on youth's "attendant characteristics").

of life without parole.[226] Such parole review should then be considered a violation of *Miller* and grounds for constitutional challenge.

B. Beyond Graham *and* Miller

The new Eighth Amendment parole challenges depend on the constitutionality of the underlying sentence. A prisoner convicted of a juvenile nonhomicide offense can bring this claim only because the Supreme Court has declared that he should not receive life without parole. A prisoner convicted of a juvenile homicide offense should be able to bring this claim only because the Court has declared that most defendants like him should not receive life without parole either. But until the Court prohibits life without parole for additional categories of defendants, no other prisoners can bring Eighth Amendment parole claims of this kind.

The jurisprudence applying the Eighth Amendment to adult criminal sentences "make[s] it very difficult, if not impossible," for courts to invalidate any prison sentence.[227] In *Solem v. Helm*,[228] the Supreme Court had held that it was unconstitutional for South Dakota to issue life without parole for passing a "no account" check worth $100, a sentence under the state's recidivist statute that was triggered by the defendant's string of minor prior offenses.[229] *Solem* remains good law,[230] but the Court soon curtailed its precedential effect.[231] In *Harmelin v. Michigan*, the Court upheld a life-without-parole sentence for the possession of over 650 grams of cocaine.[232] *Solem*'s effect was further limited by *Lockyer v. Andrade*,[233] in which the Court upheld a life sentence with parole eligibility after fifty years for petty theft.[234] The case was an application of California's "three strikes" law.[235]

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226. Along similar lines, see W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 971–72 (2009) (advancing the theory that parole denials based on the severity of the original offense "second-guess the jury," thereby violating the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 496–97 (2000) that sentence-lengthening facts should be found by a jury beyond a reasonable doubt).

227. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1050 (2004).

228. 463 U.S. 277 (1983).

229. *Id.* at 281, 284.

230. *See* Graham v. Florida, 560 U.S. 48, 59 (2010) (citing *Solem* as such).

231. *Cf.* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1160 (2009) ("*Solem* now stands as an outlier.").

232. 501 U.S. 957, 961, 996 (1991).

233. 538 U.S. 63 (2003).

234. *Id.* at 67, 77.

235. *Id.* at 68. The Court issued another Eighth Amendment proportionality decision the same day, *Ewing v. California*, 538 U.S. 11 (2003). However, *Ewing* is a somewhat-less-stark example of the Court's tolerance for lengthy adult prison sentences, in that the crime at issue was more

Andrade had stolen videotapes worth approximately $150 from two stores, which garnered him two criminal charges.[236] Convicted on both, he received two sentences of twenty-five years to life, served consecutively.[237] The Court distinguished *Solem*'s invalidation of a life-without-parole sentence, because Andrade was lucky enough to have parole eligibility after 50 years.[238]

"The bottom line" of this jurisprudence is that "it is hard to imagine what prison sentence will be deemed to violate the Eighth Amendment."[239] As long as *Harmelin* and *Andrade* govern life-without-parole sentences for adults, states can rebuff Eighth Amendment parole challenges by adults because it would be constitutional for these adults simply to receive life without parole. They can argue further that the law does not obligate them to offer parole to adults at all.[240]

A full discussion of the Court's adult-sentencing decisions is beyond this Note's scope,[241] but it is worth noting that *Graham*, *Miller*, and *Montgomery* furnish new material with which defendants can challenge their life-without-parole sentences on Eighth Amendment grounds. *Harmelin* had featured impassioned argument from Justice Kennedy in his controlling concurrence about the inherently violent nature of drug distribution.[242] In *Graham*, by contrast, Kennedy's arguments conveyed a different sort of passion—not fear of drug crime, but sadness for the "forfeiture [of life] that is irrevocable" when a juvenile defendant receives life without parole and sympathy for the "denial of hope" experienced by that defendant.[243]

If the principles of *Harmelin* and *Andrade* are soon revised, it will more likely result from changed circumstances: judicial notice of the swelling life-

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serious (theft of approximately $1,200 of property, rather than $150) and parole eligibility began earlier (after twenty-five years, not fifty). *Id.* at 18, 20.

236. 538 U.S. at 66–67.

237. *Id.* at 66, 68.

238. *Id.* at 74.

239. Chemerinsky, *supra* note 227, at 1061; *see also* Barkow, *supra* note 231, at 1148 (characterizing this jurisprudence as "a backwater devoid of any procedural protections").

240. *See* Swarthout v. Cooke, 562 U.S. 216, 220 (2011) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.").

241. For such discussion, see Barkow, *supra* note 231, at 1197–205 (proposing a "uniform jurisprudence of sentencing," in which the judge-made rules in the capital context are extended to noncapital sentencing decisions); O'Hear, *supra* note 100, at 1122–23 (identifying 21 U.S.C. § 814(b)(1)(A), a sentencing statute for repeat high-level drug offenders, as the first target for adults bringing Eighth Amendment challenges against their life-without-parole sentences); William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 338–41 (2014) (advocating the extension of Miller's prohibition on mandatory life-without-parole sentences to all "death-in-custody" sentences).

242. *See* Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) ("Petitioner's suggestion that his crime was nonviolent and victimless . . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.").

243. Graham v. Florida, 560 U.S. 48, 69–70 (2010).

without-parole population;[244] long-term decreases in crime that lower the emotional intensity of sentencing debates;[245] growing skepticism that harsh punishment effectively reduces crime;[246] the death penalty's declining frequency,[247] rendering life without parole the harshest available sentence;[248] scientific advances that change our perceptions of other defendants, just as adolescent brain science has changed our view of juvenile defendants;[249] and changes in the Supreme Court's composition, amid these other shifts.

When the challenge comes, *Graham*'s sensitivity to the severity of life without parole will make it harder for the Court to hew to *Harmelin* and *Andrade*. In the interim, parole challenges under *Graham* and *Miller* can point the way towards better parole regimes that offer fair consideration of the person's rehabilitation and maturation over time, rather than repetitive condemnation of the original crime.

Conclusion

This Note has reviewed new litigation demonstrating that *Graham v. Florida* enables prisoners within the scope of its holding to make novel demands of their states' parole systems. These new Eighth Amendment parole challenges raise the same question that hangs over any effort to alter dysfunctional institutions through constitutional litigation: Will new procedural requirements for state parole and prison systems meant to aid the *Graham* and *Miller* populations actually produce better, fairer outcomes, or will they merely layer a patina of legitimacy atop a system that remains no less punitive or unfair?[250]

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244. *See* NELLIS & KING, *supra* note 37, at 9 fig.2 (showing a tripling of the number of life-without-parole sentences being served in the United States between 1992 and 2008).

245. *Cf.* COMMITTEE, *supra* note 32, at 114–15 (describing the social and political conditions of the 1960s and 1970s, including rising crime, that "helped foster a receptive environment for political appeals for harsher criminal justice policies and laws").

246. COMMITTEE, *supra* note 32, at 340.

247. Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 197–98 (2014).

248. *Id.* at 205–06 (suggesting that "when the death penalty is no longer a penal option, political and legal challenges to [life without parole] would likely be invigorated"). Of note, in *Solem v. Helm*, Helm's sentence was invalidated in part because life without parole was then South Dakota's most severe sentence, and it seemed excessive to mete it out for passing a bad check. 463 U.S. 277, 297 (1983).

249. *See* Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1051 (2013) (speculating that scientific evidence of mental impairment may alter the constitutional analysis of criminal sentences).

250. *See* Bierschbach, *supra* note 5, at 1788 (warning that procedural parole reforms might "mak[e] it seem as if life without parole punishments for juveniles are largely off the table when in fact no one is released"); *cf.* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 402–03, 438 (1995) (characterizing modern death penalty jurisprudence as "the worst of all possible worlds" because it created an illusion of fairness that served to legitimate the increased frequency of execution).

This Note has argued that the standard procedural due process framework, if enhanced in accord with *Graham*'s principles, offers a sensible and familiar way to analyze *Graham* parole challenges. Courts adjudicating these new parole claims should attend to parole systems' structure, actual practice, and release rates. They should also inquire into the prerequisites for parole release to see whether prison policies are creating arbitrary barriers to parole review. Such judicial scrutiny would help not only to ensure that *Graham*'s call for a "meaningful opportunity to obtain release" is realized, but also to nudge parole systems towards more fair and appropriate decision making.

The more difficult question is whether the courts will extend this logic beyond *Graham* and *Miller*. The broadening of Eighth Amendment parole challenges will bring the federal courts into conflict with the criminal laws and policies that states have consciously chosen. The risk of politicization is real. Releasing prisoners convicted of serious crimes is sure to draw attention, particularly if more crimes follow.[251] The coming years will test the Supreme Court's resolve that, for recipients of unconstitutional life-without-parole sentences, "their hope for some years of life outside prison walls must be restored."[252]

—Matthew Drecun

251. *See, e.g.*, Peter Holley, *A Convicted Murderer was Released Early for Good Behavior. Months Later, He Killed Again*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/25/he-was-released-early-for-good-behavior-it-took-him-less-than-a-year-to-kill-again/ [https://perma.cc/7ZXZ-RJNC] (reporting on a man who spent nineteen years in prison for second-degree murder and committed another murder within nine months of his release for good behavior).

252. Montgomery v. Louisiana, 136 S. Ct. 718, 737 (2016).