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A Liberty Interest in Release: Recognizing the Unconstitutionality of Youth Offender Parole Regimes that Undermine Juvenile-Specific Eighth Amendment Protections

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A LIBERTY INTEREST IN RELEASE: RECOGNIZING THE UNCONSTITUTIONALITY OF YOUTH OFFENDER PAROLE REGIMES THAT UNDERMINE JUVENILE-SPECIFIC EIGHTH AMENDMENT PROTECTIONS

*Sarah Cook**

This Note proposes that procedural due process safeguards are necessary to vindicate the right to release for juvenile offenders who mature and rehabilitate. Miller v. Alabama *and* Montgomery v. Louisiana *announced this right, but state actors have resisted the "central intuition" of those cases—"that children who commit even heinous crimes are capable of change." Several overlapping analyses establish a liberty interest in release for transiently immature juvenile offenders based on the Eighth Amendment, the Fourteenth Amendment, local law, or some combination of the three. Most of these analyses hinge on the premise that post-*Miller *juvenile offender parole processes are of constitutional magnitude. Youth offender parole hearings carry constitutional weight that mandates recognizing a liberty interest in release upon a showing of maturity and rehabilitation, so due process protections are required.*

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INTRODUCTION

Beginning over a decade ago with *Miller v. Alabama*,[1] the Supreme Court limited the government's power to sentence juvenile offenders to life without parole (LWOP).[2] In *Miller*, the Court established that the Eighth Amendment prohibits imposing mandatory LWOP sentences on juvenile offenders because "children are constitutionally different from adults for the purposes of sentencing" and mandatory sentencing schemes foreclose consideration of youth-related mitigating factors.[3] In *Montgomery v. Louisiana*,[4] the Court clarified that *Miller* announced a substantive rule of constitutional law, and thus applied retroactively, by creating two categories of juvenile offenders: those who may be constitutionally sentenced to LWOP because they are irreparably corrupt, and those who were only transiently immature and must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[5] The Court approved of two approaches to retroactively constitutionalizing juvenile LWOP sentences: (1) states could resentence juvenile offenders, or (2) states could grant juvenile offenders serving LWOP parole eligibility.[6] Most recently, in *Jones v. Mississippi*,[7] the Court held that a sentencing court need not explicitly categorize a juvenile offender as permanently incorrigible before imposing or reimposing an LWOP sentence, but was clear that it left *Miller* and *Montgomery* intact, so the substantive right announced in *Montgomery* survives.[8]

Although the juvenile-specific Eighth Amendment constraints on sentencing courts are relatively settled following *Jones*,[9] there remains a significant jurisprudential gap surrounding *Montgomery*'s impact on parole review for juvenile offenders.[10] *Miller*, *Montgomery*, and *Jones* did not outright define the constitutional protections juvenile offenders enjoy after the sentencing phase, and courts have reached differing

1. 567 U.S. 460 (2012).
2. *Id.* at 465.
3. *Id.* at 471, 474.
4. 577 U.S. 190 (2016).
5. *Id.* at 212.
6. *Id.*
7. 141 S. Ct. 1307 (2021).
8. *Id.* at 1311, 1321; *see also Montgomery*, 577 U.S. at 212 (holding that "*Miller* announced a substantive rule of constitutional law").
9. *See Jones*, 141 S. Ct. at 1322–23.
10. *See generally* Brown v. Precythe, 46 F.4th 879, 886–87 (8th Cir. 2022) (declining, along with the Fourth Circuit, to extend "the Supreme Court's juvenile-specific Eighth Amendment protections" to parole proceedings for juvenile offenders sentenced to LWOP).

conclusions regarding whether and how *Montgomery* establishes constitutional checks on the parole process.[11] This Note argues that the most logical application of the Eighth and Fourteenth Amendments requires recognizing that juvenile offenders have a liberty interest at stake in the parole process that is protected by the Due Process Clause, and that liberty interest is best defined as the right to release upon a showing of maturity and rehabilitation under the Eighth Amendment. The Court's juvenile-specific Eighth Amendment jurisprudence significantly limits the discretion of parole boards,[12] and under established Fourteenth Amendment precedent, procedural safeguards are necessary to ensure the proper exercise of that cabined discretion.[13]

Recognizing a liberty interest in release for juvenile offenders who show they were only transiently immature at the time of their crimes requires several analytical steps, but it is nonetheless the most coherent application of *Miller* and its progeny to the parole process. First, the Eighth Amendment's juvenile-specific protections must govern the parole process because *Montgomery* specifically identified parole as a mechanism for effectuating the constitutionally required "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[14] Permitting parole boards to deny release without undertaking *Miller*'s individualized assessment of youth-related mitigating evidence would greenlight a meaningless remedy to a constitutional violation.[15] The constitutional implications of parole processes are especially compelling in states that (1) chose to reform parole rather than sentencing to comply with *Miller* and (2) added *Miller*-like restrictions on the parole board's analysis.[16] Second, *Greenholtz v. Inmates of Nebraska Penal and Corrections Complex*,[17] which foreclosed recognizing a constitutionally created liberty interest implicated by the parole process decades before the Court reformed juvenile sentencing,[18] is inapplicable to juvenile offenders.[19] While *Greenholtz*

11. *Compare id.*, *with* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 777 (Iowa 2019).

12. *See, e.g.*, *Bonilla*, 930 N.W.2d at 777 ("If the [parole board] determines that a juvenile offender has demonstrated maturity and rehabilitation, parole or work release is required as a matter of law.").

13. *See, e.g.*, Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

14. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016); Miller v. Alabama, 567 U.S. 460, 479 (2012).

15. *See Brown*, 46 F.4th at 891–92 (Kelly, J., dissenting).

16. *See id.*; MO. ANN. STAT. §§ 565.033, 558.047 (West 2016).

17. 442 U.S. 1 (1979).

18. *Id.* at 11.

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

hinged on the assumption that parole release is a discretionary privilege rather than a right,[20] *Montgomery* constrained the parole board's discretion by mechanizing parole release to vindicate a substantive Eighth Amendment right.[21]

After reaching the threshold conclusions that *Miller* governs and *Greenholtz* is inapplicable, the next steps are to (1) recognize a new liberty interest at stake in parole processes for juvenile offenders, and (2) set forth the procedures necessary to protect that interest.[22] This Note briefly discusses what procedures might accompany a recognized liberty interest, as well as the limits of procedure as a tool for realizing a substantive right.[23] The central analysis of this Note focuses on the threshold prong—recognizing the liberty interest—which requires courts to both identify the precise interest at stake and find a constitutional or state-created basis for protecting that right.[24] Several overlapping analyses establish a liberty interest in release for transiently immature juvenile offenders based on the Eighth Amendment, the Fourteenth Amendment, local law, or some combination of the three. Most of these analyses hinge on the premise that post-*Miller* juvenile offender parole processes are of constitutional magnitude.[25]

In defining the liberty interest, there are three conceivable outcomes to procedural due process challenges to parole processes for juvenile offenders, but only one fully encompasses *Miller* and *Montgomery*'s interpretation of the Eighth Amendment as reconciled by the majority in *Jones*. The most coherent application of the Eighth and Fourteenth Amendments calls for courts to recognize a liberty interest in parole *release* for juvenile offenders who demonstrate maturity and rehabilitation.[26] This result flows more logically than protecting only the interest in meaningful parole *review* or declining to recognize a protectible right at all.

The sum total of the Court's reasoning in *Miller*, *Montgomery*, and *Jones* is that the determination of whether a parole-eligible juvenile offender was transiently immature at the time of the crime is

20. *Greenholtz*, 442 U.S. at 9–11.

21. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

22. *See Greenholtz*, 442 U.S. at 12.

23. *See* Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1220 (2021).

24. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

25. *See* Harrington, *supra* note 23, at 1207.

26. *Cf.* Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 400 (App. Div. 2016).

postponed until the parole process. *Montgomery* clarified *Miller* in two key respects: (1) it established that juvenile offenders who are irreparably corrupt must be categorized separately from transiently immature juvenile offenders, and (2) it assumed that parole boards would ensure that the latter group would not face disproportionate punishment.[27] By simultaneously upholding *Montgomery* and declining to require that sentencing courts affirmatively categorize juvenile offenders, *Jones* effectively established—through process of elimination—that some other institutional actor (most predictably a parole board) must vindicate a juvenile offender's substantive right to proportional punishment.[28] When a juvenile offender becomes parole-eligible, the question of whether he was transiently immature at the time of his crime becomes ripe, and the parole board's decision whether to grant release must hinge on whether he has matured and rehabilitated.[29]

This Note posits that all parole-eligible juvenile offenders, even the rare individuals who never demonstrate rehabilitation, are entitled to meaningful parole *review*, and juvenile offenders whose crimes

27. Montgomery v. Louisiana, 577 U.S. 190, 209–10, 212 (2016). When applying *Montgomery*'s categorical analysis to the parole process, a finding of parole suitability becomes an express or implied determination that the juvenile offender has matured and rehabilitated; therefore, he is in the category of juvenile offenders who are entitled to release because they were transiently immature at the time of their crimes. *See id.* at 212. However, the inverse is not true. *See id.* A finding of parole unsuitability is not a finding of permanent incorrigibility; a denial simply represents the parole board's conclusion that the juvenile offender has not *yet* matured and rehabilitated. *See id.* ("Those prisoners who have shown an inability to reform will continue to serve life sentences.").

In fact, given that only permanently incorrigible juvenile offenders may be constitutionally sentenced to LWOP, the question of irreparable corruption becomes moot once the state grants a juvenile offender parole eligibility; the state has impliedly categorized him as presumptively transiently immature. *See id.* Although some parole-eligible juvenile offenders may occupy a liminal space where they are not permanently incorrigible but are also unsuitable for parole (for example, because a recent disciplinary violation indicates insufficient rehabilitation), this does not mean that they certainly will never demonstrate that their crimes were the result of transient immaturity. *See id.* Rather, the structure of state parole systems presumes that parole-eligible juvenile and adult offenders alike have an enduring potential to rehabilitate that survives each parole denial—the sentencer has concluded that they are *not* permanently incorrigible, so the parole board must review their records for evidence of rehabilitation at regular intervals following their eligibility date. *See, e.g.*, CAL. PENAL CODE § 3041(c) (2018) ("[T]he board shall appoint panels of at least two persons to meet annually with each inmate until the time the person is released pursuant to proceedings or reaches the expiration of his or her term . . . .").

28. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311, 1321 (2021). Juvenile offenders serving discretionary LWOP sentences will likely never appear before a parole board because, under *Jones*, the fact that their LWOP sentences were discretionarily imposed renders them constitutionally proportionate. *See id.* at 1322. However, *Jones* did not necessarily foreclose relief for parole-eligible juvenile offenders. *See id.* at 1321 (noting that the majority's holding "d[id] not disturb" *Miller* and *Montgomery*).

29. *See Montgomery*, 577 U.S. at 212.

reflected transient immaturity and who have since matured have a more potent right to *release*. The parole board may continuously deny parole, thus giving effect to a life sentence, only if the juvenile offender cannot show that he has matured and rehabilitated, which supports the conclusion that he is incapable of the requisite growth.[30] But if the juvenile offender proves that he was transiently immature at the time of his crime by demonstrating his present-day maturity and rehabilitation to the parole board, the only constitutional result is to grant him release.[31]

Two circuit courts have decided against juvenile offenders who claimed they had certain procedural due process rights in the parole process.[32] No other circuit courts have addressed the issue, but lower federal courts and state courts have reached the opposite conclusion.[33] This Note argues that *Brown v. Precythe*[34] and *Bowling v. Director, Virginia Department of Corrections*[35] failed to recognize that due process protections must attach in parole processes for juvenile offenders—even if they would not for adult offenders under *Greenholtz*—in light of the constitutional significance *Montgomery* assigned to the parole process.

Recognition of a liberty interest obliges parole boards to adhere to *Montgomery*'s rule that the government may not subject a juvenile offender to life in prison unless an authorized decision-maker concludes that his crime was not the result of transient immaturity,[36] and the absence of a recognized liberty interest leads to unprincipled results.[37] The courts in *Brown* and *Bowling* reasoned that because youth offenders were parole-eligible, their sentences comported with the Eighth Amendment, so their parole review processes were not governed by *Miller*.[38] But for parole eligibility to actually cure *Miller* constitutional error, it must provide a "meaningful opportunity to obtain

30. *See id.*

31. *See id.*

32. Brown v. Precythe, 46 F.4th 879 (8th Cir. 2022); Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192 (4th Cir. 2019).

33. *See* Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015); Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015); Flores v. Stanford, No. 18-CV-2468, 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019); Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 357 (Mass. 2015); Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 777 (Iowa 2019).

34. 46 F.4th 879 (8th Cir. 2022).

35. 920 F.3d 192 (4th Cir. 2019).

36. *See Montgomery*, 577 U.S. at 209, 212.

37. *See Brown*, 46 F.4th at 891–92 (Kelly, J., dissenting).

38. *Id.* at 886 (majority opinion) (citing *Bowling*, 920 F.3d at 197).

release based on demonstrated maturity and rehabilitation," and a parole process that does not require the parole board to significantly engage with the youth-related considerations laid out in *Miller* cannot be considered "meaningful."[39] Without procedure to ensure compliance with the Eighth Amendment in the parole process, the state is essentially free to re-violate the Constitution.[40]

The practical result of *Miller*, *Montgomery*, and *Jones* is that in states across the country, people serving decades-long sentences for crimes committed when they were under eighteen are funneled into the parole process, some of whom have never had the opportunity to be heard regarding youth-related mitigating evidence.[41] A juvenile offender sentenced to life will most likely face a parole board as the ultimate decision-maker of whether he will ever leave prison, regardless of whether he was initially sentenced to life *with* the possibility of parole,[42] was resentenced to an indeterminate sentence after *Miller*,[43] or was granted parole eligibility post-*Miller* by statute.[44]

An important step toward protecting the empirical reality embodied in *Miller*, that juveniles who commit crimes are less culpable and more capable of rehabilitation than adults, is to mandate procedural safeguards in parole processes for juvenile offenders.[45] The Supreme Court has declared that the "vast majority" of juvenile offenders deserve a second chance at life outside of prison walls, so *Montgomery*'s most natural result is to release all juvenile offenders who demonstrate maturity and rehabilitation.[46] But many juvenile offenders face

39. *See id.* at 891–92 (Kelly, J., dissenting).

40. *See id.*

41. *See* Harrington, *supra* note 23, at 1184–89 (citing People v. Franklin, 370 P.3d 1053, 1054 (Cal. 2016) (holding that California's statute granting parole eligibility for juvenile offenders after twenty-five years mooted the defendant's *Miller* claim)); *see also* Arizona v. Vera, 334 P.3d 754, 761 (Ariz. Ct. App. 2014) (holding that Arizona's statutory grant of parole review for youth offenders met *Miller*'s requirement of a "meaningful opportunity").

42. *See, e.g.*, *Bowling*, 920 F.3d at 194 (juvenile offender was initially sentenced to life with parole but was denied parole yearly for a decade).

43. *See, e.g.*, Commonwealth v. Felder, 269 A.3d 1232 (Pa. 2022) (de facto LWOP sentence was constitutional where a juvenile offender was initially sentenced to LWOP but validly resentenced to fifty-years to life under a discretionary scheme that included consideration of youth).

44. *See, e.g.*, *Brown*, 46 F.4th at 884 (juvenile LWOPers who became parole-eligible via a post-*Montgomery* Missouri statute challenged denials of parole). In some states, there are still juvenile offenders serving LWOP whose sentences were imposed under a discretionary scheme. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021). The current majority of the Supreme Court does not consider these sentences a constitutional violation. *See id.*

45. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012).

46. Montgomery v. Louisiana, 577 U.S. 190, 212 (2016); *see also* Harrington, *supra* note 23, at 1200–01 (noting that "[t]he Court made clear that for children whose crimes reflect transient immaturity, [LWOP] is a disproportionate sentence" and "[s]erving such a sentence deprives this

procedural inadequacies during parole review that result in repeated denials and enable functional (de facto) LWOP sentences.[47] These denials tend to overvalue the facts of the crime and give insufficient weight to youth-related considerations.[48] This is a clear violation of the rule in *Montgomery*, which at a minimum requires meaningful consideration of youth when effectuating a de jure or de facto juvenile LWOP sentence, and further requires release upon a finding of transient immaturity.[49] One approach to remedying this constitutional failure is to establish a liberty interest in the parole process for juvenile offenders that entitles them to procedural due process protections.

As a definitional matter, this Note uses "youth" as a term of art interchangeable with "juvenile," which the Court has historically defined as those under the age of eighteen.[50] Relatedly, this Note uses the term "youth offender parole processes" to describe parole review for individuals who were under eighteen at the time of their crimes, regardless of whether the applicable state statute(s) governing parole mandate consideration of youth.[51]

It is worth stating that this Note is narrow in scope. Juvenile offenders challenging repeated parole denials have cognizable claims under both the Eighth Amendment and the Due Process Clause. Scholars have reasoned that juvenile offenders have an Eighth Amendment right to release upon a showing of maturity and rehabilitation and analyzed whether parole denials violate that right.[52] A full discussion of the Eighth Amendment implications of youth offender parole

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category of individuals who committed offenses as juveniles—'the vast majority of juvenile offenders'—of a substantive, Eighth Amendment right").

47. *Cf. Bowling*, 920 F.3d at 195 (plaintiff denied parole every year between 2005 and 2016 based primarily on the seriousness of the crime, resulting in de facto LWOP); Amelia Courtney Hritz, *Board to Death: De Facto Juvenile Life Without Parole*, 47 AM. J. CRIM. L. 47, 68, 80–81 (2020) (analyzing South Carolina parole statistics over eleven years and finding that juveniles serving life sentences had a 1 to 8 percent change of being released on parole and there was no evidence that *Graham-Miller* changed how the parole board evaluated juvenile offenders); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 522–23 (2019) (analyzing outcomes from California youth offender parole hearings and finding that 48 percent of denied parole applicants "had rehabilitation levels at or above the rehabilitation levels of normal grantees"); Rachel E. Leslie, *Juvenile Life With(Out) Parole*, 98 N.Y.U. L. REV. 373, 396 (2023) ("Several states' parole systems actually treat juvenile lifers more harshly than the general parole-eligible population.").

48. *See, e.g.*, *Bowling*, 920 F.3d at 195; *Brown*, 46 F.4th at 884.

49. *See Miller*, 567 U.S. at 471, 477–78; *Montgomery*, 577 U.S. at 210; Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015).

50. *See Miller*, 567 U.S. at 465.

51. *Compare* CAL. PENAL CODE § 3051(f)(1) (2020) (requiring consideration of youth), *with* WYO. STAT. ANN. § 6-10-301(c) (West 2022) (no statutory requirement).

52. *See* Harrington, *supra* note 23, at 1201, 1204–08; Leslie, *supra* note 47, at 389–90.

processes is beyond the scope of this Note, which focuses on the argument that the Fourteenth Amendment also governs youth offender parole processes in light of *Miller*.

In sum, this Note proposes that establishing procedural due process safeguards is necessary to vindicate the right to release for juvenile offenders who mature and rehabilitate. *Miller* and *Montgomery* announced this right, but state actors have resisted the "central intuition" of those cases—"that children who commit even heinous crimes are capable of change."[53] The principled solution is to acknowledge that youth offender parole hearings carry constitutional weight that mandates recognizing a liberty interest in release upon a showing of maturity and rehabilitation, so due process protections are required.

Section I.A surveys the Supreme Court jurisprudence on the Eighth Amendment in the context of juvenile sentencing. Section I.B discusses how states have given effect to *Miller*'s constitutional mandate and summarizes how the courts in *Brown* and *Bowling* responded to claims that *Miller*'s juvenile-specific Eighth Amendment protections and the Due Process Clause govern youth offender parole hearings. Section I.C outlines the state of the law regarding procedural due process rights in post-conviction administrative agency decisions.

Part II argues the Due Process Clause protects post-*Miller* youth offender parole hearings. Section II.A envisions what procedures a court might require upon recognizing a liberty interest at stake in youth offender parole processes and considers the limitations of a procedural due process approach to challenging de facto LWOP sentences. Section II.B makes the argument that there is a protectible liberty interest implicated in youth offender parole processes.

Section II.B.1 establishes that *Miller* governs youth offender parole processes. Section II.B.2 argues that *Miller* guaranteed a substantive right to release for juvenile offenders who demonstrate maturity and rehabilitation, not just meaningful consideration of youth-related factors by parole boards. Section II.B.3 then argues that there is a constitutionally created liberty interest in release upon a showing of maturity and rehabilitation. Section II.B.4 analyzes how existing case law contemplating post-conviction procedural due process rights requires recognizing a state-created liberty interest in release once a juvenile offender has matured and rehabilitated.

53. *See Montgomery*, 577 U.S. at 212.

I. BACKGROUND ON JUVENILE LWOP AND RELEVANT PROCEDURAL DUE PROCESS PRECEDENTS

This part provides background on applicable juvenile sentencing and procedural due process precedents. Section I.A discusses the Supreme Court jurisprudence on juvenile LWOP sentences beginning with *Roper v. Simmons*,[54] *Graham v. Florida*,[55] and *Miller*, then *Montgomery*, and finally *Jones*. Section I.B discusses how states have responded to *Miller* through resentencing, parole, and cases considering the constitutionality of de facto juvenile LWOP sentences. Section I.C overviews procedural due process rights in various categories of post-conviction administrative agency decisions: parole revocation and release decisions; decisions altering the conditions of confinement; decisions revoking good time credit; and clemency decisions.

A. The Supreme Court Jurisprudence on Juvenile LWOP Sentences

This section overviews the Supreme Court jurisprudence regarding LWOP sentences for juvenile offenders. Section I.A.1 discusses *Roper*, *Graham*, and *Miller*, which established that children are constitutionally different from adults for sentencing purposes. Section I.A.2 discusses *Montgomery*, which gave *Miller* retroactive effect and identified a category of juvenile offenders who may be constitutionally sentenced to LWOP and a category who may not. Section I.A.3 discusses *Jones*, where the Court refused to require that sentencing courts affirmatively categorize juvenile offenders but did not discuss the parole process.

1. *Roper*, *Graham*, and *Miller* Recognized that Children Are Different

Just over a decade ago, the Supreme Court commenced an overhaul of juvenile sentencing that sought to reconcile the science of juvenile brain development with the Eighth Amendment's proscription on cruel and unusual punishment.[56] The Court began with *Roper*, where it held that the Eighth Amendment prohibits sentencing youth offenders to death.[57] In *Graham*, the Court likened LWOP for

54. 543 U.S. 551 (2005).

55. 560 U.S. 48 (2010).

56. *Roper*, 543 U.S. at 569–70 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

57. *Id.* at 578.

juveniles to capital punishment for adults and banned LWOP for juvenile offenders convicted of non-homicide crimes.[58] Ultimately, in *Miller*, the Court announced that mandatory juvenile LWOP sentences violate the Eighth Amendment.[59]

The Court relied on two lines of precedent in reaching the conclusion that LWOP sentences are disproportionate for most juvenile offenders.[60] First, the Court cited a series of cases where it banned certain sentences because the severity of the penalty was disproportionate to the culpability of a certain class of offenders; for example, mentally disabled defendants.[61] Analogously, *Roper* and *Graham* established that "children are constitutionally different from adults for the purposes of sentencing."[62] Because of their "diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments."[63] The second line of cases prohibited the mandatory imposition of capital punishment and required sentencing courts to consider mitigating factors before sentencing any defendant to death.[64]

The Court reasoned that these two lines of precedent converged to require the conclusion that mandatory juvenile LWOP violates the Eighth Amendment because mandatory sentencing schemes preclude a sentencer from considering the offender's youth and its attendant characteristics.[65] Under *Miller*, sentencers must be permitted to consider the "hallmark features" of youth, namely: (1) children's "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) their inability to extricate themselves from dysfunctional home environments; (3) their vulnerability to "familial and peer pressures"; (4) their incompetency in dealing with actors in the criminal legal system; and (5) their unique capacity for rehabilitation.[66]

Miller's holding built on the reasoning in *Roper* and *Graham* that juveniles "have diminished culpability and greater prospects for

58. *Graham*, 560 U.S. at 61.
59. Miller v. Alabama, 567 U.S. 460, 489 (2012).
60. *Id.* at 469–70.
61. *Id.* at 470; *see also* Atkins v. Virginia, 536 U.S. 304, 320–21 (2022) (holding that sentencing mentally disabled defendants to death violates the Eighth Amendment in part due to their reduced culpability).
62. *Miller*, 567 U.S. at 471.
63. *Id.*
64. *Id.* at 475–76.
65. *Id.* at 476–77.
66. *Id.* at 471, 477–78.

reform."[67] The Court relied on scientific studies evidencing that children who commit crimes are less likely to continue patterns of problematic behavior into adulthood.[68] Children are biologically less mature and responsible, and this leads to "recklessness, impulsivity, and heedless risk taking."[69] They are also uniquely vulnerable to peer and family pressures and "lack the ability to extricate themselves from horrific, crime-producing settings."[70] Further, a child's character is underdeveloped and "less fixed" than that of an adult, so their crimes are less likely to indicate "irretrievabl[e] deprav[ity]."[71]

The penological justifications for harsh punishments diminish when applied to a complex understanding of juvenile brain science: "even when they commit terrible crimes," juveniles are *fundamentally* less blameworthy.[72] Retribution rationales are defeated by children's diminished culpability, and deterrence, incapacitation, and rehabilitation do not justify severe punishments because children's character is more malleable; they are transiently immature, not permanently incorrigible, so they are more capable of change than adults.[73]

The Court emphasized that "none of what [*Graham*] said about children . . . is crime specific,"[74] so it focused on mandatory sentencing schemes that link a category of crime to a certain sentence and thus prevent the sentencer from considering youth-related mitigating factors.[75] *Miller* technically stopped short of outlawing discretionary juvenile LWOP sentences[76] or de facto LWOP sentences where a youth offender is repeatedly denied parole or will only become eligible at the end of his life.[77] The Court noted that although "[a] State is not required to guarantee eventual freedom," it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[78]

67. *Id.* at 471 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).
68. *Id.*; Roper v. Simmons, 543 U.S. 551, 569–70 (2005).
69. *Miller*, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569).
70. *Id.*
71. *Id.* (citing *Roper*, 543 U.S. at 570).
72. *Id.* at 472.
73. *Id.* at 472–73.
74. *Id.* at 473.
75. *Id.* at 474.
76. *Id.* at 479.
77. *See* People v. Caballero, 282 P.3d 291, 295 (Cal. 2012).
78. *Miller*, 567 U.S. at 479 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

2. *Montgomery* Made *Miller* Retroactive and Identified a Category of Juvenile Offenders Who May Be Constitutionally Sentenced to LWOP and a Category Who May Not

Four years after *Miller*, the Court decided in *Montgomery* that *Miller* applies retroactively to cases on collateral review because it announced a substantive rule by creating a category of juvenile offenders who may be constitutionally sentenced to LWOP because they are irreparably corrupt, and a distinct category for whom LWOP is a disproportionate sentence because their crimes reflected transient immaturity.[79] The petitioner, Henry Montgomery, argued that his sentence was illegal under *Miller* because in 1963 he received an LWOP sentence mandated by Louisiana law for killing a deputy sheriff when he was seventeen.[80] The Court agreed that Montgomery's sentence was unconstitutional.[81]

Key to the Court's reasoning was that *Miller* did more than impose a procedural requirement that a sentencer consider youth before imposing a juvenile LWOP sentence; rather, it announced a *substantive* rule that LWOP is "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'"[82] Thus, LWOP was unconstitutional for an entire class of defendants "whose crimes reflect the transient immaturity of youth."[83] To give effect to this rule, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not."[84]

Montgomery stated that giving *Miller* retroactive effect did not "require States to relitigate sentences."[85] The Court specified that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them."[86] This "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to

79. Montgomery v. Louisiana, 577 U.S. 190, 208, 212 (2016).
80. *Id.* at 194–95.
81. *Id.* at 213.
82. *Id.* at 208, 212 (citing Teague v. Lane, 489 U.S. 288, 307, 312–13 (1989) (holding that new constitutional rules of criminal procedure generally do not apply to final convictions, but courts must give retroactive effect to substantive rules); Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (substantive rules include rules that "prohibit[] a certain category of punishment for a class of defendants because of their status or offense")).
83. *Id.*
84. *Id.* at 210.
85. *Id.* at 212.
86. *Id.*

serve a disproportionate sentence in violation of the Eighth Amendment."[87] Juvenile offenders who are granted parole eligibility pursuant to *Miller* and have not reformed will not be granted release, but "[t]he 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."[88] Montgomery himself proved this premise: there was evidence that he had transformed from a "troubled, misguided youth to a model member of the prison community."[89]

3. *Jones* Declined to Require That Sentencing Courts Affirmatively Categorize Juvenile Offenders, but May Not Extend to the Parole Process

The most recent Supreme Court case analyzing sentencing for juvenile offenders is *Jones*, which retreated from the categorical analysis in *Montgomery* by refusing to mandate that sentencing courts affirmatively classify juvenile offenders as permanently incorrigible before imposing an LWOP sentence, and veered back toward *Miller*'s procedurally focused analysis by holding that there was no Eighth Amendment violation so long as the sentencing court exercised discretion.[90] Importantly, *Jones* did not address the parole process and—by refusing to enforce *Montgomery*'s categorical determination at the sentencing phase—effectively punted the question of transient immaturity to parole boards, at least for parole-eligible juvenile offenders.[91]

Brett Jones initially received a mandatory LWOP sentence for murdering his grandfather, and when he was resentenced post-*Miller* the court reimposed LWOP under a newly enacted discretionary scheme.[92] The Supreme Court considered whether a sentencing court must make a finding of permanent incorrigibility before imposing a discretionary juvenile LWOP sentence.[93]

Justice Sotomayor, writing for the three liberal dissenters, asserted that the Court's new conservative majority had dodged Justice Kennedy's reasoning in *Montgomery* that a juvenile offender who was

87. *Id.*
88. *Id.*
89. *Id.* at 212–13.
90. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).
91. *See id.* at 1317–18. Because the Court affirmed Mr. Jones's post-*Miller* LWOP sentence, it foreclosed relief for juvenile offenders resentenced to LWOP, but *Jones* does not necessarily impact parole-eligible juvenile offenders. *See id.*
92. *Id.* at 1312–13.
93. *Id.* at 1311.

transiently immature at the time of his crime cannot be constitutionally sentenced to LWOP, and *Miller*'s proposition that juvenile LWOP should be exceedingly "rare."[94] Instead, the majority claimed that simply because the resentencing court exercised discretion, there was no constitutional deficiency.[95]

The dissent pointed out that "the data since *Miller* proves that sentencing discretion alone will not make LWOP a rare sentence for juvenile offenders."[96] Mississippi courts, "[u]nbound by *Miller*'s essential holding," re-imposed LWOP in more than a quarter of juvenile resentencing hearings.[97] The dissent recounted the robust youth-related mitigating evidence and rehabilitative record in Mr. Jones's case and underscored that despite the majority's holding, "the [rehabilitative] efforts of the almost 1,500 . . . juvenile offenders like Jones who are serving LWOP sentences" matter.[98]

Crucially, Alexandra Harrington observes that *Jones* "did not address parole or back-end review of sentences but rather focused on the front-end sentencing decision."[99] She argues that "[i]n some ways perhaps *Jones* changes little: the Court explicitly said that it leaves *Miller* and *Montgomery* intact."[100] *Jones* undoubtedly lowered the bar for constitutionally compliant procedures at sentencing—a gut-punch for juvenile offenders sentenced or resentenced to LWOP under discretionary schemes—but the Court expressly stopped short of overruling *Montgomery*.[101] Accordingly, for parole-eligible juvenile offenders, *Jones* simply deferred the question of transient immaturity to sometime after the sentencing phase, and process of elimination reveals that if *Montgomery* indeed remains good law, it must constrain the discretion of parole boards to deny release.[102]

Rachel Leslie offers that "[i]f a finding of incorrigibility is not a prerequisite for sentencing a juvenile to LWOP after *Jones*, then the most powerful parts of *Miller* and *Montgomery* may be their 'back end' sentencing protections."[103] Because *Jones* focused on initial

94. *Id.* at 1331–34 (Sotomayor, J., dissenting).
95. *See id.* at 1321 (majority opinion).
96. *Id.* at 1333 (Sotomayor, J., dissenting).
97. *Id.*
98. *Id.*
99. Harrington, *supra* note 23, at 1176.
100. *Id.*
101. *See id.*; *see also Jones*, 141 S. Ct. at 1321 (explicitly stating that the Court's holding "does not overrule *Miller* or *Montgomery*").
102. *See Jones*, 141 S. Ct. at 1321.
103. Leslie, *supra* note 47, at 384.

sentencing procedures, it "did not reach the constitutionality of sentences of life *with* parole—which by their definition mean that the sentencer did not find irreparable corruption."[104] A sentencing court decides how much time a defendant must serve before release, then once the defendant has served that time the parole board decides whether he will be released, and *Montgomery* makes clear that juvenile offenders who make a showing of maturity and rehabilitation must be released.[105] For the state to incarcerate a juvenile offender for his entire adult life, some institutional actor must actually decide that he is irreparably corrupt or has never achieved his potential to mature and rehabilitate; otherwise, the effect of *Montgomery*'s categorical approach is nullified.[106]

While sentencing courts need not, and perhaps cannot, categorize juvenile offenders given that maturity only becomes apparent with the passage of time,[107] the parole board must decide that a juvenile offender has not yet matured and rehabilitated in order to constitutionally deny him release.[108] This is the only way to reconcile *Jones* with *Miller* and *Montgomery*. Accordingly, this Note assumes that *Jones* did not foreclose the argument that the constitutional import of youth offender parole processes gives rise to procedural due process protections.[109]

B. How the States Have Responded to Miller *and* Montgomery

This section surveys how different states have answered *Miller* and *Montgomery*'s constitutional mandate. Section I.B.1 discusses resentencing, Section I.B.2 discusses parole, and Section I.B.3 discusses de facto LWOP sentences. Section I.B.3.a summarizes the Fourth Circuit's response to an Eighth and Fourteenth Amendment challenge to a state's youth offender parole procedures, and Section I.B.3.b summarizes a similar case out of the Eighth Circuit.

A key question after *Miller* and *Montgomery* was the mechanism through which states must manifest the meaningful opportunity to obtain release owed to juvenile offenders.[110] *Graham* did not define the

104. *Id.*
105. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).
106. *See id.* at 210, 212.
107. *See* Greiman v. Hodges, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015).
108. *See Montgomery*, 577 U.S. at 212.
109. *See* Leslie, *supra* note 47, at 384.
110. 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, 254 (2016).

scope of the required "meaningful opportunity," except by distinguishing executive clemency as providing a "remote possibility" that does not mitigate a harsh LWOP sentence.[111] States took *Montgomery* at its word that there are two possible mechanisms for remedying an unconstitutional juvenile LWOP sentence;[112] some states placed the responsibility for reviewing allegedly disproportionate sentences with the courts, while others avoided resentencing juvenile LWOPers by relying on parole boards to decide the ultimate length of incarceration.[113] Some states, such as California, have taken a hybrid approach by adopting both parole and resentencing procedures that mandate consideration of youth-related mitigating evidence.[114]

Under *Jones*, a court may still impose a juvenile LWOP sentence so long as that sentencing decision is discretionary.[115] Even before *Jones*, some states adopted this narrow reading of *Miller* through resentencing schemes where the court was free to reimpose LWOP.[116] Even so, twenty-two states and the District of Columbia currently prohibit LWOP sentences for defendants who were under eighteen at the time of the crime, and some of those states have made that prohibition retroactive.[117]

1. Resentencing

In thirteen states, juveniles who were initially sentenced to LWOP were granted automatic resentencing after *Miller*.[118] In five other states, juvenile LWOPers are permitted to petition the court for review of their sentences after they have served a certain number of years (most frequently fifteen).[119] But if the court exercises its discretion to impose a lengthy indeterminate sentence, the decision of when the youth offender will actually be released is effectively punted to the parole board.[120]

111. *Id.* at 258; Graham v. Florida, 560 U.S. 48, 69–70 (2010).
112. *Montgomery*, 577 U.S. at 195.
113. Caldwell, *supra* note 110, at 260.
114. *Id. See generally* CAL. PENAL CODE § 1170(d) (2024) (resentencing); CAL. PENAL CODE § 3051 (parole).
115. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).
116. Caldwell, *supra* note 110, at 259.
117. Harrington, *supra* note 23, at 1184–85.
118. *Id.*
119. *Id.* at 1185–86.
120. *See, e.g.*, Commonwealth v. Felder, 269 A.3d 1232, 1246 (Pa. 2022).

2. Parole

As an alternative approach, seventeen states have made juvenile offenders parole-eligible after somewhere between fifteen and thirty years.[121] Eight states have created new rules governing youth offender parole hearings specifically.[122] California led the trend to create specialized youth offender parole hearings.[123] The California Board of Parole Hearings is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."[124] Other states have followed suit in various ways.[125] Some states limited eligibility to youth offenders serving de jure LWOP.[126] Others did not define specific procedures requiring consideration of youth.[127] In some ways, the parole board seems like the decision-maker best suited to determine whether a youth offender should be released.[128] *Miller* is premised on the principle that children are capable of change and deserve a chance at freedom as mature adults, and the parole board is positioned to review a youth offender's record in prison decades after the crime to determine whether he has matured and rehabilitated.[129] However, Amelia Courtney Hritz points out that this logic ignores that "predicting future dangerousness, at any point in life, is notoriously difficult, even for trained experts."[130]

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121. Harrington, *supra* note 23, at 1186–87.

122. *Id.* at 1187.

123. Caldwell, *supra* note 110, at 262. *See generally* CAL. PENAL CODE § 3051 (2019) (establishing a youth offender parole hearing process).

124. *Id.*; CAL. PENAL CODE § 4801(c) (2017). In a study of the first eleven months of California's youth offender parole hearings, Beth Caldwell found that youth offenders were granted parole at a rate 11 percent higher than for non-youth offenders and were granted release at a younger age. Caldwell, *supra* note 110, at 272, 274.

125. Caldwell, *supra* note 110, at 248.

126. *Id.* at 248–49; *see, e.g.*, MO. ANN. STAT.§ 558.047 (West 2016).

127. Caldwell, *supra* note 110, at 261; *see, e.g.*, WYO. STAT. ANN. § 6-10-301(c) (West 2022); HAW. REV. STAT. § 706-656 (2014).

128. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (noting the "great difficulty" of distinguishing between the transiently immature juvenile and the uncommon, irreparably corrupt juvenile at a young age); Hritz, *supra* note 47, at 59 ("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.").

129. *See Miller,* 567 U.S. at 473; *see also* Hritz, *supra* note 47, at 59–60 (acknowledging that utilizing parole boards to assess whether juvenile offenders have aged out of problematic behavior "seems like a natural choice" but "predicting future dangerous, at any point in life, is notoriously difficult").

130. Hritz, *supra* note 47, at 60.

Additionally, several other inherent problems hamper achieving fair, proportionate sentences through parole. Parole release decisions have racially disparate outcomes,[131] compounding the wildly disproportionate rates of children of color who are tried as adults and sentenced severely.[132] Members of parole boards frequently have military or law enforcement backgrounds[133] and are often political appointees, so they are susceptible to tough-on-crime political pressures and face backlash if parolees reoffend.[134] As a result, parole boards are generally inclined to deny parole based on the seriousness of the offense, without meaningfully considering an offender's record in prison or circumstances at the time of the crime.[135] But at least one scholar has argued that the severity of the crime is not relevant to determining parole suitability for youth offenders, which must hinge on the rehabilitation and growth that occurred *after* the crime.[136]

3. De Facto LWOP

In the wake of *Miller*, courts have split regarding whether juvenile-specific Eighth Amendment protections apply to sentences that are not de jure LWOP sentences but are the functional equivalent of LWOP for juvenile offenders.[137] There are two categories of juvenile offenders who can be described as facing de facto LWOP sentences.[138]

131. Kathryne M. Young & Jessica Pearlman, *Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations*, 47 LAW & SOC. INQUIRY 783, 807 (2022) (finding a "significant difference between the rate at which Black lifer parole candidates and white lifer parole candidates obtain grants, with Black candidates significantly less likely to be granted parole"); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, FED. SENT'G REP. 237, 237 (2015) (finding that risk assessment tools collapse risk into prior criminal history, which is a proxy for race, so they "significantly exacerbate unacceptable racial disparities" in the criminal legal system). *See generally* Olinda Moyd, *Racial Disparities Inherent in America's Fragmented Parole System*, CRIM. JUST., Spring 2021, at 6 (noting that a disproportionate 38 percent of people on parole in the United States are Black, even though Black Americans make up only 13 percent of the country's adult population).

132. *See, e.g.*, JEREE MICHELE THOMAS & MEL WILSON, THE COLOR OF YOUTH TRANSFERRED TO THE ADULT CRIMINAL JUSTICE SYSTEM: POLICY & PRACTICE RECOMMENDATIONS 1 (2018), https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0 [https://perma.cc/5VGC-N7XZ].

133. Steve Disharoon, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177, 179 (2009).

134. Harrington, *supra* note 23, at 1198, 1216; Hritz, *supra* note 47, at 60.

135. Hritz, *supra* note 47, at 60.

136. Sarah Russell, *The Role of the Crime at Juvenile Parole Hearings: A Response to Beth Caldwell's* Creating Meaningful Opportunities for Release, 41 HARBINGER 227, 227–28 (2016).

137. Hanna Shah, *De Facto Life Sentences Trigger Juvenile-Specific Eighth Amendment Protections: Why* Bowling *Was Wrongly Decided*, 30 B.U. PUB. INT. L.J. 215, 219 (2021).

138. *Id.*

First, there are juvenile offenders whose stacked or consecutive sentences are so long that they will spend the majority or entirety of their lives in prison before being released or becoming parole-eligible.[139] For example, a juvenile offender sentenced to two consecutive terms of fifty years for a crime committed at age sixteen will die in prison even though he is not technically sentenced to LWOP.[140] Even a juvenile offender sentenced to fifty years to life will spend the vast majority or all of his life in prison.[141] The Third, Seventh, Ninth, and Tenth Circuits have held that *Miller* applies to such de facto juvenile LWOP sentences, but the Fourth and Eighth Circuits have read *Miller* narrowly to outlaw only mandatory de jure juvenile LWOP sentences.[142]

Second, courts and scholars have contemplated whether life *with* parole sentences where parole is repeatedly denied implicate *Graham-Miller*.[143] The Fourth and Eighth Circuits are the only federal appellate courts to decide this issue, and both held that juvenile-specific Eighth Amendment protections do not attach to life with parole sentences.[144] Lower courts have reached the opposite conclusion,[145] and scholars have articulated compelling arguments why cabining *Miller* to de jure LWOP sentences ignores the letter of *Graham*, *Miller*, and *Montgomery*.[146]

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139. *Id.* at 229.

140. *See* McKinley v. Butler, 809 F.3d 908, 909 (7th Cir. 2016); People v. Caballero, 282 P.3d 291, 291 (Cal. 2012) ("[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment . . . .").

141. *See* People v. Contreras, 411 P.3d 445, 446, 454 (Cal. 2018) (juvenile offenders' sentences of fifty and fifty-eight years to life for nonhomicide crimes were unconstitutional under *Graham* because "[e]ven assuming defendants' parole eligibility dates are within their expected lifespans, the chance for release would come near the end of their lives; even if released, they will have spent the vast majority of adulthood in prison").

142. Shah, *supra* note 137, at 219, 229; Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 197 (4th Cir. 2019); Brown v. Precythe, 46 F.4th 879, 886 (8th Cir. 2022).

143. *See, e.g.*, Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 377 (2014); Matthew Drecun, *Cruel and Unusual Parole*, 96 TEX. L. REV. 707, 708–09 (2017); Leslie, *supra* note 47, at 391. *Compare* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 772, *with Bowling*, 920 F.3d at 197.

144. *Brown*, 46 F.4th at 883, 886; *Bowling*, 920 F.3d at 197.

145. *See, e.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

146. *See, e.g.*, Russell, *supra* note 143, at 418; *see also* discussion *infra* Section II.B.2 (arguing that *Miller* guaranteed a substantive right to release for juvenile offenders who demonstrate maturity and rehabilitation, not just consideration of youth by parole boards).

a. The Fourth Circuit

The Fourth Circuit was the first circuit court to consider a juvenile offender's claims that a state parole system violated his Eighth and Fourteenth Amendment rights.[147] Thomas Franklin Bowling was sentenced to life with parole at age seventeen, and the Virginia Parole Board annually denied him release for over a decade.[148] The Board consistently cited the seriousness of his crime in finding him unsuitable.[149] Mr. Bowling alleged that the Board's repeated denials violated the Constitution because the Board was not required to consider "age-related characteristics" in reviewing his applications.[150] The court held that Virginia's parole procedures were constitutionally sufficient on the basis that *Miller* did not "extend" to juvenile offenders serving life *with* parole, or to proceedings past the sentencing phase.[151]

The court acknowledged that the circuit courts were split regarding whether *Miller* applied to de facto LWOP sentences but reasoned that even where courts did find juvenile life with parole sentences unconstitutional, they only required that the juvenile offender be considered for parole eligibility in his lifetime.[152] Because Mr. Bowling was at least eligible for parole consideration, his sentence was purportedly not incompatible with *Miller-Montgomery*.[153]

The court further reasoned that "to the extent that *Graham* and *Miller* require parole proceedings to provide juveniles a meaningful opportunity to release after sentencing," Mr. Bowling's parole proceedings met that standard.[154] At the time, the relevant Virginia parole statute did not require consideration of the youth factors laid out in *Miller*.[155] Even though the Board repeatedly denied Mr. Bowling based solely on the severity of his crime, the factors the Board

147. Shah, *supra* note 137, at 234.
148. *Bowling*, 920 F.3d at 194.
149. *Id.* at 195.
150. *Id.* at 194.
151. *Id.* at 197.
152. *Id.* at 198.
153. *Id.* at 199.
154. *Id.* at 198.
155. *Id.* at 197. *But see* VA. CODE ANN. §§ 53.1-165.1, 53.1-136 (West 2023) (current statutes instruct the Board to adopt rules for granting parole to juvenile offenders sentenced to life who have served at least twenty years "on the basis of demonstrated maturity and rehabilitation and the lesser culpability of juvenile offenders").

considered did not foreclose consideration of his youth and subsequent growth.[156]

In addition to his Eighth Amendment claim, Mr. Bowling asserted that he was "constitutionally entitled to the opportunity to reenter society as a mature adult" and the Due Process Clause protected that interest.[157] He argued "that the constitutional right announced by *Miller* and its lineage gives rise to a constitutionally protected liberty interest in juvenile-specific Eighth Amendment protections."[158] The court sidestepped this argument by maintaining that Mr. Bowling's de facto LWOP sentence was outside the scope of *Miller*.[159] Thus, the court impliedly acknowledged that existing Supreme Court precedent foreclosing a constitutionally created liberty interest in parole for adult offenders may not apply to juveniles.[160]

Mr. Bowling also asserted a state-created liberty interest, but the court concluded that while Virginia law created a liberty interest in parole *consideration*, there was no entitlement to parole *release*.[161] Further, Virginia parole procedures met the minimal due process requirements triggered by a protectable liberty interest under pre-*Miller* Fourth Circuit precedent.[162]

b. The Eighth Circuit

The Eighth Circuit followed the Fourth Circuit in holding that parole denials for a class of juvenile offenders passed constitutional muster.[163] In response to *Miller*, Missouri enacted a statute[164] permitting juvenile homicide offenders who received mandatory LWOP sentences to petition for parole.[165] Unlike *Bowling*, under the statute, the Missouri Board of Probation and Parole was instructed to consider youth-related factors.[166] Four named plaintiffs who: (1) were

156. *Bowling*, 920 F.3d at 198. Among other factors, the Board considered Mr. Bowling's risk of future dangerousness, his rehabilitative efforts, and his personal history. *Id.*

157. *Id.* at 199.

158. *Id.*

159. *Id.*

160. *Id.*; Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).

161. *Bowling*, 920 F.3d at 200 n.3.

162. *Id.* at 200 (citing Bloodgood v. Garraghty, 783 F.2d 470, 473 (4th Cir. 1986)) ("[A] parole board need only provide an offender an opportunity to be heard and a 'statement of reasons indicating . . . why parole has been denied.'").

163. Brown v. Precythe, 46 F.4th 879, 886 (8th Cir. 2022).

164. MO. ANN. STAT.§ 558.047 (West 2016).

165. *Brown*, 46 F.4th at 883.

166. *Id.* at 883–84.

sentenced to mandatory LWOP; (2) became parole-eligible under the statute; (3) appeared before the Board with robust rehabilitative records and youth-related mitigating evidence; and (4) were nonetheless denied parole exclusively because of the seriousness of their crimes, brought an action on behalf of a class of inmates alleging that the Missouri parole process violated the Eighth Amendment and the Due Process Clause.[167] The Eighth Circuit reversed the district court's finding that the state's parole review practices were unconstitutional on the basis that *Miller* only applied to sentencing proceedings and did not protect the plaintiffs because they were parole-eligible.[168]

The plaintiffs argued that several failures in their parole hearings collectively amounted to cruel and unusual punishment and a denial of due process:

> The inmates alleged a series of grievances: that they were unable to review their parole files in advance of their hearings before the parole board; that they were permitted only one delegate to advocate on their behalf at the hearings; that the delegate was limited to discussing an inmate's plans to transition back into the community; that victims and their advocates who spoke at the hearings did not face similar limitations; that the board communicated its decisions via "barebones, boilerplate" forms; that the board's decisions rested primarily on the seriousness of an inmate's offense, rather than an evaluation of an inmate's maturity or rehabilitation; and that the State declined to provide the inmates with state-funded counsel at the parole hearings.[169]

The district court had granted summary judgment for the plaintiffs on their constitutional claims, reasoning that *Miller* and *Montgomery* required that the juvenile offenders be provided "a meaningful and realistic opportunity to secure release upon demonstrated maturity and rehabilitation," and the Board had denied them that opportunity.[170]

167. *Id.* at 884; Brown v. Precythe, No. 2:17-CV-04082, 2018 WL 4956519, at *2–4, 10 (W.D. Mo. Oct. 12, 2018).

168. *Brown*, 46 F.4th at 883, 886.

169. *Id.* at 884. The inmates "also sought a declaratory judgment that the board did not adequately consider the factors" under the youth offender parole statute, but the district court concluded that they failed to make a prima facie showing of this failure. *Id.*

170. *Id.* at 884; *Brown*, 2018 WL 4956519, at *7, 10.

The lower court ordered the state to implement a robust remedial plan.[171]

In reversing the district court, the Eighth Circuit reasoned that under *Montgomery*, simply granting a parole hearing was enough to escape *Miller*'s mandate.[172] The factors laid out in *Miller* "apply as a constitutional matter only to a judge's decision at sentencing whether to impose a term of life imprisonment without parole for a juvenile homicide offender."[173] The court relied on the fact that the Missouri statute converted the plaintiffs' unconstitutional mandatory LWOP sentences to life *with* parole.[174] The mere possibility of parole was enough, and the state's parole procedures need not ensure "some meaningful opportunity for release of a juvenile homicide offender."[175]

The court also held that even assuming that juvenile-specific Eighth Amendment protections apply to parole hearings, there was no violation.[176] Because the youth offender parole statute required consideration of youth-related factors, this satisfied any requirement of "'some meaningful opportunity' to obtain release based on demonstrated maturity and rehabilitation."[177] Further, there was "nothing impermissible" about considering the seriousness of the offense in addition to evidence of rehabilitation.[178]

In a single paragraph, the court dismissed the plaintiffs' procedural due process claims on the basis that there was no liberty interest at stake under pre-*Miller* precedent.[179] Relying on *Greenholtz*, a decades-old Supreme Court case contemplating parole processes for adult offenders, the court reasoned that "[t]he inmates have no liberty interest in release from prison before expiration of their valid sentences."[180] But the plaintiffs did not assert a liberty interest in parole release; instead, they claimed a liberty interest in "meaningful parole review."[181]

171. *Brown*, 46 F.4th at 884; *Brown*, 2019 WL 3752973, at *7–11.
172. *Brown*, 46 F.4th at 885 ("*Montgomery* said that '[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them.'").
173. *See id.* at 886.
174. *Id.*
175. *Id.*
176. *Id.* at 886–87.
177. *Id.* at 887.
178. *Id.* at 888.
179. *Id.* at 890.
180. *Id.* (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979)).
181. *Id.*

To dodge this distinction, the court relied on a second pre-*Miller* case and reasoned that the plaintiffs were entitled to no "substantive interest" that the Due Process Clause could protect and there was no "protected interest in the state procedures themselves."[182]

C. An Overview of Procedural Due Process Rights in Post-Conviction Administrative Agency Decisions

This section overviews how the Supreme Court has approached the question of whether the Due Process Clause is implicated by certain post-conviction administrative agency decisions: (1) parole revocation and release decisions; (2) decisions altering the conditions of confinement; (3) decisions revoking good time credit; and (4) clemency decisions.

The Due Process Clause of the Fourteenth Amendment protects against deprivations of life, liberty, or property without due process of law.[183] To invoke the procedural protections of the clause, a party must first establish that one of the protected interests in life, liberty, or property is at stake.[184] A liberty interest, the right most frequently implicated in the context of criminal punishment, may arise from the guarantees implicit in the word "liberty" in the Due Process Clause itself, or may be state-created, meaning that a state law or policy gives rise to an expectation or reliance.[185] Only severe deprivations of freedom trigger a constitutionally created liberty interest, but where a dispossession is not substantial enough to inherently implicate the Due Process Clause, procedural protections may still attach where local, nonconstitutional law has created an entitlement to a certain liberty, akin to a property interest.[186]

The Supreme Court has flip-flopped regarding the proper analysis for determining if a state-created liberty interest exists.[187] One approach looks to the nature of the asserted right to determine if deprivation amounts to a "grievous loss" or an "atypical and significant

182. *Id.* (citing Olim v. Wakinekona, 461 U.S. 238, 250 n.12 (1983)).

183. Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

184. *Id.*

185. *Id.* While the Supreme Court has long debated whether the word "liberty" in the Due Process Clause gives rise to unlisted substantive rights, it is uncontroversial that the Fifth and Fourteenth Amendments prohibit the government from restricting a person's physical freedom without due process of law. *See, e.g.*, Kerry v. Din, 576 U.S. 86, 91–93 (2015).

186. *See* Sandin v. Conner, 515 U.S. 472, 497 (1995) (Breyer, J., dissenting).

187. *Id.*

hardship."[188] Under the alternative method, courts analyze whether local laws or policies constrain official discretion such that there is a "protectable expectation" of the right.[189]

Once a liberty interest is established, courts evaluate what process is due to protect that interest.[190] Due process requirements are "flexible and call[] for such procedural protections as the particular situation demands."[191] Courts do not follow rigid rules and instead apply the balancing framework established in *Mathews v. Eldridge*.[192]

The Court has analyzed due process rights in several buckets of post-conviction administrative agency decisions. None of these categories are squarely analogous to youth offender parole decisions, but the case law nonetheless compels recognizing a liberty interest in parole release for juvenile offenders who demonstrate maturity and rehabilitation.[193]

1. Parole Revocation and Release Decisions

In a "messy, underdefined series of due process cases," the Supreme Court has generally held that inmates have a conditional liberty interest at stake in parole *revocation* decisions, but there is no constitutionally created liberty interest in parole *release*.[194] While the Due Process Clause itself does not constrain a parole board's discretion to deny parole for any reason or any length of time past an inmate's eligibility date, some minimal procedural safeguards are required where a state law or policy establishes an expectation of parole release.[195]

In *Greenholtz*, a class of inmates who had been denied parole claimed due process deficiencies in Nebraska's parole system.[196] The

188. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *Sandin*, 515 U.S. at 484.

189. *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979); *Sandin*, 515 U.S. at 497 (Breyer, J., dissenting).

190. Wilkinson v. Austin, 545 U.S. 209, 224 (2005).

191. *Morrissey*, 408 U.S. at 481.

192. 424 U.S. 319 (1976); *see Wilkinson*, 545 U.S. at 224–25 (citing *Mathews*, 424 U.S. at 335). Under *Mathews*, courts consider three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

193. *See* Graham v. Florida, 560 U.S. 48, 75 (2010); Montgomery v. Louisiana, 577 U.S. 190, 213 (2016).

194. David W. Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 944 (2009).

195. *See id.*

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

Court held that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[197] Following a lawful conviction, "the criminal defendant has been constitutionally deprived of his liberty" such that his liberty interest is "extinguished."[198]

The plaintiffs in *Greenholtz* relied heavily on *Morrissey v. Brewer*,[199] where the Court recognized that once parole is granted parolees have a liberty that, although conditioned on compliance with certain rules, "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss.'"[200] Given the severity of the deprivation, due process required an "informal hearing" to ensure that the revocation was based on a verified factual finding of a parole violation.[201] The Court in *Greenholtz* distinguished *Morrissey* on the basis that once an inmate is granted parole, a conditional liberty interest is restored and cannot be revoked without due process, but the plaintiffs in *Greenholtz* merely desired the conditional liberty of being released.[202]

The Court in *Greenholtz* emphasized the highly discretionary nature of the parole process: states are not required to establish a parole system, the conditions for release may be defined specifically or generally, and the release decision is "an informed prediction."[203] Further, "[u]nlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual."[204] The possibility of parole is not an entitlement; rather, it is an act of grace that grants an inmate "a mere hope that the benefit will be obtained."[205]

Although *Greenholtz* declined to find a liberty interest in parole release created by the Constitution, it went on to find a state-created liberty interest based on the language of Nebraska's parole statute, which required release absent a finding that one of four conditions

197. *Id.* at 7.
198. *Id.*
199. 408 U.S. 471 (1972).
200. *Greenholtz*, 442 U.S. at 9; *Morrissey*, 408 U.S. at 482.
201. *See Morrissey*, 408 U.S. at 484. Justice Brennan concurred and reasoned that a right to counsel at revocation hearings was also required by due process. *Id.* at 491 (Brennan, J., concurring). Some states have since included this requirement in their procedures. *See, e.g.*, FLA. STAT. ANN. § 947.23 (West 2004); MICH. COMP. LAWS § 791.240a (1953); *see also* WYO. STAT. ANN. § 7-13-408 (West 2023) (allowing the inmate to consult with "any person he reasonably desires, prior to the hearing").
202. *Greenholtz*, 442 U.S. at 9.
203. *Id.* at 7–8, 10.
204. *Id.* at 10.
205. *Id.* at 11.

indicating unsuitability existed.[206] Because the statute's mandatory language operated to "bind" the Board based on certain "predictive" judgments, it created an "expectancy of release" requiring due process protections.[207] Nonetheless, the Court concluded that Nebraska's existing procedures were sufficient to protect that interest.[208]

In *Olim v. Wakinekona*,[209] the Court defined the mandatory language test differently than in *Greenholtz* and held that there is a state-created liberty interest where the state statute places "substantive limitations on official discretion,"[210] an approach that still hinges on statutory language.[211] In *Board of Pardons v. Allen*,[212] the Court reaffirmed the statutory language analysis and clarified that just because a parole board has broad discretion, this "is not incompatible with the existence of a liberty interest in parole release when release is required after the Board determines (in its broad discretion) that the necessary prerequisites exist."[213]

Later, in *Swarthout v. Cooke*,[214] the Court limited the scope of procedural protections in holding that, even if there is a state-created liberty interest, "the relevant inquiry is what process [the plaintiffs] received," not whether the application of those procedures reached the correct result.[215]

206. *Id.* at 11–12. However, the Court was clear that a state does not create an entitlement to parole merely by establishing a parole system. *Id.* at 8.

207. *Id.* at 11–12.

208. *Id.* at 16 ("Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances.").

209. 461 U.S. 238 (1983).

210. *See id.* at 249.

211. *See* Sandin v. Conner, 515 U.S. 472, 481 (1995) ("Parsing the language of the regulation led the [*Olim*] Court to hold that the discretionary nature of the transfer decision negated any state-created liberty interest.").

212. 482 U.S. 369 (1987).

213. *Id.* at 376, 381 (finding a state-created liberty interest in release based on mandatory language in Montana's parole statute that was similar to the statutory language in *Greenholtz*).

214. 562 U.S. 216 (2011).

215. *Id.* at 217, 221–22 (reversing the Ninth Circuit and holding that, because the provision was not constitutionally mandated and an error of state law is not a denial of due process, California's statutory requirement that a parole unsuitability finding be based on "some evidence" of current dangerousness was not "a component" of the liberty interest, so there was no due process violation where the plaintiffs were denied parole based on the "especially cruel and callous" manner of their crimes).

2. Decisions Altering the Conditions of Confinement and *Sandin*'s Revised Test

The Supreme Court has held that changes in the conditions of confinement may be so severe as to implicate the Due Process Clause itself or may be protected by a state-created liberty interest. In *Vitek v. Jones*,[216] the Court held that a state's decision to involuntarily commit an inmate to a mental hospital was a deprivation of liberty sufficiently substantial to mandate the protection of the Due Process Clause.[217] Involuntary psychiatric treatment was beyond the scope of the inmate's prison sentence, so procedural protections were required to protect against an erroneous determination that the inmate was mentally ill.[218]

Twenty years after *Greenholtz*, the Court revised the test for recognizing a state-created liberty interest in *Sandin v. Conner*,[219] where it held that prisoners were not entitled to procedural due process protections before being placed in disciplinary segregation (solitary confinement) for a month.[220] The *Sandin* majority, authored by Chief Justice Rehnquist, rejected the *Greenholtz* approach of parsing statutory language as unworkable because it disincentivized the establishment of prison management procedures and "led to the involvement of federal courts in the day-to-day management of prisons."[221] Instead, the Court announced that liberty interests protected by due process are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[222]

It is unclear whether *Sandin*, which was centered on decisions affecting the conditions of confinement instead of the duration of a

216. 445 U.S. 480 (1980).
217. *Id.* at 493–94.
218. *Id.* at 495–96.
219. 515 U.S. 472 (1995).
220. *Id.* at 486.
221. *Id.* at 482–84.
222. *Id.* at 484. In his dissent, Justice Breyer found Chief Justice Rehnquist's new "atypical and significant hardship" test unnecessary to ensure that only significant, nontrivial deprivations were protected and articulated a spectrum of asserted rights based on existing precedent: (1) interests that are so fundamental that they are inherently protected by the Due Process Clause, as in *Vitek*; (2) deprivations that are less severe, but where state law has "cabined discretion" such that there is an expectation of freedom; and (3) insignificant interests that are not protected. *Id.* at 493–94, 496–99 (Breyer, J., dissenting). Justice Ginsburg argued in her dissent that a liberty interest should be derived from fundamental principles rather than a source independent of the Constitution. *Id.* at 489 (Ginsburg, J., dissenting).

sentence, established a new test for finding state-created due process rights in the context of parole.[223] Courts have stated that *Greenholtz*, not *Sandin*, continues to govern parole release determinations,[224] but this may be an oversimplification.[225] *Greenholtz*'s statutory language approach appeared to have rendered *Morrissey*'s "grievous loss" analysis of parole revocation decisions obsolete, but *Sandin*'s "atypical and significant hardship" inquiry revived analyzing the nature of the liberty interest.[226]

The overlap between decisions altering prison conditions and parole release determinations is further emphasized by *Wilkinson v. Austin*,[227] where the Court applied *Sandin* and concluded that transfer to supermax prisons amounted to an "atypical and significant hardship" in part because the "placement disqualifies an otherwise eligible inmate [from] parole consideration."[228] Accordingly, it is murky whether *Greenholtz-Olim*'s statutory language approach still controls parole release decisions, or whether courts should apply *Sandin-Morrissey*'s nature of the deprivation analysis absent a constitutionally created right.[229]

3. Decisions Revoking Good Time Credit

In *Wolff v. McDonnell*,[230] the Court held that the loss of good time credit as a sanction for misconduct warranted greater procedural protections than parole release determinations but fewer safeguards than parole revocation.[231] In *Sandin*, the plaintiff argued that, under *Wolff*, the potential loss of the opportunity to earn good-time credit due to disciplinary confinement supported recognizing a liberty interest, but the Court distinguished *Wolff* and reasoned that due process protections are required only where "the state's action will inevitably affect the duration of [the inmate's] sentence."[232] The law is uncertain where

223. *See* Ball, *supra* note 194, at 947.

224. *See, e.g.*, Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996); Hall v. Henderson, 672 A.2d 1047, 1051 (D.C. 1996).

225. *See* Ball, *supra* note 194, at 947.

226. *Id.* at 944–46.

227. 545 U.S. 209 (2005).

228. *Id.* at 223–24; *see also* Sandin v. Connor, 515 U.S. 472, 488–89 (1995) (Ginsburg, J., dissenting) (concluding the plaintiff had a constitutionally created liberty interest in avoiding disciplinary confinement in part because it "diminishes parole prospects").

229. *See* Ball, *supra* note 194, at 947.

230. 418 U.S. 539 (1974).

231. *Id.* at 561.

232. S*ee Sandin*, 515 U.S. at 486–87.

the decision at issue has an uncertain but not entirely remote impact on sentence length.[233]

4. Clemency Decisions

States have broad discretion to grant or deny clemency.[234] In *Connecticut Board of Pardons v. Dumschat*,[235] the Supreme Court rejected the plaintiffs' argument that the fact that Connecticut granted three-fourths of commutation applications created an expectation of release.[236] However, the Court has considered whether clemency in noncapital cases, which implicate a liberty interest, is distinct from clemency in capital cases, where a life interest may be at stake.[237] In *Ohio Adult Parole Authority v. Woodard*,[238] the Court acknowledged that a capital defendant "maintains a residual life interest, e.g., in not being summarily executed by prison guards," but reasoned that under *Greenholtz* and *Dumschat*, clemency is a "unilateral hope," not an entitlement.[239] Justice O'Connor concurred and reasoned that capital clemency determinations require "some *minimal* procedural safeguards."[240] Justice Stevens went further and reasoned that while noncapital inmates have already had their liberty "extinguished," a death row inmate seeking commutation faces future deprivation of the "life that he still has."[241]

II. THE ARGUMENT THAT POST-*MILLER* YOUTH OFFENDER PAROLE HEARINGS REQUIRE PROCEDURAL DUE PROCESS PROTECTIONS

This part lays out various analyses establishing that the Due Process Clause protects post-*Miller* youth offender parole hearings. Section II.A briefly considers the procedural safeguards a court could require upon recognizing a constitutionally or state-created liberty

233. *See* Donnah H. Lee, *Law of Typicality: Examining the Procedural Due Process Implications of* Sandin v. Conner, 72 FORDHAM L. REV. 785, 828, 834 (2004).

234. *See* Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 67–68 (2009) (holding that because the defendant was not entitled to clemency, he could not "challenge the constitutionality of any procedures available to vindicate an interest in state clemency").

235. 452 U.S. 458 (1981).

236. *Id.* at 459, 467.

237. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 281 (1998); Herrera v. Collins, 506 U.S. 390, 417 (1993) (rejecting an innocence claim on a capital habeas petition and noting that "the traditional remedy for claims of innocence based on new evidence . . . has been executive clemency").

238. 523 U.S. 272 (1998).

239. *Id.* at 281–82.

240. *Id.* at 289 (O'Connor, J., concurring).

241. *Id.* at 291–92 (Stevens, J., concurring in part and dissenting in part).

interest at stake in youth offender parole hearings. Section II.B undertakes various analyses that necessitate recognizing a constitutionally created liberty interest in parole release for youth offenders who demonstrate maturity and rehabilitation. Section II.C proposes analyses that support finding a state-created liberty interest at stake in youth offender parole hearings.

A. Assuming There Is a Liberty Interest in Parole Release for Juvenile Offenders Who Demonstrate Maturity and Rehabilitation, What Procedures Are Required and Can Procedural Reforms Adequately Protect That Interest?

This section jumps to the second prong of the procedural due process analysis and discusses what procedures a court might require after recognizing a liberty interest, as well as whether procedural reforms are adequate to vindicate a liberty interest in parole release for transiently immature juvenile offenders. A protectable liberty interest is the prerequisite for mandating certain procedures, so a look at the possible procedural safeguards a court could impose illuminates why it matters to establish a liberty interest in release for youth offenders who demonstrate maturity and rehabilitation as well as the limits of a procedural approach to reform.[242] Recognizing a liberty interest at stake in youth offender parole hearings could mandate a right to counsel and expert witnesses at state expense,[243] procedures specifically requiring meaningful consideration of the *Miller* factors and limiting reliance on the facts of the crime,[244] and other procedures ensuring notice and an opportunity to be heard.[245]

However, the Due Process Clause is an imperfect tool to ensure that juvenile offenders are afforded *Miller*'s protections.[246] Sarah French Russell cautions that when analyzing what procedures are required, courts will likely first look to the minimal due process

242. *See, e.g.*, Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 14 (1979).

243. Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 361, 363–64 (Mass. 2015).

244. Harrington, *supra* note 23, at 1209, 1213 (proposing that "the parole board ought to presume maturity and rehabilitation and, therefore, release for juvenile parole applicants"); *Diatchenko*, 27 N.E.3d at 365 (authorizing judicial review of parole hearings to determine "whether the board has carried out its responsibility to take into account the" *Miller* factors).

245. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

246. *See* Russell, *supra* note 143, at 419; Harrington, *supra* note 23, at 1220–21, 1224; Bell, *supra* note 47, at 466 (acknowledging that it would be "naïve" to expect procedural protections to ensure that parole boards give adequate weight to youth-related considerations, given that research has shown that "procedural due process has failed miserably in its mission to rationalize frontline decisionmaking").

requirements for adult parole hearings.[247] Protection of the state-created liberty interest in *Greenholtz* did not even require a formal evidentiary hearing or a written statement of the evidence relied upon,[248] and *Swarthout* constrained federal courts from looking beyond the process afforded to scrutinize whether a parole board reached the correct result.[249] Predictably, the court in *Bowling* found that the Virginia parole procedures at issue met the minimal due process requirements under pre-*Miller* precedent.[250] Accordingly, advocates must distinguish youth offender parole hearings in order to win more robust procedural protections than those afforded to adult offenders, and this is likely an "uphill battle."[251]

Alexandra Harrington posits that procedural protections under the Fourteenth Amendment are a weaker mechanism for realizing the spirit of *Miller* in parole processes than recognizing substantive Eighth Amendment protections.[252] Once a liberty interest is established, "there is no unfettered right" to release; rather, there is a right to a certain process prior to denial.[253] While the Eighth Amendment's proscription on disproportionate punishment might require a certain outcome—for example, parole release—the Fourteenth Amendment guarantees only the procedures that must precede that decision.[254] For example, procedures requiring consideration of youth do not necessarily prevent a parole board from denying parole based on the facts of the crime so long there was pro forma consideration of youth.[255]

However, protecting the Eighth Amendment right through procedure should not be disregarded.[256] After all, even minimal procedural oversight is better than none at all, and despite the Court's historical reluctance to implement safeguards, courts are not barred from

247. Russell, *supra* note 143, at 418–19.

248. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 14–15 (1979).

249. Swarthout v. Cooke, 562 U.S. 216, 220 (1989).

250. Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 200 (4th Cir. 2019) (citing Bloodgood v. Garraghty, 783 F.2d 470, 473 (4th Cir. 1986)) (reasoning that "a parole board need only provide an offender an opportunity to be heard" and a statement of the reasons for denial).

251. *See* Russell, *supra* note 143, at 419.

252. Harrington, *supra* note 23, at 1220 ("[A]n assessment that focuses exclusively on the liberty interest in parole will not guarantee that the Eighth Amendment rights of people who committed crimes as children will be vindicated.").

253. *Id.*

254. *Id.* at 1220–21.

255. *Id.* at 1224; *see also* Bell, *supra* note 47, at 466 (procedural remedies "effectively trust[] that the parole board will make good enough decisions so long as modest procedural protections are in place and they are required to give at least lip service to the features of youth").

256. *See* Harrington, *supra* note 23, at 1220.

requiring robust protections where necessary.[257] For example, before the Eighth Circuit reversed, the district court in *Brown* "ordered the State to implement a twenty-three-point remedial plan" to correct its Eighth and Fourteenth Amendment violations.[258] The plan "instituted mandatory training for board members [on the requirements of *Miller*], increased the number of delegates that an inmate may bring to a parole hearing, allowed an inmate to bring an expert witness whose presentation [could not] 'be limited in any fashion,' and required parole board members 'to document the reasons' for voting to deny parole."[259] Further, the parole board was prohibited from denying parole based solely on the seriousness of the offense, and inmates were granted a right to counsel at their own expense in their pre-hearing interview.[260] The court declined to find a right to state-funded counsel,[261] but other courts have recognized this right.[262] Although consideration of youth was already mandated by the Missouri parole statute at issue in *Brown*, several other courts have imposed a procedural requirement that the parole board consider youth in making its determination.[263]

In *Brown* and *Bowling*, the courts found no constitutional liberty interest at stake, so they did not reach the analysis of the procedures necessary to protect that interest.[264] It is useful to envision the procedural remedies that could flow from a finding that the Due Process Clause protects youth offender parole hearings while also recognizing the limits of procedure as a tool to vindicate a substantive Eighth Amendment right.

257. *See id.*

258. *See* Brown v. Precythe, 46 F.4th 879, 884 (8th Cir. 2022); Brown v. Precythe, No. 17-CV-4082, 2019 WL 3752973, at *7–11 (W.D. Mo. Aug. 8, 2019).

259. *Brown*, 46 F.4th at 884.

260. *Id.* at 884 n.2.

261. Brown v. Precythe, No. 2:17-CV-04082, 2018 WL 4956519, at *11 (W.D. Mo. Oct. 12, 2018).

262. Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 353 (Mass. 2015).

263. Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 400 (App. Div. 2016) ("[A] defendant who committed a crime as a juvenile is procedurally entitled to a 'hearing where "youth and its attendant characteristics" are considered' in order to separate out those who can be punished by a life in prison from those who cannot.").

264. *Brown*, 46 F.4th at 890; Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 199–200 (4th Cir. 2019).

B. There Is a Liberty Interest at Stake in Youth Offender Parole Hearings

This section makes the central argument of this Note: that there is a liberty interest in release upon a showing of maturity and rehabilitation implicated by youth offender parole hearings. Section II.B.1 establishes that *Miller* governs youth offender parole hearings. Section II.B.2 argues that *Miller* guaranteed a substantive right to release for juvenile offenders who demonstrate maturity and rehabilitation, not just meaningful consideration of youth-related factors by decision-makers. Section II.B.3 argues that there is a constitutionally created liberty interest in release upon a showing of maturity and rehabilitation. Section II.B.4 analyzes how existing case law contemplating post-conviction procedural due process rights requires recognizing a state-created liberty interest in release once a juvenile offender has matured and rehabilitated.

In finding no Eighth or Fourteenth Amendment violations arising from parole denials for youth offenders, the Fourth and Eighth Circuits overlooked compelling arguments that juvenile offenders have a liberty interest in parole review and release under *Miller*.[265] *Brown* ignored that pre-*Miller* procedural due process precedent cannot be blindly applied to juvenile offenders whose parole hearing must afford them a "meaningful opportunity to obtain release."[266] *Bowling* held that de facto LWOP sentences are not governed by *Miller* simply because they are technically life *with* the possibility of parole sentences, and the court relied on this narrow reading of *Miller* to avoid deciding the plaintiff's due process claim.[267] Further, neither court analyzed whether there was a state-created liberty interest in parole review or release for juvenile offenders, although the court in *Bowling* acknowledged a previously recognized liberty interest in parole consideration that was not specific to juvenile offenders.[268]

265. *Brown*, 46 F.4th at 890; *Bowling*, 920 F.3d at 199–200.

266. *Cf.* Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) (distinguishing between "reach[ing] the wrong conclusion on whether to grant parole" and a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Brown*, 46 F.4th at 887.

267. *Compare* Atwell v. State, 197 So. 3d 1040, 1041–42 (Fla. 2016) (finding that even a mandatory life *with* parole sentence was unconstitutional because the parole process "fail[ed] to take into account the offender's juvenile status at the time of the offense" and "effectively force[d] juvenile offenders to serve disproportionate sentences of the kind forbidden by *Miller*"), *with Bowling*, 920 F.3d at 192 ("[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.").

268. *Bowling*, 920 F.3d at 200; *Brown*, 46 F.4th at 890.

Counter to *Brown* and *Bowling*, a careful application of the Eighth and Fourteenth Amendments reveals that juvenile offenders have a liberty interest in release upon a showing of maturity and rehabilitation, and due process protections are required to safeguard that interest.[269] As state and district courts have held, *Graham*, *Miller*, and *Montgomery* create at least a liberty interest in meaningful parole review for juvenile offenders.[270] Further, scholars argue that under *Miller* there is a substantive right to release upon a showing that a youth offender has matured and rehabilitated, and this Note argues that this creates a liberty interest in release, not just review.[271]

1. *Miller* Extends to Youth Offender Parole Hearings

As a preliminary step, both the Fourth and Eighth Circuits concluded that *Miller* did not reach the parole hearings at issue because its holding only governed mandatory juvenile LWOP sentences, not parole decisions.[272] But numerous courts have more persuasively concluded that *Miller* extends beyond initial sentencing proceedings and reaches the parole process,[273] and others have applied *Miller-Graham* to non-mandatory de facto LWOP sentences.[274]

In *Greiman v. Hodges*,[275] an Iowa district court declined to dismiss an inmate's claim that the Iowa Board of Parole violated his Eighth and Fourteenth Amendment rights by denying him release "based solely on the seriousness of his offense" without "tak[ing] into account [his] youth and demonstrated maturity and rehabilitation."[276] The plaintiff was serving LWOP for kidnapping, but in the wake of *Graham*'s ban on LWOP for non-homicide crimes, an Iowa statute

269. Harrington, *supra* note 23, at 1220–21.

270. Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015); *Greiman*, 79 F. Supp. 3d at 945; Flores v. Stanford, No. 18 CV 2468 (VB), 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019); Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 357 (Mass. 2015); Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 777 (Iowa 2019).

271. *See, e.g.*, Leslie, *supra* note 47, at 390.

272. *See Brown*, 46 F.4th at 886 ("As the Fourth Circuit observed, accepting the inmates' argument here would require this court to conclude (1) that the Supreme Court's juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with the possibility of parole, and (2) that those protections extend beyond sentencing proceedings." (citing *Bowling*, 920 F.3d at 197)).

273. *See* Brown v. Precythe, No. 2:17-CV-04082, 2018 WL 4956519, at *7 (W.D. Mo. Oct. 12, 2018) (collecting cases).

274. *See, e.g.*, United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018); Budder v. Addison, 851 F.3d 1047, 1059–60 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); Moore v. Biter, 725 F.3d 1184, 1186 (9th Cir. 2013).

275. 79 F. Supp. 3d 933 (S.D. Iowa 2015).

276. *Id.* at 936.

granted him parole eligibility after twenty-five years.[277] The court disagreed with the government's argument that *Graham* did not apply outside of initial sentencing and reasoned that "[i]t is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation . . . at some time well after a sentence is imposed."[278] Given Iowa's indeterminate sentencing scheme, the meaningful opportunity to obtain release promised by *Graham* "could only reasonably exist during parole review."[279] Because the Board would ultimately decide the length of the plaintiff's sentence, it was responsible for realizing *Graham*'s mandate.[280]

The courts in *Brown* and *Bowling* failed to appreciate what the court in *Greiman* did—that *Graham*'s requirement of a meaningful opportunity to obtain release, later reiterated in *Miller* and *Montgomery*, must necessarily reach the parole process.[281] Other courts have recognized that *Miller* prohibits de facto LWOP sentences spawned by repeated denials of parole.[282] A sentence of life *with* the possibility of parole where parole is denied despite a juvenile offender's rehabilitation and maturity is no less cruel and unusual than a de jure juvenile LWOP sentence.[283] This was especially apparent in the facts in *Bowling*, where Mr. Bowling was denied parole every year for over a decade based on the unchangeable facts of his crime.[284] Had the Fourth

277. *Id.* at 935–36.

278. *Id.* at 943.

279. *Id.*

280. *Id.*

281. *See id.*; Shah, *supra* note 137, at 246 ("By substituting the requirement of meaningful opportunity for release for merely the inclusion of parole in the sentence, the Fourth Circuit missed the spirit and letter of *Graham* and *Miller*.").

282. *Compare* Hayden v. Keller, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015) ("If a juvenile offender's life sentence, while ostensibly labeled as one 'with parole,' is the functional equivalent of a life sentence without parole, then the State has denied that offender the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' that the Eighth Amendment demands."), *and* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 772 (Iowa 2019) ("Parole reviews cannot involve repeated incantations of ritualistic denials."), *with* Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 198 (4th Cir. 2019) (noting the circuit split regarding whether *Miller* reaches de facto LWOP and concluding that *Miller*'s "protections have not yet reached" parole-eligible juvenile offenders).

283. *See* Shah, *supra* note 137, at 246; Leslie, *supra* note 47, at 389.

284. *Bowling*, 920 F.3d at 195; *see also* Russell, *supra* note 136, at 231 (arguing that the facts of the crime are not relevant to determining parole suitability for youth offenders "except to the extent that the circumstances of the crime provide a baseline for assessing how an individual has matured and changed since the time of the crime").

Circuit considered the constitutional import of Mr. Bowling's parole hearing, it could not have avoided analyzing his due process claim.[285]

The court's approach in *Bowling*, followed by the court in *Brown*, creates a circular problem for juvenile offenders serving indeterminate sentences. The Fourth and Eighth Circuits reasoned that because youth offenders were eligible for parole, their sentences comported with the Eighth Amendment, so their parole hearings were not governed by *Miller*.[286] But the courts ignored that the release mechanism of parole is what rendered the plaintiffs' sentences constitutionally proportionate, so *Miller*'s juvenile-specific Eighth Amendment protections must govern the parole process.[287]

A key difference between the facts in *Brown* and *Bowling* illuminates the divergent paths courts could take in analyzing similar challenges to parole processes. The plaintiff in *Bowling* was initially sentenced to life *with* parole at seventeen years old, so he technically never received an unconstitutional sentence under the narrowest reading of *Miller*.[288] Conversely, the plaintiffs in *Brown* were "afforded parole eligibility as a remedy to cure their unconstitutional sentences."[289] Each plaintiff was sentenced to a mandatory term of LWOP prior to *Miller* but became parole-eligible under a post-*Montgomery* statute providing for parole review after twenty-five years.[290] The dissent in *Brown* distinguished the case from *Bowling* on the basis that in order to remedy their unconstitutional sentences, the plaintiffs in *Brown* were entitled to have their youth at the time of the crime considered by a decision-maker, but in *Bowling* there was no constitutional violation requiring such a remedy.[291]

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285. *See Bowling*, 920 F.3d at 199 ("[B]ecause we find that juvenile-specific Eighth Amendment protections do not apply to [the plaintiff's] life with parole sentence, we need not decide whether the rights articulated by *Miller* and its lineage trigger liberty interests."); Greiman v. Hodges, 79 F. Supp. 3d 933, 943–44 (S.D. Iowa 2015).

286. Brown v. Precythe, 46 F.4th 879, 886 (8th Cir. 2022) (citing *Bowling*, 920 F.3d at 197).

287. Harrington, *supra* note 23, at 1199 ("[P]arole is a mechanism that converts an unconstitutional sentence that condemns a juvenile to die in prison into a sentence that complies with Eighth Amendment proportionality principles."); Leslie, *supra* note 47, at 390 ("[A] parole system which provides only a remote, unreliable chance for release does not save an otherwise unconstitutional sentence under the Eighth Amendment."); *Greiman,* 79 F. Supp. 3d at 943.

288. *Brown*, 46 F.4th at 892 n.4 (Kelly, J., dissenting) ("Importantly, the plaintiff in *Bowling*, unlike Plaintiffs here, never received an unconstitutional sentence requiring remedial action under *Miller* and *Montgomery*."); *Bowling*, 920 F.3d at 198.

289. *Brown*, 46 F.4th at 892 n.4 (Kelly, J., dissenting).

290. *Id.* at 883–84 (majority opinion).

291. *Id.* at 892 n.4 (Kelly, J., dissenting).

This Note adopts the broader reading of *Miller* rejected in *Brown* and *Bowling* and assumes that *Miller* governs sentences that are the practical equivalent of life in prison for a juvenile offender[292] in arguing that the youth offender parole hearings in both *Brown* and *Bowling* were of constitutional magnitude.[293] However, as the dissent in *Brown* demonstrates, a court could easily distinguish mandatory de jure LWOP sentences from de facto LWOP sentences and conclude that *Miller* only reaches youth offender parole hearings where the initial sentence was unconstitutional under the narrowest reading of *Miller*.[294]

The Eighth Amendment mandates a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and a showing of maturity and reform logically can only be made after the passage of time, likely at a resentencing or parole hearing.[295] *Montgomery* specifically identified parole as a mechanism for constitutionalizing sentences that violate *Miller*, so the parole process cannot itself ignore *Miller*, or it is an illusory remedy.[296]

2. *Montgomery* Guarantees a Substantive Right to Release for Juvenile Offenders Who Have Matured and Rehabilitated, Not Just Meaningful Consideration of Youth-Related Factors

Given *Montgomery*'s clarification that LWOP is categorically disproportionate for juvenile offenders who were transiently immature at the time of their crimes, there is a substantive right to release upon

292. *Compare Bowling*, 920 F.3d at 194, 197–99 (holding that there was no *Miller* violation where a juvenile offender was repeatedly denied parole based on the severity of his crime), *with* Moore v. Biter, 725 F.3d 1184, 1191–92 (9th Cir. 2013) ("[The juvenile offender's] sentence of 254 years is materially indistinguishable from a life sentence without parole because [he] will not be eligible for parole within his lifetime . . . regardless of his remorse, reflection, or growth.").

293. Harrington, *supra* note 23, at 1207 ("Courts reviewing parole hearings post-*Graham*, *Miller*, and *Montgomery* have recognized the constitutional nature of juvenile parole determinations.").

294. *See Brown*, 46 F.4th at 892 (Kelly, J., dissenting).

295. *See* Greiman v. Hodges, 79 F. Supp. 3d 933, 935, 943 (S.D. Iowa 2015) (citing Graham v. Florida, 560 U.S. 48, 50 (2010)).

296. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."); Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 772 (Iowa 2019) ("[A] recalcitrant parole authority could convert a potentially valid sentence into the functional equivalent of an unconstitutional life without possibility of parole."); Caldwell, *supra* note 110, at 285 (arguing that illusory possibilities of parole do not amount to a realistic opportunity for release); Harrington, *supra* note 23, at 1201 ("By sanctioning the use of a parole hearing to remedy [a *Miller*] violation, the Court placed in the hands of the parole board the task of vindicating an individual's substantive, Eighth Amendment right to a proportionate sentence under *Miller* and *Montgomery*.").

a showing of maturity and rehabilitation.[297] The most straightforward reading of *Montgomery* guarantees a right to *release* rather than the less forceful right to *review*, which would require only that sentencers and parole boards meaningfully consider youth-related factors, without ensuring that the proper outcome attaches to the decision-maker's analysis.[298]

The plaintiffs in *Brown* and *Bowling* articulated their asserted liberty interests slightly differently: in *Brown* the plaintiffs claimed an interest in "meaningful parole review,"[299] but in *Bowling* the alleged interest was in "the opportunity to reenter society as a mature adult."[300] The former articulation is an interest in parole *review*, meaning that juvenile offenders have a right for the parole board to meaningfully consider maturity and rehabilitation in making a parole suitability determination.[301] The *Bowling* court was unclear as to whether it interpreted the asserted interest as one in parole review or release,[302] but Mr. Bowling's claimed entitlement to reenter society as a mature adult appears to state an interest in parole *release* itself.[303]

Courts that have identified a liberty interest implicated by youth offender parole processes have generally framed it as an interest in

297. *See Montgomery*, 577 U.S. at 209–10, 212.

298. *Compare* Leslie*, supra* note 47, at 387 (right to release), *with* Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 400 (App. Div. 2016) (right to have youth considered at parole hearing), *and Greiman*, 79 F. Supp. 3d at 945 (right to "demonstrate maturity and reform").

299. *Brown*, 46 F.4th at 890.

300. Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 199 (4th Cir. 2019).

301. *See* Russell, *supra* note 143, at 383 ("[I]t is apparent that *Graham*'s requirement that states provide a meaningful opportunity for release encompasses three distinct components: (1) individuals must have a chance of release at a meaningful point in time, (2) rehabilitated prisoners must have a realistic likelihood of being released, and (3) the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard."); *Brown*, 46 F.4th at 890 (reading the plaintiffs' asserted interest as not an interest in parole release but an interest in "meaningful" parole review procedures).

302. *Bowling*, 920 F.3d at 199.

303. *See* Leslie*, supra* note 47, at 386–87 (arguing that because the Supreme Court has established that rehabilitation is the only "permissible purpose for the incarceration of a juvenile" and "[o]nly the exceedingly rare condition of permanent incorrigibility—an inability to rehabilitate—justifie[s] the lifelong incarceration of a child," juvenile offenders have a substantive Eighth Amendment right to be released once they have rehabilitated); Harrington, *supra* note 23, at 1209 (proposing a presumption of "maturity and rehabilitation and, therefore, release for juvenile parole applicants" and arguing that "[o]nly if the evidence establishes by clear and convincing evidence that the crime was not the result of transient immaturity and that the parole applicant has not matured and rehabilitated should the board deny release").

meaningful review,[304] similar to the asserted interest in *Brown*.[305] The court in *Greiman* denied the government's motion to dismiss the plaintiff's due process claim because the facts supported the conclusion that he was denied a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[306] The government argued that the plaintiff simply wanted to be released, a claim ostensibly foreclosed by *Greenholtz*, but the court disagreed and clarified that the plaintiff's claim was not that the government "applied fair and appropriate parole policies to him and reached the wrong conclusion"; rather, the plaintiff claimed that the government's "existing procedures and policies deprive[d] him of the 'meaningful opportunity' to which he [was] entitled."[307]

Scholars have gone a step further in articulating the right at stake. There is a distinct and more potent argument that *Miller* and *Montgomery* created a substantive right to release for juvenile offenders who demonstrate maturity and rehabilitation, so denials of parole for youth offenders who have matured and rehabilitated violate the Eighth Amendment.[308] A related statement of the liberty interest at stake in youth offender parole hearings is the most compelling: juvenile offenders have a substantive constitutional right to reenter society once they have matured and rehabilitated, and this significantly limits the discretion of parole boards, so juvenile offenders cannot be denied parole release without due process.[309] A liberty interest in release helps realize *Miller*'s most natural result—that only "the rare juvenile offender whose crime reflects irreparable corruption" will spend his

304. *See, e.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015); Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015). *But see* Flores v. Stanford, No. 18-CV-2468, 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019) (following *Greiman*'s analysis but also stating that pursuant to *Graham*, *Miller*, and *Montgomery*, if a parole board "determines that a juvenile offender has demonstrated maturity and rehabilitation, parole or work release is required as a matter of law").

305. *Brown*, 46 F.4th at 890 (plaintiffs asserted an interest in "meaningful parole review").

306. *Greiman*, 79 F. Supp. 3d at 945.

307. *Id.*

308. *See* Leslie, *supra* note 47, at 385 (arguing that the juvenile-specific Eighth Amendment cases created "a constitutional right for juvenile offenders to be released from incarceration upon a showing of maturity and rehabilitation" and "[life] with parole is a constitutional sentence for juvenile offenders whose crimes reflect transient immaturity only if it fulfills [that] right to release"); *see also* Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 399–400 (App. Div. 2016) ("Although the Court has not specifically reviewed a case regarding a parole determination for a juvenile homicide offender, it is axiomatic that such an offender still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity.'").

309. *See* Harrington, *supra* note 23, at 1221.

whole life in prison.[310] Accordingly, "in light of the empirical fact that nearly all youthful offenders reform, a constitutionally compliant release mechanism would result in the release of nearly all juvenile offenders."[311]

A right to review ensures only procedural compliance, but *Montgomery* was unequivocal that *Miller*'s rule was not just procedural but also substantively prohibited LWOP for juvenile offenders who were only transiently immature at the time of their crimes.[312] *Montgomery* is best read as establishing that while all parole-eligible juvenile offenders have a right to meaningful parole review to determine whether they have matured and rehabilitated, individuals who prove that they were transiently immature at the time of their crimes enjoy a supplementary right to release.[313] This is because once a juvenile offender demonstrates maturity and rehabilitation, the parole board has no discretion to deny parole.[314] Without a right to release for juvenile offenders who prove they are not irreparably corrupt, and thus cannot be constitutionally condemned to de facto LWOP, *Montgomery* is a nullity.

While a liberty interest in release is more similar to the right asserted in *Bowling*, it necessarily encompasses the right to meaningful review claimed in *Brown* because the process required to ensure that matured and rehabilitated adults are granted release must include meaningful review.[315] Ultimately, whether the Eighth Amendment right established in *Miller* is a right to reenter society upon maturity and rehabilitation or a right to be heard regarding the maturity and rehabilitation that necessitates release, the due process implications of both rights are likely similar given that the Fourteenth Amendment stops short of requiring a certain outcome, namely, release.[316] While framing the right as requiring the release of matured and rehabilitated

310. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012); Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

311. Leslie, *supra* note 47, at 390.

312. *See Montgomery*, 577 U.S. at 209–10.

313. *See id*. at 209–10, 212.

314. *See* Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (recognizing that "a [s]tate creates a protected liberty interest by placing substantive limitations on official discretion"); *cf.* Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision, 30 N.Y.S.3d 397, 399–400 (App. Div. 2016) (reasoning that "it is axiomatic that [a juvenile homicide offender] still has a substantive constitutional right not to be punished with life imprisonment for a crime 'reflect[ing] transient immaturity'" (quoting *Montgomery*, 577 U.S. at 210)).

315. *See* Russell, *supra* note 143, at 383.

316. Harrington, *supra* note 23, at 1221.

youth offenders could lead to more favorable results for a juvenile offender challenging the length of his sentence under the Eighth Amendment,[317] it is less determinative for a Fourteenth Amendment claim attacking the procedures used to decide the time of release.[318] That said, a liberty interest in release upon a showing of maturity and rehabilitation remains the most compelling interpretation because a Fourteenth Amendment challenge to youth offender parole processes is intertwined with a correlative Eighth Amendment claim.[319]

Montgomery is most coherently interpreted as requiring a right to meaningful parole review for all juvenile offenders and a right to release for juvenile offenders who prove they were transiently immature at the time of their crimes.

3. There Is a Constitutionally Created Liberty Interest in Release Upon a Showing of Maturity and Rehabilitation

This section lays out various analyses that compel recognizing a constitutionally created liberty interest in release for juvenile offenders who have matured and rehabilitated. Section II.B.3.a argues that *Greenholtz*'s holding that there is no constitutionally created liberty interest in parole must be cabined to adult parole review and does not control constitutionally necessitated youth offender parole hearings. Section II.B.3.b proposes recognizing a constitutionally created liberty interest based on both the Eighth and Fourteenth Amendments. Section II.B.3.c puts forth an alternative approach that relies on the Court's precedents concerning the conditions of confinement to find a right to release flowing from the Due Process Clause alone.

a. Greenholtz *does not foreclose recognizing a constitutionally created liberty interest at stake in youth offender parole hearings*

The first step in recognizing a constitutionally created liberty interest in release for juvenile offenders who demonstrate maturity and rehabilitation is to distinguish *Greenholtz*, which broadly held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[320]

317. *See* Leslie, *supra* note 47, at 390.

318. Harrington, *supra* note 23, at 1221 (under the Fourteenth Amendment, "a liberty interest might guarantee a certain process, but not a certain outcome," but under the Eighth Amendment, "the outcome of the parole hearing matters").

319. *See, e.g.*, Brown v. Precythe, 46 F.4th 879, 890 (8th Cir. 2022).

320. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).

One problem with applying *Greenholtz* to juvenile parole hearings is that under *Miller* and *Montgomery* a juvenile offender's liberty interest in a life outside of prison is not "extinguished."[321] Rather, *Montgomery* operates to keep a juvenile offender's interest in freedom metaphorically ignited, conditioned upon a showing of maturity and rehabilitation.[322] Under *Greenholtz*, parole eligibility is an ameliorative benefit conferred on the inmate, and the government generally has discretion to grant or deny parole based on a subjective assessment of suitability.[323] However, juvenile offenders have a substantive right to be released if they demonstrate maturity and rehabilitation, so parole review and/or release is elevated to a right where it otherwise would be a privilege.[324]

In *Greiman*, the court reasoned that there was an important distinction between the right to demonstrate maturity and rehabilitation claimed by the plaintiff and the asserted entitlement to release rejected in *Greenholtz*.[325] While parole for the adult offenders in *Greenholtz* was a "hope" too insubstantial to be protectable, *Graham* "provide[d] the juvenile offender with substantially more than a possibility of parole or a 'mere hope' of parole; it create[d] 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.'"[326] Further, in *Woodard*, the Court reasoned that executive clemency, like parole, is "a unilateral hope,"[327] but "*Graham* specifically rejected the mere possibility of executive clemency as sufficient to satisfy constitutional requirements."[328] Thus, a meaningful opportunity to obtain

321. *See id.*; Montgomery v. Louisiana, 577 U.S. 190, 213 (2016).

322. *See Montgomery*, 577 U.S. at 213 ("[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.").

323. *Greenholtz*, 442 U.S. at 7–8.

324. Harrington, *supra* note 23, at 1178–79 ("*Graham*, *Miller*, and *Montgomery* constitutionalize parole and transform it from a discretionary, subjective determination into a vindication of a substantive, Eighth Amendment right."); *cf.* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 776 (Iowa 2019) ("[U]nlike a prisoner who is entitled to parole only as a matter of legislative grace, a juvenile offender under *Graham-Miller* is constitutionally entitled to receive the meaningful opportunity to demonstrate maturity and rehabilitation.").

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

326. *Id.*

327. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 281–82 (1998).

328. *Bonilla*, 930 N.W.2d at 772 (citing Graham v. Florida, 560 U.S. 48, 70 (2010) (holding that the "remote possibility" of executive clemency "does not mitigate the harshness of the sentence")).

release must mean more than the "mere hope" contemplated in *Greenholtz* and *Woodard*.[329]

Essential to *Greenholtz*'s reasoning was the premise that a valid conviction and sentence constitutionally deprives a defendant of his liberty for the duration of the sentence.[330] But a de facto LWOP sentence cannot be considered valid,[331] because an indeterminate sentence for a juvenile offender is only constitutional with the requisite meaningful opportunity to obtain release.[332] It is illogical to claim that there is no liberty interest in parole release because the sentence is valid when it was the opportunity for release that cured the previously invalid sentence.[333] Applying *Greenholtz* to youth offender parole hearings creates this contradiction because the parole hearings in that case were not of constitutional magnitude.[334] *Miller* established a constitutional entitlement for juvenile offenders to be released upon a showing of maturity and rehabilitation, so procedural protections are required when this right is realized by parole consideration.[335]

Like *Greiman*, other courts have recognized that *Greenholtz* is inapplicable because it contemplated parole before the Court had identified the constitutional difference between children and adults for sentencing purposes.[336] In *Hayden v. Keller*,[337] the court concluded that North Carolina's parole process, which provided "no advance notice or opportunity for juvenile offenders to be heard on the question of

329. *Id.* at 775.

330. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).

331. *Bonilla*, 930 N.W.2d at 772 ("[A] recalcitrant parole authority could convert a potentially valid sentence into the functional equivalent of an unconstitutional [LWOP sentence].").

332. *See* United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018) (holding that de facto LWOP sentences are unconstitutional because *Graham* and *Miller* require "that sentencing judges must provide non-incorrigible juvenile offenders with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'").

333. *See* Harrington, *supra* note 23, at 1199 ("[P]arole is a mechanism that converts an unconstitutional sentence that condemns a juvenile to die in prison into a sentence that complies with Eighth Amendment proportionality principles.").

334. *Compare Greenholtz*, 442 U.S. at 7 ("A state may, as Nebraska has, establish a parole system, but it has no duty to do so."), *with* Brown v. Precythe, 46 F.4th 879, 892 n.4 (8th Cir. 2022) (Kelly, J., dissenting) ("Plaintiffs here are being afforded parole eligibility as a remedy to cure their unconstitutional sentences.").

335. Harrington, *supra* note 23, at 1200–01.

336. *See* Hayden v. Keller, 134 F. Supp. 3d 1000, 1010 (E.D.N.C. 2015). *But see* Heredia v. Blythe, 638 F. Supp. 3d 984, 1003 (W.D. Wis. 2022) (noting that, even if *Graham* did require the release of juvenile offenders who demonstrate maturity and rehabilitation, "the Court said nothing about the Due Process Clause or liberty interests in *Graham*, and it [did not] purport to overrule any cases, so [lower courts] remain bound by *Greenholtz* and *Swarthout*, even if they are in tension with *Graham*").

337. 134 F. Supp. 3d 1000 (E.D.N.C. 2015).

maturity and rehabilitation" failed to meet *Graham*'s constitutional mandate and pointed out that *Greenholtz* "notably did not address whether Nebraska's parole scheme comported with due process as applied to juvenile offenders."[338] "[D]ue process is flexible and calls for such procedural protections as the *particular situation demands*," and the "Supreme Court has now clarified that juvenile offenders' parole reviews demand more procedural protections."[339]

In relying in part on *Greenholtz* to dodge due process claims brought by youth offenders, the Fourth and Eighth Circuits overlooked that youth offender parole hearings carry a constitutional import that *Greenholtz* did not contemplate.[340] After *Miller*, youth offender parole hearings are constitutionally required to ensure that the length of an inmate's incarceration is proportionally linked to his maturity and rehabilitation, so *Greenholtz* does not control and a new analysis of whether a youth offender has a constitutionally created liberty interest in parole release is necessary.[341]

b. There is a liberty interest in release upon a showing of maturity and rehabilitation created by a combination of the Due Process Clause and the Eighth Amendment

Because *Greenholtz* cannot govern youth offender parole hearings, courts must undertake a fresh analysis of the liberty interest at stake by analyzing existing procedural due process precedents through a post-*Miller* lens. One approach to finding a liberty interest requires relying on both the Eighth Amendment and the Due Process Clause, an analysis that does not fit squarely within the Court's existing jurisprudence establishing two categories of liberty interests: those flowing from the Due Process Clause itself or state-created liberty interests arising out of local law.[342] The added element of the Eighth

338. *Id.* at 1010–11; *see also* Wershe v. Combs, 763 F.3d 500, 506 (6th Cir. 2014) (affirming the dismissal of a juvenile offender's parole due process claim under *Greenholtz*'s reasoning but implying it may not extend to juvenile offenders by stating that "[b]ecause [the plaintiff] did not allege a particular liberty interest based on his youth at the time of arrest, we need not determine whether *Graham v. Florida* created a new liberty interest").

339. *Hayden*, 134 F. Supp. 3d at 1010 (citing Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015); Graham v. Florida, 560 U.S. 48 (2010)).

340. *See id.*

341. *See* Harrington, *supra* note 23, at 1221; Russell, *supra* note 143, at 417.

342. *See* Kerry v. Din, 576 U.S. 86, 108 (2015) (Breyer, J., dissenting) ("Our cases make clear that the Due Process Clause entitles [the plaintiff] to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a

Amendment is distinguishable from existing case law, which generally has not found a constitutionally created liberty interest based on a second constitutional provision in addition to the Fourteenth Amendment.[343] But protection of the constitutional right to be free from a disproportionate sentence is a "liberty interest sufficiently important for procedural protection to flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause" as opposed to "nonconstitutional law."[344] The Due Process Clause establishes a basic entitlement to liberty,[345] and *Miller* held that it violates the Eighth Amendment to permanently extinguish a juvenile offender's liberty with a life sentence absent a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[346]

Montgomery implied that *Miller* gave rise to a liberty interest.[347] The Court emphasized that giving *Miller* retroactive effect was consistent with *Teague v. Lane*,[348] which established that substantive rules of constitutional law must be applied retroactively to final convictions, because *Teague* "sought to balance the important [government] goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional."[349] "Allowing [youth] offenders to be considered for parole ensures 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."[350] The Court's reasoning implies that because an LWOP sentence for transiently immature juvenile offenders violates the Eighth Amendment, those who have matured and

statute, for example) creates 'an expectation' that a person will not be deprived of that kind of liberty without fair procedures.").

343. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 221, 224 (2005) (finding a liberty interest in avoiding transfer to the state's supermax prison based on the Fourteenth Amendment alone). *But see* Ford v. Wainwright, 477 U.S. 399, 410, 413 (1986) (relying on the Eighth Amendment in analyzing a Fourteenth Amendment claim).

344. *See Kerry*, 576 U.S. at 108.

345. *Id.*

346. Harrington, *supra* note 23, at 1221 ("*Graham* and *Montgomery*'s language arguably gives juvenile parole applicants a legitimate claim of entitlement to a meaningful opportunity for parole based on demonstrated growth and maturity."); Russell, *supra* note 143, at 417 (arguing that, after *Graham*, "prisoners have a certain entitlement: although they are not guaranteed release, they are entitled to a realistic chance of release if they demonstrate maturity and rehabilitation," and this could be viewed as creating a liberty interest).

347. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (citing Teague v. Lane, 489 U.S. 288, 307 (1989)).

348. 489 U.S. 288 (1989).

349. *Montgomery*, 577 U.S. at 212.

350. *Id.*

rehabilitated have a liberty interest in release that may be vindicated by the parole process.[351]

Some scholars view the Eighth and Fourteenth Amendments as two distinct avenues for recognizing procedural rights in youth offender parole processes.[352] *Miller*'s requirement of a meaningful opportunity to obtain release makes it distinct from other Eighth Amendment cases in that constitutional compliance requires that juvenile offenders be afforded a certain meaningful process.[353] Thus, *Miller* and its progeny both substantively limit punishment for juvenile offenders and implicate a procedural aspect; a juvenile offender's sentence is disproportionate if procedures mandating consideration of youth are not followed.[354]

Sarah French Russell and Richard Bierschbach have observed that this "interaction of substance and procedure that drives the constitutional significance of parole" evokes capital cases that recognize that certain procedural rights flow from the Eighth Amendment.[355] In *Woodson v. North Carolina*,[356] the Court held that a mandatory death penalty statute violated the Eighth Amendment because it prevented "particularized consideration" of each defendant,[357] and *Lockett v. Ohio*[358] held that death penalty sentencing must allow broad consideration of mitigating factors.[359] These cases required heightened procedural protections for capital cases but invoked the Eighth Amendment rather than a procedural due process analysis.[360] *Miller* relies on those cases in prohibiting mandatory juvenile LWOP, which indicates that the Eighth Amendment creates procedural rights outside of the capital context.[361] In youth offender parole hearings, "denial of parole means the prisoner will die in prison," so under *Woodson* and *Lockett* a court could find that the Eighth Amendment requires procedural protections to ensure meaningful consideration and reliable judgments.[362]

351. *See id.*
352. Russell, *supra* note 143, at 416–17.
353. *Id.*
354. *Id.*
355. *Id.*
356. 428 U.S. 280 (1976).
357. *Id.* at 303.
358. 438 U.S. 586 (1978).
359. *Id.* at 604.
360. Russell, *supra* note 143, at 416–17.
361. *Id.*
362. *Id.*

Although scholars have viewed the Eighth and Fourteenth Amendments as two separate approaches to securing procedural protections, a more holistic analysis requires recognizing a constitutionally created liberty interest under the existing Fourteenth Amendment framework in part because of the procedural aspects of *Miller*'s Eighth Amendment holding.[363] This is the inverse of the analysis in *Lockett*, where the Court considered whether death penalty sentencing procedures were inadequate under the Eighth and Fourteenth Amendments but analyzed the case under an Eighth Amendment framework.[364]

At least one case supports the notion that the adequacy of government procedures can be assessed by drawing from both the Eighth and Fourteenth Amendments.[365] In *Ford v. Wainwright*,[366] the Court held that the Eighth Amendment created a substantive right for insane people to be spared from execution and concluded that Florida's procedures for determining sanity in capital cases did not adequately protect that right.[367] The Court reasoned that because "the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty," determining if Florida's procedures were deficient depended on whether the Eighth Amendment "places a substantive restriction on the State's power to take the life of an insane prisoner."[368]

The Court's subsequent analysis drew from both Eighth Amendment and procedural due process precedents,[369] and although the Court was not explicit in recognizing a constitutionally created liberty interest, it referred to the right at stake as a "constitutional interest" before proceeding to the second step of the procedural due process analysis.[370] Thus, the Court at least impliedly recognized that a constitutionally created liberty interest can be based on both the Eighth and Fourteenth Amendments.[371] Further, Justice Powell's controlling concurrence recognized that the inmate's claim was founded in the

363. *See id.*

364. *Lockett*, 438 U.S. at 608; *see also* Woodson v. North Carolina, 428 U.S. 280, 288, 305 (1976) (holding that the state's mandatory death penalty statute violated the Eighth and Fourteenth Amendments but relying on an Eighth Amendment analysis).

365. Russell, *supra* note 143, at 418.

366. 477 U.S. 399 (1986).

367. *Id.* at 405, 410, 416.

368. *Id.* at 405.

369. Russell, *supra* note 143, at 418.

370. *Ford*, 477 U.S. at 413.

371. *Id.* at 410, 413.

Eighth Amendment[372] but applied an exclusively Due Process Clause analysis.[373] Only Justice O'Connor's concurrence in that case stated that liberty interests can only arise from "two sources—the Due Process Clause itself and the laws of the States."[374] O'Connor appears to have read the plurality's analysis as finding a constitutionally created liberty interest based at least in part on an Eighth Amendment right, whereas she would have found no Eighth Amendment right but a state-created liberty interest independent of the Constitution.[375]

Additionally, the Court's death penalty jurisprudence suggests that a matured and rehabilitated juvenile offender's interest in parole release is not quite a liberty interest and is more akin to a life interest.[376] Justice Stevens's opinion in *Woodard* reasoned that there is a life interest at stake in capital clemency proceedings, so due process protections attach.[377] Whereas *Greenholtz* hinged on whether the asserted interest was in a "liberty one has" (as in parole revocation decisions) or a "conditional liberty one desires" (as in parole release decisions), Justice Stevens viewed capital clemency decisions as depriving a death-row inmate "of life that he still has, rather than any conditional liberty he desires."[378] Justice O'Connor also concurred in that case and concluded that the Due Process Clause safeguards capital clemency proceedings.[379] While *Greenholtz* is premised on the proposition that a liberty interest may be subsumed by a valid conviction,[380] O'Connor reasoned that a life interest cannot be extinguished in any living person, even if the state has lawfully condemned him to die.[381]

Sarah French Russell posits that "relying on *Ford* and *Woodard*, courts might use procedural due process analysis in considering the scope of *Graham*'s mandate" as opposed to a purely Eighth Amendment framework.[382] The Court's apparent hybrid Eighth Amendment

372. *Id.* at 425 (Powell, J., concurring).
373. Russell, *supra* note 143, at 418; *Ford*, 477 U.S. at 425 (Powell, J., concurring).
374. *Ford*, 477 U.S. at 428 (O'Connor, J., concurring).
375. *Id.* at 427–28 (reasoning that the Eighth Amendment did not create a substantive right and "the Due Process Clause [did] not independently create a protected interest," but mandatory language in the state statute gave rise to a state-created liberty interest).
376. *See* Russell, *supra* note 143, at 416–17.
377. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 290 (1998) (Stevens, J., concurring in part and dissenting in part).
378. *Id.* at 291–92 (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9 (1979)).
379. *Id.* at 288–89 (O'Connor, J., concurring).
380. *Greenholtz*, 442 U.S. at 7.
381. *Woodard*, 523 U.S. at 288–89 (O'Connor, J., concurring).
382. Russell, *supra* note 143, at 418.

and Due Process Clause analysis in capital cases logically extends to post-*Miller* youth offender parole hearings.[383] *Miller* stands for the proposition that an LWOP sentence for a juvenile is like a death sentence for an adult.[384] Both lines of precedent that were foundational to *Miller* support this analogy.[385] First, *Roper* outlawed the death penalty for juvenile offenders and *Graham* likened LWOP for a juvenile to a death sentence.[386] Second, like the Supreme Court's death penalty jurisprudence, which has repeatedly recognized that death is different and requires at least individualized consideration of each defendant,[387] "children are different too" and can only be condemned to spend the rest of their lives in prison in "rare" circumstances.[388] Where a child is permanently deprived of his liberty before he even becomes an adult, the deprivation implicates both a life interest and a liberty interest, so the necessity of due process is strengthened by Eighth Amendment considerations.[389]

Considered together, the Eighth Amendment and the Due Process Clause compel finding a constitutionally created liberty interest in release for juvenile offenders who have matured and rehabilitated.

c. Existing Supreme Court precedent supports finding a constitutionally created liberty interest flowing from the Due Process Clause itself

Precedent contemplating decisions affecting the conditions of confinement supports recognizing a constitutionally created liberty interest in release for transiently immature juvenile offenders arising from the Due Process Clause alone.[390] The standard for finding a

383. *See* Miller v. Alabama, 567 U.S. 460, 470 (2012).

384. *See id.*; Graham v. Florida, 560 U.S. 48, 69–70 (2010) (reasoning that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences" because even though there is no actual execution, the life sentence "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration").

385. *See Miller*, 567 U.S. at 470.

386. Roper v. Simmons, 543 U.S. 551, 568 (2005); *Graham*, 560 U.S. at 78.

387. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Lockett v. Ohio, 438 U.S. 586, 603–04 (1978).

388. *Miller*, 567 U.S. at 479–81.

389. *Cf.* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring).

390. *See* Vitek v. Jones, 445 U.S. 480, 494–95 (1980) (an inmate's "involuntary commitment to a mental hospital" implicated a liberty interest protected by the Due Process Clause); Washington v. Harper, 494 U.S. 210, 221–22 (1990) (finding a liberty interest in avoiding the "unwanted administration of antipsychotic drugs").

liberty interest inherently protected by the Fourteenth Amendment is vague; the Court has stated that the deprivation must be "so severe in kind or degree"[391] or must "exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force."[392]

Denial of parole for a juvenile offender who demonstrates maturity and rehabilitation is a deprivation severe enough to establish a constitutionally created liberty interest because the decision extends his sentence past the time when *Montgomery* demands he be released.[393] In *Vitek*, a state's decision to involuntarily commit an inmate to a mental hospital implicated a constitutionally created liberty interest because changes to the conditions of confinement that exceed the sentence imposed are "sufficient to invoke the protections of the Due Process Clause."[394] Confinement in a psychiatric institution was more severe and stigmatizing than regular incarceration, so it exceeded the scope of the inmate's prison sentence such that it implicated a liberty interest.[395] In the case of juvenile offenders, only permanently incorrigible individuals may be sentenced to LWOP, so the only lawful life sentences for transiently immature defendants are those that result in release upon a showing of maturity and rehabilitation.[396] Thus, a denial of parole for a juvenile offender who has matured and rehabilitated (and therefore cannot be categorized as irreparably corrupt) effectively extends his confinement beyond what the Eighth Amendment permits.[397]

Further, similar to *Vitek*, where due process was required to ensure a reliable finding that the inmate was mentally ill prior to the involuntary commitment, procedural protections in youth offender parole processes are required to protect against an erroneous determination that the parole applicant has not matured and

391. Sandin v. Conner, 515 U.S. 472, 497 (1995) (Breyer, J., dissenting).

392. *Id.* at 484. Some courts have read *Sandin* and its progeny as leaving *Greenholtz* untouched insofar as it found no constitutionally created liberty interest in parole, but, as discussed above, *Greenholtz*'s holding cannot be stretched to reach post–*Graham*-*Miller* youth offender parole hearings. *See, e.g.*, Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996); Hall v. Henderson, 672 A.2d 1047, 1051 (D.C. 1996). *But see, e.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

393. *See Vitek*, 445 U.S. at 493; Montgomery v. Louisiana, 577 U.S. 190, 212 (2016).

394. *Vitek*, 445 U.S. at 493–94.

395. *See id.* at 494.

396. Leslie, *supra* note 47, at 385.

397. Russell, *supra* note 143, at 375–76, 380–83.

rehabilitated and is thus ineligible for parole.[398] Parallel to *Vitek*, in *Greenholtz* the Court reasoned that unlike parole revocation, which depends on the factual predicate of a parole violation, there is "no set of facts which, if shown, mandate a decision favorable to the individual" in discretionary parole review.[399] But the same cannot be said of youth offender parole processes, where the factual determination that a juvenile offender has matured and rehabilitated mandates release under *Montgomery*.[400] Because categorizing a juvenile offender as transiently immature requires release, procedural protections must attach to ensure that the facts relevant to that determination are elicited and considered.[401]

Finally, in her dissent in *Sandin*, Justice Ginsburg reasoned that she would have found a liberty interest in avoiding solitary confinement arising from the Constitution because the punishment severely alters incarceration in that it "deprives prisoners of privileges for protracted periods . . . [and] also stigmatizes them and diminishes parole prospects."[402] Although reduced parole prospects were just one factor Justice Ginsburg considered, her dissent acknowledges that the alteration of parole eligibility as a check on an inmate's sentence may be a deprivation severe enough to directly implicate the Due Process Clause.[403]

Denial of parole for a juvenile offender who demonstrates maturity and rehabilitation is a deprivation so severe that youth offender parole processes are inherently protected by the Due Process Clause.

4. The Analysis for Finding a State-Created Liberty Interest in Release Once a Juvenile Offender Has Matured and Rehabilitated

This section proposes possible analyses for finding a state-created liberty interest in release for juvenile offenders who demonstrate maturity and rehabilitation. Section II.B.4.a discusses an overlap in the Court's two categories of liberty interests that arises in the context of

398. *See Vitek*, 445 U.S. at 495.

399. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9–10 (1979); *see also* Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (requiring "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior" prior to parole revocation).

400. *See* Montgomery v. Louisiana, 577 U.S. 190, 209–10, 212 (2016).

401. *Cf. Morrissey*, 408 U.S. at 484.

402. *See* Sandin v. Conner, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting).

403. *See id.*

youth offender parole hearings: the state-created liberty interest analysis considers whether a state statute or regulation has created a protectible expectation of parole, but courts have also applied this analysis in finding an expectation created by *Miller-Graham*'s constitutional mandate. Section II.B.4.b undertakes the analysis for finding a state-created liberty interest in parole release under the *Greenholtz-Olim* statutory language approach, using the Missouri parole statutes considered in *Brown* as a case study. Section II.B.4.c analyzes the Missouri parole statutes under the *Morrissey-Sandin* nature of the deprivation approach.

Even if there is no constitutionally created liberty interest, an interest may be derived from another source, such as a statute or regulation, that creates an expectation of release.[404] The test for a state-created liberty interest has vacillated over the years and the proper analysis for whether there is a state-created liberty interest in parole release remains unclear.[405] If *Greenholtz-Olim* still controls, courts must look to the state statute at issue to determine if it creates an expectation of parole.[406] If *Morrissey-Sandin* governs, courts must assess whether the parole suitability decision imposes a "grievous loss" or "atypical and significant hardship" compared to ordinary prison life.[407]

a. Borrowing the state-created liberty interest analysis to find a liberty interest based on the Eighth Amendment or state constitutional analogues

The state-created liberty interest analysis, which hinges on whether state law created a protectable expectation of parole, maps on to the question of what procedural protections *Graham* and *Miller* mandate, even though the Eighth Amendment right announced in those cases is not a state statute or regulation.[408]

In finding that juvenile offenders have a "liberty interest in the proper application of *Graham-Miller* principles" under the federal and Iowa constitutions, the Iowa Supreme Court reasoned that "[j]ust as the mandatory language in a parole statute may give rise to a constitutionally protected liberty interest . . . [*Miller*] imposes a

404. *See, e.g.*, *id.* at 477 (majority opinion).
405. Ball, *supra* note 194, at 944.
406. *See id.* at 948.
407. *See id.* at 944, 948.
408. *See* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 776 (Iowa 2019).

constitutionally based mandatory requirement on the Board to provide a juvenile offender with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[409] The court appeared to recognize that *Graham-Miller* created a "constitutional liberty interest," but analogized *Miller*'s mandate to the mandatory language analysis used to find a state-created liberty interest in *Greenholtz*.[410]

Similarly, the line between a state-created and a constitutionally created liberty interest blurs when the liberty interest is based on a state constitutional right.[411] The Massachusetts Supreme Court relied on *Greenholtz*'s conclusion that a state parole statute may create a "protectible expectation of parole" in finding that even though the Massachusetts parole statute did not create a liberty interest, the state constitution did.[412] Thus, even if *Greenholtz* forecloses finding a constitutionally created liberty interest in parole release for juvenile offenders under the federal Constitution, the same result is not necessarily mandated under a state constitution's Eighth Amendment analogue if it is interpreted to comport with *Miller*.[413] Ultimately, whether this is a constitutionally created or state-created liberty interest—or perhaps a penumbra between the two—is primarily a categorical distinction.[414] Once a liberty interest is identified via either approach, the next step is to decide what procedures are required to protect *that interest*, and for juvenile offenders, the Eighth Amendment–based interest is the same regardless of the analysis used to recognize it.[415] The state-created liberty interest analysis lends itself to finding that *Miller* created a protectable expectation of parole release for transiently immature juvenile offenders.

409. *See id.* at 777–78.

410. *Id.*; Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9–10 (1979).

411. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 357 (Mass. 2015); *Bonilla*, 930 N.W.2d at 777.

412. *Diatchenko*, 27 N.E.3d at 357.

413. *See id.*

414. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 428 (1986) (O'Connor, J., concurring) (identifying two categories of liberty interests).

415. *Greenholtz,* 442 U.S. at 12 ("[D]ue process 'is flexible and calls for such procedural protections as the particular situation [requires].'" (quoting Morrissey v. Brewer, 408 U.S. 471, 481, (1972))).

b. An analysis of Missouri's youth offender parole statute under the Greenholtz-Olim *statutory language approach*

This section undertakes a statutory language analysis of the Missouri laws governing parole for youth offenders.[416] Although this Note argues that *Greenholtz* is inapplicable to youth offender parole hearings insofar as it foreclosed recognizing a constitutionally created liberty interest in parole, the Court's statutory analysis could still be applied to recognize a state-created liberty interest.[417] Under *Greenholtz*, courts look for mandatory language in a state statute or regulation that creates an expectation of release.[418] The slightly different articulation set forth in *Olim* considers whether the state placed "substantive limitations on official discretion."[419]

Missouri courts have held that the state's general parole statute does not create a liberty interest because its permissive language gives the Missouri Board of Probation and Parole "almost unlimited discretion."[420] At a youth offender parole hearing in Missouri, the Board is required to consider the same ten factors the factfinder considers during the sentencing phase, including the youth-related considerations laid out in *Miller*.[421] Additionally, the Board must consider five independent factors specific to youth offender parole decisions.[422]

Unlike the Nebraska parole statute in *Greenholtz*, there is no language in any of the Missouri statutes that requires release upon a finding of certain facts.[423] While the Missouri laws governing youth offender parole hearings mandate consideration of several factors, they

416. *See id.* at 12.

417. *Id.* at 11–12.

418. *See id.* at 12.

419. Olim v. Wakinekona, 461 U.S. 238, 249 (1983).

420. Anselmo v. Mo. Bd. of Prob. & Parole, 27 S.W.3d 831, 833 (Mo. Ct. App. 2000); Winfrey v. Mo. Bd. of Prob. & Parole, 521 S.W.3d 236, 240 (Mo. Ct. App. 2017) (noting that Missouri law allows release of an inmate if "there is a reasonable probability that the inmate can be released without detriment to community or himself"); MO. ANN. STAT. § 217.690 (West 2021).

421. Hicklin v. Schmitt, 613 S.W.3d 780, 785 (Mo. 2020); MO. ANN. STAT. §§ 565.033, 558.047 (West 2016).

422. MO. ANN. STAT. § 558.047 (West 2016) (listing the independent factors: (1) rehabilitation; (2) growth and maturity; (3) acceptance of accountability; (4) record in prison; and (5) "[w]hether the person remains the same risk to society as he or she did at the time of initial sentencing"); *see also Hicklin*, 613 S.W.3d at 788–89 (requiring consideration of youth).

423. *See Greenholtz*, 442 U.S. at 11–12 ("[T]he structure of the [Nebraska] provision together with the use of the word 'shall' binds the Board Parole to release an inmate unless any one of the four specifically designated reasons are found."); MO. ANN. STAT. § 217.690 (West 2021) (general parole statute); MO. ANN. STAT. § 565.033 (West 2016) (youth offender sentencing procedures); *id.* § 558.047 (youth offender parole procedures requiring consideration of sentencing factors and five independent factors).

do not dictate a certain outcome if those factors are met.[424] Thus, on their face, the youth-specific laws do not expressly limit the broad discretion granted to the Board under the general parole statute.[425] However, because the youth offender parole statute was enacted to cure a *Miller* problem,[426] it must be applied to comport with *Miller*, which necessarily implies a requirement that a youth offender must be released upon a finding that he has matured and rehabilitated.[427] Because the Board's discretion is cabined such that it may not deny release once a parole applicant demonstrates maturity and rehabilitation, this gives rise to a protectable expectation of parole.[428]

In *Bonilla*, the court applied the principle of constitutional avoidance in interpreting the Iowa parole statutes at issue "in a fashion to satisfy the constitutional commands of *Graham-Miller*."[429] The court reasoned that the mandatory statutory language directing the Board to release inmates who are not a danger to public safety should "be interpreted to require release when a juvenile offender demonstrates maturity and rehabilitation" to align with *Miller*.[430] Further, the statutory requirement that the Board consider the seriousness of the offense could be applied in a constitutional manner by using the crime as "a baseline to measure rehabilitation," but not as a barrier to release for juvenile offenders.[431]

Although, unlike Iowa law, Missouri's general parole statute does not limit the Board's discretion to deny release, Missouri law requires consideration of youth factors where the statutes at issue in *Bonilla* did

424. *See* MO. ANN. STAT. §§ 565.033, 558.047 (West 2016).

425. *Id.*; MO. ANN. STAT. § 217.690 (West 2021); *see also* Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 463 (1989) (stating that statutes and regulations must "contain explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest").

426. *See* Brown v. Precythe, 46 F.4th 879, 892 n.4 (8th Cir. 2022) (Kelly, J., dissenting); MO. ANN. STAT. § 558.047 (West 2016).

427. *Cf.* Flores v. Stanford, No. 18-CV-2468, 2019 WL 4572703, at *10 (S.D.N.Y. Sept. 20, 2019); *see also* Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 773 (Iowa 2019) (finding that statutory language directing a parole board to release an applicant upon finding that "there is reasonable probability that the person can be released without detriment to the community or to the person" should be "interpreted to require release when a juvenile offender demonstrates maturity and rehabilitation").

428. *See Greenholtz*, 442 U.S. at 12–13.

429. *Bonilla*, 930 N.W.2d at 773 (noting that the principle of constitutional avoidance directs courts to strive for a statutory interpretation that passes constitutional muster).

430. *Id.*

431. *Id.* at 772–74.

not.[432] The court in *Bonilla* reasoned that the statutes were constitutional so long as the Board applied them through a "*Graham-Miller* lens," and similarly a *Graham-Miller* gloss on Missouri law requires the Board to grant release if consideration of the specified youth-related factors reveals that the juvenile offender has matured and rehabilitated.[433] This again merges the argument that there is a constitutionally created liberty interest under the Eighth Amendment with the entitlements analysis the Court has typically applied to local law.[434]

There is an alternative argument that because *Miller* and *Montgomery* state that only the rare irreparably corrupt juvenile may be condemned to serve life in prison, proper consideration of rehabilitation and youth-related evidence in parole hearings (as required by Missouri law) will result in the vast majority of juvenile offenders being freed, and this gives rise to an expectation of release.[435] In *Dumschat*, the Court rejected an argument that because Connecticut had historically granted most commutation applications, it created an expectation of release sufficient to implicate due process.[436] But youth offender parole hearings are distinguishable from *Dumschat* because, unlike commutations, the expectation that only rare juveniles will die in prison is not premised on a retrospective look at historical discretionary decisions but on *Miller* and *Montgomery*'s prospective promise.[437] Parole is not a privilege but a substantive right for all but the rare juvenile offender who never matures and rehabilitates, and Missouri's statutory requirement that the Board consider rehabilitation evidence creates an expectation of release for parole-eligible juvenile offenders.[438]

The court in *Brown* never addressed the question of whether there was a state-created liberty interest at stake in youth offender parole

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432. *Compare* MO. ANN. STAT. §§ 565.033, 558.047 (West 2016), *with* IOWA CODE ANN. § 906.4 (West 2010).

433. *See Bonilla*, 930 N.W.2d at 774.

434. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 27 N.E.3d 349, 357 (Mass. 2015); *Bonilla*, 930 N.W.2d at 777.

435. *See* Leslie, *supra* note 47, at 390 ("[I]n light of the empirical fact that nearly all youthful offenders reform, a constitutionally compliant release mechanism would result in the release of nearly all juvenile offenders."); Montgomery v. Louisiana, 577 U.S. 190, 212 (2016) (noting that *Miller* held that LWOP "is disproportionate for the vast majority of juvenile offenders").

436. Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) ("A constitutional entitlement cannot 'be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past.'" (quoting Leis v. Flynt, 439 U.S. 438, 444 n.5 (1979))).

437. *Montgomery*, 577 U.S. at 212.

438. *See* Leslie, *supra* note 47, at 390; MO. ANN. STAT. § 558.047 (West 2016).

hearings,[439] and even absent mandatory language in the state's laws, a court could find an interest in release on the basis that *Miller-Montgomery* operate to limit the Board's discretion to deny youth offenders release.[440]

c. An analysis of Missouri's youth offender parole statute under the Morrissey-Sandin *nature of the deprivation approach*

Given that there is no mandated outcome in the relevant Missouri statutes, which courts have historically looked for to find a state-created liberty interest under *Greenholtz*, the more favorable analysis for youth offenders is likely *Sandin-Morrissey*'s nature of the deprivation approach.[441] In *Morrissey*, the Court analyzed whether there was liberty interest in parole revocation decisions by looking to the nature of the interests involved.[442] *Greenholtz* followed and looked to the statutory language instead, but in *Sandin* the Court abrogated the *Greenholtz* approach and returned to considering the nature of the deprivation.[443] The rule in *Sandin* was that a state could create a liberty interest where the deprivation "impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[444]

Morrissey is particularly relevant because it contemplated the parole process.[445] *Greenholtz* distinguished *Morrissey* as specific to parole revocation decisions and inapplicable to parole release determinations, but post-*Miller* youth offender parole processes are more like the revocation hearings in *Morrissey* than the release decisions in *Greenholtz*.[446] Under *Morrissey*, a parolee has a "conditional liberty interest" because the government creates an expectation that parole will only be revoked upon a factual finding that the parolee violated the conditions of his release.[447] Similarly, there is a conditional liberty

439. Brown v. Precythe, 46 F.4th 879, 890 (8th Cir. 2022).

440. *See* Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 772–74 (Iowa 2019).

441. Sandin v. Conner, 515 U.S. 472, 480–81, 486 (1995); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

442. *Morrissey*, 408 U.S. at 481 ("Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'").

443. Ball, *supra* note 194, at 945.

444. *Sandin*, 515 U.S. at 484.

445. *Morrissey*, 408 U.S. at 473–74.

446. *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 9 (1979).

447. *Morrissey*, 408 U.S. at 479–80; *see also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (reasoning that if a state grants a prisoner a right or expectation that adverse action will only be

interest for juvenile offenders who are entitled to release provided they demonstrate maturity and rehabilitation, so a denial of release amounts to a "grievous loss" that must be predicated upon a finding that they have not matured and rehabilitated.[448] Parole release is an entitlement conditioned on a finding of maturity and rehabilitation, not a "mere hope."[449]

The analysis is messier under *Sandin*, which framed its test as a comparison between the challenged change in prison conditions and ordinary prison life.[450] At least one court has expressed the view that restraint will "always be an 'ordinary incident of prison life,'" so if a prisoner's confinement continues because he was denied parole, this will never amount to "an 'atypical' or 'significant hardship' as compared to other prisoners."[451] But, given the developmental harms of growing up in prison,[452] a denial of parole for a juvenile offender is a "significant hardship" when compared to denial of parole for adult offenders who enter prison after they have lived free lives as adults.[453]

Additionally, in *Wilkinson* the Court applied *Sandin* and found that a prisoner's transfer to a supermax prison was an "atypical and significant hardship" in part because transfer would render an inmate ineligible for parole.[454] Thus, denial of parole eligibility is at least an indicia of a significant hardship, and it follows that a juvenile offender who continues to be incarcerated even after he has demonstrated maturity and rehabilitation suffers a significant hardship compared to an inmate who is properly granted release once he has matured and rehabilitated.[455] Further, *Sandin* characterized *Wolff* and its progeny as finding a liberty interest only where the state's action "will inevitably affect the duration of [an inmate's] sentence," as the loss of good time

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taken upon the occurrence of specified behavior, "the determination of whether such behavior has occurred becomes critical" and minimal procedural protections are required).

448. *See Morrissey*, 408 U.S. at 481, 483–84.

449. *Compare Morrissey*, 408 U.S. at 479–82, *with Greenholtz*, 442 U.S. at 9, 11.

450. *See* Sandin v. Conner, 515 U.S. 472, 484 (1995).

451. Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996).

452. *See, e.g.*, RICHARD MENDEL, WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE 4–5 (2022), https://www.sentencingproject.org/app/uploads/2023/03/Why-Youth-Incarceration-Fails.pdf [https://perma.cc/WC22-FUUP].

453. *See* Miller v. Alabama, 567 U.S. 460, 470, 476–77 (2012) (noting that *Graham* likened juvenile life sentences to capital punishment).

454. Wilkinson v. Austin, 545 U.S. 209, 223–24 (2005).

455. *See id.*; *see also* Ball, *supra* note 194, at 946–47 ("By [*Wilkinson*'s] reasoning, eligibility for prospective parole release is sufficiently weighty to create a protectible liberty interest.").

credits did in *Wolff*.[456] Whereas in *Sandin* the challenged disciplinary decision could only potentially impact a parole suitability finding, the decision to grant or deny parole itself "inevitably affect[s]" how long a juvenile offender will spend in prison, similar to *Wolff*.[457]

State parole statutes give rise to a liberty interest in release for youth offenders who demonstrate maturity and rehabilitation because denial of release for all but the rare juvenile offender who never matures is a "grievous loss" and an "atypical and significant hardship."[458]

CONCLUSION

Recognizing a liberty interest in release once a juvenile offender demonstrates that he has matured and rehabilitated is the crucial first step in securing necessary procedural protections in youth offender parole determinations. As this Note lays out, there are several overlapping analyses that compel finding this liberty interest, most of which hinge on an acknowledgment that post-*Miller* youth offender parole hearings are of constitutional magnitude.

In reflecting on the importance of recognizing a liberty interest at stake in youth offender parole processes, it is useful to think of Thomas Franklin Bowling. Mr. Bowling is a Black man who received two life sentences in 1988 for murder, robbery, marijuana possession, and the use of a firearm when he was just seventeen.[459] Mr. Bowling grew up in prison and became parole-eligible in 2005 but was denied release that year and every year in the decade that followed.[460] The Board almost exclusively cited the seriousness of his crime as the reason for its denials.[461]

In 2012, the Supreme Court decided *Miller*, announcing a sea change juvenile sentencing law that appeared to ignite a meaningful hope of release for youth offenders like Mr. Bowling.[462] But in 2012, as in the years prior, Mr. Bowling was denied parole, and in 2013,

456. Sandin v. Conner, 515 U.S. 472, 487 (1995); Wolff v. McDonnell, 418 U.S. 539, 558, 561 (1974); *cf.* Ball, *supra* note 194, at 948 (speculating that repeated denials of parole based on the same facts might constitute an atypical and significant hardship under *Sandin*).

457. *See Sandin*, 515 U.S. at 487.

458. *See id.* at 480–81, 486; Morrissey v. Brewer, 408 U.S. 471, 473–74, 482 (1972).

459. *See* Bowling v. Dir., Va. Dep't of Corr., No. 7:17CV00142, 2018 WL 521592, at *1 (W.D. Va. Jan. 23, 2018); Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 194 (4th Cir. 2019); VA. PAROLE BD., PAROLE DECISIONS FOR APRIL, 2019, WITH REASONS (2019), https://vpb.virginia.gov/files/1159/vpb-decisions-apr19.pdf [https://perma.cc/3PBP-3M5H].

460. *Bowling*, 920 F.3d at 194–95.

461. *Id.* at 195.

462. Miller v. Alabama, 567 U.S. 460, 465, 479 (2012).

2014, 2015, and 2016, he appeared before the Board again only to be denied release because of a crime he committed as a teenager, a fact frozen in time.[463] After his twelfth denial in 2016, presumably fed up with chasing the dangling carrot that his parole eligibility had become, Mr. Bowling, proceeding pro se, filed a petition for writ of habeas corpus alleging that the Board's repeated denials violated his rights under *Miller*.[464] The district court granted the government's motion to dismiss,[465] and the Fourth Circuit affirmed on the basis that the only thing Mr. Bowling was constitutionally entitled to was the chance to show up at his parole hearings annually to be told that he was unsuitable for parole because of a terrible thing he did as a child.[466]

Mr. Bowling may have grown up in a "brutal [and] dysfunctional" home environment or suffered a traumatic childhood like Evan Miller, or his crime may have been a product of peer pressure like Kuntrell Jackson, the second plaintiff in *Miller*.[467] Sidney Roberts, a named plaintiff in *Brown*, functioned at a sixth-grade level and was under the influence of alcohol and marijuana when he committed his crime at age seventeen.[468] Further, both of his parents used cocaine and his father physically abused him and his mother.[469] Theron Roland, another named plaintiff in *Brown*, began using alcohol at eleven and drugs at fourteen and was following peers when he committed his offense.[470]

But in prison, Mr. Bowling and the four named plaintiffs in *Brown* grew up.[471] Through hard work and natural aging, they matured and rehabilitated like Henry Montgomery, who grew from "a troubled, misguided youth to a model member of the prison community."[472] As Justice Sotomayor wrote to Brett Jones, despite their crimes, what these youth offenders "do[] in life matters."[473] But in Mr. Bowling's case, for over fifteen years the Board refused to recognize his maturity

463. *Bowling*, 920 F.3d at 195.
464. *See Bowling*, 2018 WL 521592, at *1, *3.
465. *Id.* at *1.
466. *Bowling*, 920 F.3d at 198–200.
467. *See Miller*, 567 U.S. at 465–68, 477.
468. Brown v. Precythe, No. 17-CV-4082, 2019 WL 3752973, at *3 (W.D. Mo. Aug. 8, 2019).
469. *Id.*
470. *Id.*
471. *See Brown*, 2019 WL 3752973, at *2–4 (recognizing that all four named plaintiffs had robust rehabilitative records and the Board even made findings that Mr. Roberts had matured and Norman Brown was not dangerous); VA. PAROLE BD., *supra* note 459, at 1 (showing that Mr. Bowling must have matured and rehabilitated because he was ultimately granted release).
472. *See Brown*, 2019 WL 3752973, at *2–4.; Montgomery v. Louisiana, 577 U.S. 190, 212–13 (2016).
473. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1341 (2021).

and rehabilitation because of a crime he committed when his brain was still developing.[474]

In 2019, when Mr. Bowling was forty-eight years old, the Board finally granted him release.[475] After what must have been a painful fifteen years of denials and more than thirty years of surviving in prison, he earned a second chance.[476] Youth offenders with records showing maturity and rehabilitation like Mr. Bowling cannot be constitutionally incarcerated until some indeterminate—and potentially illusory—date when the government decides they have suffered the dehumanizing conditions of incarceration long enough.[477] These youth offenders are not the rare irreparably corrupt juveniles who may be constitutionally denied release; almost no one is.[478] But denied release they are.[479]

All youth offenders are entitled to release at the first parole hearing where they make a showing of maturity and rehabilitation,[480] but the process reliably fails them.[481] It failed Mr. Bowling for fifteen years of his life.[482] Recognizing a liberty interest in parole release for youth offenders who mature and rehabilitate will not eradicate unconstitutional decision-making by parole boards, but it will at least open the door to procedural protections to mitigate this constitutional failure.[483]

A judicious application of Supreme Court precedent compels recognizing a liberty interest.[484] The next circuit court to decide the issue should split from *Brown* and *Bowling* and hold that states must grant parole release to youth offenders who demonstrate maturity and rehabilitation. Youth offenders grow into mature adults, and they deserve to experience "some years of life outside of prison walls," no matter what awful mistakes they made as children.[485]

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474. *See* Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 195 (4th Cir. 2019); VA. PAROLE BD., *supra* note 459, at 1.

475. *See* VA. PAROLE BD., *supra* note 459, at 1.

476. *See id.*

477. *See, e.g.*, Brown v. Precythe, 46 F.4th 879, 884 (8th Cir. 2022).

478. *See, e.g.*, Brown v. Precythe, No. 17-CV-4082, 2019 WL 3752973, at *2–4 (W.D. Mo. Aug. 8, 2019); Leslie, *supra* note 47, at 390.

479. *See, e.g.*, *Brown*, 2019 WL 3752973, at *2–4.

480. *See* Montgomery v. Louisiana, 577 U.S. 190, 212 (2016); Leslie, *supra* note 47, at 385.

481. *See, e.g.*, Bowling v. Dir., Va. Dep't of Corr., 920 F.3d 192, 195 (4th Cir. 2019).

482. *Id.*

483. *See* Harrington, *supra* note 23, at 1220.

484. *See, e.g.*, Greiman v. Hodges, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015).

485. *See Montgomery*, 577 U.S. at 213.