

# Article

## BOARD TO DEATH: DE FACTO JUVENILE LIFE WITHOUT PAROLE

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### Abstract

*In Miller v. Alabama, the Supreme Court held that sentencing a juvenile to life without parole absent a finding that the youth was incorrigible violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Court contemplated that states could remedy a Miller violation by offering parole hearings to juveniles serving life sentences, but did not address the fact that many states rarely grant parole to juveniles serving life sentences and afford them few due process rights at their parole hearings. This means that juveniles sentenced to life with parole are likely to die in prison regardless of the evidence of their rehabilitation. Moreover, juvenile offenders sentenced to life with parole before Miller may not have had the opportunity to present evidence of their youth as a mitigation factor at sentencing (or during parole hearings), unlike juveniles who have been sentenced to life without parole after Miller. In order to investigate the difference between life with and life without parole, this article examines the parole system for individuals sentenced to life in South Carolina, a state that still gives the parole board complete discretion in their decision-making. Although South Carolina, like most states, has not reformed its parole procedures in response to Miller the state claims that juvenile offenders who appear before its parole boards are receiving a meaningful opportunity to obtain release. The article presents an analysis of over a decade of parole decisions involving 100 juvenile offenders and considers whether the state's process is affording juveniles that*

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*meaningful opportunity. The results indicate that very few juveniles are paroled, and most are denied parole based solely on factors relating to the crime. In addition, there is no evidence that the juvenile parole grants have increased since Miller. The article concludes by discussing the implications for the future of Miller.*

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## INTRODUCTION

When he was 17, Stewart Buchanan was sentenced to life in prison with the possibility of parole after ten years.<sup>1</sup> Forty-six years later, he has been

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<sup>1</sup> Brief of Appellant at 1, *Buchanan v. South Carolina Department of Probation, Parole and Pardon Services*, 19-ALJ-15-0039 (May 19, 2019).

denied parole 18 times. The reasons for his last 15 parole denials had nothing to do with his reentry plan or institutional record but instead were based on the circumstances of his offense.<sup>2</sup>

Buchanan's most recent parole hearing lasted less than 15 minutes.<sup>3</sup> Buchanan's attorney and numerous supporters described Buchanan's remorse and healing through spirituality. The chairman asked Buchanan three questions relating to his drug use at the time of the crime and subsequent treatment. In response, Buchanan described his decades of recovery and what he has learned about himself. The board then reflected for less than a minute and denied parole because of the circumstances of the offense, again.<sup>4</sup>

In a series of cases, the Supreme Court has ruled that the cruel and unusual punishment clause of the Eighth Amendment limits the ability of states to treat juveniles as if they were adults and sentence them to the most severe punishments. This legal sea change has been driven in significant part by advances in research on adolescent development revealing that the human brain is not fully developed until the mid-twenties, especially the parts of the brain associated with decision-making and behavior control.<sup>5</sup> As a result, the Court has held that "[c]hildren are different" in ways that reduce their moral culpability even when they commit heinous crimes.<sup>6</sup>

One of the more recent cases, *Miller v. Alabama*, held that sentencing a juvenile to life without parole absent an individualized consideration of age violated the cruel and unusual punishment clause of the Eighth Amendment. While a few states have modified their parole procedures and created special guidelines for evaluating juveniles serving life sentences, most have not.<sup>7</sup> Many states continue to treat juveniles as adults and give parole boards complete discretion, meaning parole boards can deny parole solely based on the crime and without a consideration of the hallmarks of youth.

At his most recent parole hearing, Buchanan asked the board to consider the fact that he was a juvenile at the time of the crime and to focus on his subsequent rehabilitation in prison. He provided the parole board with a memorandum outlining his accomplishments, including his G.E.D. earned in 1973, his extensive work history, and his participation in the highly-selective character-based housing unit.<sup>8</sup> Buchanan also described his release plan: he had two years of guaranteed housing, vocational support, and counseling because he earned the highest honors in JumpStart's re-entry program.<sup>9</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *E.g., id.* at 68.

<sup>6</sup> *See Miller v. Alabama*, 567 U.S. 460, 480 (2012).

<sup>7</sup> Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 388–93 (2014).

<sup>8</sup> Brief of Appellant, *supra* note 1, at 6–8.

<sup>9</sup> *Id.* at 8.

In the memorandum, Buchanan explained his remorse for his crime and discussed his difficult childhood and early substance abuse.<sup>10</sup> At the time of the crime, Buchanan was high on drugs and entered the wrong home late at night.<sup>11</sup> When he saw his neighbor, he panicked and killed her. The sentencing judge described Buchanan's crime as a tragic situation "brought about by drugs" and said he hoped that Buchanan could "salvage some phase of his life."<sup>12</sup> The judge's hands were tied; Buchanan had pled guilty to murder, and life in prison was the mandatory sentence.<sup>13</sup>

Even though juveniles like Buchanan have opportunities to appear before the parole board, in many states there is no guarantee that parole boards will treat them differently than adult offenders. In addition, since there is no right to parole, parole boards are not required to afford individuals due process rights at their parole hearings,<sup>14</sup> further limiting the ability of juvenile offenders to advocate adequately for their release. Nevertheless, these states argue that the opportunity to appear before the parole board makes life with parole sentences qualitatively different from life without parole sentences. Despite the continuing importance of parole, most of the previous research is almost 30 years old, and parole board decision-making has varied greatly over time. Moreover, very few studies focus on juvenile offenders and how they are perceived by the parole board.

This article questions whether juveniles serving life sentences receive meaningful opportunities to obtain parole using research on adolescent development and parole decision-making. In Part I, I review the Supreme Court's recent jurisprudence on juvenile sentencing. I discuss the research on adolescent development relied on by the Supreme Court in these cases and how it applies to parole hearings. Part II reviews the parole hearing process and research on parole decision-making. Part III presents findings from a study of parole board decisions in South Carolina, one of the many states that give parole boards complete discretion to reject a parole application based solely on the crime and without consideration of the individual's age at the time of the offense or his maturity and rehabilitation during incarceration.<sup>15</sup> I conclude by discussing the implications of the study for the application of *Miller's* meaningful opportunity for release.

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<sup>10</sup> *Id.* 3–4.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* 3–4.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979).

<sup>15</sup> Russell, *supra* note 7, at 396–97; see also Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1040 (2014).

## I. ADOLESCENT DEVELOPMENT AND ADULT PUNISHMENT

A. *Constitutional Limits on the Punishment of Juvenile Offenders*

In 2005, the Supreme Court held in *Roper v. Simmons* that the Eighth Amendment prohibits sentencing a juvenile<sup>16</sup> to death.<sup>17</sup> The Court overruled prior cases holding that individuals 16 and older could be sentenced to death.<sup>18</sup> In so doing, the *Roper* Court reviewed current state practices and scientific research on juvenile development.<sup>19</sup> Based on the research, the Court distilled three characteristics that differentiate juveniles from adult offenders: (1) juveniles have a “lack of maturity and . . . responsibility;”<sup>20</sup> (2) they are “more vulnerable or susceptible to negative influences and outside pressures,” “have less control . . . over their own environment,” and “lack the freedom that adults have to extricate themselves from a criminogenic setting;”<sup>21</sup> and (3) they are more capable of rehabilitation.<sup>22</sup> These characteristics of youth make it “less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”<sup>23</sup>

Five years later, in *Graham v. Florida*, the Court held that life without parole is an unconstitutional punishment for juveniles who commit non-homicide offenses.<sup>24</sup> The Court noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”<sup>25</sup> Notwithstanding the severity of Graham’s offenses,<sup>26</sup> the Court stated that juvenile offenders like Graham are “less deserving of the most

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<sup>16</sup> The Court defined a juvenile as a person under the age of 18.

<sup>17</sup> *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

<sup>18</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (concluding the Eighth and Fourteenth Amendments did not proscribe the execution of 16 and 17-year olds because of the national consensus at the time); see also *Thompson v. Oklahoma*, 487 U.S. 815, 818–838 (1988) (Stevens, J., plurality) (finding that national standards of decency did not permit the execution of any offender under age sixteen at the time of the crime).

<sup>19</sup> *Roper*, 543 U.S. at 570 (citing Erik Erikson, *Identity: Youth and Crisis* (1968)); see also *id.* at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003)).

<sup>20</sup> *Id.* at 569 (“A lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions”).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 570 (finding that their characters are “not as well formed as th[ose] of an adult,” and their personalities are “more transitory, less fixed”).

<sup>23</sup> *Id.*

<sup>24</sup> *Graham v. Florida*, 560 U.S. 48, 71–72 (2010).

<sup>25</sup> *Id.* at 68.

<sup>26</sup> *Id.* at 55 (Graham committed a home invasion and held the occupants at gunpoint while he was on parole for a separate burglary).

severe punishments,” and must be given a “realistic” and “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>27</sup>

Next, the Court held that all mandatory life without parole sentences are unconstitutional for juveniles, even when they are convicted of murder.<sup>28</sup> For juveniles facing life without parole, the Eighth Amendment requires an individualized sentencing hearing similar to a death penalty sentencing hearing.<sup>29</sup> Like in *Roper* and *Graham*, the *Miller* Court reiterated that the criminal justice system must, at some point, consider a juvenile’s age and the “wealth of characteristics and circumstances attendant to it.”<sup>30</sup>

Later the Court held that *Miller* announced a new substantive rule of constitutional law and applied retroactively.<sup>31</sup> In *Montgomery v. Louisiana*, the Court again emphasized that “a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect ‘irreparable corruption.’”<sup>32</sup> Defendants must have an opportunity to present evidence of (and the court must consider) his juvenility, including evidence such as his “limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation” as mitigating evidence before sentencing him to life without parole, despite the severity of his crime.<sup>33</sup> Unless the state finds that an offender is irredeemable, it must give juvenile offenders the opportunity to live “some years of life outside prison walls.”<sup>34</sup>

The Court’s juvenile sentencing jurisprudence establishes that even for the most serious crimes, the Eighth Amendment requires the sentencer to give individualized consideration to the juvenile offender’s youth and youthful characteristics at the time of a crime before sentencing the juvenile to the death penalty or life without parole.<sup>35</sup> When a crime reflects “transient immaturity,” rather than “irreparable corruption,” a life-without-parole sentence constitutes cruel and unusual punishment, even if the sentence follows a constitutionally adequate sentencing hearing.<sup>36</sup> Unless the juvenile is one of the

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<sup>27</sup> *Id.* at 68, 75, 82.

<sup>28</sup> *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 476.

<sup>31</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

<sup>32</sup> *Id.* at 726.

<sup>33</sup> *Id.* at 725–26 (Montgomery was convicted of murdering a sheriff).

<sup>34</sup> *See id.* at 737.

<sup>35</sup> *Graham v. Florida*, 560 U.S. 48, 75 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 570 (2005) (“Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.” (internal quotation marks and citation omitted)).

<sup>36</sup> *Montgomery*, 136 S. Ct. at 734 (“Because *Miller* determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.” (quoting *Roper*, 543 U.S. at 573)).

very few individuals who are irredeemable, then the juvenile must have “some meaningful opportunity to obtain release.”<sup>37</sup>

The Court in *Montgomery* suggested that to remedy *Miller* violations, states could use parole hearings to “ensure[] that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”<sup>38</sup> Despite this suggestion, parole boards have few due process requirements because parole is often viewed as an “act of grace.”<sup>39</sup> In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, the Supreme Court considered the minimum due process required for people seeking parole.<sup>40</sup> In *Greenholtz*, the Court applied the two-step minimum due process analysis. First, the Court determined whether due process applied by examining the nature of the interest and whether the individual had “a legitimate claim of entitlement to it.”<sup>41</sup> Second, the Court determined “the process that is due” under the Constitution.<sup>42</sup> The *Greenholtz* Court considered the institution of parole in 1979—“still in an experimental stage”<sup>43</sup>—and the nature of parole decision-making at the time:

In parole releases . . . few certainties exist . . . [T]he choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate’s release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice. The entire inquiry is, in a sense, an “equity” type judgment that cannot always be articulated in traditional findings.<sup>44</sup>

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<sup>37</sup> *Graham*, 560 U.S. at 75; see also *id.* at 82 (“A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some *realistic opportunity* to obtain release before the end of that term.” (emphasis added)).

<sup>38</sup> *Montgomery*, 136 S. Ct. at 736. In *Montgomery*, the Court noted that the named petitioner’s work as a coach for the prison boxing team and other evidence that he is a role model for other inmates is “an example of one kind of evidence that prisoners might use to demonstrate rehabilitation.” *Id.*; see also *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2017 WL 4980872, at \*12 (W.D. Mo. Oct. 31, 2017) (“[U]nder *Graham*, *Miller*, and *Montgomery*, the juvenile offender has a liberty interest in a meaningful parole review.”).

<sup>39</sup> *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019). Since parole is a matter of grace, it “may be denied for any reason (except, of course, an unlawful one such as race), or for no reason.” *Garner v. Jones*, 529 U.S. 244, 258–59 (2000) (Scalia, J., concurring). See also *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam) (“[T]he States are under no duty to offer parole to their prisoners.”).

<sup>40</sup> 442 U.S. 1, 3 (1979).

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* at 11–12.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.*



The Court was not persuaded that a liberty interest in parole was created by the state's decision to offer the possibility of parole, "a hope which is not protected by due process."<sup>45</sup> But a mere possibility of parole as considered in *Greenholtz*, a 5-4 decision decided 26 years before *Roper*, is fundamentally different from the "meaningful opportunity" mandated in *Miller*. Although generally there is no constitutional right to parole, the Eighth Amendment entitles juveniles to a meaningful opportunity for release, which may only be realized through parole.<sup>46</sup>

A few states have responded to *Graham* and *Miller* by reforming their parole procedures to ensure each juvenile offender has a realistic and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."<sup>47</sup> Recent laws passed in Arkansas, California, Connecticut, Missouri, and West Virginia require parole boards to consider immaturity at the time of the offense and subsequent growth and rehabilitation.<sup>48</sup> The Maryland and Rhode Island parole boards made similar changes to the factors they consider in their guidelines.<sup>49</sup>

Despite these changes, most states continue to grant parole only rarely to individuals serving life sentences, and they afford people very few due process rights at parole hearings. Recently the Fourth Circuit upheld this practice, refusing to extend the Eighth Amendment protections from *Graham* and

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<sup>45</sup> *Id.* at 11. The Supreme Court found that the Nebraska parole statute, which used mandatory language that the parole board "shall" give parole in certain situations, gave rise to a *statutory* liberty interest entitled to due process protections. *Id.* at 12.

<sup>46</sup> *Graham v. Florida*, 560 U.S. 48, 79 (2010); *see also* *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1005 (E.D.N.C. 2015) (finding that *Graham* mandates consideration of maturity after sentencing); *see also* *Flakes v. People*, 153 P.3d 427, 437 (Colo. 2007) ("[J]uveniles have a 'liberty interest in avoiding harsh punishment.'"); *Carter v. State*, 461 Md. 295, 340 (2018), *reconsideration denied* (Oct. 4, 2018) ("[A] 'meaningful opportunity to obtain release based on demonstrated maturity or rehabilitation'—by parole or otherwise—is not simply a 'matter of grace' for juveniles serving life sentences. It is required by the Eighth Amendment."); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) ("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; it creates a categorical entitlement to 'demonstrate maturity and reform,' to show that 'he is fit to rejoin society,' and to have a 'meaningful opportunity for release.'"); *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751 (Iowa June 28, 2019); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 19, 27 N.E.3d 349, 357 (2015) ("[W]here the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of [the Massachusetts constitution], the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility."); *but see* *Bowling v. Dir., Virginia Dep't of Corr.*, 920 F.3d 192, 199 (4th Cir. 2019) ("[B]ecause we find that juvenile-specific Eighth Amendment protections do not apply to Appellant's life with parole sentence, we need not decide whether the rights articulated by *Miller* and its lineage trigger liberty interests.").

<sup>47</sup> *Graham*, 560 U.S. at 75; *see also* JUVENILE SENTENCING PROJECT, *Legislation Eliminating Life-Without-Parole Sentences for Juveniles* (2019), <https://juvenilesentencingproject.org/legislation-eliminating-lwop/>

<sup>48</sup> Ark. Code § 16-93-621(b); Cal. Penal Code § 4801(c); Conn. Gen. Stat. § 54-125a(f)(4) (West 2019); Mo. Ann. Stat. § 217.692 (West 2019); W. Va. Code § 62-12-13b(b).

<sup>49</sup> COMAR 12.08.01.18 (2016); R.I. Parole Board, 2018 Guidelines § 1.5(F)(2), <http://www.parole-board.ri.gov/guidelines/UPDATED%20PB%20Guidelines%202018v2.pdf>.

*Miller* to de facto life-without-parole sentences<sup>50</sup> and noting the circuit split regarding whether the *Miller* and *Graham* protections apply to term-of-years sentences that are de facto life without parole.<sup>51</sup>

*B. Adolescent Development and Capacity for Change*

*Miller* held that the criminal justice system must consider the characteristics of youth for individuals who are sentenced to life in prison for crimes committed prior to the age of 18. For this reason, the same adolescent development research contemplated in the Supreme Court's juvenile sentencing cases should be central to parole decisions involving juvenile offenders. Not only do the characteristics of youth affect culpability and capacity for rehabilitation, but they will also shape youthful prisoners' institutional behavior. For this reason, juvenile offenders and adult offenders are likely to have different records when they appear before the board.

Throughout the lifespan, the human brain is plastic, meaning neural pathways can change, altering behavior, thinking patterns, and more. Brain connectivity is influenced by experiences, including adverse life consequences.<sup>52</sup> The brain is most plastic during two periods: the first three years of life and adolescence.<sup>53</sup> The two parts of the brain that change the most during adolescence are the limbic system and the prefrontal cortex. The limbic system is responsible for emotion processing, social information processing, and reward appraisal. The limbic system changes early in adolescence, partly due to puberty. The changes in the limbic system are associated with adolescents becoming more emotional, more sensitive to stress, more sensitive to rewards, and more likely to engage in sensation-seeking.<sup>54</sup> The prefrontal cortex gives people the ability to engage in sophisticated thinking like weighing risks and rewards, taking on other people's perspectives,<sup>55</sup> and modulating impulses, which allows for planned action and long-term goals. During adolescence connectivity between the limbic system and the prefrontal cortex

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<sup>50</sup> *Bowling v. Dir.*, Virginia Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019) (“[B]ecause we find that juvenile-specific Eighth Amendment protections do not apply to Appellant’s life with parole sentence, we need not decide whether the rights articulated by *Miller* and its lineage trigger liberty interests.”).

<sup>51</sup> *Id.*; see also, e.g., *United States v. Grant*, 887 F.3d 131, 144 (3d Cir. 2018) (vacating a 65-year sentence), *reh’g en banc granted*, *opinion vacated*; 905 F.3d 285 (3d Cir. 2018); *McKinley v. Butler*, 809 F.3d 908, 913–14 (7th Cir. 2016) (vacating a 100-year sentence); *Moore v. Biter*, 725 F.3d 1184, 1191–92 (9th Cir. 2013) (vacating an aggregate sentence of 254 years); *but see*, e.g., *United States v. Jefferson*, 816 F.3d 1016, 1019 (8th Cir. 2016) (declining to vacate a 50-year sentence); *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012) (declining to vacate an 89-year sentence).

<sup>52</sup> JAMES GARBARINO, *MILLER’S CHILDREN: WHY GIVING TEENAGE KILLERS A SECOND CHANCE MATTERS FOR ALL OF US* 11-12 (2018); LAURENCE STEINBERG, *ADOLESCENCE* 54 (11 ed., 2017).

<sup>53</sup> STEINBERG, *supra* note 52, at 51–58; Daniel Romer, Valerie F. Reyna & Theodore D. Satterthwaite, *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 *DEVELOPMENTAL COGNITIVE NEUROSCIENCE* 19, 19–21 (2017).

<sup>54</sup> STEINBERG, *supra* note 52, at 55–56.

<sup>55</sup> Sarah-Jayne Blakemore, *Avoiding Social Risk in Adolescence*, 27 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 116 (2018).

increases, which improves the ability to regulate emotions.<sup>56</sup> The prefrontal cortex is the last part of the brain to mature and is not fully developed until the mid-twenties.<sup>57</sup>

The asynchronicity in brain maturation in adolescence, with the limbic system (reward seeking) developing before the prefrontal cortex (impulse control), is associated with increased sensation seeking.<sup>58</sup> Adolescence is characterized as a period when people have the accelerator but not the brakes, meaning they are driven to take risks but often do not think about the consequences.<sup>59</sup> While there is considerable variation in the types of risks taken, most people engage in more risky behaviors during adolescence than at any other point in their lives.<sup>60</sup> These cognitive differences supported the Court's reasoning in *Roper* that adolescent offenders are less culpable for their actions compared to adult offenders.<sup>61</sup>

The Supreme Court also noted that social changes during adolescent development make adolescents less culpable for their actions.<sup>62</sup> Compared to children, adolescents feel closer to their friends and form more intimate relationships.<sup>63</sup> Peers are an important factor in adolescents' happiness, and adolescents are particularly affected by social exclusion.<sup>64</sup> Possibly due to the fear of social exclusion, peer pressure is an important motivator in adolescent behavior.<sup>65</sup> Adolescents are more likely to make decisions motivated by social consequences compared to health and legal consequences.<sup>66</sup> For example, in a simulated driving task, adolescents took the most risks when a peer was present.<sup>67</sup> In addition, consistent with the research on adolescent risk

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<sup>56</sup> STEINBERG, *supra* note 52, at 55–56.

<sup>57</sup> *Id.* at 60.

<sup>58</sup> B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 63 (2008).

<sup>59</sup> Elizabeth Cauffman, *Arrested Development: Adolescent Development & Juvenile Justice*, TEDX TALKS (2016), <https://www.youtube.com/watch?v=wUa0bIqZ0XU>.

<sup>60</sup> JEFFREY J. HAUGAARD, PROBLEMATIC BEHAVIORS DURING ADOLESCENCE 41 (2001).

<sup>61</sup> *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (noting that juveniles have a “lack of maturity and an underdeveloped sense of responsibility” that “often result in impetuous and ill-considered actions and decisions.” In addition, their characters are “not as well formed” and their personalities “more transitory, less fixed” than those of adults); *see also* GARBARINO, *supra* note 52, at 11–15 (“For a start, teenage killers are not playing with a full deck when it comes to making good decisions and managing emotions because of their immature brains. But many of them are also playing with a *stacked* deck because of the developmental consequences of adverse life circumstances.”).

<sup>62</sup> *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (stating that juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”).

<sup>63</sup> STEINBERG, *supra* note 52, at 127–28.

<sup>64</sup> *Id.* at 128; Sarah-Jayne Blakemore & Kathryn L. Mills, *Is Adolescence a Sensitive Period for Sociocultural Processing?*, 65 ANNUAL REV. PSYCHOL. 187 (2014).

<sup>65</sup> Blakemore, *supra* note 55, at 118.

<sup>66</sup> *Id.*

<sup>67</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 629–30 (2005).

taking, adolescents were more likely to take risks while driving compared to adults.<sup>68</sup>

While normative changes during adolescence make young people less culpable for their actions, they may also cause them to appear more dangerous than adults. The cognitive differences between juveniles and adults may cause the homicides committed by juveniles to be more impulsive, which may make those homicides seem more heinous. Homicides committed by adolescents are more likely than adult homicides to involve another felony, other offenders, and a firearm.<sup>69</sup> In addition, homicides committed by juveniles are most likely to be unintentional, that is the juvenile did not intend to commit murder, but they intended to commit another type of crime or act of delinquency that culminated in murder.<sup>70</sup> Despite the fact that these murders are not intentional, felony murder often carries the same punishment as intentional murder.<sup>71</sup> Previous research has found that people will be lenient towards juvenile offenders compared to adult offenders, unless the crime is heinous.<sup>72</sup> When the crime is heinous, they will punish adolescent offenders similarly to adult offenders.

The increased importance of peers can be seen in analysis of juvenile homicides. Analysis of arrests shows that adolescent homicide offenders are more likely than adult offenders to have co-defendants.<sup>73</sup> This trend follows an upside-down “U” shape, with an increase in the portion of crime involving co-offending during adolescence followed by a decline in the portion of co-offending after the adolescent years. As discussed next, this curve follows a similar path to the decline in crime overall after the adolescent years, leading many to conclude that group pressure is an important cause of adolescent crime.<sup>74</sup>

In sum, likely due to a combination of the biological and social transitions that occur during adolescence, most individuals will take more risks during adolescence than they do at any other point in their lives.<sup>75</sup> For some individuals, risk-taking rises to the level of externalizing problems like

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<sup>68</sup> *Id.*

<sup>69</sup> Richard Block & Franklin Zimring, *Homicide in Chicago, 1965-1970*, 10 J. RES. CRIME & DELINQ. 1, 7-8 (1973); Derral Cheatwood & Kathleen J. Block, *Youth and Homicide: An Investigation of the Age Factor in Criminal Homicide*, 7 JUST. Q. 265, 277-79 (1990) (comparing murders by adults and juveniles in Baltimore); Alison Roscoe, Mohammad S. Rahman, Hetal Mehta, David While, Louis Appleby & Jenny Shaw, *Comparison of a National Sample of Homicides Committed by Lone and Multiple Perpetrators*, 23 J. FORENSIC PSYCHIATRY & PSYCHOL. 510, 514 (2012).

<sup>70</sup> Edie Greene & Andrew J. Evelo, *Attitudes Regarding Life Sentences for Juvenile Offenders*, 37 LAW & HUMAN BEHAV. 276, 271 (2013).

<sup>71</sup> See, e.g., Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446-49 (1985).

<sup>72</sup> Greene & Evelo, *supra* note 70, at 277.

<sup>73</sup> See Franklin E. Zimring & Hannah Laqueur, *Kids, Groups, and Crime: In Defense of Conventional Wisdom*, J. RES. CRIM. & DELINQ. 403, 409-11 (2015).

<sup>74</sup> *Id.* at 411.

<sup>75</sup> Steinberg, *supra* note 52, at 66-67.

criminal behavior and substance abuse.<sup>76</sup> Externalizing behavior generally increases in the teenage years and then decreases in the twenties and beyond.<sup>77</sup> This “age-crime curve” predicts that most adolescent offenders will not continue to reoffend as adults.<sup>78</sup>

The age-crime curve present in the community is also present in the criminal justice system and is likely to be exacerbated by the stressful prison environment.<sup>79</sup> During the time that they are adolescents, adolescent offenders are likely to have worse institutional records compared to adult offenders.<sup>80</sup> Differences in cognitive and social development make adolescents less equipped to deal with the stress of prison and increase the likelihood that they will exhibit behavior problems and commit disciplinary infractions in prison.<sup>81</sup> A study in Florida found that the rate of juvenile disciplinary infractions is 2.7 times the rate of adult infractions in adult prison.<sup>82</sup> As the severity of the infraction increased, the ratio of juvenile offending to adult offending also increased.<sup>83</sup> If parole boards do not consider adolescent development at the time of the crime and disciplinary infractions, the type of crime and increased number of disciplinary infractions during adolescence may cause parole boards to punish juvenile offenders for behavior that is a hallmark of youth.<sup>84</sup>

## II. PAROLE

Leaving the decision of whether to release a juvenile offender up to the parole board seems like a natural choice. It may be impossible to determine reliably whether young people will age out of offending or become the rare life-course offenders because their brains are still maturing.<sup>85</sup> Through that lens, it may be a better solution to wait until juveniles have served their minimum sentence, possibly 30 years or more, and consider their adult behavior.

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<sup>76</sup> ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 52–55 (2008).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674, 675 (1993).

<sup>79</sup> Marsha Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 *LAW & INEQ.: J. THEORY AND PRAC.* 369, 393 (2013) (“[M]any juvenile lifers entered prison at a tumultuous developmental time in their lives. They were ill-equipped for life in prison, where they had to adjust to a primitive, Darwinian battle to survive.”).

<sup>80</sup> Attapol Kuanliang, Jon R. Sorensen & Mark D. Cunningham, *Juvenile Inmates in an Adult Prison System*, 35 *CRIM. JUST. & BEHAV.* 1186, 1188, 1197 (2008).

<sup>81</sup> Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 227, 261–64 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Marilyn D. McShane & Frank P. Williams III, *The Prison Adjustment of Juvenile Offenders*, 35 *CRIME & DELINQ.* 254 (1989) (finding that the youngest prisoners in their sample (ages 18 to 21) had the highest rates of prison misconduct and violence).

<sup>82</sup> Kuanliang et al., *supra* note 80, at 1193.

<sup>83</sup> *Id.*

<sup>84</sup> Levick & Schwartz, *supra* note 79, at 406; see also *id.* at 394 (“When juveniles start their sentences poorly—for any number of reasons, including their efforts to ‘act tough’ to get by—their misbehavior can be used against them decades later.”).

<sup>85</sup> STEINBERG, *supra* note 52, at 51–58.

The problem with that argument is that predicting future dangerousness, at any point in life, is notoriously difficult, even for trained experts.<sup>86</sup> Even the best assessments will be mostly inaccurate because most juveniles are not irreparably corrupt, which creates a low base rate problem.<sup>87</sup>

Political factors are also likely to influence decisions. Many board members are politically appointed, making them susceptible to backlash if someone they release reoffends. Even a small possibility of future victims, therefore, may be too much of a risk for a parole board.<sup>88</sup> This challenge may cause boards to reject parole for people who have committed serious crimes regardless of their behavior in prison.<sup>89</sup> In this part, I review the parole procedures in South Carolina and research on parole decision-making more generally. South Carolina, like most states,<sup>90</sup> has not reformed its parole procedures in response to *Miller* and affords individuals seeking parole few due process rights.

#### A. *The Parole Hearing Process*

The South Carolina Board of Pardons and Paroles is composed of seven members, each representing a district in South Carolina.<sup>91</sup> They are appointed by the governor with the advice and consent of the senate to serve staggered

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<sup>86</sup> *Barefoot v. Estelle*, 463 U.S. 880, 920 (1983) (“[The American Psychiatric Association’s] best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong.”) (Blackmun, J., dissenting); John S. Carroll, *Causal Theories of Crime and Their Effect upon Expert Parole Decisions*, 2 LAW & HUM. BEHAV. 377, 378 (1978); Jon O. Newman, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 826, 827, 848 (1975); see also Robert M. Garber & Christina Maslach, *Parole Hearing: Decision or Justification?*, 1 LAW & HUM. BEHAV. 261, 279 (1977); R. Barry Ruback & Charles H. Hopper, *Decision Making by Parole Interviewers: The Effect of Case and Interview Factors*, 10 LAW & HUM. BEHAV. 203, 207–11 (1986).

<sup>87</sup> When something occurs in only a small percentage of the population (a low base rate), like the small percentage of juveniles offenders that are “irreparably corrupt,” even a highly valid measure will generate large numbers of false-positive errors (or labeling someone as irreparably corrupt who is not). Melton and his colleagues provide an example: assume psychologists can accurately classify 90% of violent individuals and the number of truly violent individuals is only 15% of the population (and 85% of the population is not violent). If psychologists evaluate 1,000 people, 150 will be violent and 850 will not be. The number of people that psychologists will accurately predict are violent will be 135 which is (.90 \* 150) and the number of inaccurate labels will be 85 (.10 \* 850). This creates a false-positive rate of 39% (which is 85 / (135 + 85)). As the percentage of people who are violent decreases, the error rate increases. If the rate of people who are violent is 5% of the population, the false-positive rate will be 68%. GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 302–03 (3rd ed. 2007).

<sup>88</sup> Kathryn D. Morgan & Brent Smith, *The Impact of Race on Parole Decision-Making*, 25 JUST. Q. 411, 414 (2008).

<sup>89</sup> Robert O. Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. U. L.Q. 243, 249 (1966) (“[P]arole boards are concerned with the probability of recidivism because of the public criticism which often accrues to them when a person they have released violates his parole, especially by committing a serious offense.”).

<sup>90</sup> See *supra* notes 47–49 and accompanying text.

<sup>91</sup> S.C. DEP’T OF PROB., PAROLE AND PARDON SERVICES, Parole Board, <https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board> (last visited Mar. 2, 2020).

six-year terms.<sup>92</sup> Many are reappointed.<sup>93</sup> The board elects a chairman, vice chairman and secretary.<sup>94</sup> By statute, the board has the responsibility for making parole and pardon decisions, revoking or modifying parole decisions, and making recommendations on petitions for reprieves and commutations to the Governor.<sup>95</sup> The Department of Probation, Parole and Pardon Services (DPPP) is an agency tasked with preparing pre-parole and pre-sentencing reports and supervising individuals once they are placed on probation or parole, among other things.<sup>96</sup> The board is independent but is administratively attached to DPPP.<sup>97</sup>

South Carolina has had this form of part-time independent board since the creation of the department of parole in 1941. Most other states switched full-time professional boards with other post-World War I reforms based on the belief that the part-time boards were dominated by prison personnel and were overly sensitive to political and institutional influences.<sup>98</sup>

Parole eligibility is determined by statute at the time of sentencing. Before 1977 a person convicted of murder and sentenced to life needed to serve at least 10 years before becoming eligible for parole.<sup>99</sup> In 1977 the minimum time served increased to 20 years.<sup>100</sup> In 1986 it increased to 20 or 30 years depending on whether the jury found an aggravating circumstance.<sup>101</sup> The 1986 law also lowered the frequency of parole hearings for violent crimes from every year to every two years.<sup>102</sup> South Carolina completely removed parole eligibility for persons convicted of murder after 1996.<sup>103</sup> There are

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> S.C. Code Ann. § 24-21-620 (1976).

<sup>96</sup> *Id.*

<sup>97</sup> Seven other states have this organizational structure. EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY, & KELLY LYN MITCHELL, *THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY* 17 (2017). It is more common for the parole board to be administratively connected to the department of corrections (20 states). *Id.*

<sup>98</sup> John A. Conley & Sherwood E. Zimmerman, *Decision Making by a Part-Time Parole Board: An Observational and Empirical Study*, 9 CRIM. JUST. & BEHAV. 396, 397 (1982); RUHLAND ET AL., *supra* note 97, at 20 (surveying parole boards in the United States and finding: "Of the 206 board members with a reported appointment status, 76% were full-time.").

<sup>99</sup> S.C. Code § 55-611 (1962) (parole eligibility after 10 years); S.C. Code § 16-52 (1962) (sentence for murder); *see also* Deborah Drucker Deutschmann & Stephen K. Benjamin, *Accurately Advising Clients on Parole Eligibility*, 12 S.C. LAW. 27, 27 (2000) ("Offenders sentenced to life for a murder committed before June 12, 1977 are eligible for parole after serving 10 years. Offenders sentenced to life for a murder committed between June 13, 1977 and June 2, 1986 are eligible for parole after serving 20 years. Offenders sentenced to life for a murder committed on or after June 3, 1986 and between January 1, 1996 are eligible for parole after the service of 20 or 30 years, as ordered by the sentencing judge. After January 1, 1996, offenders are sentenced to life without parole or a 30-year mandatory minimum sentence without credits and are not eligible for parole.").

<sup>100</sup> Act No. 177 § 1 (S.C. 1977).

<sup>101</sup> Act No. 462, § 27 (S.C. 1986).

<sup>102</sup> S.C. Code Ann. § 24-21-645 (Supp. 1998).

<sup>103</sup> Act No. 83, § 10 (S.C. 1995). S.C. Code Ann. § 16-3-20 ("No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is

special exceptions allowing earlier parole eligibility for individuals convicted of murdering a household member who battered them.<sup>104</sup>

Like many states, in South Carolina the parole process begins with an interview with a parole agent.<sup>105</sup> The agent creates a case summary report that includes a description of the crime, criminal record, medical history, work experience, prison and disciplinary records, risk classification reports, and (if available) statements from law enforcement, witnesses, prosecutors and the judge.<sup>106</sup> The person seeking parole does not have a right to access this report, and the parole board has a policy of not sharing it. This creates a risk that error may go uncorrected: reports of offense behavior are very difficult to establish accurately, and history of drug dependence can be frequently disputed.<sup>107</sup> The board members receive the case reports two weeks in advance of the hearings.

The parole hearings occur once a week, and there may be as many as 70 hearings in one sitting.<sup>108</sup> Unlike some states that give the parole board discretion to grant a parole hearing based on the results from a preliminary interview, in South Carolina all people who are eligible for parole have a full hearing with the board.<sup>109</sup> For violent crimes (designated by statute), the full board meets and at least five votes are required to grant parole. For non-violent crimes, the board meets in three-person panels.<sup>110</sup> The panels need a unanimous vote in order to grant parole; if a case receives split votes, it is rescheduled for a full board hearing.<sup>111</sup> The board alternates weeks between non-violent full-board hearings and non-violent panels. The use of panels is common across states.<sup>112</sup>

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the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.”).

<sup>104</sup> S.C. Code Ann. § 16-25-90 (1976).

<sup>105</sup> S.C. DPPP, POLICY AND PROCEDURE: SOUTH CAROLINA BOARD OF PAROLES AND PARDONS. 22–23 (2019), <https://www.dppps.sc.gov/content/download/209320/4885043/file/Board+of+Paroles+and+Pardons+11062019.pdf>; see also Ruhland et al., *supra* note 97, at 31.

<sup>106</sup> *Id.* at 21 (“Every file that the Department prepares for the Board’s review includes, though it is not limited to, the following information: The criminal offense and a description of it; The sentencing date, the ‘max-out’ date, the parole eligibility date, the date of any previous<sup>(1)</sup> parole hearings, the names of any co-defendants; The offender’s criminal record; The offender’s prison and disciplinary records; Risk classification reports; A medical history and psychological reports, if any; A history of the offender’s supervision on probation or parole, if any; The parole examiner’s recommendation(s); Any statements from law enforcement; Any statement from the prosecuting witness or the prosecuting witness’s next of kin, if the witness is deceased; Any statement from the solicitor or his successor; Any statement from the sentencing judge; The offender’s social history; The offender’s employment experience.”).

<sup>107</sup> Newman, *supra* note 86, at 835.

<sup>108</sup> See S.C. DPPP, *Frequently Asked Questions: Parole and Pardon Hearings*, [https://www.dppps.sc.gov/FAQ#parole\\_pardon\\_hearings](https://www.dppps.sc.gov/FAQ#parole_pardon_hearings) (last accessed Mar. 2, 2020) (“The Parole Board hears up to 70 cases per day so their time is limited.”).

<sup>109</sup> RUHLAND ET AL., *supra* note 97, at 32 (finding that 27 states (69%) require an interview for some people who are eligible for parole).

<sup>110</sup> Annual Report 1994-95 at 55; Annual Report 1995-96 at 47.

<sup>111</sup> Annual Report 1995-96 at 47. The board hears 110 non-violent cases during panel meetings. *Id.*

<sup>112</sup> RUHLAND ET AL., *supra* note 97, at 30.



The parole hearing itself involves a presentation by the person seeking parole (or their lawyer) to the board. South Carolina, like most states, does not provide lawyers to people seeking parole who cannot afford them.<sup>113</sup> The board members may ask questions. Generally, they ask about the individual's criminal record, the details of the crime for which the person is seeking parole, her institutional behavior, and her plans for release.<sup>114</sup> The person seeking parole may also invite family and friends to speak. A total of five people may speak in support of parole.

As individuals do not have access to the parole summary report, it can be difficult to know what to cover during their brief presentation to the board. They may try to correct any perceived misconceptions about their crime or prior history, but the board may not trust the word of the person seeking parole over the official report or the account of the victims.<sup>115</sup> And due to the brevity of the hearings, there is a good chance that the board will want to focus on rehabilitation and plans for release, and the offense characteristics will not be raised at all. Next, the person seeking parole is excused and up to five people opposing parole may speak. South Carolina, like most jurisdictions, notifies victims of parole hearings<sup>116</sup> and considers victim input in parole release decisions.<sup>117</sup>

The board deliberates immediately after the hearing and then informs interested parties of its decision. Due to the large number of hearings per day, the length of the hearings ranges from a just a few minutes to about twenty minutes and the deliberations are even shorter, lasting seconds and often containing no discussion. South Carolina, like many jurisdictions, notifies the person seeking parole of the decision immediately.<sup>118</sup> If parole is denied, the department sends a brief written notice of denial (usually one page in length) that includes a list indicating which of the six official reasons for rejection applied in the case.<sup>119</sup> Across the country, most states require a similar form

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<sup>113</sup> *Id.* at 29 (finding that of the 38 states who responded to the survey question, 10 provided an attorney (26%)); see also S.C. DPPP, *supra* note 105, at 20 (explaining the right to have an attorney present at the parole hearing “at the offender’s own expense”).

<sup>114</sup> *E.g.*, Kathryne M. Young, Debbie A. Mukamal, Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California’s Lifer Inmates*, 28 FED. SENT’G REP. 268, 269 (2016).

<sup>115</sup> *Id.* at 836–37.

<sup>116</sup> RUHLAND ET AL., *supra* note 97, at 28. DPPP includes an Office of Victim Services with the goal “to provide information, education and support services to crime victims, while ensuring that they are kept informed of the status of their case.” Annual Report 1995-96 at 10. Victims receive 30-day notice of parole hearings and are invited to attend hearings.

<sup>117</sup> RUHLAND ET AL., *supra* note 97, at 28 (“[A]ll [38 releasing authorities who responded to the survey question] reported they consider input from the victim. . . . [A]ll 50 states and the U.S. Parole Commission have laws that allow for victim impact statements either at sentencing, parole hearings, or both.”).

<sup>118</sup> S.C. DPPP, *supra* note 105, at 23; see also RUHLAND ET AL., *supra* note 97, at 33 (finding that 48% of 40 respondent states tell inmates right away, 15% notify within seven days, 33% notify within 30 days, and 5% take longer than 30 days.).

<sup>119</sup> *Id.* at 31. The official reasons for denial are: (1) “Nature and seriousness of the current offense;” (2) “Indication of violence in this or a previous offense;” (3) “Use of a deadly weapon in this or a previous offense;” (4) “Prior criminal record indicates poor community adjustment;” (5) Failure to successfully complete a community supervision program;” and (6) “Institutional record in unfavorable.” *Id.*

of notification of reasons for denial.<sup>120</sup> In South Carolina, these reasons are suggested by the chairperson of the board and agreed to by the rest of the board members. The person seeking parole will have another opportunity to appear the board in one or two years depending on the sentence. The practice of guaranteeing parole hearings regularly by statute occurs in approximately 14 states.<sup>121</sup> In most states (at least 26), the parole board can determine whether the inmate will receive another parole hearing.<sup>122</sup>

In South Carolina, individuals may contest a denial of parole through an administrative appellate process, but the agency will not review the decision and it will only grant an appeal if the parole board did not follow the law.<sup>123</sup> Overall, inmates are not entitled to appeal in only 11 states. Most states allow an inmate to appeal or request the parole board to reconsider its decision.<sup>124</sup>

### *B. Parole Decision-Making*

In South Carolina, like many states, the parole board has complete discretion in deciding whether to grant parole.<sup>125</sup> In order to grant release, the parole board states that it must determine “that the conduct of the offender merits a lessening of the rigors of imprisonment; that the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence.”<sup>126</sup> The Parole Board Manual describes a number of factors it considers when weighing whether to grant a person parole.<sup>127</sup> South Carolina does not include youth or immaturity as a relevant factor.

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<sup>120</sup> RUHLAND ET AL., *supra* note 97, at 33.

<sup>121</sup> *Id.* at 33.

<sup>122</sup> *Id.*

<sup>123</sup> S.C. Code Ann. § 1-23-600(D) (Supp. 2018); *see generally* Cooper v. S.C. Dept. of Probation, Pardon and Parole Services, 377 S.C. 489 (2008).

<sup>124</sup> RUHLAND ET AL., *supra* note 97, at 33.

<sup>125</sup> S.C. DPPP, *supra* note 105, at 26–27.

<sup>126</sup> *Id.* at 26.

<sup>127</sup> *Id.* at 26–27 (“The risk that the offender poses to the community; The nature and seriousness of the offender’s offense, the circumstances surrounding that offense, and the prisoner’s attitude toward it; The offender’s prior criminal record and adjustment under any previous programs of supervision; The offender’s attitude toward family members, the victim, and authority in general; The offender’s adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself; The offender’s employment history, including his job training and skills and his stability in the workplace; The offender’s physical, mental, and emotional health; The offender’s understanding of the causes of his past criminal conduct; The offender’s efforts to solve his problems; The adequacy of the offender’s overall parole plan, including his proposed residence and employment; The willingness of the community into which the offender will be paroled to receive that offender; The willingness of the offender’s family to allow the offender, if he is paroled, to return to the family circle; The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender’s parole; The feelings of the victim or the victim’s family, about the offender’s release; Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.”).

The board's factors, which are common across other jurisdictions, relate to culpability as well as rehabilitation.<sup>128</sup> A survey of all states and the U.S. Parole Commission found that all 40 responding states considered the nature of the present offense and the offender's prior adult criminal record.<sup>129</sup> All 40 states also considered institutional program participation and psychological reports.<sup>130</sup>

Like other jurisdictions, the South Carolina Board does not describe the relative weight given to each factor.<sup>131</sup> A 2015 survey of twenty-nine parole authority chairs found that 45% believed the "nature" of the current offense was the most important factor.<sup>132</sup> The second and third highest ranked factors were the "severity" of the current offense and prior criminal record.<sup>133</sup> The report concluded that "the combined importance of the 'original crime' and prior record, . . . make up a definitive first tier of the decisional process. Prisoners' current and past criminal conduct are prime considerations for sentencing judges and, months or years later, are reevaluated during the prison-release process."<sup>134</sup> The "second-tier considerations" of parole, as rated by the parole authority chairs, included in-prison conduct (ranked fourth) and empirically founded risk and needs assessments (ranked fifth).<sup>135</sup> Victim input was ranked ninth out of seventeen factors.<sup>136</sup>

The emphasis on criminal record rather than institutional behavior is also supported by research studying the variables that predict parole board decisions.<sup>137</sup> For example, a recent study found individuals convicted of more serious charges are less likely to be granted parole than individuals convicted of lesser charges even after variables relating to future dangerousness are taken into account.<sup>138</sup> More research on parole board decision-making is needed for at least two reasons. First, most of the previous research is almost 30 years old, and parole board decision-making has varied greatly over time. Second, very few studies focus on juvenile offenders and how they are perceived by the parole board.

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<sup>128</sup> RUHLAND ET AL., *supra* note 97, at 25–26 (“[A]ll of the 19 most common factors were in force in more than three-quarters of the 40 respondent jurisdictions.”).

<sup>129</sup> *Id.* at 26.

<sup>130</sup> *Id.*

<sup>131</sup> S.C. DPPP, *supra* note 105, at 26–27.

<sup>132</sup> RUHLAND ET AL., *supra* note 97, at 26.

<sup>133</sup> *Id.* at 27.

<sup>134</sup> *Id.* at 26–27.

<sup>135</sup> *Id.* at 27.

<sup>136</sup> *Id.* The survey of parole board chairpersons found that most (59%) felt that victim input provided “valuable information about an offender’s readiness for release;” 36% were neutral and only 6% disagreed. *Id.* at 47.

<sup>137</sup> Cohen, *supra* note 15, at 1074; *but see* Joel M. Caplan, What Factors Affect Parole: A Review of Empirical Research, 71-Jun. Fed. Prob. 16, 16-17 (2007) (“Despite the nuances of parole board policies or structures, a review of parole decision-making literature to date reveals that parole release decisions are primarily a function of institutional behavior, crime severity, criminal history, incarceration length, mental illness, and victim input.”).

<sup>138</sup> E. Rely Vilcica, *Revisiting Parole Decision Making: Testing for the Punitive Hypothesis in a Large U.S. Jurisdiction*, 62 Int’l J. Offender Therapy & Comparative Criminology 1357, 1363, 1372 (2018).

The relative importance placed on the criminal record compared to behavior in prison has changed dramatically over the last several decades.<sup>139</sup> Originally many parole boards with mandatory minimum sentences saw the goal of the parole process as purely rehabilitation and usually granted parole after a person had served a minimum sentence so long as the institutional record was favorable and the individual had positive psychological reports.<sup>140</sup> The emphasis on rehabilitation began to change in the 1970s with increasing criticisms of the rehabilitative programs available at the time.<sup>141</sup> There was also a growing trend in criminal justice policy to increase the number of people in prison and the length of time they would serve, which continued into the 1990s.<sup>142</sup> As a result of these trends and a public feeling that parole board decision-making was arbitrary and unjust, parole boards fell out of favor.<sup>143</sup> Many states, like South Carolina, greatly reduced the pool of people eligible for parole or abolished parole altogether.<sup>144</sup>

Attitudes towards parole may be shifting again. Growing prison populations have caused some states like California to increase the pool of people eligible for parole.<sup>145</sup> In addition, the *Graham* and *Miller* Supreme Court cases have increased the number of juveniles who are eligible for parole, and the Court's mandate that juveniles have a meaningful opportunity for parole has caused a growing number of states to update their parole guidelines to consider factors relevant to youth. New research on parole decision-making is necessary to understand the influence that these changes have on parole outcomes and whether the states that have not changed their parole process are violating juvenile offenders' constitutional rights.

There is also a need for more research that examines the difference in treatment between juvenile and adult offenders. Few studies have examined the direct influence of age at the time of the crime on parole outcomes, but many factors suggest that age could be a double-edged sword.<sup>146</sup> While young age is mitigating for the reasons suggested in *Roper* and *Miller*,<sup>147</sup> factors associated with age may also be aggravating to the parole board. An adolescent offender may be a worse candidate for parole if the adolescent's

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<sup>139</sup> RUHLAND ET AL., *supra* note 97, at 9; Vilcicia, *supra* note 137, at 1361–62.

<sup>140</sup> See John S. Carroll & Pamela A. Burke, *Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315, 316–18 (1990) (“It is the viewpoint of the Board that the minimum sentence is the judge’s evaluation of crime seriousness and just deserts. The Board sees its own role as the maintenance of control in the prisons by punishing misconduct and the protection of the community and rehabilitation of offenders by providing incapacitation and appropriate programs in prisons and communities . . . . When crimes were attributed to more stable, enduring causes, the hearing examiners predicted that future crime was more likely and rehabilitation less likely, and were more likely to deny parole.”); Garber & Maslach, *supra* note 86, at 279.

<sup>141</sup> RUHLAND ET AL., *supra* note 97, at 9.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Cohen, *supra* note 15, at 1079–81.

<sup>147</sup> See *supra* notes 17–30 and accompanying text.

crime is viewed as more serious, possibly reflected in multiple charges associated with the murder, or if the crime is seen as a product of inherent character defects.<sup>148</sup> Research suggests that juveniles are more likely to have poorer institutional records but are also likely to be viewed as less culpable for their crimes. All of these factors are important in parole decisions. The clearest evidence that parole boards may use youth at the time of the crime as evidence of future dangerousness is the way youth is considered by risk assessment tools like COMPAS. COMPAS, which is widely used by parole boards,<sup>149</sup> uses young age at the time of the crime to predict a higher risk of re-offense.<sup>150</sup> In addition, particularly relevant to juvenile lifers who are seeking parole after serving a minimum sentence of 20 or 30 years, the risk assessment systematically *over*-predicts recidivism among people seeking parole who are currently over age 44.<sup>151</sup> Some studies have found that age at the time of the hearing significantly predicts release, with older people being more likely to be released.<sup>152</sup> This suggests that youthful offenders may have to serve longer sentences before they reach the age when the parole board is willing to release them.<sup>153</sup>

A recent study of parole hearings of juveniles serving life sentences in California found evidence that the decisions were arbitrary and capricious.<sup>154</sup> Despite the fact that California had passed a law for juvenile offenders that required the board to place great emphasis on the hallmark features of youth and subsequent growth and rehabilitation, the study found that, in the first year of the new parole system, parole decisions were essentially random once a candidate had met a minimum standard with respect to rehabilitation.<sup>155</sup> The author concluded “In essence, candidates must pay to play, but then they roll the dice.”<sup>156</sup>

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<sup>148</sup> See *supra* notes 69–72 and accompanying text.

<sup>149</sup> RUHLAND ET AL., *supra* note 97, at 24 (“Of forty respondents, thirty-six states (90%) reported using such a tool, while 4 jurisdictions (10%) indicated they do not (these were California, Illinois, New Mexico, and the U.S. Parole Commission).”).

<sup>150</sup> COMPAS’s General Recidivism Risk and Violent Recidivism Risk scales both consider age at the first offense as a factor *increasing* the risk that they will reoffend. Tim Brennan & William Dieterich, *Correctional Offender Management Profiles for Alternative Sanctions*, in HANDBOOK OF RECIDIVISM RISK/NEEDS ASSESSMENT TOOLS 55–56 (Jay Singh et al. eds. 2017).

<sup>151</sup> Sharon Lansing, *New York State COMPAS-Probation Risk and Need Assessment Study*, CRIM. JUST. RES. REP. 14 (Sept. 2012) (finding COMPAS over-estimated risk “for cases involving offenders age 44 or older with differences generally spanning up to 12 percentage points” and explaining that the overestimation “of the likelihood of rearrest for older-offender cases may be due in part to the fact that the importance of criminal history as a predictor diminishes as an offender’s age increases – as he or she ‘ages out’ of offending”).

<sup>152</sup> John S. Carroll, Richard L. Wiener, Dan Coates, Jolene Galegher & James J. Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 *Law & Society Rev.* 199, 208 (1982); Cohen, *supra* note 15, at 1079–81.

<sup>153</sup> See *id.*

<sup>154</sup> Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of Juvenile Lifer Parole Decisions*, 54 *HARV. C.R.-C.L. L. REV.* 455, 523 (2019).

<sup>155</sup> *Id.* at 469, 485.

<sup>156</sup> *Id.* at 485.

The current research expands on the previous research in a few ways. First, I examine multiple years of data to test whether parole boards eventually place great weight on youth and rehabilitation. Second, I focus on South Carolina, a state that has not modified its parole procedure for juvenile offenders and gives the parole board total discretion to reject parole based on the crime. New research on parole board decision-making is necessary to understand the ways in which juvenile status and the criminal offense are currently affecting parole board decision making.<sup>157</sup> Just because parole boards give individuals an opportunity to present information about their youth does not guarantee that the board will give that presentation constitutionally adequate weight. This research can help inform our understanding of whether current parole systems are adequately protecting juveniles' constitutional right to a meaningful opportunity to obtain parole.

### III. FINDINGS FROM SOUTH CAROLINA

#### A. *The Data*

I sent Freedom of Information Act requests to the South Carolina Department of Probation, Parole and Pardon Services (DPPP) and Department of Corrections (SCDC) for information on people who had parole hearings during 2006–2016 and were serving life sentences. This time frame allows for a comparison of parole outcomes before and after *Graham* (2010) and *Miller* (2012).

DPPP and SCDC provided information on parole hearings and outcomes, criminal records, institutional disciplinary records, and institutional work history. DPPP provided all the convictions in their database for each person fitting the criteria. SCDC provided all prison disciplinary infractions and work histories, including infractions occurring before the charges that resulted in life sentences. I also requested information on participation in education and rehabilitation programs, but SCDC declined to provide this information.

After reviewing the records of the life sentences, I decided to narrow the sample to individuals convicted of murder. There were only three juveniles serving life sentences for crimes other than murder, and all three were charged with kidnapping. In contrast, there were many adults sentenced to life for crimes other than murder, and there was more variation among their charges. Because I predicted that the type of crime would be an important predictor of parole, I decided to narrow the sample to the most serious cases to avoid other differences between the juvenile and adult populations. The final sample included 960 people and 3,941 parole hearings.

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<sup>157</sup> See *id.* at 458–595 (describing the dearth of modern research on parole); Sarah French Russell & Tracy L. Denholtz, Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation, 48 Conn. L. Rev. 1121, 1132 (2016).

Two limitations of this dataset are missing data and possible errors in records. SCDC provided institutional records for 941 of 960 people in my sample (98%). Both DPPP and SCDC were missing the institutional records for the remaining individuals. Presumably the board also cannot use those records in making parole decisions.<sup>158</sup> As a check on data quality, research assistants coded 200 cases (21%), checked the accuracy of dates where possible, and found only minor errors where dates of offenses, sentences, and admission were switched. Many variables, like disciplinary infractions, could not be verified with outside sources. When there was a discrepancy in the charges listed by DPPP and SCDC, I have chosen to rely on the DPPP's description of the criminal charges for the current paper because DPPP carefully reviews the SCDC records before parole hearings and therefore is likely to be more accurate.

To measure the criminal records of people in the sample at each parole hearing, I counted the number of murder convictions and total convictions. I also coded whether the person had ever been charged with a sex crime,<sup>159</sup> escape,<sup>160</sup> a weapons crime,<sup>161</sup> or drug or alcohol offense.<sup>162</sup> I separated these charges into those before the murder, on the same day as the murder, and after the murder.

To measure the institutional records, I examined disciplinary infractions and work history. For each parole hearing, I calculated the total number of disciplinary infractions, the years since the last infraction, the number of level 1 and 2 infractions (more serious infractions),<sup>163</sup> and the number of infractions after the age of 25 (when the brain is more likely to be fully mature<sup>164</sup>). I also coded whether the person had ever been charged with an infraction that

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<sup>158</sup> See e.g., Brief for Appellant at, *Thompson v. DPPP*, 2016-000781 (S.C. App. 2016) (“The [Parole Board] uses SCDC records of Appellant’s activities while incarcerated in making its (sic) decisions. These records are now computer based and very inaccurate and incomplete in Appellant’s case.”).

<sup>159</sup> Sex crimes included criminal sexual conduct with a minor, first degree; criminal sexual conduct, first degree; criminal sexual conduct, second degree; lewd act with a child under 14; rape; and sexual assault with intent to ravish.

<sup>160</sup> Escape crimes included escape and attempted escape.

<sup>161</sup> Weapons crimes included aggravated assault with a gun, carrying a prohibited weapon, carrying a concealed weapon, discharge of a firearm in a dwelling, firearms provision, pointing a firearm, possession of a weapon, and weapons offense.

<sup>162</sup> Alcohol and drug offenses included cocaine distribution, cocaine possession with intent to distribute, cocaine possession, crack cocaine possession with intent to distribute, crack cocaine distribution, dangerous drugs, driving under the influence of liquor, heroin distribution, marijuana distribution, marijuana possession with intent to distribute, marijuana possession, narcotic equipment possession, obtaining a controlled substance through fraud, possession of methamphetamine or cocaine base (second), possession of an open container, trafficking in cocaine, and trafficking in marijuana.

<sup>163</sup> SDCD POLICY OP-22.14, INMATE DISCIPLINARY SYSTEM 31 (last visited Feb. 20, 2020), <http://www.doc.sc.gov/policy/OP-22-14.htm.pdf>.

<sup>164</sup> See generally Blakemore, *supra* note 55 and accompanying text (describing age 25-26 as “adulthood,” when the brain has matured enough to distinguish it from “adolescence” and “emerging adulthood”).

involved sexual misconduct,<sup>165</sup> escape,<sup>166</sup> weapons,<sup>167</sup> or drugs or alcohol.<sup>168</sup> For work history, I calculated the longest time at one job and the current level of employment.<sup>169</sup>

## B. Results

### 1. Opportunities to Obtain Parole

One-hundred juveniles and 960 adults were convicted of murder, sentenced to life, and had parole hearings in 2006–2016.<sup>170</sup> Consistent with the homicide arrest rates in South Carolina,<sup>171</sup> the population is mostly male<sup>172</sup> and black.<sup>173</sup> Individuals had an average of 4.11 parole hearings during the 11 years ( $SD = 2.76$ , range: 1–11).

At the time of their parole hearings, the juvenile offenders ranged in age from 34 to 65 years old ( $M = 44$ ,  $SD = 6.76$ ). They had served approximately 19.95 to 50.16 years in prison ( $M = 27.64$ ,  $SD = 6.69$ ).<sup>174</sup> Nineteen juveniles (14 black and 5 white) had served at least 35 years in prison at the time of at least one of their parole hearings. Eleven juveniles had lived beyond their life expectancy; actuarial data shows that the life expectancy of people who enter prison in South Carolina as juveniles is approximately 54–57 years old.<sup>175</sup>

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<sup>165</sup> Sexual disciplinary infractions included exhibitionism and public masturbation, and sexual assault, sexual misconduct.

<sup>166</sup> Escape disciplinary infractions included attempted escape or breach of a restricted area, class I escape, class II escape, and possession of escape tools or paraphernalia.

<sup>167</sup> Weapons disciplinary infractions included fighting with a weapon and possession of a weapon.

<sup>168</sup> Alcohol and drug disciplinary infractions included inmate under influence

<sup>169</sup> SCDC has four job levels, with lower numbers being harder to achieve. People can be promoted to lower job levels and be demoted to higher levels through poor performance or disciplinary infractions.

<sup>170</sup> The murders were committed between 1954 and 1995. There were missing offense dates for 11 cases, which were filled with sentencing dates. This method overestimates age at the time of the offense, as it may be years between the offense date and the sentence date. Murders were committed by people between the ages of 14 and 65. By definition, juveniles were younger at the age of the crime ( $M = 16.96$ ,  $SD = 0.82$ ) compared to adults ( $M = 27.72$ ,  $SD = 7.91$ ).

<sup>171</sup> See NATIONAL CENTER FOR JUVENILE JUSTICE, EASY ACCESS TO SUPPLEMENTAL HOMICIDE REPORTS, [https://www.ojjdp.gov/ojstatbb/ezashr/asp/off\\_selection.asp](https://www.ojjdp.gov/ojstatbb/ezashr/asp/off_selection.asp) (last visited June 14, 2020) (finding that from 1980 to 1995, black youth were 76% of youth arrested ( $n = 485$ ), black adults are 65% of adults arrested ( $n = 5452$ ). Boys were 92% of youth arrests and men are 85% of adult arrests).

<sup>172</sup> One of the juveniles (1%) and 44 of the adults (5%) were female.

<sup>173</sup> Sixty-seven juveniles were black (67%), 32 were white (32%), 1 was described as “other” (1%). Five-hundred-thirty-five adults were black (62%), 321 were white (37%), 2 were Native American (0.2%), and 2 were other (0.2%). Number does not total 100% due to rounding. The race and gender make up of juveniles and adults were not significantly different. A Fisher’s exact test was used to compare the distribution of all races between adults and juveniles and a chi-square test of association was used to compare the distribution of people of color versus white people between adults and juveniles. Both tests were not significant ( $p > .10$ ).

<sup>174</sup> This number is based on the date of admission to prison and therefore does not include the amount of time served before the person was convicted.

<sup>175</sup> *Aff. of Vera Dolan, State v. Slocumb*, 426 S.C. 297 (S.C. 2019) (finding that the life expectancy for a white male entering prison at age 14, 15, 16, and 17 is as follows: 39.9, 38.9, 37.9, and 36.9 from the time

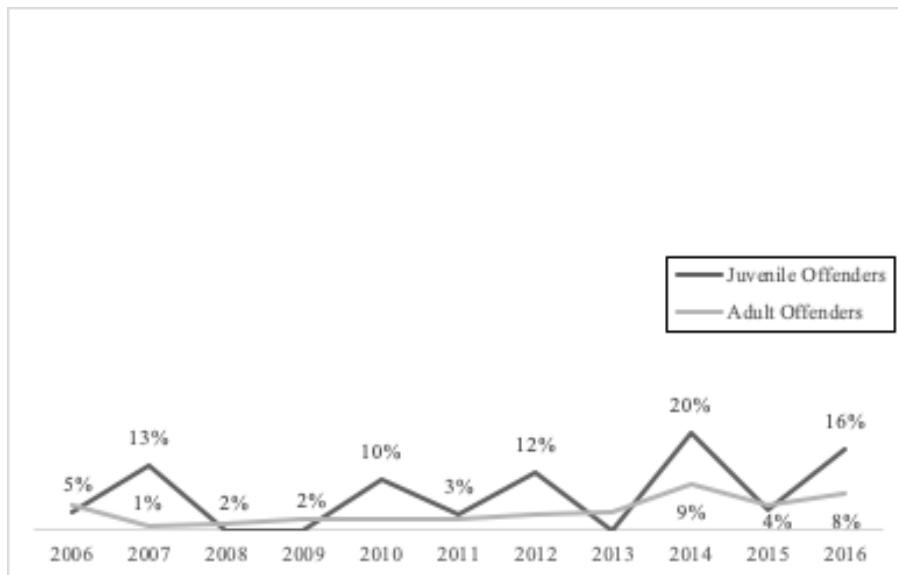


Overall there were 175 grants of parole (just 4% of parole hearings). These grants of parole were given to 28 juvenile offenders and 144 adult offenders (one juvenile and two adult offenders were paroled twice in the eleven-year period). Put another way, 788 individuals (144 juveniles and 716 adults) did not receive parole over the course of 11 years.

The number of people who were granted parole remained consistently low from 2006 to 2016. The percentage of hearings resulting in a parole grant each year ranges from 1% to 10% (in 2008 and 2014, respectively). Figure 1 displays the percent of juvenile and adult offender hearings resulting in parole each year. For juvenile offenders, the percent paroled ranges from 0% to 20% (in 2013 and 2014, respectively).<sup>176</sup> There is no sizable increase in the percentage of juveniles granted parole after the *Graham* decision in 2010 or the *Miller* decision in 2012. Instead, both juvenile and adult rates remain somewhat stable, with changes in juvenile percentages amplified due to small cell counts. These findings (and the lack of any official policy reform) strongly suggest that *Graham* and *Miller* had no impact on the parole hearing outcomes of juveniles serving life sentences.

Figure 1

*Percent of Hearings Resulting in Parole by Year and Age Group*



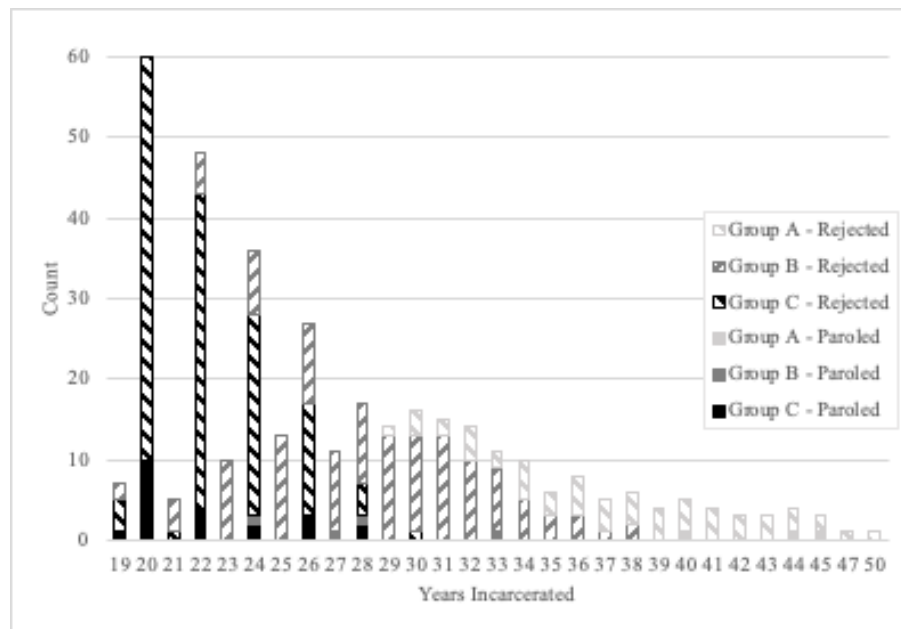
Juveniles who were paroled had served slightly fewer years at the time of their parole hearings ( $M = 25.56$  years,  $SD = 7.16$ ) compared to juveniles

he enters prison (respectively)) Appendix B (the life expectancy of a black male entering prison at age 14, 15, 16, and 17 is: 42.0, 41.1, 40.1 and 39.1 (respectively)).

<sup>176</sup> The number of juvenile offender parole hearings ranged from a low of 23 in 2007 to a high of 48 in 2015. The number of hearings for adult offenders ranged from 266 in 2011 to 403 in 2015.

who were not paroled ( $M = 27.82$  years,  $SD = 6.63$ ).<sup>177</sup> Twenty-two of the juvenile offender parole grants (76%) were for crimes committed after 1986. Figure 3 displays parole outcomes by years incarcerated and sentencing scheme. Eleven of the parole grants were given after 19 or 20 years in prison (38%). All but three of the parole grants (90%) were granted after less than 35 years served in prison.<sup>178</sup> In sum, if a juvenile is not granted parole after thirty-five years, they are unlikely to ever be granted parole. There is no evidence that a juvenile offender’s chances of parole increase with time.

Figure 2  
*Juvenile Offender Hearing Outcomes 2006–2016 by Years Incarcerated and Sentencing Scheme*



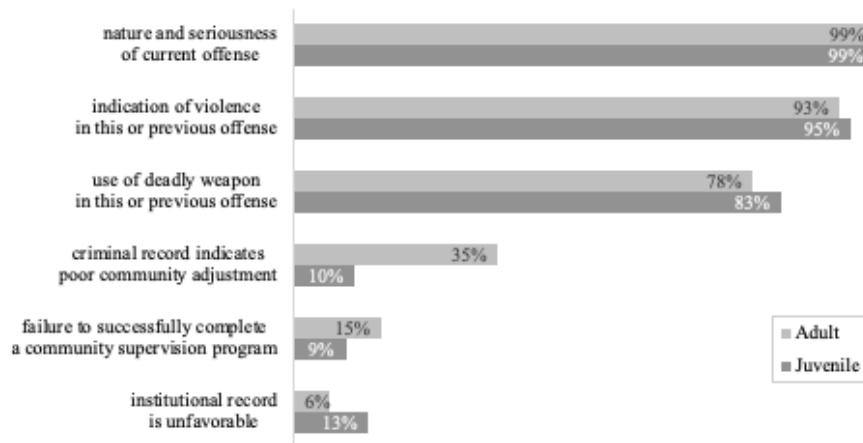
*Note:* Group A includes individuals whose crimes occurred before June 13, 1977 (eligible for parole after ten years); Group B includes individuals whose crimes occurred between June 13, 1977 and June 3, 1986 (eligible for parole after 20 years); and Group C is individuals whose crimes occurred after June 3, 1986 (eligible for parole after 20 or 30 years based on sentence, with parole hearings every two years).

<sup>177</sup> A t-test revealed that this difference was marginally significant  $t(365) = -1.75, p = 0.08$ . Of the 28 juveniles who received parole some point in the eleven years, most (75%) were charged with crimes that occurred after June 3, 1986, when parole eligibility was changed to 20 or 30 years after the sentence.

<sup>178</sup> On average juveniles live for thirty-seven to thirty-nine years after entering prison. Affidavit of Vera Dolan, *supra* note 175. Therefore, it is not surprising that there only a handful of parole hearings after thirty-five or more years in prison.

Further evidence that individuals who are repeatedly denied parole are unlikely to ever be granted parole because the chances of parole do not increase with time is found in a comparison of the reasons for denial. Individuals were denied parole based on exclusively static variables relating to the crime or their criminal history in 78% of juvenile offender hearings ( $n = 340$ ) and 73% of adult offender hearings ( $n = 3426$ ).<sup>179</sup> These static variables included: “nature and seriousness of current offense,” “indication of violence in this or previous offense,” “use of a deadly weapon in this or previous offense,” and “criminal record indicates poor community adjustment.” Only two official reasons for denying parole are dynamic and capable of change: “failure to successfully complete a community supervision program” and “institutional record is unfavorable.” Reasons for parole denial are presented in Figure 3. In 11 years of hearings, only 334 people (35%), including 40 juveniles, were ever denied because of dynamic variables. This further suggests that *Miller* and *Graham* did not affect juvenile parole hearing outcomes.

Figure 3  
*Official Reasons for Denying Parole by Age Group*



Despite the overwhelming emphasis on the crime, it is possible that, in both juvenile and adult hearings, the crime becomes slightly less important with time. People who are denied exclusively for static reasons have, on average, served less time (27.12 years,  $SD = 5.42$ ) than people who are denied for at least one dynamic reason (average time served is 30.29 years,  $SD = 7.81$ ). This difference is marginally significant.<sup>180</sup> Figure 4 displays the

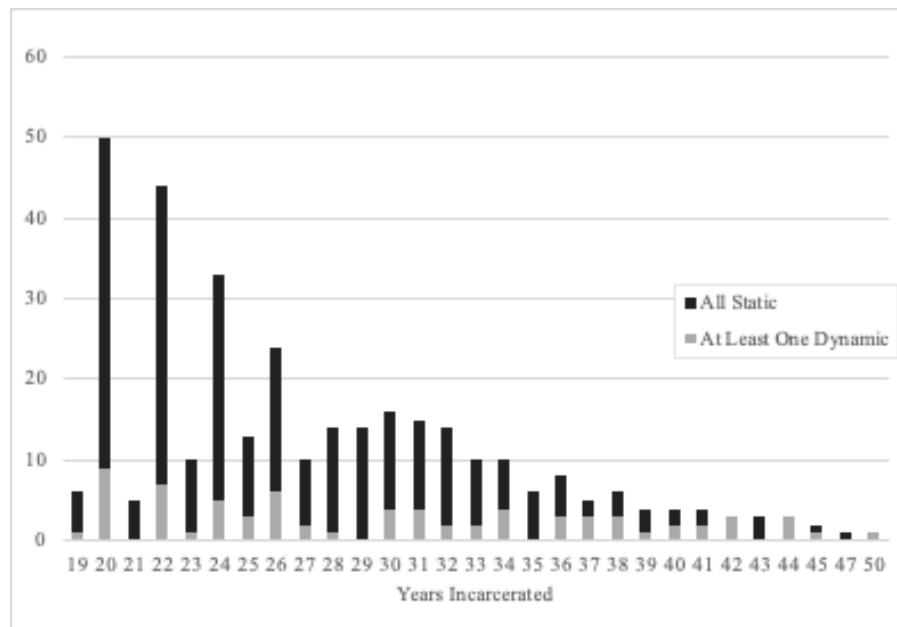
<sup>179</sup> Reasons for denial were missing for one parole hearing.

<sup>180</sup> I estimated a linear mixed effect model with a fixed effect of reasons for denial (a binary variable of all static reasons or at least one dynamic reason) and a random effect of identification number (to take

number of juveniles denied parole for exclusively static reasons and the number denied for at least one dynamic reason by the number of years they have served in prison. There is a decrease in the number of people denied for exclusively static reasons, but most juveniles are denied parole for exclusively static reasons until they have served 37 years in prison. Even after serving 37 years, thereby reaching the approximate life expectancy of a juvenile in prison in South Carolina,<sup>181</sup> juveniles are denied parole because of their crimes. This suggests that the factors relating to the crime remain a significant determinant of parole outcomes even after lengthy prison sentences.

Figure 4

*Static and Dynamic Reasons for Denying Parole by Time Served*



## 2. Variables Predicting Parole Outcomes

Next, I examine the factors that predict parole outcomes. Juvenile offenders were significantly more likely to be granted parole compared to adult offenders,<sup>182</sup> although the percentage of all juvenile offender hearings resulting in parole was still very low: 29 of 369 hearings (8%). More specifically,

into account that individuals had multiple parole hearings) to predict time served in prison,  $t(3374.01) = -1.80, p = 0.07$ .

<sup>181</sup> See Dolan, *supra* note 174.

<sup>182</sup> I estimated a generalized linear mixed effects model with a binomial distribution to predict parole outcome. I included fixed effects of age group, race and gender and a random effect of identification number. The results of the regression are reported in the Appendix.

considering age at the time of the crime, one 14-year-old (100%), three 15-year-old (20%), eight 16-year-old (35%), and sixteen 17-year-old offenders (26%) were given parole. Seventeen percent of people 18 and older at the time of the crime were given parole. The odds of being granted parole did not significantly differ by race and gender.<sup>183</sup> Table 1 displays demographic variables by parole outcome.

Table 1  
*Demographic Variables by Parole Outcome*

	Paroled ( <i>n</i> = 172)		Always Denied ( <i>n</i> = 788)	
	<i>n</i>	%	<i>n</i>	%
Age group				
Juvenile offenders	28	28%	72	72%
Adult offenders	144	17%	716	83%
Race				
People of color	106	17%	501	83%
White	66	19%	287	81%
Sex				
Female	10	22%	35	78%
Male	162	18%	753	82%

*Note:* “Paroled” includes everyone who was paroled at least once (many of these people were also denied parole within the time period).

As discussed, individuals convicted of murder are rarely granted parole. But individuals convicted of *certain types* of murder are even less likely to be granted parole. Comparing crimes charged on the same day as the murder, including sex offenses, weapons, and additional murders, reveals this effect. Table 2 displays crime variables by parole outcome.<sup>184</sup> The average number of crimes charged on the same day as the murder (including the murder) is 1.86 (*SD* = 1.43), suggesting most people were charged with other crimes in addition to the murder. Of the individuals who were paroled over the course of 11 years of hearings, none were convicted of sex crimes and very few were convicted of multiple murders or weapons offenses. In addition, although there were only a few individuals convicted of escape or drug or alcohol offenses in addition to murder, none of them were granted parole over the 11 years.

Table 2

<sup>183</sup> *Id.*

<sup>184</sup> Grouping the charges into categories, 31 involve sex crimes, 4 involve escape, 101 involve weapons, and 3 involve alcohol or drugs. Fifty-seven people were charged with more than one murder.

*Criminal Offense and Parole Outcome*

	Paroled ( $n = 172$ )		Always Denied ( $n = 788$ )	
	<i>M</i> or <i>n</i>	<i>SD</i> or %	<i>M</i> or <i>n</i>	<i>SD</i> or %
Number of concurrent offenses <sup>185</sup>	1.61	0.93	1.91	1.52
Number of murders				
One	170	99%	733	93%
Two or more	2	1%	55	7%
Sexual crime	0	0%	31	4%
Escape conviction	0	0%	4	1%
Weapons conviction	10	6%	91	12%
Drug or alcohol conviction	0	0%	3	0.3%

*Note:* For the categorical variables, reported numbers are cases where the variable is present. See *supra* notes 160–162 for a list of crimes in the sexual crime, escape, weapons and drug or alcohol conviction categories.

Prior criminal history does not appear to have a strong relationship with parole outcome. Most people in the dataset (90%) do not have a criminal history, therefore it is possible that results would be different with more data.<sup>186</sup> That being said, of the 172 people who received parole during the 11 years of hearings, one had a previous charge for escape, one had a prior weapons charge, and three had prior charges relating to drugs or alcohol. None had prior charges for sexual offenses. This is proportionate to the people with these previous convictions who were denied parole.

Next, I compared prison records, including subsequent criminal convictions, disciplinary infractions, and work history by parole outcomes. Table 3 displays the prison record variables by parole outcome. I present these variables at each parole hearing (rather than for each person) in order to account for changes in individuals' records between each hearing. Individuals who were granted parole had fewer disciplinary infractions and more years since their last disciplinary infractions compared to people who were denied parole. I also compared the types of infractions and criminal convictions in prison. Of the 175 grants of parole during the 11 years of hearings, none were given to individuals convicted of sexual crimes or weapons crimes after the

<sup>185</sup> For hearings resulting in a grant of parole, the range of the number of offenses on the same day as the murder (including the murder) was from 1 to 8, for hearings resulting in a parole denial, it ranged from 1 to 24. For both juveniles and adults, the most common crimes charged on the same day as the murder include armed robbery ( $n = 181$ ), assault and battery with intent to kill ( $n = 88$ ), firearms provision ( $n = 85$ ), criminal conspiracy ( $n = 49$ ), and burglary ( $n = 43$ ).

<sup>186</sup>  $M = 0.21$ ,  $SD = 0.88$ , range: 0–17. The average number of prior crimes is 0.22 ( $SD = 1.05$ , range: 0–17). Table B displays ultimate parole outcome by the number of previous charges and whether they involve these categories of crimes. See Appendix.

murders, although it was given to individuals who had related disciplinary infractions.

Table 3  
*Institutional Record and Parole Outcome at Each Hearing*

	Paroled ( $n = 175$ )		Denied ( $n = 3766$ )	
	<i>M</i> or <i>n</i>	<i>SD</i> or %	<i>M</i> or <i>n</i>	<i>SD</i> or %
Number of later convictions <sup>187</sup>	0.37	0.96	0.62	1.44
Total disciplinary infractions	10.59	12.80	16.21	24.12
Total level 1 and 2 infractions	2.70	4.78	4.75	8.71
Infractions after age 25	7.14	8.07	13.58	20.00
Years since last infractions	10.51	7.89	7.94	7.44
Conviction of a sexual crime	0	0%	50	5%
Infraction for a sexual act	17	12%	560	17%
Conviction: Escape	14	41%	307	30%
Infraction: Escape	8	6%	294	9%
Conviction: Weapons offense	0	0%	34	3%
Infraction: Weapons act	15	11%	809	24%
Conviction: Substance offense	4	12%	96	9%
Infraction: Substance offense	67	47%	1671	50%
Longest time at one job	5.68	3.41	6.26	3.57
Current job level <sup>188</sup>				
Best	34	19%	492	13%
Rest	141	81%	3257	87%

*Note:* For the categorical variables, reported numbers are the number of hearings (and percentage of hearings) where the variable is present. See *supra* notes 160–162 and 165–168 for a list of crimes and disciplinary infractions in each category.

I calculated a generalized linear mixed effects model with a binomial distribution to test the importance of the institutional record variables (disciplinary infractions, criminal charges during incarceration), while also considering factors relating to the crime for which the person is serving a life sentence (measured as the number of charges on the same day as the murder), and juvenile status. I used a binary outcome (paroled or not paroled) at each

<sup>187</sup> For hearings resulting in a grant of parole, the range of the number of offenses after the murder was from 0 to 5, for hearings resulting in a parole denial, it ranged from 0 to 13. The most common crimes after the murder included: escape ( $n = 316$ ), smuggling or possession of contraband in prison ( $n = 175$ ), armed robbery ( $n = 173$ ), assault and battery with a highly aggravated nature ( $n = 154$ ), and assault and battery with intent to kill ( $n = 97$ ) (counts are at the hearing level).

<sup>188</sup> I recoded job level to two categories: the best job level (requires best work history and prison record) and all other job levels. See *supra* note 169.

hearing and took into account the fact that people had multiple hearings within the time period by adding a random effect to the model.<sup>189</sup> Results of the regression are displayed in the Appendix. Multiple factors significantly predicted parole, and the probability of parole approached zero based on the value of a number of variables. This suggests that there are certain minimum qualifications that a person must meet to have even a 1% chance at parole. For example, as the total number of crimes charged on the same day as the murder increased, the probability of parole significantly decreased. If an individual had the average number of criminal charges on the same day as the murder (1.87), that person's probability of parole was 2%. For a one standard deviation increase in the number of charges (1.62 charges), the probability of parole decreased to 1%; for a two standard deviation increase, the probability decreased to 0.8%. Similarly, the probability of parole was 1% when less than a year had passed since an individual's last disciplinary infraction. Alternatively, even if an individual's last disciplinary infraction was over thirty years ago (three standard deviations above the mean), the probability of obtaining parole was just 8%. The total number of disciplinary infractions marginally predicted parole outcome ( $p = 0.08$ ). Individuals with the average number of disciplinary infractions (15.98) had a 2% probability of obtaining parole. People with close to zero disciplinary infractions had a probability of parole of only 3%.

Categorical variables also significantly predicted parole. Juvenile offenders were significantly more likely to obtain parole compared to adult offenders, but both groups had small chances (probability of 4% and 1%, respectively; the odds of adult offenders obtaining parole are 0.26 times lower than the odds for juvenile offenders). Finally, the sentencing scheme significantly predicted parole, with individuals convicted of crimes that occurred after June 3, 1986 (Group C) being the mostly likely to obtain parole compared to people convicted of crimes before June 13, 1977 (Group A) and crimes between June 13, 1977 and June 3, 1986 (Group B).

### 3. *Comparison of Juvenile and Adult Offenders*

Variables that distinguish juveniles and adults affect parole outcomes. Juvenile offenders were significantly more likely to have other criminal charges on the same day as the murder ( $t(958) = 2.23, p = 0.03$ ). Juveniles also had had less time since their last disciplinary infractions and had shorter amounts of time at single jobs. This may be because they had less time as adults to develop these traits that the parole board may see as evidence of stability and rehabilitation. Juveniles also had significantly more disciplinary infractions and significantly more level one and two infractions (the more serious offenses). Juveniles did not have significantly more infractions than

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<sup>189</sup> Charles E. McCulloch & John M. Neuhaus, 3 *Generalized Linear Mixed Models*, ENCYCLOPEDIA OF BIOSTATISTICS 2085 (2nd ed. 2005). I used identification number as the variable for the random effect.



adults after they reached the age of twenty-five, when their brains were likely to be fully mature. Table 4 displays the institutional records by age group. These findings reinforce the importance of taking into account youth at the parole hearings. Without an understanding of adolescent development, juveniles may be denied parole based on hallmark features of youth that affected their behavior while they were adolescents in prison.

Table 4  
*Institutional Record by Age Group at the Hearing Level*

	Juveniles ( <i>n</i> = 367)		Adults ( <i>n</i> = 3,574)	
	<i>M</i> or <i>n</i>	<i>SD</i> or %	<i>M</i> or <i>n</i>	<i>SD</i> or %
Number of later convictions	0.49	0.94	0.58	1.39
Years since last disciplinary infraction	4.77	5.23	8.42	7.6
Total disciplinary infractions	82.47	113.16	45.45	97.36
Total level 1 and 2 infractions	26.78	44.47	12.84	32.58
Level 1 and 2 after age 25	51.54	75.07	39.56	79.49
Longest time at one job	4.44	2.35	6.42	3.62
Current job level <sup>190</sup>				
Best	7	2%	519	15%
Rest	360	98%	3038	85%

*Note:* The reported numbers represent the number of people in the category (for categorical variables) or the average per person (for all other variables). Numbers are reported for each parole hearing, so individuals with multiple hearings are counted more than once.

#### CONCLUSION

In deciding that a categorical rule was necessary to protect juveniles from capital punishment, the Supreme Court noted that “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”<sup>191</sup> Later, in extending the categorical ban to life without parole sentences for juvenile offenders who are capable of reform, the court noted that “Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.”<sup>192</sup> Thus, it is up to the parole board

<sup>190</sup> See *supra* note 188.

<sup>191</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>192</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016); see also *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 772x (Sup. Ct. Iowa 2019) (finding that denying parole based on the heinousness of the

to ensure that the factors of the crime do not overshadow demonstrated rehabilitation while in prison.

Research on parole board decision-making can shed light on whether parole boards deny parole to juvenile offenders based on lack of rehabilitation rather than the severity of the offense.<sup>193</sup> As the Court noted that the overwhelming majority of juvenile offenders are capable of reform,<sup>194</sup> we would expect parole boards to be regularly releasing juvenile offenders. The board abuses its discretion when it allows other factors to overwhelm the factors of rehabilitation and maturity.<sup>195</sup>

This study of parole outcomes for juvenile and adult offenders serving life sentences reveals a number of important findings. First, the chances of parole remained consistently low for both juvenile and adult offenders during the 11-year period. There was no evidence that the parole board changed the way they evaluated juvenile offenders in light of *Graham* or *Miller*. Next, the most cited official reasons for parole denial are overwhelmingly related to characteristics of crime or previous offenses. This suggests that people are being denied parole for things they cannot change. Earlier criticisms of the parole process focused on the fact that offense severity was already taken into account at sentencing: “the Parole Board’s second guess makes a mockery and often a nullity of the sentencing process, as unknown judicial purposes may be thwarted and further inequities introduced into the system.”<sup>196</sup> The findings of this study support this criticism: individuals who commit certain crimes may have no realistic opportunity to obtain parole even though they were sentenced to life *with* the possibility of parole.

In addition, in contradiction to the Fourth Circuit’s musings,<sup>197</sup> there was no evidence that chances of parole for juvenile offenders increased with time. The average number of years served at the time of parole was less than 26 years, and all but three of the juveniles granted parole had served less than 35 years.

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crime without consideration of demonstrated maturity and rehabilitation would violate the *Graham–Miller* principles).

<sup>193</sup> See, e.g., Greiman v. Hodges, 79 F. Supp. 3d 933, 944 (S.D. Iowa 2015) (denying defendants’ motion to dismiss based in part on plaintiff’s allegation that the parole board denied parole based solely on the seriousness of the offense, thus depriving him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation); Brown v. Precythe, No. 2:17-cv-04082- NKL, 2017 WL 4980872, at \*10–11 (W.D. Mo. Oct. 31, 2017) (denying motion to dismiss challenge to parole system citing, *inter alia*, allegations that parole is usually denied based on seriousness of the offense and that parole hearings focus mostly on the crime rather than youth-related mitigation or maturity and rehabilitation); but see Bowling v. Dir., Virginia Dep’t of Corr., 920 F.3d 192, 198–99 (4th Cir. 2019) (“Although the bases of the Parole Board’s denials have, so far, been linked to the severity of his crime, the record suggests that ‘there is a possibility that in time, [Appellant’s] conduct and positive adjustment while in prison, when considered with all other factors, will outweigh the concerns that the Board has for the offense.’”).

<sup>194</sup> See *Graham*, 560 U.S. at 68.

<sup>195</sup> *Bonilla*, 930 N.W.2d at 778.

<sup>196</sup> *Newman*, *supra* note 86, at 893.

<sup>197</sup> *Bowling*, 920 F.3d at 198–199.

Juvenile offenders were more likely to be granted parole compared to adult offenders, but this should not obscure the bigger picture: juveniles serving life sentences have very small chances of being released on parole (8%). These chances can quickly reach below 1% when criminal records are taken into account. Even people with nearly perfect disciplinary records had very small chances of parole. Juvenile offenders are more likely to receive parole compared to adult offenders, but their chances of parole are still very small. In addition, juvenile and adult offenders have different records when they appear before the parole board. Juveniles are more likely to have other charges on the same day as the murder, more disciplinary infractions, and shorter work history. These variables all distinguish people who are granted parole from people who are denied parole, and therefore juveniles may be punished for being juveniles if their youth is not taken into account during the parole hearing.

These findings raise the concern that, in violation of the rights of juvenile offenders recognized in *Miller* and *Graham*, parole hearings in South Carolina “involve repeated incantations of ritualistic denials.”<sup>198</sup> For juvenile offenders convicted of murder, chances of receiving parole are very low. In addition, they are likely to be denied parole based on the original nature of their crime regardless of their demonstrated maturity and rehabilitation. There are numerous individuals like Stewart Buchanan who have been repeatedly denied parole because of their offense and have lived in prison beyond their life expectancy. For these individuals, the chances of parole are so small that they are serving de facto life without parole sentences.

In this study I was only able to access criminal records, institutional work histories, and disciplinary infractions. Reforms making parole files publicly available would make more nuanced research possible. Parole board decision-making is an important area for future research. Greater transparency improves fairness for both people seeking parole and for the public seeking to understand the process.

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<sup>198</sup> *Bonilla*, 930 N.W.2d at 772; see also 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, 285 (2016) (“*Graham* and *Miller* will not result in meaningful changes to the law if parole is merely an illusory possibility.”).

## APPENDIX

Table A  
*Demographic Variables Predicting Parole Outcome*

	B	SE	95% CI	OR
Intercept	-3.12***	0.36	-3.83, -2.41	0.04
Adult	-0.97**	0.32	-1.60, -0.33	0.38
Female	0.31	0.48	-0.63, 1.26	1.37
White	0.02	0.22	-0.41, 0.46	1.02

Note: \*\*\* $p < 0.001$ , \*\* $p < 0.01$ , \* $p < 0.05$ . Generalized linear mixed model fit by maximum likelihood (Laplace Approximation). Random effects variance = 3.03 ( $SD = 1.74$ ).

Table B  
*Prior Criminal Record and Parole Outcome*

	Paroled ( $n = 172$ )		Always Denied ( $n = 788$ )	
	$M$ or $n$	$SD$ or %	$M$ or $n$	$SD$ or %
Total previous convictions <sup>199</sup>	0.16	0.54	0.24	1.13
Sexual crime	0	0%	3	0.4%
Escape	1	1%	2	0.3%
Weapons	1	1%	6	1%
Drug or alcohol crime	3	2%	9	1%

Note: For the categorical variables, reported numbers are number of cases where the variable is present. See *supra* notes 160–162 for a list of crimes in each category.

<sup>199</sup> For hearings resulting in a grant of parole, the range of the number of previous offenses was from 0 to 4, for hearings resulting in a parole denial, it ranged from 0 to 17. The most common crimes in criminal histories are armed robbery ( $n = 16$ ), assault and battery of a highly aggravated nature ( $n = 10$ ), driving under the influence of liquor ( $n = 9$ ), house breaking during the day ( $n = 9$ ), and larceny ( $n = 9$ ). Grouping the charges into categories, three involve sex crimes, three involve escape, seven involve weapons, and 12 involve alcohol or drugs.

Table C  
*Criminal and Institutional Record Predicting Parole*

	B	SE	95% CI	OR
Intercept	-3.55***	0.55	-4.63, -2.48	0.03
Adult	-1.36***	0.39	-2.12, -0.59	0.26
Years since last disciplinary infraction	0.49**	0.15	0.19, 0.78	1.63
Total infractions	-0.37 <sup>+</sup>	0.21	-0.78, 0.05	0.69
Number of concurrent charges	-0.46*	0.21	-0.88, -0.04	0.63
Number of later charges	-0.15	0.15	-0.45, 0.14	0.86
Group B	0.21	0.38	-0.53, 0.96	1.24
Group C	0.89*	0.38	0.14, 1.64	2.44

*Note:* \*\*\* $p < 0.001$ , \*\* $p < 0.01$ , \* $p < 0.05$ , <sup>+</sup> $p < 0.1$ . Generalized linear mixed model fit by maximum likelihood (Laplace Approximation). Random effects variance = 3.36 ( $SD = 1.83$ ). I standardized years since last disciplinary infraction, total infractions, number of concurrent offenses, and number of later offenses. I used dummy codes for juvenile status (adult or juvenile) and sentencing scheme (group A, B or C). Group A includes individuals convicted of crimes committed before June 13, 1977 (eligible for parole after 10 years); Group B includes individuals convicted of crimes between June 13, 1977 and June 3, 1986 (eligible after 20 years); and Group C includes people convicted of crimes after June 3, 1986 (10 or 20 year eligibility determined at sentencing).

