

Murder Most Human: A Case for a Categorical Ban of Life-Without-Parole Sentences for All Juvenile Offenders with Guidelines for Release Decisions for Former Juvenile Life-Without-Parole Cases

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The Supreme Court has made clear that there is a categorical ban of *mandatory* life without parole sentences for all juveniles. This ban of mandatory sentences necessarily includes juveniles convicted of the most heinous murders. However, juveniles convicted of murder can be sentenced to life without parole when the sentence is meted out on an individual basis, with due consideration given to the individuality of the offender and the unique circumstances surrounding the offense. As enunciated in *Miller v. Alabama*, “[a]lthough we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”¹ Why no categorical ban of life without parole for all juveniles offenders? One impediment to a categorical ban of life without parole sentences for all juveniles, including juveniles convicted of murder, may be found in the Court’s understanding of the crime of murder and the character of offenders convicted of murder, which I will argue is misguided. An assessment of the interplay among murder dynamics, juvenile development, and crime desistance allows us to establish sentence length parameters that can be used to guide release decisions for juveniles serving life terms.

Murder is described in *Graham* as a uniquely serious offense that differs from all other crimes “in a moral sense,” inflicting a profound and irrevocable loss on the victim.² It is telling that the

¹ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

² *Graham v. Florida*, 560 U.S. 48, 69 (2010).

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Court in *Graham* used murder as a marker of moral depravity: “in terms of moral depravity,” the Court stated that even the most serious non-homicide crimes “cannot be compared to murder.”³ The implication is that some juveniles convicted of murder are depraved—corrupt or evil—and hence may be irredeemable. The research on homicide dynamics does not support this view.

Moral considerations pertaining to murder aside, research on homicide suggests that this crime is the result of fluid social transactions that unfold in emotionally laden encounters.⁴ Murder generally, and particularly murder by juveniles, is not the outcome of warped moral characters acting out pre-formed and unvarying malevolent intent, as is presumed, for example, in media depictions of homicide and implied in *Graham*.⁵ An extensive body of research on homicide by Miethe and Regoeczi lead them to state: “Our primary conclusion is that a more complete understanding of homicide involves conjunctive thinking and attention to the interaction between offenders and victims within particular situational contexts.”⁶ Their analysis of statistics on homicide patterns, together with their review of crime reports, highlights the interpersonal and cultural dynamics of homicides.⁷ Motivations for homicide are shaped by contextual forces that play on personal susceptibilities and cultural understandings, notable among which is the common view in high crime environments that one’s worth as a person is connected to one’s ability to use violence in daily life.⁸ The inner city is a case in point. Research by Anderson and others has been read to confirm that “all inner city adolescents, especially males, become versed in the ways of the street, including the need to defend oneself through displays of toughness or violence. Manners of handling interpersonal disputes are learned early in life and reinforced by the pervasiveness of violence and conflict in these communities. It is within this context that violence becomes a mechanism for acquiring respect.”⁹

A considerable body of evidence suggests that “the harsh conditions of life in urban ghettos may provide a context in which aggression and violence are fundamental to one’s survival,”¹⁰ particularly in light of the fact that there is a “profound lack of faith in the police and the judicial system, and in others who would champion one’s personal security.”¹¹ That you are on your own, isolated from the larger society and responsible to protect yourself and maintain order in your world are violence-promoting lessons that are reinforced in juvenile confinement facilities, sometimes referred to as Gladiator Schools, a telling appellation, capturing the lessons in violence conveyed in such institutions.¹² These institutions hold a disproportionate number of inner city

³ *Id.*

⁴ See generally TERANCE D. MIETHE & WENDY C. REGOECZI, *RETHINKING HOMICIDE: EXPLORING THE STRUCTURE AND PROCESS UNDERLYING DEADLY SITUATIONS* (2004).

⁵ Violent criminal behavior, especially homicide, “is depicted—through the media, political discourse, and public discussion—as entirely individualistic and lacking a meaningful social historical context.” Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 842 (2008).

⁶ MIETHE & REGOECZI, *supra* note 4, at xviii.

⁷ *Id.* at 182-84.

⁸ *Id.* at 189.

⁹ *Id.* at 189.

¹⁰ *Id.* at 225.

¹¹ *Id.* at 184.

¹² Youth in the California Youth Authority institutions, for example, routinely refer to these institutions as gladiator schools because they must live by violence while confined and, upon release, come out more violent

youths.¹³ A substantial proportion of people serving life sentences for crimes committed as children come from impoverished, inner city areas of the country.¹⁴ A stint in juvenile confinement has “an enduring criminogenic effect”¹⁵ and is *significantly* associated with the commission of homicide later in the offender’s life.¹⁶

Mean streets, damaged and damaging families, devastating economic hardships, and cold institutions may promote terrible violence, but the agents of that violence are human beings managing hard lives, not evil or depraved creatures beyond reason or redemption. In fact, research on persons convicted of murder indicates that they are not, as a class, among the most obdurate and unregenerate offenders. Over the last several decades, large numbers of offenders convicted of capital murder, mostly adults but some juveniles as well, have been released from death row and placed in prisons, and some have earned release from prison and returned to society.¹⁷ These persons were mainly non-violent inmates; remarkably, lifers commit few prison rule violations of any kind, and are often described as a force for stability in the prison population.¹⁸ Those few who

than when they went in. See Nicole Lee, *Youth Prisons Fail Our Society*, WITNESS MAGAZINE (May 20, 2004), <http://www.thewitness.org/article.php?id=37>; see also CLEMENS F. BARTOLLAS ET AL., JUVENILE VICTIMIZATION: THE INSTITUTIONAL PARADOX 273 (1976); Clemens Bartollas, *Survival Problems of Adolescent Prisoners*, in *THE PAINS OF IMPRISONMENT* (Robert Johnson & Hans Toch eds., 1982).

¹³ “Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population. Disproportionate minority confinement (DMC) has far-reaching consequences not only for these young offenders but for society as a whole.” HEIDI M. HSIA ET AL., OFF. OF JUV. JUST. AND DELINQ. PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE, at iii (2004), <http://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf>.

¹⁴ See ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 2, 16 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.

¹⁵ Matt DeLisi et al., *The Road to Murder: The Enduring Criminogenic Effects of Juvenile Confinement Among a Sample of Adult Career Criminals*, 9 YOUTH VIOLENCE & JUV. JUST. 207, 207 (2011).

¹⁶ As a general matter, research reveals that “juvenile confinement exerts unique, deleterious effects on youths’ subsequent offending, on youths’ perceptions of successfully reintegrating to society, on youths’ mental and physical health, education attainments, family and peer relations, and [relations with] others.” *Id.* at 209.

¹⁷ Over the years, a sizeable number of capital offenders have been commuted or had their sentences overturned. THORSTEN SELLIN, THE PENALTY OF DEATH 103–04 (1980); see James W. Marquart & Jonathan R. Sorensen, *Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY 677, 679 (1988); see also JOAN M. CHEEVER, BACK FROM THE DEAD: ONE WOMAN’S SEARCH FOR THE MEN WHO WALKED OFF AMERICA’S DEATH ROW 2-4 (2006).

¹⁸ A sizeable body of research supports the assertion that murderers with no hope for parole adjust to prison with few rule violations or acts of violence. See Jonathan R. Sorensen, Robert Wrinkle & April Gutierrez, *Patterns of Rule-Violating Behaviors and Adjustment to Incarceration Among Murderers*, 78 THE PRISON J. 222, 230 (1998); Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000); Mark D. Cunningham & Jonathan R. Sorensen, *Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates*, 33 CRIM. JUST. AND BEHAV. 683, 684 (2006); Robert G. Morris et al., *Institutional Misconduct and Differential Parole Eligibility Among Capital Inmates*, 37 CRIM. JUST. AND BEHAV. 417, 425-27 (2010). The early years of confinement, when prisoners are beginning to settle into routines, may be marked by higher rates of infractions but, with rare exceptions, infraction rates drop over time. This is true for offenders sentenced as adults or juveniles. For adults, see note 17; for juveniles, see Eric Schab et al., *Miller Resentencing Project Report: Florida Juveniles Sentenced to Mandatory Life Without Parole*

are released, after years of confinement, typically desist from crime.¹⁹ In a recent study, fully 75% desisted from crime over the five-year study period, with only 7% (less than one in ten) committing acts of violence.²⁰ John Irwin's in-depth ethnographic research on lifers in California prisons clearly affirms the capacity for positive change among lifers eligible for parole – both while in prison and upon release into the free world, for the few prisoners that are ultimately paroled.²¹ The crime of murder is uniquely serious, but the empirical fact, reflected in the research on murderers in prison and upon release, is that persons convicted of murder *can and do* change, can mature and come to see the tragic error of their ways, and can, when given the chance, live decently in civil society, many coming over time to develop remorse for their crimes. In Margaret Leigey's study of older male inmates serving life without parole, almost all of those convicted of murder expressed guilt, shame, and contrition for taking another's life and sympathy for the victim's loved ones.²² Thus, a conviction for the crime of murder, in and of itself, is not a valid marker of moral depravity as the Court in *Graham* purports, and hence should not disqualify juveniles from the special consideration they are accorded for all other crimes as a result of their inherently immature, unformed characters.

Felony Murder No Exception

Even felony murders – murders committed in the course of a felony, among the most legally serious forms of homicide – are often much less cold-blooded than they appear at first blush.²³ Most felony murders occur in complex situations that unfold rapidly and sometimes unpredictably, such as when a robbery or burglary goes bad and results in an unplanned homicide.²⁴ At times, those convicted of felony murder were not active or even knowing participants in the crime at all, such as when they were acting as a driver of a getaway car and were unaware that a felony, much

6 (FSU C. of Law, Pub. Law Res. Paper No. 662, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374429.

¹⁹ As a general matter, murderers released from prison show the lowest rates of recidivism of all offender groups. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>. Recent research confirms the low recidivism rate of released murders, with only a quarter of the sample returning to crime and, overall, a mere 7 percent committing acts of violence. Melanie-Angela Neuilly et al., *Predicting Recidivism in Homicide Offenders Using Classification Tree Analysis*, 15 HOMICIDE STUD. 154, 163 (2011) (specifically table 5).

Prior to the 1972 Furman decision voiding the death penalty, research on released capital offenders revealed a low recidivism rate. See SELLIN, *supra* note 17. Capital murderers released from prison subsequent to the Furman decision have likewise shown low rates of recidivism and little violence. "[T]he great majority of the Furman inmates were not violent predators in the prison or free society." James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L. A. L. REV. 5, 28 (1989).

²⁰ Neuilly et al., *supra* note 19, at 163 (specifically, table 5).

²¹ JOHN IRWIN, LIFERS: SEEKING REDEMPTION IN PRISON 94–95 (2009).

²² MARGARET LEIGEY, THE FORGOTTEN MEN: SERVING A LIFE WITHOUT PAROLE SENTENCE 54-55 (2015).

²³ *Id.* at 43.

²⁴ *Id.* at 49–65.

less a homicide, was about to occur.²⁵ Analysis of crime report narratives reveals that felony murders typically are “chaotic and disorderly”²⁶ and “haphazard,”²⁷ the fruits of inept rather than methodical and planned undertakings. Juveniles have a limited capacity for planning and foresight, which makes it more likely they will fail to consider the consequences of the original offense, including the deadly sequence of events the original offense may put in motion.²⁸ They are simply not thinking beyond the robbery or the burglary, or even, in many cases, beyond what it means to tag along with others who themselves may engage in risky or criminal behaviors.²⁹

Impulse control problems common to juveniles are compounded when they engage in criminal activity with their peers, since juveniles are notoriously susceptible to peer pressure.³⁰ Much of juvenile crime, including homicide, occurs in a group context³¹ and involves “elements of honor contests, masculine competitiveness, or issues of respect.”³² In many peer group situations, volatile emotions give rise to unplanned actions that escalate quickly, with little or no chance for individuals to retreat or disengage; normal adolescent impulsivity makes it difficult for juveniles to interpret these complex and often emotionally charged interactions.³³ Juveniles are thus more likely than adults to react with unplanned violence under the extreme duress of a crime that goes awry – to fight rather than flee and lose face with their peers. As reported in one crime case file, relating to a robbery-homicide in which the offender could easily have retreated in the face of insults but did not, “[t]he suspect said he hated for people to think he was a joke.”³⁴

The popular image of a felony murder is that of a coolly calculated crime in which the killing is undertaken with malice and premeditation to achieve a rational objective.³⁵ For younger offenders, and especially juveniles, the evidence overwhelmingly indicates that it would be more accurate to see the vast majority of these crimes as situations that have gotten beyond their control and even full comprehension, as is evident in the following crime narrative rendered in the words of the offender:

²⁵ See Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham, and J.D.B.*, 11 CONN. PUB. INT. L. J. 297, 300-02 (2012).

²⁶ MIETHE & REGOECZI, *supra* note 4, at 185.

²⁷ *Id.* at 186.

²⁸ These traits of adolescents are recognized in *Roper* as sources of reduced culpability. See *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005). See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008) (primary work cited by the Court in *Roper*, particularly chapter two, titled “The Science of Adolescent Development and Teenagers’ Involvement in Crime”).

²⁹ See *Roper*, 543 U.S. at 569–71.

³⁰ See *Roper*, 543 U.S. at 569. Many murders “took place in contexts in which powerful peer pressure was operating or strong emotions flared.” IRWIN, *supra* note 21, at 42. SCOTT & STEINBERG, *supra* note 28.

³¹ MIETHE & REGOECZI, *supra* note 4, at 179.

³² *Id.* at 182.

³³ Most murders are committed by young men, 24 and under. IRWIN, *supra* note 21, at 44. The situational, emotional, and peer-related pressures discussed as factors in these homicides apply with particular force to juveniles. Juveniles are, by virtue of their inherent immaturity, impulsivity, and short-sightedness, especially susceptible to the situational, emotional and often peer-related pressures that drive the typical murder, and particularly the typical felony murder. *Roper*, 543 U.S. at 569.

³⁴ MIETHE & REGOECZI, *supra* note 4, at 186.

³⁵ IRWIN, *supra* note 21, at 42–3.

I killed him. There's no question about that. But I didn't intentionally kill him. I didn't go in there with murder on my mind... It was a robbery that went astray. Somebody walked in... I wind up shooting him and to this day I don't know how it all happened. It happened. This kind of thing, at least for me, it happened in a haze, you know. One minute he is standing up. I'm saying, you know how it goes, stuff happens too quick, so fast, you're on automation. The next thing you know, the man is shot.³⁶

As a general matter, as I have noted, felony homicides are particularly "chaotic and disorderly" and "haphazard," which makes these events both complicated and confusing for adults as well as juveniles.³⁷ I argue that juveniles convicted of felony murder are, as a result of their susceptibility to peer pressure, impulsivity, and limited foresight, much less culpable than adults convicted of the same crime. These deficits were apparent to the Court in *Miller* as distinctive features of adolescent violence in general, and Kuntrell Jackson's and Evan Miller's adolescent violence, in particular; in both cases, the fluid and evolving situational dynamics of violence, embedded in lives suffused with damage wrought by violence in their formative years, were clearly in evidence.³⁸ It is, then, not cold-blooded depravity but rather impulsive immaturity that drives juveniles to commit such crimes.

Conclusion

In thinking of homicide as a potential marker of depravity for at least some juveniles convicted of murder, the Court may have been indirectly influenced by the media, which regularly casts violent teens as heartless predators,³⁹ or by the work of some social scientists, now widely discredited, who made unsubstantiated claims like "today's bad boys are far worse than yesterday's and tomorrow's will be even worse than today's."⁴⁰ Allegedly rooted in "moral poverty," perhaps the social science equivalent of depravity as understood by the Court, some social scientists warned of a generation marked by character deficits that gave rise to wild and extraordinarily violent offenders. These offenders were said to comprise the "thickening ranks of juvenile 'super-predators' – radically impulsive, brutally remorseless youngsters, including even more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders."⁴¹ These offenders, moreover, were

³⁶ *Id.* at 55.

³⁷ MIETHE & REGOECZI, *supra* note 4, at 185-186.

³⁸ *Miller*, 132 S. Ct. at 2468-69.

³⁹ A classic example of this is the Youth Crime issue of Time Magazine, which featured predatory-looking juveniles poised to attack. See *The Youth Crime Plague*, TIME MAG. (July 11, 1977), <http://www.time.com/time/magazine/article/0,9171,919043-9,00.html>. The subject of teen crime was also dramatized in Richard Lacayo & Sally B. Donnell, *Teen Crime*, TIME MAG. (July 21, 1997), <http://www.time.com/time/magazine/article/0,9171,986709,00.html>.

⁴⁰ See MIETHE & REGOECZI, *supra* note 4, at 177. It is possible that the Court simply decided to address the narrow question raised in these cases. The legal question in both *Graham* and *Miller* pertained to mandatory sentences. Within the framework of mandatory sentences, the Court struck down the practice and left to the states the task of narrowly figuring out when the LWOP sentence is appropriate for a juvenile offender. That said, the Court is not immune to media-driven images of crime and punishment in general or in the case of juveniles.

⁴¹ *Id.*

presumed to be beyond the reach of punishment: “They do not fear the stigma of arrest, the pains of imprisonment or the pangs of conscience.”⁴² One might well imagine that such offenders, a kind of army of junior psychopaths in training, must be confined until death, since they are simply too dangerous to be at large in society.⁴³ Arguably, a lonely and degrading death in a prison cell would seem a suitable if premature end to their depraved lives. However, as we have indicated, research simply does not support the existence of such super-predators. Rather, research tells us that juvenile homicide, like much of juvenile crime, is rooted in group pressures, impulsiveness, and short-sightedness—defining elements of adolescence—that give rise to misguided efforts to save face and establish respect.⁴⁴

The Court in *Graham* spared non-homicide juvenile offenders from life without parole, our other death penalty, but at least some juveniles convicted of murder are still eligible for this harsh sanction. Life without parole entails a permanent loss of hope and a grim, lonely, and degrading death.⁴⁵ It is a cruel sanction for *any* young person and is used with juveniles virtually nowhere else in the world.⁴⁶ In principle, a maximum sentence of life *with* the possibility of parole – and hence the hope of one day rejoining society – is punishment enough for *any* juvenile, even one convicted of the terrible crime of murder. The Court expressed concern about “the rare juvenile offender whose crime reflects irreparable corruption.” Should such offenders exist, there would be no way to identify them while they are still developing adolescents since there is no way to reliably determine which attributes of their personalities are transitory and which are enduring elements of character. As adults, cumulative evidence of “irreparable corruption” may emerge in rare cases, at which point these offenders can be identified, monitored over time, and offered intensive rehabilitative services. These offenders would presumably be denied release unless and until they show evidence of profound character change.

In practice, lesser terms than life with parole for juveniles convicted of murder are possible and advisable. When these offenders reach the age range 35-39, for example, their risk of

⁴² *Id.*

⁴³ This characterization of psychopaths, juvenile or otherwise, reflects popular misconceptions and is used here for effect. In fact, “most psychopaths are not violent, and most violent people are not psychopaths.” Moreover, though hard to treat, psychopathic offenders are treatable, as are their criminal tendencies. See Scott O. Lilienfeld & Hal Arkowitz, *What ‘Psychopath’ Means*, SCIENTIFIC AMERICAN (Dec. 1, 2007), <http://www.scientificamerican.com/article.cfm?id=what-psychopath-means>.

⁴⁴ MIETHE & REGOECZI, *supra* note 4, at 182.

⁴⁵ Robert Johnson & Sonia Tabriz, *Death by Incarceration as a Cruel and Unusual Punishment When Applied to Juveniles: Extending Roper to Life without Parole, our Other Death Penalty*, 9 U. MD. L. J. RACE RELIGION GENDER & CLASS 241, 251-55 (2009).

⁴⁶ *Enforcing the International Prohibition on the Juvenile Death Penalty: A Human Rights Watch submission for the Secretary-General’s report on follow-up to General Assembly resolution 62/149 on a death penalty moratorium*, HUMAN RIGHTS WATCH (May 30, 2008), https://www.hrw.org/sites/default/files/related_material/HRW.Juv.Death.Penalty.053008.pdf. “The United States is the only country in the world that sentences children (persons under the age of 18) to life in prison without possibility of parole or release (known as life without parole, or LWOP).” Letter to the Secretary of the Committee on the Elimination of Racial Discrimination (Feb. 26, 2008), <https://www.hrw.org/news/2008/02/26/united-states-was-not-forthcoming-and-accurate-its-presentation-cerd>; See also Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008).

recidivism drops substantially: using national figures for arrests as a measure of recidivism, the drop ranges from a quarter to a half;⁴⁷ using re-imprisonment as a measure, the drop is from a third to a half.⁴⁸ These figures are illustrative of the fact that these prisoners, no longer young, are now at lower risk for recidivism; the lengthy prison terms they will have served by the time they reach the 35-39 age range are also associated with a low risk of recidivism.⁴⁹

By age 35-39, moreover, individual prisoners will have had sufficient time to establish that they have evolved and matured, and hence are no longer the impulsive juveniles who committed the heinous crimes that landed them behind bars.⁵⁰ Thus, I contend that prisoners sentenced to life terms as juveniles should be entitled to hearings to determine their eligibility for release at some point during this age interval. These hearings would be used to determine recidivism risk in individual cases. Significantly, the primary factor that underlies successful (that is, recidivism-free) reentry for lifers is “a change in the self” in the direction of self-efficacy.⁵¹ Self-efficacy is the product of maturation and development, which can be assessed in the review of individual cases at release or re-sentencing hearings.⁵²

By age 50, recidivism is negligible; arrests are down by half or more (by one accounting, dropping by a robust 80%);⁵³ re-imprisonment for a new crime drops by well over half, in some states (e.g., Virginia) dropping by over 90%.⁵⁴ These figures are illustrative of “the criminological consensus” that age 50 is the point at which “recidivism in all crime categories

⁴⁷ See AM. CIVIL LIBERTIES UNION, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* 21 (2012), <https://www.aclu.org/report/americas-expense-mass-incarceration-elderly?redirect=criminal-law-reform/report-americas-expense-mass-incarceration-elderly>; LANGAN & LEVIN, *supra* note 19, at 7.

⁴⁸ See AM. CIVIL LIBERTIES UNION, *supra* note 47, at 22-25, 48; LANGAN & LEVIN, *supra* note 19, at 7.; see also MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

⁴⁹ “In general, studies point to a young age at the time of release and a previous criminal record as the main predictors for recidivism.” Marieke Liem, *Homicide offender recidivism: A review of the literature*, 18 *AGGRESSION AND VIOLENT BEHAVIOR* 19, 23 (2013). Moreover, “when the length of imprisonment exceeds eight to 10 years, it decreases recidivism.” *Id.* By the time juveniles sentenced to life terms reach the 35-39 age category, they are no longer young (and thus cannot be counted as young and with a criminal record), and have served well over eight to ten years in prison.

⁵⁰ Robert Johnson & Ania Dobrzanska, *Mature Coping Among Life-Sentence Prisoners: An Exploratory Study of Adjustment Dynamics*, 30 *CORRECTIONS COMPENDIUM*, 8-9, 36-38 (2005); see generally ROBERT JOHNSON ET AL., *HARD TIME: A FRESH LOOK AT UNDERSTANDING AND REFORMING THE PRISON* (John Wiley & Sons, Inc., 4th ed. 2017).

⁵¹ “[T]he process of staying out for lifers is not the result of coming-of-age societal forces (e.g., parenthood, marriage, employment) ... but rather a change in the self, or a transformation of identity. Interviews with these lifers show that the group who was able to stay out reflected a strong sense of self-efficacy, while those who were re-incarcerated lacked this sense of voluntary action.” Marieke Liem and Jennifer Garcin, *Post-Release Success among Paroled Lifers*, 3 *LAW* 798, 817 (2014).

⁵² Examples of measures of coping competence and maturity include the Coping Resource Inventory (<http://www.mindgarden.com/88-coping-resources-inventory>) and the Cope Survey (<http://www.psy.miami.edu/faculty/ccarver/sciCOPEF.html>). There are several measures of recidivism risk, most notably the Level of Service Inventory (<http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=resources>) and the Level of Service Inventory-Revised (<http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=resources>).

⁵³ AM. CIVIL LIBERTIES UNION, *supra* note 47, at 21. LANGAN & LEVIN, *supra* note 19, at 7.

⁵⁴ AM. CIVIL LIBERTIES UNION, *supra* note 47, at 24 (Figure 20).

plummets.”⁵⁵ Given the reduced culpability of juveniles for their original crimes, the normal progression of maturity over the course of their imprisonment, and the dramatically reduced risk of returning to crime after age 50, life sentences for juvenile offenders should include a presumption of release at age 50. Absent unambiguous evidence of a continuing disposition to violence, offenders at age 50 should be released and permitted to reenter society.

In sum, it is my contention that eligibility for release starting at age 35, together with a presumption of release by age 50, would seem entirely appropriate for the vast majority of juvenile offenders whose life without parole sentences were overturned following *Miller* and are now up for reconsideration in many jurisdictions. To date, it would appear that only a handful of states have explicitly incorporated the factors articulated in the *Miller* decision into the language of parole statutes. Three states that do are California, Connecticut, and West Virginia, each of which requires parole boards to “consider factors such as age at the time of the offense, potential for rehabilitation, and increased maturity.”⁵⁶ The framework proposed here would be of immediate value in the deliberations within these jurisdictions, giving benchmarks to guide release decisions.

Most jurisdictions, it would appear, have simply made juvenile offenders “eligible for release under existing and long-standing parole procedures,” which do not require parole boards to consider, or give guidance to how such boards might consider, the key *Miller*-related factors of age at the time of the offense in relation to reduced culpability, potential for rehabilitation, and increased maturity over the course of one’s confinement.⁵⁷ The framework provided here may serve to encourage these jurisdictions to explicitly take into account the factors we have reviewed here when revisiting juvenile life-without-parole sentences—age and culpability at the time of the offense, prison adjustment and personal maturation over the course of the person’s confinement as a measure of rehabilitation, and an age-based assessment of recidivism risk at the time of release hearings.

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⁵⁵ *Id.* at 48; see generally NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).

⁵⁶ Personal Communication, James A. Johnston, Maryland Office of the Public Defender, April 21, 2016; Personal Communication, Ashley Nellis, The Sentencing Project, April 24, 2016; see S.B. 260, 2013-2014 Reg. Sess. (Cal. 2013); S.B. 796, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015); W. VA. CODE § 62-12-13b (2014).

⁵⁷ Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L. J. 373, 373 (2014).

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