THE ROLE OF THE CRIME AT JUVENILE PAROLE HEARINGS: A RESPONSE TO BETH CALDWELL'S *CREATING MEANINGFUL OPPORTUNITIES FOR RELEASE*

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I.
INTRODUCTION

In a series of recent decisions, the U.S. Supreme Court has placed Eighth Amendment limits on the sentences that may be imposed on children.[1] *Graham v. Florida* held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[2] *Miller v. Alabama* and *Montgomery v. Louisiana* establish that children must have this meaningful opportunity for release even in homicide cases—except in the rarest of cases where the sentencer determines that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible."[3]

Beth Caldwell's article explores a critical issue that is emerging from these decisions: What must state parole boards do to provide juveniles with a meaningful opportunity for release under the Eighth Amendment?[4] In studying juvenile parole hearings in California, Caldwell finds that, in many cases, the reasons parole commissioners give for denying parole focused on the nature of the crime or closely related factors, such as the prisoner's lack of insight or honesty about the offense. In my view, the severity of the crime should not weigh against release in these juvenile cases. The Supreme Court cases require states to provide children with "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[5] Thus, the central question for the parole board in juvenile

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1. Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S.Ct. 2455 (2012); Montgomery v. Louisiana, 136 S.Ct. 718 (2016).

2. *Graham*, 560 U.S. at 74–75.

3. *Montgomery*, 136 S.Ct. at 733; *Miller*, 132 S.Ct. at 2465.

4. Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham, Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245 (2016).

5. *Graham*, 560 U.S. at 74–75; *Miller*, 132 S.Ct. at 2469.

cases must be whether an individual has, in fact, demonstrated maturity and rehabilitation. Allowing the crime to drive the release decision is inconsistent with the Eighth Amendment.

II.
STATE PAROLE BOARDS AND JUVENILE CASES

Twenty-eight states have enacted legislation responding to the Supreme Court's recent decisions,[6] and some states have put in place special procedures and

6. S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (repealing MO. REV. STAT. §§ 565.020, .030, .032, .040 and enacting §§ 558.047; 565.020, .030, .032, .033, .034, .040) (awaiting Governor's signature); S.B. 16-180, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (amending COLO. REV. STAT. §§ 17-22.5-403.7(2), 24-4.1-302.5(1)(j) and enacting §§ 17-34-101, -102; 17-22.5-403(4.5); 17-22.5-403.7(6)); S.B. 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (amending COLO. REV. STAT. §§ 18-1.3-401(4)(b)(I); 17-22.5-104(2)(c)(I), -(2)(d)(IV); 17-22.5-405(4); 24-4.1-302(2)(h); 24-4.1-302.5(1)(d)(IV); 24-4.1-303(12)(c) and enacting §§ 18-1.3-401(4)(c); 17-22.5-104(2)(d)(V); 17-22.5-403(2)(c); 17-22.5-405(1.2); 16-13-1001, -1002); H.B. 323, 2016 Reg. Sess. (Ala. 2016) (amending ALA. CODE §§ 13A-5-2, -5-39, -5-43, -6-2); S.B. 140, 91st Legis. Assemb. (S.D. 2016) (amending S.D. CODIFIED LAWS § 22-6-1 and enacting a new section); H.B. 405, 2016 Gen. Sess. (Utah 2016) (amending UTAH CODE § 76-3-203.6, -206, -207, -207.5, -207.7 and enacting § 76–3–209); S.B. 796, 2015 Leg., Jan. Sess. (Conn. 2015) (amending CONN. GEN. STAT. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a and enacting new sections); H.B. 2471, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (amending 720 ILL. COMP. STAT. 5/10-2; 5/11-1.20, -1.30, -1.40; 5/12-33; 5/29D-14.9, -35; 730 ILL. COMP. STAT. 5/5-4.5-95, 5/5-8-1 and enacting 730 ILL. COMP. STAT. 5/5-4.5-105); S. File 448, 86th Gen. Assemb., 1st Sess. (Iowa 2015) (amending IOWA CODE §§ 902.1, 903A.2); A.B. 267, 78th Reg. Sess. (Nev. 2015) (amending NEV. REV. STAT. §§ 176.025, 213.107 and enacting new sections in chapters 176 and 213); H. 62, 73d Sess. (Vt. 2015) (enacting VT. STAT. ANN. tit. 13, § 7045); S.B. 1319, 64th Leg., 2015 Reg. Sess. (Wash. 2015) (amending WASH. REV. CODE §§ 9.94A.501, .533, .704, .728, .729, .730; 10.95.030, .035); H.B. 2593, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (amending ARIZ. REV. STAT. § 41-1604.09 and enacting §§ 13-106, -716); H.B. 7035, 2014 Reg. Sess. (Fla. 2014) (amending FLA. STAT. §§ 775.082, 316.3026, 373.430, 403.161, 648.571 and enacting §§ 921.1401, 921.1402); H.B. 2116, 27th Leg., Reg. Sess. (Haw. 2014) (amending HAW. REV. STAT. §§ 706-656(1), -657); H. 4307, 188th Gen. Court (Mass. 2014) (amending MASS. GEN. LAWS ch. 27, § 4; ch. 119, § 72B; ch. 127, §§ 133A, 133C; ch. 265, § 2; ch. 279, § 24 and enacting new sections); S.B. 5064, 63d Leg., 2014 Reg. Sess. (Wash. 2014) (amending WASH. REV. CODE §§ 9.94A.510, .540, .6332, .729; 9.95.425, .430, .435, .440; 10.95.030 and enacting §§ 10.95.035, 9.94A.730); H.B. 4210, 81st Leg., 2d Sess. (W. Va. 2014) (enacting W. VA. CODE §§ 61-11-23, 62-12-13b); H.B. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (amending ARK. CODE §§ 5-4-104, 5-10-101); S.B. 260, 2013-2014 Leg., Reg. Sess. (Cal. 2013) (amending CAL. PENAL CODE §§ 3041, 3046, 4801 and enacting § 3051); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013) (amending DEL. CODE tit. 11, §§ 636(b), 4209, 4209A, 4204A); H.B. 152, 2013 Leg., Reg. Sess. (La. 2013) (amending LA. REV. STAT. ANN. § 15:574.4 and enacting LA. CODE CRIM. PROC. ANN. art. 878.1); S.B. 319, 97th Leg., Reg. Sess. (Mich. 2014) (enacting MICH. COMP. LAWS §§ 769.25, 769.25a); L. B. 44, 103d Leg., 1st Sess. (Neb. 2013) (amending NEB. REV. STAT. §§ 28-101, 83-1,135 and enacting §§ 28-105.02, 83-1,110.04); S.B. 2, 83d Leg., 2d. Sess. (Tex. 2013) (amending TEX. PENAL CODE ANN. § 12.31, TEX. CODE CRIM. PROC. ANN. art. 37.071); H.B. 23, 62d Leg., 2013 Gen. Sess. (Wyo. 2013) (amending WYO. STAT. ANN. §§ 6-2-101(b), -306(d), (e); 6-10-201(b)(ii), -301(c); 7-13-402(a)); S.B. 9, 2011-2012 Leg., Reg. Sess. (Cal. 2012) (amending CAL. PENAL CODE § 1170); S.B. 635, 2011-2012 Gen. Assemb., Reg. Sess. (N.C. 2012)

criteria for parole boards to use in juvenile cases.[7] In several states, litigation is underway asserting that parole board practices fail to provide a meaningful opportunity for release in compliance with the Eighth Amendment.[8] Caldwell's article, which studies the implementation of California's new Youth Offender Parole Hearing law (S.B. 260), comes at an important time as advocates seek to ensure that parole hearings indeed provide a realistic and meaningful chance for release.[9]

In considering challenges to sentences following the Supreme Court decisions, numerous lower courts around the country have concluded that sentences may violate the Eighth Amendment even if they are not technically labeled "life without parole." In light of the Supreme Court's recent decisions, the relevant inquiry is whether the sentence provides a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[10] In determining whether sentences deny a meaningful opportunity for release, courts have considered: (1) the length of time before eligibility for release;[11] and (2) the criteria

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(enacting N.C. GEN. STAT. §§ 15A-1476, 1477, 1478, 1479); S.B. 850, 2011 Gen. Assemb., Reg. Sess. 2011 (Pa. 2011) (amending PA. CONS. STAT. §§ 1102, 6139 and enacting 1102.1).

7. For example, parole boards in California, Connecticut, Louisiana, Massachusetts, and West Virginia are holding special types of hearings for juvenile offenders serving lengthy sentences. *See* Sarah French Russell & Tracy Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121, 1136, 1151 n.159 (2016).

8. *See, e.g.*, Hayden v. Keller, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) (holding that North Carolina's parole system fails to provide a meaningful opportunity for release for juveniles); Greiman v. Hodges, 79 F. Supp. 3d 933, 940, 944 (S.D. Iowa 2015) (denying motion to dismiss prisoner's claim that Iowa parole process deprives him of a meaningful opportunity to obtain release); Complaint for Declaratory Relief, Injunctive Relief & Attorney's Fees at ¶ 15, Maryland Restorative Justice Initiative v. Hogan, 316 F.R.D. 106 (D. Md. 2016) (No. 1:16-cv-01021-ELH) (challenging Maryland's parole system as failing to provide a meaningful opportunity for release); Petition for Judicial Review of Agency Action, Bonilla v. Iowa Board of Parole (Sept. 14, 2016), http://www.aclu-ia.org/iowa/wp-content/uploads/2016/09/09-14-2016-Bonilla-Stamped-Petition.pdf. Courts in Florida and New York have held that parole boards in those states failed to comply with the Eighth Amendment. Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S. 3d 397, 400-01 (N.Y. App. Div. 2016); Atwell v. State, 197 So. 3d 1040, 1050 (Fla. 2016). In addition, the Fourth Circuit recently held that the Virginia Parole Board's geriatric release program fails to comply with *Graham*'s requirement that juvenile offenders have the opportunity to obtain release "based on demonstrated maturity and rehabilitation" because, *inter alia*, "it allows for the lifetime incarceration of a juvenile nonhomicide offender based solely on the heinousness or depravity of the offender's crime." LeBlanc v. Mathena, No. 15-7151, 2016 WL 6575077, at *10 (4th Cir. Nov. 7, 2016).

9. I explored these topics several years ago, before states had begun adopting special procedures and criteria. Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L. J. 373 (2014).

10. *See, e.g.*, State v. Louisell, 865 N.W.2d 590, 602 (Iowa 2015).

11. *See, e.g.*, Casiano v. Commissioner, 115 A.3d 1031, 1047 (Conn. 2015) (holding that a sentence of fifty years without parole denied a meaningful opportunity for release, noting: "The United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.").

and procedures used by parole boards in making release decisions.[12] As Caldwell asserts, lengthy term-of-years sentences may fail to provide an opportunity for release at a meaningful time and thus violate the Eighth Amendment. In addition, a life-*with*-parole sentence violates the Eighth Amendment if the state's parole practices and criteria do not provide juvenile offenders with a realistic and meaningful opportunity for release that is based on maturity and rehabilitation.

III.
PAROLE RELEASE DECISIONS AND THE CRIME OF CONVICTION

Caldwell studies the first six months of hearings held by the California Board of Parole Hearings under S.B. 260 and finds four variables that were statistically significant predictors for whether the Board would find an inmate suitable for parole.[13] These factors are: (1) age at the time of offense; (2) cumulative number of disciplinary infractions; (3) number of years since last disciplinary infraction; and (4) risk assessment rating.[14] Caldwell finds that the type of crime an individual was convicted of was not correlated to the outcome at the parole hearings. In other words, the study does not reveal a difference in likelihood of release depending on whether the crime was first-degree murder, second-degree murder, attempted murder, or kidnapping.[15] However, Caldwell finds that "the reasons Commissioners provided for denying parole in many cases focused on the nature of the commitment offense, or to closely related issues such as the individual's lack of insight or honesty about the offense."[16] Thus, Caldwell found that the fact that the crime was a murder, kidnapping, or other type of offense did not appear to impact the likelihood of release. However, in denying release, the board often cited circumstances relating to the particular offense (e.g., the "heinous" nature of the crime).

Caldwell asserts that denying parole based on circumstances relating to the commitment offense is problematic in light of *Graham* and *Miller*, and she urges the parole board to weigh the nature of the crime in light of "(1) the diminished culpability of the offender at the time of the offense given his youthful characteristics and (2) the unique capacity of young offenders to mature, such that their characteristics at the time of the offense no longer define them."[17] She notes that "[p]arole standards could be modeled after sentencing hearings for youth

12. *See, e.g.*, *Atwell*, 197 So. 3d at 1049; *LeBlanc*, 2016 WL 6575077, at *8-11.

13. For homicide cases in California, even if the Board of Parole Hearings finds an inmate suitable for parole, the governor can reverse the decision.

14. Caldwell, *supra* note 4, at 275.

15. Caldwell, *supra* note 4, at 295.

16. Caldwell, *supra* note 4, at 295.

17. Caldwell, *supra* note 4, at 296.

facing LWOP," where *Miller* requires consideration of the characteristics and circumstances of youth.[18]

I would go somewhat further and assert that the severity of the crime should carry no weight in a parole board's release decision in juvenile cases. In my view, the nature of a child's particular crime should be irrelevant to the board's decision, except to the extent that the circumstances of the crime provide a baseline for assessing how an individual has matured and changed since the time of the crime. The Supreme Court requires that children have a meaningful opportunity for release "based on demonstrated maturity and rehabilitation."[19] Thus, in juvenile cases, parole boards must focus on whether an individual has demonstrated maturity and rehabilitation. Examples might include an individual's participation in educational and vocational programs, mentorship of other prisoners, efforts to overcome drug addiction, or a reduction in the number of disciplinary tickets obtained over time.

The severity of the crime was already taken into account at the time the original sentence was imposed and should not drive the parole board's release decision. In many instances, the timing of parole eligibility for an offense has been set by the state legislature.[20] In some instances, judges (or juries) have a role in determining the timing of parole eligibility. Thus, at sentencing, the date for eligibility for release is set.[21] When that eligibility date later arrives, the sentence has served its retributive purpose, and the relevant question should be whether the individual has demonstrated rehabilitation and can be safely released into society. By denying parole based on the severity of the offense, the parole board essentially converts a sentence of life *with* parole to a sentence of life *without* parole. This action displaces the role of the sentencer and the legislature.[22] And it is certainly inconsistent with the Supreme Court's requirement that sentences for juveniles provide a meaningful opportunity for release *based on demonstrated maturity and rehabilitation*.[23]

Indeed, following *Montgomery*, several Justices reiterated that life without parole may be imposed only in the rarest of homicide cases, where the crime reflects the juvenile's irreparable corruption.[24] In making this determination,

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18. Caldwell, *supra* note 4, at 296.

19. *Graham*, 560 U.S. at 74–75.

20. *See, e.g.*, W. Va. Code § 61-11-23.

21. *See, e.g.*, Mass. Gen. Laws ch. 279, § 24.

22. Indeed, W. David Ball has asserted that in California, the parole board has been permitted to "second-guess the jury" by deeming a crime sufficiently serious "to deny suitability for parole even when a jury did not." In his view, consistent with the Sixth Amendment jury trial right, the parole board should not "consider the commitment offense in determining a prisoner's suitability for parole." W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 971 (2009).

23. *Graham*, 560 U.S. at 74–75.

24. Adams v. Alabama, 136 S.Ct. 1796, 1800 (2016) (Sotomayor, J., concurring) (concurring with Justice Ginsburg in Court's decision vacating judgments of cases and remanding for further

sentencers must consider the "Court's repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption."[25] The relevant question for the sentencer is not the severity of the crime, but whether the child is capable of rehabilitation. Assuming that irreparable corruption is not established at sentencing, the child must be given a chance to later show rehabilitation. Thus, at a later hearing, the parole board's focus must be on whether rehabilitation has occurred. If so, the individual should be released. For the parole board to use the severity of the crime to deny release renders the opportunity for parole meaningless. If the severity of the crime trumps rehabilitation, then the sentence is equivalent to a life-without-parole sentence for Eighth Amendment purposes, as it denies a meaningful opportunity for release *based on demonstrated maturity and rehabilitation.* Accordingly, a parole board violates the Eighth Amendment by denying parole to a juvenile offender based on the severity of the offense.

In addition to urging the California Board of Parole Hearings to place less weight on the nature of the crime, Caldwell asserts that the Board should view prison behavior in the context of adolescent development principles and should ensure that risk assessments emphasize growth and maturity while incorporating expertise in adolescence.[26] These are important recommendations, and adopting them would help California make parole hearings more meaningful for juvenile offenders. As parole hearings get underway for juveniles in other states, Caldwell's article will be an important resource for advocates and parole boards. In many states, parole boards need to adapt their procedures and criteria to ensure that they are meeting constitutional requirements in their consideration of juvenile cases. The parole decision must be based on an individual's maturity and rehabilitation since the time of the crime—*not* the severity of the crime.

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consideration under *Montgomery*); *see also* Tatum v. Arizona, No. 15-8850, 2016 WL 1381849, at *1 (Oct. 31, 2016) (Sotomayor, J., concurring) (concurring in Court's decision vacating judgments of cases and remanding for further consideration under *Montgomery*).

25. *Adams v. Alabama*, 136 S.Ct. at 1800.

26. Caldwell, *supra* note 4, at 297-304.