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## No Path to Redemption: Evaluating Texas's Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison

Lindsey Linder  
lindseydlander@gmail.com

Justin Martinez  
Texas Criminal Justice Coalition, jmartinez@texascjc.org

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## ARTICLES

### **NO PATH TO REDEMPTION: EVALUATING TEXAS'S PRACTICE OF SENTENCING KIDS TO DE FACTO LIFE WITHOUT PAROLE IN ADULT PRISON**

**LINDSEY LINDER &  
JUSTIN MARTINEZ\***

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\* Lindsey Linder is a Senior Policy Attorney for the Texas Criminal Justice Coalition (TCJC), overseeing youth justice and women's justice initiatives. She joined TCJC in 2015 as a member of the Texas Legislative Internship Program and continued to support TCJC while completing law school, receiving her J.D., *cum laude*, from Southern University in 2016. In 2020, Ms. Linder was named an Austin Under 40 award finalist for successfully advocating for policies that will better prevent crime, support survivors, and foster safe, healthy Texas communities.

Justin Martinez is the Bexar County Justice Project Advocate at TCJC, where he fights for decarceration reforms throughout San Antonio. He previously served as a Policy Associate at TCJC, specifically focusing on the devastating impacts of de facto life sentences on youth. Mr. Martinez is pursuing his Master of Arts in Legal Studies, with a Paralegal Certification, at Texas State University.

This article is dedicated to the staff of the Texas Criminal Justice Coalition, who tirelessly seek to end mass incarceration and foster safer Texas communities. Their work to elevate the voices and experiences of people behind bars has opened the door for "Second Look" advocacy and has made this article possible. The authors would also like to thank the many experts, advocates, family members, and "Second Lookers" that contributed to this paper.

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## INTRODUCTION

This article examines de facto life sentences and urges reformers to continue addressing and advocating for sentencing and punishment schemes that take into account the emerging science behind adolescent brain development, as well as a show of growth and maturity among people incarcerated for crimes committed as youth. Part I examines the history of mass incarceration and its extensive impact on justice system-involved youth, along with more recent reformation attempts. Part II examines how the unfounded “superpredator” theory in the 1990s led to legislation and court practices that had destructive consequences when applied to children.

Part III provides an overview of de facto life sentences (involving a sentence of nearly forty years served); it introduces the science behind adolescent development; and examines the human and fiscal costs of juvenile incarceration. Part IV walks through relevant United States Supreme Court rulings and outlines important conclusions reached regarding the need for psychological and neuroscientific research, which should shape how juveniles are sentenced. This section also demonstrates the ever-changing nature of adolescence and how such nature must prevent fundamentally inappropriate permanent sentences—like the death penalty and de facto life sentences—from being applied to juveniles.

Part V examines what *Miller v. Alabama* left unanswered: while mandatory life without parole sentences for juveniles were ruled unconstitutional, how are de facto life sentences impacted by the Court’s proportionality concern, and what role, if any, do state legislatures have in regard to resolving the constitutionality concerns that de facto life sentences raise? Part VI examines “Second Look” efforts undertaken by Texas, including in a national context, and provides more information about the individuals impacted by de facto life sentences, with personal stories from “Second Lookers.”

I. A BRIEF HISTORY OF MASS INCARCERATION  
AND MOVEMENT TOWARDS REFORM

The United States is responsible for nearly twenty percent of the world’s prisoners, despite having only five percent of the world’s

population.<sup>1</sup> America incarcerates more of its citizens than any other country in the world.<sup>2</sup> In 1972, the incarcerated population in the United States totaled less than 200,000 people.<sup>3</sup> Today, more than 2.2 million people are incarcerated across the country,<sup>4</sup> and nearly seven million people are under “correctional control,” which includes probation and parole supervision.<sup>5</sup> This is largely a policymaking problem with significant ramifications—“[c]hanges in law and policy, not changes in crime rates, explain most of this increase.<sup>6</sup> The results are overcrowding in prisons and fiscal burdens on states, despite increasing evidence that large-scale incarceration is not an effective means of achieving public safety.”<sup>7</sup>

One example of policymaking with severe consequences is the War on Drugs, initiated in the 1980s.<sup>8</sup> The number of people incarcerated in the United States for a drug offense skyrocketed from 40,900 in 1980 to 452,964 in 2017.<sup>9</sup> As a result, “there are more people behind bars for a drug offense than the number of people who were in prison or jail for any crime in 1980.”<sup>10</sup> The War on Drugs was followed by other “tough on

1. Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 5, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/J2FT-GVU4>].

2. See ROY WALMSLEY, *WORLD PRISON POPULATION LIST 2* (Inst. Criminal Pol’y Res. ed., 12th ed. 2018) (revealing in a 2018 report that the United States had the highest number of known prisoners at 2.1 million, as well as the highest prison population rate of 655 per 100,000 people).

3. See U.S. DEP’T OF JUST., *PRISONERS 1925-81* at 2 (Dec. 1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf> [<https://perma.cc/RV66-RXWS>] (showing a total United States prison population of 196,092 in 1972).

4. See *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), <https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/> [<https://perma.cc/CT98-ZNSU>] (noting this statistic indicates a 500% increase in incarceration over the last forty years).

5. See DANIELLA KAEBLE, *PROBATION AND PAROLE IN THE UNITED STATES*, 2016 at 1 (Apr. 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188> [<https://perma.cc/8VV8-GLGR>] (estimating 4,537,100 adults were under community supervision at the end of 2016).

6. See *Criminal Justice Facts*, SENTENCING PROJECT (2019), <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/NR4H-PMBX>] (declaring a significant racial bias in policymaking that disproportionately impacts people of color).

7. *Id.*

8. See *id.* (identifying the War on Drugs as a significant beginning to an era of “tough on crime” policies).

9. See *id.* (attributing this drastic increase to the War on Drugs).

10. See *id.*

crime” campaigns during the 1990s, leading to the expansion of mandatory minimum sentencing, the growth of private prisons, and the explosion of life without parole sentences.<sup>11</sup>

Research has shown that, over time, the dramatic increase in incarceration has had a limited, diminishing effect on crime, and that continuing to incarcerate more people has almost no effect on reducing crime.<sup>12</sup> Furthermore, the United States’ addiction to incarceration is associated with great fiscal and human costs—to individuals, families, communities, and the country.<sup>13</sup> According to the Bureau of Justice Statistics, the cost of mass incarceration in the United States is \$81 billion per year.<sup>14</sup> However, this figure fails to include the costs of policing, court costs, and costs paid by families to support their incarcerated loved ones.<sup>15</sup> A 2017 report from the Prison Policy Initiative estimates the real fiscal costs of mass incarceration to be \$182 billion per year.<sup>16</sup>

But now, after nearly forty years of unprecedented growth, the United States’ prison population is stabilizing.<sup>17</sup> Progressing views on criminal

11. See Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/> [<https://perma.cc/QG4T-NH6K>] (explaining the policies that expanded mandatory minimum sentences and created more funds for prisons often came from politicians like Ronald Regan and Bill Clinton who did not want to be portrayed as soft on crime).

12. See OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUST., *WHAT CAUSED THE CRIME DECLINE?* 2 (Feb. 12, 2015), [https://www.brennancenter.org/sites/default/files/analysis/Crime\\_rate\\_report\\_web.pdf](https://www.brennancenter.org/sites/default/files/analysis/Crime_rate_report_web.pdf) [<https://perma.cc/MG75-D4VV>] (proposing the United States should focus on fostering opportunity rather than policies that destroy human potential).

13. See *id.* (rebutting the claim that the current mass incarceration system protects lives, property, and has caused a significant decrease in crime).

14. TRACEY KYCKELHAHN, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2011 – PRELIMINARY (July 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5050> [<https://perma.cc/F66H-WDJK>].

15. See Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/4NAB-GS5K>] (acknowledging that ignoring these factors hides damning implications of the institutions and actors that benefit from the mass incarceration system).

16. See *id.* (revealing several actors who have an interest in preventing reform such as private prisons, private companies who provide goods to the prisons, bail bondsmen, and certain telephone companies who have monopoly contracts).

17. See David Firestone, *U.S. Figures Show Prison Population is Now Stabilizing*, N.Y. TIMES (June 9, 2001), <https://www.nytimes.com/2001/06/09/us/us-figures-show-prison-population-is-now-stabilizing.html> [<https://perma.cc/BKB7-D3Q7>] (reporting that in 2000 and 2001, the number of prisoners in New York and California fell and the number of prisoners in Texas grew by only 0.5%).

justice have led to more pragmatic approaches to public safety resulting in common-sense policy changes.<sup>18</sup> One discernable example of this shift at the state level can be found in Texas.<sup>19</sup> Texas has historically been viewed as resolutely “tough on crime.”<sup>20</sup> However, in 2007, when Texas faced a projected prison population increase of 17,000 individuals over five years, policymakers chose to invest in alternatives to incarceration.<sup>21</sup> Instead of allocating \$2.5 billion on new prison construction, the legislature invested a fraction of the amount—approximately \$241 million—in probation, parole, and treatment beds.<sup>22</sup> Since then, Texas has closed a record eight prison facilities<sup>23</sup> as crime rates<sup>24</sup> and prison populations continue to fall, and taxpayers have saved billions of dollars.<sup>25</sup> Texas is not an outlier: between 2007 and 2017, thirty-four states reduced both crime and incarceration in tandem, clearly demonstrating that reductions in mass incarceration do not compromise public safety.<sup>26</sup>

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18. See Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, N.Y. TIMES (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [<https://perma.cc/8CTV-XP5F>] (highlighting policy ideas of the 2020 the democratic presidential hopefuls).

19. *Adult and Juvenile Justice System Reforms in Texas*, TEX. CRIM. JUST. COAL. (2017), <https://www.texascjc.org/adult-juvenile-justice-system-reforms-texas> [<https://perma.cc/8XP6-MFAA>].

20. See ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* 6 (1st ed. 2010) (identifying how Texas's approach to handling crime in the late civil rights era became the template for a more fearful and vengeful society).

21. TEX. CRIM. JUST. COAL., *supra* note 19.

22. *Id.*

23. Brandi Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALLAS MORNING NEWS (July 5, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/05/crime-incarceration-rates-falling-texas-closes-record-number-lock-ups> [<https://perma.cc/26A5-FZR8>].

24. *Texas Crime Rates 1960-2018*, DISASTER CTR. (2018), <http://www.disastercenter.com/crime/txcrime.htm> [<https://perma.cc/8EVL-MTB9>].

25. See generally Mark Holden & Brooke Rollins, *Commentary: Texas Saved \$3B Closing Prisons. Why Rehabilitation Works*, STATESMAN (Sept. 25, 2018), <https://www.statesman.com/news/20180209/commentary-texas-saved-3b-closing-prisons-why-rehabilitatn-works> [<https://perma.cc/YHS9-5D72>] (explaining how states that enacted rehabilitation programs cut the prison population and saved millions, if not billions, of dollars in the process).

26. Cameron Kimble & Ames Grawert, *34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/blog/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> [<https://perma.cc/TRF6-3N2>].

## II. HOW WE GOT HERE: THE RISE OF THE “SUPERPREDATOR” THEORY

In the 1980s and early 1990s, an increase in juvenile crime rates called into question the efficacy of rehabilitation-centered juvenile justice practices.<sup>27</sup> In response, legislatures enacted harsher laws to respond to juvenile offenders, embracing the idea of “adult time, adult crime.”<sup>28</sup> The transition towards a more punitive approach to juvenile offending was based on the perception that, at that time, system-involved youth were a “new breed of juveniles . . . for whom violence was a way of life . . . unlike youth of past generations.”<sup>29</sup>

Ultimately, this era saw the creation of the “superpredator” theory, coined by Princeton Professor John Dilulio, who stated that: “America is now home to thickening ranks of juvenile ‘superpredators’—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.”<sup>30</sup> Dilulio warned that “the number of juveniles in custody would increase three-fold in the coming years and that, by 2010, there would be ‘an estimated 270,000 more young predators on the streets than in 1990.’”<sup>31</sup> However, the data during the 1980s and 1990s actually suggests that adults, not juveniles, were responsible for the increase in murder and violent crime rates.<sup>32</sup>

Regardless, due to the pervasiveness of the juvenile “superpredator” theory throughout the country, harsh new state laws exposed youthful offenders to permanent punishments—including life without parole and

27. Danielle Petretta, Comment, *Juveniles Make Bad Decisions, But Are Not Adults & Law Continues to Account for This Difference: The Supreme Court’s Decision to Apply Miller v. Alabama Retroactively Will Have a Significant Impact on Many Decades of Reform and Current Debate Around Juvenile Sentencing*, 37 PACE L. REV. 765, 768 (2017).

28. Daniel Jones, *Technical Difficulties: Why a Broader Reading of Graham and Miller Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN’S L. REV. 169, 174 (2016).

29. U.S. DEP’T OF JUST., 1999 NATIONAL REPORT SERIES: CHALLENGING THE MYTHS 2 (Feb. 2000), <https://www.ncjrs.gov/pdffiles1/ojdp/178993.pdf> [<https://perma.cc/5GLY-BFFZ>].

30. *The “Superpredator” Myth and the Rise of JWLOP*, FAIR PUNISHMENT PROJECT (Apr. 12, 2016), <http://fairpunishment.org/the-superpredator-myth-and-the-rise-of-jwlop/> [<https://perma.cc/W27D-MPNU>].

31. *The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later/> [<https://perma.cc/R89F-FN27>].

32. Petretta, *supra* note 27 at 769.



the death penalty—which were once only reserved for adults.<sup>33</sup> The number of juveniles receiving life without parole sentences reached an all-time high in 1996, at 152 sentences, compared to three juvenile offenders serving that sentence in 1981.<sup>34</sup>

During the rise of the “superpredator” theory, legislatures also enacted laws that permitted a more general use of juvenile transfers to the adult court system.<sup>35</sup> This was accomplished either by lowering the age at which a court could transfer a juvenile to the adult system, or by expanding the types of offenses eligible for transfer—in some cases making crueler sentences mandatory.<sup>36</sup> Separately, some courts began departing from individual considerations of juvenile offenders, instead adopting a more categorical view, while also giving prosecutors more power.<sup>37</sup>

In the end, however, the wave of violent, young “superpredators” never actualized in the way that people like John Dilulio predicted.<sup>38</sup> Dilulio expressed regret about the notion of a new generation of violent young

33. Andrea Huerta, Comment, *Juvenile Offenders: Victims of Circumstance with a Potential for Rehabilitation*, 12 FIU L. REV. 187, 191 (2016).

34. Kristin E. Murrock, Comment, *A Coffin Was the Only Way Out: Whether the Supreme Court's Explicit Ban on Juvenile Life Without Parole for Non-Homicide Offenses in Graham v. Florida Implicitly Bans De Facto Life Sentences for Non-Homicide Juvenile Offenses*, 25 GEO. MASON U. CIV. RTS. L.J. 243, 254 (2015).

35. See Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. CIV. RTS. - CIV. LIBERTIES L. REV. 457, 473 (2012) (discussing treatment of adults and juveniles as the same for example, “[l]egislatures, policy-makers, and courts ceased regarding children as mostly different from adults, and instead, for the first time since juvenile court came into being, began regarding children—at least children who committed very serious crimes and older children—as largely similar to adults.”); see also OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 9 (Dec. 1999), <https://www.ncjrs.gov/pdffiles1/ojdp/178995.pdf> [<https://perma.cc/SV49-PCCD>] (discussing how in many states juvenile courts and criminal courts have concurrent jurisdiction, and when they have concurrent jurisdiction, the prosecutor has the discretion of choosing which court to prosecute the juvenile in).

36. See Guggenheim, *supra* note 35 (providing a list of examples of how the legislature handled the growing problem of juveniles committing violent crimes); see also OFF. OF JUVENILE JUST. & DELINQUENCY PREVENTION, *supra* note 35 at 5 (describing the three ways states changed their laws between 1992 and 1997 to expand the eligibility for criminal court processing, adult correctional sanctioning, and reduced confidentiality protections for juveniles).

37. See Guggenheim, *supra* note 35 (discussing the shift from an individual approach to a categorical handling of juvenile cases).

38. Brief of Amici Curiae in Support of Petitioners at 18-19, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646), 2012 WL 92505.

criminals, admitting that no evidence supported such a theory.<sup>39</sup> Yet, it was not until 2005 that the United States Supreme Court began the slow process of undoing the many wrongs that had resulted from this unsubstantiated, destructive theory.<sup>40</sup>

### III. DE FACTO LIFE SENTENCES

As will be discussed in Part IV, courts have taken incremental steps to provide more protections for youths sentenced to lengthy terms of incarceration.<sup>41</sup> Now, mandatory life without parole sentences for juveniles are found to violate the Eighth Amendment's protections against cruel and unusual punishment.<sup>42</sup> However, lengthy "term-of-years sentences" are permitted (in which a defendant must serve a set number of years); similarly, life *with* parole sentences are permitted, and states are setting minimum terms to be served before initial parole eligibility.<sup>43</sup> States that set lengthy minimums, as well as those that sentence youths to long term-of-years sentences, are creating de facto life sentences.<sup>44</sup> While there is no strict legal definition for what constitutes

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39. *See id.* ("Professor DiIulio, the original proponent of the juvenile superpredator notion and a signatory to this brief, has repudiated the idea and 'expressed regret, acknowledging that the prediction was never fulfilled.'").

40. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who are under the age of 18 when their crimes were committed.").

41. *See Overview of U.S. Supreme Court Decisions*, JUVENILE SENTENCING PROJECT (2020), <https://juvenilesentencingproject.org/us-supreme-court-decisions/> [<https://perma.cc/4K9G-QPER>] (highlighting the four Supreme Court cases which lessened the sentencing range juveniles can be convicted of as a victory for children because it allowed the children to rehabilitate and be released from prison as a new person).

42. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

43. *See id.* (stating judges and juries can give out "a lengthy term of years" sentence to juveniles which would not violate the Eight Amendment as a cruel and unusual punishment); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) ("Allowing those offenders to be considered for parole ensure that juveniles whose crimes reflected only transient immaturity—and who have since mature—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment."); Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT 3 (July 23, 2019), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/EM62-QHUS>] (highlighting twenty-nine states have changed their laws to provide a mandatory minimal incarceration sentence for juveniles who are convicted before they can receive parole eligibility).

44. *Cf. Emily Steiner, Mandatory Minimums, Maximum Consequences*, JUVENILE L. CTR. (Aug. 16, 2017), <https://jlc.org/news/mandatory-minimums-maximum-consequences> [<https://>

“de facto life,” the United States Sentencing Commission defines de facto life imprisonment sentences at lengths of 470 months or more.<sup>45</sup> These sentences do not account for adolescent brain development and culpability, nor do they consider the human and fiscal costs imposed on individuals, families, and communities.<sup>46</sup>

#### A. *The Science of Adolescent Development*

Developmental and scientific research demonstrates that adolescence represents “a period of significant changes in brain structure and functioning.”<sup>47</sup> Furthermore, these changes in brain structure often take place much further into development than what was previously thought.<sup>48</sup> More specifically, when looking at the development of the adolescent brain, four important changes occur that are relevant to considering the justice system-involved youth.<sup>49</sup>

First, in pre-adolescence, the gray matter associated with the prefrontal area of the brain begins to decrease, due to a process referred to as “synaptic pruning.”<sup>50</sup> Synaptic pruning has been shown to aid in the ability of the brain to rewire itself into more “adult patterns” that allow for continued structural brain changes to occur later in life.<sup>51</sup> Second, when adolescents reach puberty, a process begins in which the dopamine transmitters within the brain begin to change and interact with other brain systems that play an important role in the regulation of emotions and

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perma.cc/Y596-K9EL] (“While mandatory minimums negatively impact all individuals involved in the criminal justice system, youth particularly face long-term consequences.”).

45. UNITED STATES SENTENCING COMMISSION, LIFE SENTENCES IN THE FEDERAL SYSTEM 10 (Feb. 2015), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) [https://perma.cc/SEC8-KM MN].

46. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (stating deterrence and retribution will have a lesser effect on juveniles than adults simply because juveniles lack the culpability as compared to adults when committing crimes); see also Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70 (2014) (emphasizing the “now uncontroverted evidence that adolescence is a period of significant changes in brain structure and function.”); Steiner, *supra* note 44 (addressing how the “superpredator” misconception has caused “immeasurable harm to families and communities”).

47. Steinberg, *supra* note 46.

48. *Id.*

49. *Id.*

50. *Id.*

51. See Linda Patia Spear, *Adolescent Neurodevelopment*, 52 J. ADOLESCENT HEALTH S7, S8 (2013) (explaining how synaptic pruning allows for late brain plasticity in adolescents).

impulse control.<sup>52</sup> Third, the connections between the prefrontal cortex and the limbic system that aid in regulating emotion and self-control begin to increase (and can develop well into later stages of adolescence).<sup>53</sup> Lastly, “white matter” increases, which helps to facilitate executive functions of the brain that can include, among others, the ability to weigh decisions and plan ahead.<sup>54</sup>

Each of the above changes, significant on their own, do not adhere to a predictable timetable.<sup>55</sup> As such, the argument that adolescents are just as culpable for crimes as those who are well into adulthood, when brain structure and functioning have stabilized, is problematic—and it runs counter to early views of juvenile culpability.<sup>56</sup> Indeed, when juvenile courts were first established in 1899 in Chicago, Illinois, the developing consensus was that children who commit crimes must be looked at differently than adult offenders, and that with young age comes less accountability and a greater need for rehabilitation.<sup>57</sup> While some practitioners have recognized that developmental considerations should be properly addressed when sentencing a person under the age of 18, it has not been until the prevalence of recent emerging science, coupled with significant rulings by the United States Supreme Court, that the importance of psychological and neuroscientific research should be properly foregrounded in policy reform discussions.<sup>58</sup>

## B. *The Impact of Juvenile Incarceration*

### 1. *The Human Costs*

The human costs associated with de facto life sentences are

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52. Steinberg, *supra* note 46.

53. *Id.*

54. *Id.*

55. *See id.* at 71 (“These structural and functional changes do not all take place along one uniform timetable . . .”).

56. *See id.* at 74 (arguing that juveniles should be “inherently less responsible than adults and punished less harshly”).

57. *See Youth in the Justice System: An Overview*, JUV. L. CTR. (2019), <https://jlc.org/youth-justice-system-overview> [<https://perma.cc/P8PY-N8ZH>] (discussing how juvenile courts differed from adult courts by creating separate probation systems and rehabilitation facilities).

58. *See Spear, supra* note 51 at S10 (“Nevertheless, converging data and emerging consensus in certain instances may be sufficient to help inform adolescent policy discussions.”).

immense.<sup>59</sup> Such sentences can send an unambiguous message to society—and to youths themselves—that youths are beyond redemption and undeserving of a second chance.<sup>60</sup> Furthermore, the hardships associated with lengthy terms of incarceration include permanent separation from loved ones, decades without privacy, meager health care, unpalatable food, monotony, aging in an institution ill-equipped to care for the elderly, and hopelessness.<sup>61</sup>

A 2015 study<sup>62</sup> examining the hardships associated with permanent incarceration as reported by older male inmates serving life without parole sentences found that the responding men were frustrated with the commutation process.<sup>63</sup> Specifically, that the pardons board placed too much emphasis on the seriousness of the crime for which they were sentenced, most often first-degree murder.<sup>64</sup> The men were frustrated that a crime committed decades earlier weighed heavier in a commutation decision than their more recent accomplishments or record of good behavior.<sup>65</sup>

Nearly all of the responding men who entered prison without a high school diploma or equivalent earned one while incarcerated, and each had made positive contributions to the prison, such as starting self-help groups, facilitating rehabilitative programs, and tutoring other inmates.<sup>66</sup> And while some respondents reported they engaged in misconduct when they first entered prison, most were eventually awarded placement in special housing units for inmates with good behavior.<sup>67</sup>

Despite maturing and gaining greater self-awareness and compassion, the respondents were frustrated by the lack of consideration given by the

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59. Margaret E. Leigey & Doris Schartmueller, *The Fiscal and Human Costs of Life Without Parole*, 99 THE PRISON J. 241, 248 (2019).

60. *See e.g., id.* (emphasizing how the length of time for those incarcerated for life without parole coupled with the very slight chance of release makes it one of the harshest punishments).

61. *Id.*

62. *See generally id.* at 241–62 (reporting on the hardships related to the commutation process experienced by inmates serving life sentences without the possibility of parole).

63. *Id.* at 251.

64. *See id.* (“In Leigey’s...study, the men were frustrated with the commutation process for they felt that the pardons board placed too much emphasis on the seriousness of the crime, most often first-degree murder . . .”).

65. *Id.*

66. *See id.* (detailing how inmates find meaningful purpose despite incarceration).

67. *Id.*

board to the changes they had made in their lives.<sup>68</sup> For example, an individual who had been incarcerated for over 30 years expressed, “[n]o matter how much you look at yourself, you make changes in your life, you try to stay positive, continually doing positive things, you’re never getting out.”<sup>69</sup> This sense of hopelessness is a hallmark of decades-long incarceration.<sup>70</sup>

Safety is another significant concern when placing young people in adult prisons and jails.<sup>71</sup> The National Prison Rape Elimination Commission reports that youths are the population most at risk for sexual abuse,<sup>72</sup> and a federal study shows that two out of three juveniles in adult prisons have been sexually abused.<sup>73</sup> The exposure to abuse and violence is one of the more detrimental effects that youths experience while incarcerated.<sup>74</sup> Sexual assault, physical violence, and solitary confinement during an incredibly vulnerable time of development can leave lasting trauma.<sup>75</sup> Youths in adult prisons are at five times higher risk of sexual assault in adult facilities than in juvenile facilities.<sup>76</sup>

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68. *Cf. id.* (describing the frustration inmates feel when their good behavior doesn’t seem to be taken into consideration by the pardons board).

69. *Id.*

70. *See id.* (“One interviewee, who had been incarcerated for thirty-two years, commented, “No matter how much you look at yourself, you make changes in your life, you try to stay positive, continually doing positive things, you’re never getting out.”).

71. *See generally* NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 17 (June 2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf> [<https://perma.cc/Z6NS-7E5C>] (describing the safety risk of young people when placed in the prison system).

72. *See id.* (“Rates of sexual abuse appear to be much higher for confined youth than they are for adult prisoners.”).

73. *See* U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012 at 23 (May 2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/S393-SC7X>] (reporting the rate of sexual abuse experienced by youth in the prison system).

74. *See generally* CAMPAIGN FOR YOUTH JUST., JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 13 (Nov. 2007), [http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing\\_Juveniles\\_Report\\_2007-11-15.pdf](http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf) [<https://perma.cc/4DTF-54EN>] (describing the extremes that the youth prisoners will go to in order to avoid incidents of sexual violence—such as “assault staff to get locked up” separate from the others).

75. *Cf.* NATIONAL PRISON RAPE ELIMINATION COMM’N, *supra* note 71 (“Youth who are sexually abused may live with lifelong consequences that can include persistent mental illness and tendencies toward substance abuse and criminality.”).

76. *See* William Tipton & Terri Poore, *Remembering Youth in Adult Jails & Prisons During Sexual Assault Awareness Month*, CAMPAIGN FOR YOUTH JUST. (Mar. 30, 2017), <http://www.campaignforyouthjustice.org/across-the-country/item/remembering-youth-in-adult>

Perhaps, as a result of these inhumane conditions, the youth are thirty-six times more likely to commit suicide in an adult jail, than in a juvenile detention facility.<sup>77</sup>

In a state like Texas—which mandates a mandatory forty-year minimum term before parole eligibility for a “life with parole” case for a juvenile—a person sentenced at fifteen years old is not eligible for their first parole hearing until they turn fifty-five years old, bringing many of the above concerns into play.<sup>78</sup> Most serve the entirety of their reproductive life behind bars, giving them no opportunity to start a family.<sup>79</sup> Such a sentence also sets their earliest possible release date close to retirement age, leaving them little time to start a career or save for retirement, and increasing the chance that they will be dependent on government support during their senior years.<sup>80</sup>

## 2. *The Fiscal Costs*

Separate from the high cost of diminished human potential that accompanies *de facto* life sentences for youths, the fiscal costs are extraordinary.<sup>81</sup> Incarcerating juveniles for life requires decades of public expenditures.<sup>82</sup> According to the Sentencing Project, “[n]ationally, it costs \$34,135 per year to house an average prisoner.<sup>83</sup> The cost roughly doubles when that prisoner is over 50 years old.<sup>84</sup>

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jails-prisons-during-sexual-assault-awareness-month [https://perma.cc/KRB3-KMRU] (reporting the frequency of sexual assault experienced by youth in the prison system).

77. See CAMPAIGN FOR YOUTH JUST., *supra* note 74 at 4 (recognizing the heightened risk that youths face in jail and how there is no adequate solution once the juveniles have arrived).

78. *Cf. Rovner, supra* note 43 (stating that Texas is one of twenty-nine states to change their laws regarding juvenile life sentences without parole).

79. *Cf. id.* (“Sentences that close the door on rehabilitation and second chances are cruel and misguided.”).

80. See AM. CIV. LIBERTIES UNION, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 39 (2012), [https://www.aclu.org/files/assets/elderlyprisonreport\\_20120613\\_1.pdf](https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf) [https://perma.cc/5LMJ-7XXD] (describing the challenges and financial consequences faced by aging inmates upon release from prison).

81. See Rovner, *supra* note 43 at 4 (explaining that “[a] life sentence issued to a juvenile is designed to last longer than a life sentence issued to an older defendant”).

82. See *id.* (highlighting the great economic cost of lifetime incarceration for juveniles).

83. *Id.*

84. See *id.* (clarifying that the annual cost of a lifetime incarceration for a juvenile doubles after the juvenile turns 50 years old).

Therefore, a 50-year sentence for a 16 year old will cost approximately \$2.25 million.”<sup>85</sup>

According to a study conducted by the University of California, Berkeley and Tulane University, California alone spent between \$66 and \$83 million between 1990 and the mid-2000s on incarcerated youths sentenced to life without parole.<sup>86</sup> In Texas, similar to the Sentencing Project’s findings, it costs taxpayers approximately \$2.5 million to incarcerate one juvenile for life—an enormous expense considering most youths are likely rehabilitated long before their forty years before parole eligibility date.<sup>87</sup> Moreover, this estimate only refers to the actual cost borne by the prison system to detain a person; it fails to account for other costs, like the treatment of medical and mental health issues that can be exacerbated in a prison setting, especially among older and aging individuals.<sup>88</sup> Additionally, family members of the incarcerated incur huge costs,<sup>89</sup> from the cost of visiting loved ones in far-away institutions, to expensive phone calls, to being forced to offset the cost of medical services.<sup>90</sup>

The Human Rights Committee of the United Nations has expressed that retribution alone is an insufficient system of punishment; instead, a corrections system should essentially seek reformation and social

85. See *id.* (emphasizing the multimillion-dollar cost of juveniles’ lengthy sentences).

86. See “*When I Die...They’ll Send Me Home*”, HUM. RTS. WATCH (Mar. 1, 2012), <https://www.hrw.org/report/2012/03/01/when-i-die-theyll-send-me-home/youth-sentenced-life-prison-without-parole> [<https://perma.cc/XTQ8-E2BR>] (quantifying the total amount of money California spent on incarcerating child offenders for life between 1990 and 2008).

87. See TEX. CRIM. JUST. COAL., *Support a Meaningful Opportunity for Youth Sentenced to the Texas Department of Criminal Justice* (2017), <https://www.texasjc.org/support-meaningful-opportunity-release-youth-sentenced-texas-department-criminal-justice> [<https://perma.cc/97B5-JLMH>] (emphasizing the high cost of incarcerating a juvenile for life in Texas and articulating the potential cost-reduction for taxpayers if lifetime sentences for juveniles were reassessed after twenty years).

88. See AM. CIV. LIBERTIES UNION, *supra* note 80 at 26–27 (providing that “the actual total taxpayer cost of prisons expands beyond what states allocate in their corrections budget”).

89. See SANETA DEVUONO-POWELL ET AL., ELLE BAKER CTR. FOR HUM. RTS., WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES 9 (2015) (highlighting the average debt incurred across respondents of all income brackets).

90. See Lindsey Linder, *Health Care Services in the Texas Department of Criminal Justice*, TEX. CRIM. JUST. COAL. (2019), <https://www.texasjc.org/system/files/publications/HB%20812%20Fact%20Sheet%20%28Medical%20Co-Pay%29.pdf> [<https://perma.cc/562X-WFBS>] (listing fees that accompany incarceration like medical services, commissary funds, phone calls, etc.).



rehabilitation of the prisoner.<sup>91</sup> Yet, states like Texas continue to focus on retribution—a broad-strokes approach that comes at massive fiscal and human cost, and one that fails to consider people’s rehabilitative progress or offer them the opportunity to prove redemption.<sup>92</sup>

#### IV. UNDOING JUVENILE LIFE WITHOUT PAROLE IN THE COURTS

Undoing juvenile life without parole began as an outgrowth of important rulings made by the United States Supreme Court between 2005 and 2016.<sup>93</sup> In each ruling, the Court began to change how justice system-involved youths are sentenced—finding that youths cannot be viewed by the law as comparable to their adult counterparts and, as such, are less culpable for certain crimes.<sup>94</sup> Although the Supreme Court in *Roper v. Simmons* did not specifically address the issue of juvenile life without parole sentences (instead addressing only death penalty cases for youth), it arguably set the groundwork for *Graham v. Florida* and *Miller v. Alabama* regarding the constitutionality of permanent sentences.<sup>95</sup>

##### A. *Roper v. Simmons* (2005)

In 2002, the United States Supreme Court held in *Atkins v. Virginia*<sup>96</sup> that executing individuals who are mentally incapacitated no longer represents a consensus with present-day standards of decency, thereby

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91. See G.A. Res. 2200 A XXI, annex, The International Covenant on Civil and Political Rights 76 (Dec. 16, 1966) (extending the overall goal of the penitentiary system stemming from an aim for social rehabilitation rather than punishment).

92. See John Del Rosario, *Diagnosing Crime: The Failures of Rehabilitation in the Justice System*, BORDERZINE (Aug. 11, 2010), <https://borderzine.com/2010/08/diagnosing-crime-the-failures-of-rehabilitation-in-the-justice-system/> [<https://perma.cc/EC2P-YDFU>] (underlining a state’s lack of commitment to ensure the success of rehabilitation during incarceration).

93. Cf. *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (accentuating the notion that severe punishment “is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

94. See *id.* (explaining the diminished culpability of juveniles and how such a characteristic serves to indicate that the death penalty should apply with lesser force than that of adults).

95. Compare 543 U.S. 551, 571 (2005) (explaining how this *Roper* decision was the first in a series of cases that questioned the constitutionality of enforcing severe sentences on juveniles), with 560 U.S. 48, 92 (2015) (suggesting the juvenile defendant was markedly less culpable than a typical adult who commits an identical or similar offense), and 567 U.S. 460, 468 (2012) (discussing the “mental maturity” analysis associated with a juvenile offense).

96. 536 U.S. 304 (2002).

ruling such a sentence unconstitutional.<sup>97</sup> It was because of this ruling that Christopher Simmons argued in *Roper* that it is unconstitutional to execute a person under the age of 18 at the time of their crime.<sup>98</sup> He argued *Stanford v. Kentucky* was no longer the national consensus—where the Court held capital punishment for any person who murders at sixteen or seventeen years old does not violate the Eighth Amendment.<sup>99</sup> Simmons argued that a national consensus has developed since *Stanford*.<sup>100</sup> The Missouri Supreme Court agreed with Simmons’ *Atkins* analogy and held that:

[A] national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade.<sup>101</sup>

The United States Supreme Court affirmed the Missouri Supreme Court’s ruling, finding that juveniles cannot be sentenced to death.<sup>102</sup> The Court questioned the culpability of those who committed capital crimes under the age of eighteen by citing certain characteristics that “any parent knows,” as well as emerging scientific and sociological evidence.<sup>103</sup> Studies showed that because of “[a] lack of maturity and an underdeveloped sense of responsibility;”<sup>104</sup> “juveniles are more vulnerable or susceptible to negative influences;” and “the character of a juvenile is not as well formed as that of an adult.”<sup>105</sup> Further, the Court

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97. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

98. *Roper*, 543 U.S. at 559.

99. 492 U.S. 361, 380 (1989).

100. *See generally* *Roper*, 543 U.S. at 559–60 (setting aside Simmons’ death sentence because he was a juvenile, and capital punishment was now perceived to violate the Eighth Amendment).

101. *Id.*; *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003); *see* *Atkins*, 536 U.S. at 321 (holding the State could not sentence a mentally disabled individual to death).

102. *Roper*, 543 U.S. at 578–79.

103. *Id.* at 569.

104. *See* *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (suggesting wrong acts are contributed to a juvenile’s lack of maturity and decision-making skills).

105. *See* *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (highlighting the time of adolescence is when individuals are less mature and fall into pressures).

reasoned “the personality traits of juveniles are more transitory, less fixed.”<sup>106</sup>

The fact that children are still developing and maturing show they cannot be deemed “the worst offenders” and makes it difficult to characterize them as having an “irretrievably depraved character.”<sup>107</sup> As such, the Supreme Court found that the two penological justifications for imposing the death penalty—retribution and deterrence—are weak when applied to youth, due primarily to the issue of culpability.<sup>108</sup> At this point, however, life without parole sentences were still permitted.<sup>109</sup>

#### B. *Graham v. Florida (2010)*

In *Graham v. Florida*, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a life without parole sentence for a person who commits a non-homicide crime under the age of eighteen.<sup>110</sup> The Court further held that if a state does sentence a justice system-involved youth to a life sentence, then the youth must have a “meaningful opportunity” at release.<sup>111</sup>

Here, we see how *Roper* was crucial in laying the groundwork for a process of undoing juvenile life without parole sentences.<sup>112</sup> In Justice Kennedy’s opinion in *Graham*, he reiterates the emerging scientific data on adolescent development used in *Roper*, stating: (1) that, “[n]o recent data provide reason to reconsider the Court’s observation in *Roper* about the nature of juveniles,” (2) that “parts of the brain involved in behavior control continue to mature through late adolescence,” and (3) that “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”<sup>113</sup> Justice Kennedy further stated that a

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106. *Roper*, 543 U.S. at 570.

107. *Id.*

108. *Id.* at 571.

109. *See id.* at 560 (setting aside the defendant’s death sentence and resentencing him to life imprisonment).

110. *Graham*, 560 U.S. at 81.

111. *Id.* at 74.

112. *See* 543 U.S. at 623 (suggesting the prohibition of life in prison without parole—as is currently present in the international community).

113. *Graham*, 560 U.S. at 68.

juvenile who does not kill, or intend to kill, is less culpable for their crimes when compared to adult offenders who do kill.<sup>114</sup>

As such, the Court in *Graham* found that a juvenile life without parole sentence for a person under the age of eighteen who commits a non-homicide crime deprives that person of “the most basic liberties without given hope of restoration, except perhaps by executive clemency,” and that “this sentence ‘means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever future might hold in store for the mind and spirit of [the person], he will remain in prison for the rest of his days.’”<sup>115</sup> Such a sentence invariably shares many of the characteristics that the death penalty embodies, and that the Court ruled against in *Roper*.<sup>116</sup> Notably, in *Graham*, the Court, as it did in *Roper*, questioned the penological justifications for a harsh sentence for youths.<sup>117</sup> The Court concluded that retribution, deterrence, incapacitation, and rehabilitation are utterly unsupported for a person under the age of eighteen.<sup>118</sup>

In essence, a juvenile life without parole sentence, condemns a child to a life with no chance to show growth and maturity.<sup>119</sup> Such a sentence is predicated on the fact that youths are no different than their adult counterparts, and that they are completely formed and fixed in their development.<sup>120</sup> The *Graham* Court ruled otherwise, finding that the characteristics of a person under eighteen are marked by immaturity, a lack of responsibility, and propensity to fall victim to outside influences, and, that their character is “not as well formed.”<sup>121</sup>

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114. *See id.* at 69 (comparing children offenders to adult murderers as having a twice diminished moral culpability).

115. *Id.* at 70.

116. *See id.* at 69 (expressing “life without parole sentences share some characteristics with death sentences that are shared by no other sentences”).

117. *See id.* at 71 (discussing how although the legislature has discretion, the penological justifications can still be disproportionate to the offense).

118. *See id.* (concluding that “none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification”).

119. *See Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR. (2020), <https://jlc.org/issues/juvenile-life-without-parole> [<https://perma.cc/7YHP-ZD35>] (stating that juveniles are young enough to grow and mature from their mistakes).

120. *See Graham*, 560 U.S. at 76 (acknowledging age and youthfulness are both relevant factors under the Eighth Amendment and that the sentence cannot be the sole factor considered).

121. *See id.* at 68 (discussing the stigma on associating age with certain characteristics and maturity).

C. *Miller v. Alabama* (2012)

In *Miller*, the United States Supreme Court held that *mandatory* life without parole sentences for any juvenile—even those who committed homicide (exempted in the *Graham* decision)—do not allow for proper consideration of the characteristics inherent in youths and, thereby, violate the Eighth Amendment.<sup>122</sup> Justice Kagan's opinion once again reaffirms what *Roper* and *Graham* both found regarding what “any parent knows” about youths

Their “lack of maturity” and “underdeveloped sense of responsibility” lead to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S. Ct. 1183. They “are more vulnerable...to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And because a child's character is not as “well formed” as an adult's, his traits are “less fixed” and his actions are less likely to be “evidence of irretrievabl[e] deprav[ity].”<sup>123</sup>

The important takeaway from the *Miller* Court's interpretation of *Graham* is the acknowledgement that “youth matters,”<sup>124</sup> especially when a sentence of life without parole is being considered.<sup>125</sup> Children possess unique characteristics that make them less culpable and less deserving of such a harsh punishment; as such, they must be treated differently than adult offenders, regardless of the crime committed.<sup>126</sup> Furthermore, life without parole for a youthful offender is analogous to the death penalty, as it denies the child the chance to show growth and rehabilitation.<sup>127</sup>

Again, the issue with *mandatory* life sentencing without parole is that the courts did not consider the science behind an adolescent's development, as discussed in *Roper* and *Graham*.<sup>128</sup> When a court disregards a defendant's age, one can question whether the sentence is in

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122. 567 U.S. at 489.

123. *Id.* at 471.

124. *See id.* at 473 (suggesting youth or age as a factor for the appropriateness of a life without parole sentence).

125. *See id.* (exploring arguments of proportionality and culpability when juveniles offend).

126. *Id.* at 472.

127. *Id.* at 474–75.

128. *Id.* at 470, 489.

direct proportion to the crime committed by the youth, given his or her (lack of) culpability.<sup>129</sup>

#### D. *Montgomery v. Louisiana (2016)*

In *Montgomery v. Louisiana*, the United States Supreme Court ruled that people serving life sentences for offenses committed as juveniles must either be resentenced or granted parole consideration.<sup>130</sup> The Court held that the *Miller* ruling did establish a new substantive rule, thereby requiring that it be applied retroactively.<sup>131</sup> When defining what constitutes a new substantive rule, the Court reasoned that if a rule forbids punishment of a certain conduct, or prohibits a punishment for a particular “class of defendants,” then it has met the substantive criteria.<sup>132</sup>

The Court’s finding of retroactivity was crucial in that incarcerated youths who were sentenced to life without parole years before *Miller* could now demonstrate growth and maturity with a possible means of release.<sup>133</sup> The Court—referencing *Miller*, *Graham*, and *Roper*—affirmed that “children are constitutionally different from adults,” with the Eighth Amendment acting as a “substantive guarantee” from sentencing practices which fail to consider important age-related mitigating factors.<sup>134</sup>

### V. BRINGING DE FACTO LIFE SENTENCES FOR JUVENILES INTO THE FOREGROUND

While the Court held in *Miller* that mandatory life sentences without the possibility of parole for people under the age of eighteen violated the

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129. *Id.* at 471.

130. 136 S. Ct. 718, 736 (2016).

131. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (supporting the establishment of the substantive rule because it comports with balancing the goals of finality and comity with the liberty interests of those who were imprisoned with unconstitutional rules).

132. *See id.* at 732, 734 (identifying the particular class of defendants as juvenile offenders whose crimes reflect immaturity of youth and then examining the prohibited punishment as life without parole).

133. *See* Chelsea S. Gumaer, Comment, *Making Room for Juvenile Justice: The Supreme Court’s Decision in Montgomery v. Louisiana*, 50 LOY. L.A. L. REV. 257, 257 (2017) (noting the substantive rule could be applied to people sentenced years and even decades before the *Miller* decision).

134. *Montgomery*, 136 S. Ct. at 732–33.

Eighth Amendment, it did not categorically ban such sentences.<sup>135</sup> Similar to *Graham*, the Court noted that states must give youths “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>136</sup> Justice Kagan also stated in the majority opinion, “we think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon.”<sup>137</sup> However, one issue that followed from *Miller* was that courts began to narrowly argue that neither *Graham* nor *Miller* applied to “term-of-years sentences,” which can result in de facto life sentences.<sup>138</sup>

#### A. *In the Courts*

*United States v. Grant* is a recent case that forces circuit courts to address the constitutional question of de facto life sentences.<sup>139</sup> The case is about an individual named Corey Grant who, at the age of sixteen, committed various crimes.<sup>140</sup> These crimes led to his 1992 conviction under the Racketeer Influenced and Corrupt Organizations Act (RICO), along with convictions for additional drug and gun charges.<sup>141</sup> The Third Circuit deemed that Grant “would never be fit to reenter society,” sentencing him to life without parole for the RICO convictions, as well as “a concurrent forty-year term for the drug convictions and a mandatory

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135. *See id.* at 734 (admitting life without parole may be an appropriate punishment in the rare case where the child’s crime reflected permanent incorrigibility).

136. *See Miller*, 567 U.S. at 479 (holding that there must be the possibility of parole for juvenile offenders under the Eighth Amendment); *see also Graham*, 560 U.S. at 74 (allowing the courts to analyze the individual’s development for the first time).

137. *See Miller*, 567 U.S. at 479 (foreshadowing that sentencing juveniles to extreme sentences will be rare because of the difficulty in determining whether a juvenile was immature or corrupt).

138. *See id.* at 489 (overturning *Miller*’s mandatory term of life imprisonment without the possibility of parole); *see e.g.*, Jones, *supra* note 28 at 186 (2016) (identifying the reason for misapplication to be because none of the cases related to de facto life sentences); *Graham*, 560 U.S. at 81 (overturning *Graham*’s life in prison as a violation of the Eighth Amendment).

139. *See* 887 F.3d 131, 142 (3d. Cir. 2018) (holding term of years sentences for a juvenile’s entire life is a violation of the Eighth Amendment when the crime was based on immaturity); *see also* Anton Tikhomirov, Comment, *A Meaningful Opportunity for Release: Graham and Miller Applied to De Facto Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C. L. REV. II-332, 342 (2019) (concluding this was the first time the court must determine whether de facto life without parole sentences were constitutional).

140. Grant, 887 F.3d at 134.

141. *Id.*

consecutive five-year term for the gun conviction.”<sup>142</sup>

In light of the Supreme Court’s ruling in *Miller* and *Graham*, as well as other mitigating factors, the New Jersey District Court in 2014 determined that Grant’s life without parole sentence was “inappropriate” and resentenced Grant to sixty-five years.<sup>143</sup> Grant appealed this resentencing that amounted to a de facto life sentence, making him eligible for release at the age of seventy-two.<sup>144</sup>

The Third Circuit ruled in Grant’s favor, holding that “a term-of-years sentence that was longer than a non-incorrigible juvenile’s expected lifespan was unconstitutional under the Eighth Amendment.”<sup>145</sup> The court found that *Miller* only allowed the sentence of life without parole for youths who were deemed incorrigible; that the penological justifications that failed when applied to life without parole sentences also failed when applied to de facto life sentences (in this case, a lengthy term-of-years sentence); and that there must be a “legitimate chance of being released from prison.”<sup>146</sup>

The issue with a de facto life sentence is that it fails to offer a “meaningful opportunity” at release and life.<sup>147</sup> The Third Circuit’s ruling that de facto life sentences are unconstitutional is not an outlier—falling in alignment with rulings from the Seventh, Ninth, and Tenth Circuit Courts of Appeals.<sup>148</sup> The rulings in those circuits show that, not only do the arguments and conclusions reached in *Graham* and *Miller* apply to de facto life sentences, but also that “the rules promulgated under

142. *Id.*

143. *Id.* at 135.

144. *Id.*

145. *See id.* at 146–47 (relying on the holdings from *Graham* and *Miller*).

146. *See id.* at 142 (stating that a term-of-years sentence without parole that is longer than the predicted life ability is a violation of the Eighth Amendment); *see generally* *Miller*, 567 U.S. at 489 (holding mitigating factors for juveniles given life without parole sentences must be considered to not violate the Eighth Amendment’s protection against cruel and unusual punishment).

147. *Cf.* *Grant*, 887 F.3d at 147 (“Meaningful opportunity for release is a non-incorrigible juvenile offender must be afforded an opportunity for release at a point in his or her life that still affords fulfillment outside of prison walls.”).

148. *See, e.g.,* *Budder v. Addison*, 851 F.3d 1047, 1059–60 (10th Cir. 2017) (holding a 155-year sentence to a juvenile violated the rule in *Graham*); *United States v. Jefferson*, 816 F.3d 1016, 1020 (8th Cir. 2016) (analyzing *Jefferson*’s 600-month sentence in regard to *Miller*); *McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016) (applying *Miller*’s holding); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (holding *Moore*’s sentence is unconstitutional under *Graham* because it guarantees his death in prison).



*Graham* and *Miller* did not depend on the linguistic label of a sentence . . . but instead, on the distinct difference in the severity of life without parole and all other lesser sentences.”<sup>149</sup>

*B. At the Legislature*

A majority of state legislatures have not yet addressed the policy requirements involved in the *Graham* ruling, much less the *Miller* ruling.<sup>150</sup> It is also problematic when states pass statutes regarding de facto life sentences, and then their courts draw narrow interpretations.<sup>151</sup> For instance, after the Louisiana legislature passed a law in response to *Graham*—requiring certain juveniles previously sentenced to life without parole to be eligible for a parole hearing after thirty years—the state supreme court interpreted the law to apply only to life (not life without parole) sentences.<sup>152</sup>

Although there are obvious issues with relying on legislatures to enact proper laws to address de facto life sentences, this route should not be

149. See *Miller*, 567 U.S. at 489 (addressing the need for the judge and jury to consider mitigating circumstances of juvenile delinquents before sentencing to lifetime incarceration); see also *Graham*, 560 U.S. at 81 (illustrating the need for some potential opportunity to be released before the end of the juvenile’s sentencing term); Tikhomirov, *supra* note 139 at 344 (indicating there is more difference than just a label between punishing a juvenile life without parole and a very lengthy sentence if it is beyond their life expectancy).

150. See *Graham*, 560 U.S. at 81 (requiring some meaningful opportunity for the juvenile to obtain release); see also *Miller*, 567 U.S. at 489 (allowing a judge to consider mitigating factors before imposing the harshest penalty on juveniles); Tikhomirov, *supra* note 139 at 341–42 (“Congress, however, has yet to enact any legislation doing so, and, accordingly, the matter has fallen to the circuit courts.”); Kelly Scavone, Comment, *How Long Is Too Long? Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3478–79 (2014) (suggesting legislatures need to incorporate life without parole sentences into sentencing laws in order to avoid adverse effects).

151. See Daniel Jones, Note, *Technical Difficulties: Why a Broader Reading of Graham and Miller Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN’S L. REV. 169, 200 (2016) (discussing how some courts narrowly interpret laws passed in response to *Graham*); see also *State v. Brown*, 2012-0872 (La. 5/7/13); 118 So.3d 332, 341 (providing an example of how a court may narrowly interpret a statute that is in response to *Graham*).

152. See Jones, *supra* note 151 (explaining how the Louisiana Supreme Court interpreted a Louisiana law passed in response to *Graham*); see also *Brown*, 118 So.3d 332, 341 (“Thus, it is now clear that under Louisiana law, a juvenile defendant serving a life sentence for a non-homicide offense committed before the age of 18 will be parole eligible after serving 30 years . . .”).

completely abandoned.<sup>153</sup> State legislatures can pass statutes that more clearly define an appropriate term-of-years sentence, keeping with the spirit of *Graham* and *Miller*.<sup>154</sup> States can also develop laws that provide individuals sentenced to extreme terms for offenses committed as youths with an earlier parole eligibility date—a “second look” that allows people to demonstrate acts showing rehabilitation, growth, and maturity while incarcerated.<sup>155</sup> Lastly, state legislation can assist in directing courts towards the importance of mitigating factors in the judicial process—such as the hallmark features of youth before a sentence is handed down.<sup>156</sup>

## VI. “SECOND LOOK” EFFORTS IN TEXAS

### A. *Texas in the National Landscape*

In Texas, youths are routinely sent to adult prisons in one of three ways.<sup>157</sup> First, because Texas is one of four states to treat seventeen-year-olds as adults in the criminal justice system, someone who is seventeen years old at the time the offense is committed is automatically processed through the adult system.<sup>158</sup> Second, children as young as fourteen can be transferred to adult court, or “certified” to stand trial as

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153. See Jones, *supra* note 151 at 203 (noting the issues state legislatures may create while accepting that state legislatures may be helpful in addressing de facto life sentences).

154. *Id.*

155. See *id.* at 204 (arguing the court should be required to take a “second look” to determine if rehabilitation has worked).

156. See *id.* at 204–05 (suggesting legislation that would require mitigating factors of youth be considered at sentencing).

157. See TEX. FAM. CODE ANN. § 54.02(a)(2)(A) (permitting juvenile courts to waive jurisdiction and transfer a child to district court or criminal district court); see also “Raise the Age”: Hold 17-Year-Olds Accountable in the Juvenile Justice System, TEX. CRIM. JUST. COAL. (2019), <https://www.texascjc.org/%E2%80%9Craise-age%E2%80%9D-hold-17-year-olds-accountable-juvenile-justice-system> [<https://perma.cc/QHB3-GXFY>] (indicating people as young as seventeen are automatically sent to the adult justice system); Kameron D. Johnson, *Determinate Sentence*, ST. B. OF TEX. JUV. L. SEC. (Feb. 27, 2012), <https://juvenilelaw.org/wp-content/uploads/2017/06/Determinate-Sentence.pdf> [<https://perma.cc/5HR6-NTHC>] (noting children as young as ten are eligible for determinate sentences).

158. See TEX. CRIM. JUST. COAL., *supra* note 157 (identifying the four states to still treat seventeen-year-olds automatically as adults are Georgia, Michigan, Texas, and Wisconsin). But see John Kelly, *Michigan Raises the Age, Includes 17-Year-Olds in Juvenile Justice System* (Oct. 31, 2019), <https://chronicleofsocialchange.org/justice/michigan-has-raised-its-juvenile-justice-age-to-18/38764> [<https://perma.cc/J34N-A93A>] (reporting “raise the age” legislation has passed the Michigan legislature and has been approved by the Governor).

an adult, for certain offenses.<sup>159</sup> Lastly, children as young as ten years old who received a “determinate sentence” for a felony offense can be transferred to the adult system to complete their sentence, if necessary, after aging out of the juvenile justice system.<sup>160</sup>

Juvenile sentencing laws in Texas ignore scientific evidence of adolescent development and neuroscience, and, in many cases, the state’s current parole system provides no viable mechanism for reviewing a case after a youth has grown up and matured.<sup>161</sup> While Texas passed legislation banning life without parole sentences for juveniles aged sixteen years old and younger in 2009,<sup>162</sup> and has passed additional legislation prohibiting life without parole sentences for seventeen-year-olds in 2013,<sup>163</sup> “the legislature missed the opportunity to seriously consider a broader range of punishment and more individualized sentencing” when they made the changes.<sup>164</sup> As a result, juveniles as young as fourteen years old who are convicted of certain serious crimes can be sentenced to a de facto life sentence with no opportunity for parole eligibility for up to forty years.<sup>165</sup>

Texas’s requirement that certain juveniles must serve as many as forty years before becoming parole eligible is contrary to the United States Supreme Court’s purpose for abolishing the practice of sentencing juveniles to life without parole—that is, to provide them with a

159. See TEX. FAM. CODE ANN. § 54.02(a)(2)(A) (allowing juvenile courts to waive jurisdiction and transfer a child to district court or criminal district court).

160. Johnson, *supra* note 157.

161. See Lindsey Linder, *Support a Meaningful Opportunity for Release for Youth Sentenced to Adult Facilities*, TEX. CRIM. JUST. COAL. (2017), [https://www.texascjc.org/system/files/publications/SB%20556%20Fact%20Sheet%20\(Second%20Look\).pdf](https://www.texascjc.org/system/files/publications/SB%20556%20Fact%20Sheet%20(Second%20Look).pdf) [<https://perma.cc/BYM5-Q8XE>] (discussing how Texas sentencing laws ignore recent scientific evidence and how Texas laws should motivate juveniles to focus on rehabilitation).

162. S.B. 839, 81st Leg. Sess. (Tex. 2009) (enacting TEX. GOV’T CODE ANN. § 508.145(b)).

163. S.B. 2, 83rd Leg. Special Sess. (Tex. 2013) (enacting TEX. PENAL CODE ANN. § 12.31, TEX. CODE CRIM. PROC. ANN. Art. 37.071).

164. *Texas Changes Sentencing for Juveniles Convicted of Homicide*, CHILD. AT RISK (July 17, 2013), <https://childrenatrisk.org/texas-changes-sentencing-for-juveniles-convicted-of-homicide/> [<https://perma.cc/5BMB-7XEW>].

165. *Id.*; see TEX. PENAL CODE ANN. § 12.31(a)(1) (explaining how a juvenile can be guilty for a capital felony and be sentenced to life in prison if under the age of eighteen); see also TEX. GOV’T CODE ANN. § 508.145(b) (2019) (adding to what was stated in section 12.31(a)(1) of the Texas Penal Code—where an individual convicted under that section is not eligible for parole until the inmate serves forty years in prison).

meaningful opportunity for release.<sup>166</sup> With initial parole eligibility for juveniles as extreme as forty years served, it is the authors' understanding that Texas has the harshest parole eligibility of all states that have banned juvenile life without parole sentences.<sup>167</sup>

In Nevada, North Dakota, and Washington, the maximum amount of time served required for a juvenile before parole eligibility is twenty years.<sup>168</sup> In California, Colorado, Utah, and Wyoming, a juvenile must serve twenty-five years before parole eligibility.<sup>169</sup> In Arkansas, Connecticut, Delaware, Massachusetts, and New Jersey, a juvenile must serve thirty years before parole eligibility.<sup>170</sup> Texas's forty-years-served requirement is a harsh outlier—rendering its ban on juvenile life without parole useless because the “remedy” is equally punitive and extreme.<sup>171</sup>

### B. Texas's Attempts at “Second Look” Reform

During Texas's 2015 State Legislative Session, Senator José Rodríguez<sup>172</sup> filed Senate Bill 1083, which proposed setting parole eligibility at no more than twenty-five years for a person convicted of a capital felony committed when younger than eighteen years old.<sup>173</sup> The

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166. See TEX. GOV'T CODE ANN. § 508.145(b) (stating that a juvenile serving a life sentence for a capital felony is not eligible for parole until forty calendar years have passed). Compare Miller, 567 U.S. at 479 (holding that a juvenile may not be sentenced to life in prison without parole), with TEX. PENAL CODE ANN. § 12.31(a)(1) (2019) (stating that in cases in which the death penalty is not sought, juveniles must be sentenced to life for capital felonies).

167. See *Locked Up for Life: 50 State Examination*, ASSOCIATED PRESS (July 31, 2017), <https://www.ap.org/explore/locked-up-for-life/50-states> [<https://perma.cc/72MX-3VLE>] (showing how in 2013, Texas mandated a juvenile's sentence of life with the opportunity of parole after forty years).

168. *Id.*

169. The Associated Press, *A State-By-State Look at Juvenile Life Without Parole*, SEATTLE TIMES (July 31, 2017), <https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/> [<https://perma.cc/WK2S-VFY8>].

170. *Id.*

171. See Keri Blackinger, *Convicted Young, Longtime Texas Inmates Hope Second Look Bill Could Give Them a Second Chance*, HOUSTON CHRON. (Feb. 8, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Convicted-young-longtime-Texas-inmates-hop-e-13602510.php> [<https://perma.cc/G4XY-L93P>] (discussing how the Texas forty-years-served requirement is effectively equal to no parole).

172. *Senator Jose Rodriguez: District 29*, TEX. SENATE (2020), <https://senate.texas.gov/member.php?d=29> [<https://perma.cc/S8KP-CJCN>].

173. S.B. 1083, 84th Leg., Reg. Sess. (Tex. 2015).

Bill was referred to the Senate Committee on Criminal Justice, where it never received a hearing.<sup>174</sup>

During the following state legislative session in 2017, Senator Rodríguez filed similar legislation, Senate Bill 556, which proposed setting parole eligibility at no more than twenty years for a person convicted of certain serious felonies, including a capital felony, committed when younger than eighteen years old.<sup>175</sup> The Bill also outlined a specialized set of factors for the Board of Pardons and Paroles to consider when determining whether or not to grant parole.<sup>176</sup> At the same time, Representative Joe Moody<sup>177</sup> filed an identical, or “companion,” bill in the House—House Bill 1274,<sup>178</sup> which was co-authored by Representative Gene Wu.<sup>179</sup> Notably, both Representatives Moody and Wu are former prosecutors.<sup>180</sup> The Senate Bill was once again referred to the Senate Committee on Criminal Justice and also never received a hearing.<sup>181</sup>

House Bill 1274, however, was referred to the House Committee on Criminal Jurisprudence, where it was expeditiously given a public hearing.<sup>182</sup> During the hearing, fifteen people—including a representative of the conservative Texas Public Policy Foundation—testified in favor of the Bill, and twenty-one additional people “registered” in favor of the Bill, but did not testify.<sup>183</sup> No one testified in opposition to the Bill, and only three people registered in

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174. *Id.* (detailing the legislative history and indicating the lack of a hearing).

175. S.B. 556, 85th Leg., Reg. Sess. (Tex. 2017).

176. *Id.*

177. *Texas House Member: Rep. Joe Moody District 78*, TEX. HOUSE OF REPRESENTATIVES (2020), <https://house.texas.gov/members/member-page/?district=78> [<https://perma.cc/8S9F-7C4Y>].

178. H.B. 1274, 85th Leg., Reg. Sess. (Tex. 2017).

179. *Texas House Member: Rep. Gene Wu District 137*, TEX. HOUSE OF REPRESENTATIVES (2020), <https://house.texas.gov/members/member-page/?district=137> [<https://perma.cc/93RP-SWX5>].

180. *See id.* (indicating that Representative Wu served as prosecutor in the Harris County District Attorney’s Office); *see also* TEX. HOUSE OF REPRESENTATIVES, *supra* note 177 (indicating that Representative Moody served as a prosecutor in the El Paso County District Attorney’s Office).

181. *See* S.B. 556, 85th Leg., Reg. Sess. (Tex. 2017) (referring to legislative history).

182. *See* H.B. 1274, 85th Leg., Reg. Sess. (Tex. 2017) (referencing the legislative history of the Bill).

183. *See* H.B. 1274 Committee Report Witness List, 85th Leg., Reg. Sess. (Tex. 2017) (listing the testifying and non-testifying witnesses on March 20, 2017).

opposition.<sup>184</sup> House Bill 1274 was voted favorably out of committee, but it failed to be placed on the House Calendar before the relevant deadline for the House to consider bills in its own chamber.<sup>185</sup>

During the most recent legislative session in 2019, Senator Rodríguez once again filed Second Look legislation, as the issue has come to be known in Texas,<sup>186</sup> via Senate Bill 155.<sup>187</sup> For the third consecutive session, Senate Bill 155 was referred to the Senate Committee on Criminal Justice, where it was never given a public hearing.<sup>188</sup> Representative Moody filed a companion bill in the House of Representatives, House Bill 256,<sup>189</sup> which was referred to the House Committee on Juvenile Justice and Family Issues.<sup>190</sup> House Bill 256 was given a public hearing, but the Bill ultimately was not voted out of committee—largely as a result of in-person opposition from survivors of the Santa Fe High School shooting, which had occurred the previous year.<sup>191</sup> Importantly, Representative Moody agreed to exempt people convicted of mass homicides from the Bill, but the Bill still failed to advance.<sup>192</sup>

### C. Who Are “Second Lookers”?

#### 1. Racial Disparities Among Second Lookers

“Second Lookers” refers to anyone who would be eligible for earlier

184. *Id.*

185. H.B. 1274 2017-2018, 85th Leg. (Tex. 2017), <https://legiscan.com/TX/bill/HB1274/2017> [<https://perma.cc/2GQ8-FEKE>].

186. See Blackinger, *supra* note 171 (explaining how the “Second Look” Bill could potentially release many prisoners who were convicted of first-degree felonies before they were eighteen).

187. S.B. 155, 86th Leg. (Tex. 2019).

188. S.B. 155, TEX. LEG. ONLINE (2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB155> [<https://perma.cc/AD8J-HUB8>].

189. H.B. 256, 86th Leg. (Tex. 2019).

190. H.B. 256, TEX. LEG. ONLINE (2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB256> [<https://perma.cc/UD7W-S5MY>].

191. See Lauren McGaughy, *Mass Shooters Will be Carved Out of Parole Bill After Santa Fe Parents Testify Against It*, DALLAS MORNING NEWS (Mar. 13, 2019), <https://www.dallasnews.com/news/politics/2019/03/13/mass-shooters-will-be-carved-out-of-parole-bill-after-santa-fe-parents-testify-against-it/> [<https://perma.cc/5HCH-H9WP>] (demonstrating the scrutiny during the public hearing).

192. *Id.*

parole consideration under Texas's Second Look Bill.<sup>193</sup> Stark racial disparities exist within this population.<sup>194</sup> African American individuals, who are already disproportionately impacted by punitive policies and practices across the justice system, are similarly disproportionately represented among the Second Look population—comprising only twelve percent of Texas's overall population, but forty-four percent of Second Lookers.<sup>195</sup> With Hispanic individuals comprising approximately thirty-nine percent of Texas's overall population, they are slightly underrepresented within the Second Look population, representing thirty-seven percent of all Second Lookers.<sup>196</sup> With White individuals representing forty-two percent of Texas's overall population, they are drastically underrepresented within the Second Look population, accounting for only eighteen percent of all Second Lookers.<sup>197</sup>

## 2. *The Role of "Law of Parties"*

Nearly every state has an accomplice liability law that ensures culpable individuals are not absolved of crimes they helped commit even if they were not the primary perpetrators.<sup>198</sup> Texas takes this sentiment to the extreme through its "Law of Parties," which has been effective since the 1970s in its current form<sup>199</sup> and is applied to criminal cases.<sup>200</sup>

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193. See Blackinger, *supra* note 171 ("Anyone hit with a first-degree felony before turning 18 would be up for parole after 20 years or half of their sentence—whichever is sooner.").

194. See *Racial Disparities in Sentencing*, AM. CIV. LIBERTIES UNION (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [<https://perma.cc/23Q5-VBVR>] ("Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white offenders and receive longer sentences than their white counterparts in some jurisdictions.").

195. See TEX. DEMOGRAPHIC CTR., ESTIMATES OF THE POPULATION BY AGE, SEX, AND RACE/ETHNICITY FOR THE STATE OF TEXAS 1 (July 1, 2018) [https://demographics.texas.gov/Resources/TPEPP/Estimates/2018/2018\\_ASRE\\_Estimate\\_alldata.pdf](https://demographics.texas.gov/Resources/TPEPP/Estimates/2018/2018_ASRE_Estimate_alldata.pdf) [<https://perma.cc/F8MG-KHFB>] (calculating the disproportional impact amongst Second Lookers).

196. *Id.*

197. *Id.*

198. See Christie Thompson, *Charged With Murder Without Killing Anyone*, MARSHALL PROJECT (Sept. 24, 2015), <https://www.themarshallproject.org/2015/09/24/a-person-can-be-charged-with-murder-even-if-they-haven-t-killed-anyone> [<https://perma.cc/K6U4-J27P>] (introducing the convoluted and controversial statute of felony murder and its consequences).

199. TEX. PENAL CODE ANN. § 7.01(c).

200. See Kristine Phillips, *In Texas, a Man who Didn't Kill Anybody is About to be Executed for Murder*, WASH. POST (Aug. 12, 2016), <https://www.washingtonpost.com/news/post-nation/wp/>

The Law of Parties has two parts.<sup>201</sup> First, a person can be criminally responsible for committing a crime even if they were not directly involved in it, but helped the event take place; this extends to even simply knowing the crime is about to take place without taking measures to stop it.<sup>202</sup> Second, all parties are responsible for any felony that stems from another if the second felony could have been “anticipated.”<sup>203</sup> This overly broad language casts a wide net of culpability by allowing any person who aided, was present for, or even knew about a felony taking place—even one who accidentally had the potential to stem into another felony—to be found guilty for the ensuing crime they had no part in.<sup>204</sup> The Law of Parties even allows a jury to convict a defendant for murder without requiring a finding that the person intentionally or knowingly killed.<sup>205</sup> And, if one of the co-conspirators of an underlying crime (for example, a burglary) is charged with capital murder, both that person and any and all accomplices—who may have had no part in the crime of murder—can be sentenced to death, or, in the case of people who were younger than eighteen years old at the time of the commission of the offense, can be sentenced to life with parole eligibility after forty years served.<sup>206</sup> While four other states have

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2016/08/12/in-texas-a-man-who-didnt-kill-anybody-is-about-to-be-executed-for-murder/?utm\_term=.f3937b436a91 [https://perma.cc/96ED-2NCP] (detailing any person who “solicits, encourages, directs, aids, or attempts to aid the other person to commit an offense” is also criminally liable for that offense).

201. TEX. PENAL CODE ANN. § 7.01(c) (2019); Jolie McCullough, *Texas Lawmakers Aim to Eliminate Death Penalty for Convicts Who Didn't Kill*, TEX. TRIB. (Feb. 1, 2017), <https://www.texastribune.org/2017/02/01/texas-lawmakers-see-reform-death-penalty-those-wh/> [https://perma.cc/9M99-NFFS].

202. See generally Steve Charnock, ‘Law of Parties’ – Texas’ Very Strange Rule (Sept. 12, 2018), <https://www.crimeandinvestigation.co.uk/shows/i-am-a-killer/articles/law-of-parties-texas-very-strange-rule> [https://perma.cc/PF37-TLMU] (analyzing the extremely blurred lines of responsibility relative to the involvement in the crime).

203. McCullough, *supra* note 201.

204. *Id.*

205. Compare *id.* (convicting Jeff Wood for murder under the Law of Parties statute holding those involved in a crime resulting in death equally responsible despite not directly being involved in the actual killing), with Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 78 (2004) (convicting Richard Salisbury’s servant only of manslaughter despite wounding the man and contributing to his murder).

206. See Editorial: *Paper Says Texas Man Sentenced Under “Law of Parties” Should Not be Executed*, DEATH PENALTY INFO. CTR. (Aug. 20, 2007), <https://deathpenaltyinfo.org/news/editorial-paper-says-texas-man-sentenced-under-law-of-parties-should-not-be-executed>



Law of Parties statutes, Texas is the only state in which it applies in capital cases.<sup>207</sup>

It is important to note that many Second Lookers were sentenced under Texas's Law of Parties and are being held accountable for crimes someone else committed—although the exact number is unknown because Texas does not classify or track these cases in any unique way.<sup>208</sup> Nevertheless, some egregious cases have surfaced in which the primary actor has received a lesser sentence than the person sentenced as an accomplice under the Law of Parties.<sup>209</sup>

### 3. *Second Lookers by Their Stories*

In 2017, the Texas Criminal Justice Coalition partnered with Epicenter and the Lone Star Justice Alliance to jointly publish “The Second Look Book,” a collection of stories written by people sentenced as youths to an adult prison in Texas, sharing their experiences.<sup>210</sup> Below are excerpts from some of the Second Lookers featured in the book, in their own words:

#### **Jermaine, life sentence at 15 years old**

We as humans are destined to make mistakes. As children, we have all fallen victim to our mistakes. We have all been accused of doing wrong, and finally, in God's eyes, we are all sinners. In his eyes also, we receive redemption through his love and grace. This exists for us all. So too, our society and laws should offer redemption for those who have discovered resilience and rehabilitation out of their moment of making a mistake.

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[<https://perma.cc/MH9R-QXYV>] (illustrating the purpose of the Law of Parties concerning co-conspiracy and organized crime).

207. See generally *id.* (highlighting the disproportionality of the justice system regarding this statute).

208. See TEX. CRIM. JUST. COAL. ET AL., THE SECOND LOOK BOOK (2017), <https://www.texascjc.org/system/files/publications/The%20Second%20Look%20Book.pdf> [<https://perma.cc/ZC3M-GJFQ>] (highlighting the stories of teenagers sentenced to life in prison); see also Meagan Flynn, *Sorry for Life?: Ashley Ervin Didn't Kill Anyone, But She Drove Home the Boy Who Did*, HOUSTON PRESS (Jan. 12, 2016), <https://www.houstonpress.com/news/sorry-for-life-ashley-erwin-didn-t-kill-anyone-but-she-drove-home-the-boys-who-did-8064300> [<https://perma.cc/2J7D-WRPE>] (reporting accomplice cases are more common than not).

209. *Texas Needs to Reform its 'Law of Parties,' Which Allows Death Penalty for People who Haven't Killed Anyone*, DALLAS MORNING NEWS (Feb. 9, 2017), <https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-reform-law-parties-allows-death-penalty-people-killed-anyone> [<https://perma.cc/V3H2-Q4BT>].

210. TEX. CRIM. JUST. COAL. ET AL., *supra* note 208.

Here in prison, where I compose these very thoughts, it can be hard for those of you to acknowledge my redemption. You can't read my mind, feel my heart, or see my daily walk, but somewhere in this demonstration, I hope you find my seriousness towards my atonement. In 1994, I was charged with capital murder. Even though I was not the killer in this crime, I was convicted and given a life sentence. The accused killer received less time and twenty years later went home on parole.<sup>211</sup>

### **Megan, 99-year sentence at 15 years old**

Here I sit, now a 30 yr. old woman, at the Lane Murray Unit in Gatesville Texas. In the past 14 ½ yrs. many things have become clear and many lessons have been learned. Among the things I've grown to see clearly is the fact that prison is not meant to rehabilitate. Prison is punitive at best and dysfunctionally abusive at worst. Somehow the children, like myself, must wade through the muck and chaos of prison to find out who we are how we'll rise above. Sadly, I've seen many young people lose their true essence to conform to the dysfunction of their surroundings. Amazingly, on the other side of the spectrum are those who, like myself recognize the dysfunction for what 'it' is and learn to soar. It's the second group who decide early on that we will succeed; not because of our limitations but in spite of them. Children, regardless of circumstance are still kids. Vulnerable and in need of nurturing. Prison does not solve the problem.<sup>212</sup>

### **Justin, 99-year sentence at 15 years old**

In 1993 I was convicted under the law called, "Law of Parties" and sentenced to 99 yrs. aggravated for aggravated robbery. The path that led to that point in my young life is not the one intended by my parents. Like any young teenager I had dreams of growing up and being successful, but not knowing life can change in the blink of an eye, my reality was proof that it could . . . . I never finished the 9th grade of high school, but I refused to let my academic education end there. I obtained my G.E.D. when I was 19 yrs old, received my barber's license 15 months later, enrolled in community college also obtaining 2 degrees, and I am currently enrolled in U of H for the Bachelor's program . . . . Please never think that

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211. *Id.* at 8–11.

212. *Id.* at 12–14.

incarcerating a child is a means to educate them, this is just one of the ways to survive.<sup>213</sup>

### **Robert, life sentence at 15 years old**

Should a child be punished, yes, most definitely. Should a child spend the rest of his natural life in prison for his first crime ever, no they shouldn't. Politicians would like you to believe that giving kids LIFE in prison acts as a deterrent, but it doesn't . . . . Some may think or say, "After 25 years, he has finally learned his lesson." But that isn't true, I learned my lesson not long after my incarceration . . . . Kids deserve a Second Chance because they are our future and we should never just "lock em up and throw away the key." Given a Second Chance, I'll be a success story and no longer just a statistic.<sup>214</sup>

### **Aaron, 50-year sentence at 17 years old**

In the throes of rage, sorrow, and youthful ignorance, I took the law into my own hands. I shot a man after he was released on bail following his arrest for the murder of my childhood friend, Omar . . . . Several months thereafter, Omar's killer was convicted of his murder and was sentenced to thirty years. Yes, you read that correctly; Omar's murderer was sentenced to thirty years for killing him and I was sentenced to fifty years for shooting him for killing Omar . . . . I cannot defend my act of vengeance, but even so, it is hard to fathom the injustice of these two sentences . . . . Since the years of impetuous immaturity have faded away, I have often found myself contemplating the thoughtless decision I made at that young age and how it not only changed the course of my life, but also altered the lives of all of the people who love me. The thought seems to always linger of where we would all be in life had I not taken the law into my own hands. Would those who love me have been proud of the man I would have become? Would I have found an amazing wife to love? Would I have been blessed with children? Would I have had something greater to live for? Though there is certainty in nothing in life, the possibilities are endless of what might have been.<sup>215</sup>

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213. *Id.* at 15–17.

214. *Id.* at 30–32.

215. *Id.* at 47–49.

**Patricia, life sentence at 15 years old**

I have spent the last fifteen years growing up in the Texas Department of Criminal Justice . . . . I dream of being able to use this experience, all that was lost, to help other broken little girls maybe not feel so broken. I want to help them love their selves, so they don't make the same mistakes I did and so that they know they deserve better than what so many of us are taught to accept and settle for. Also maybe help parents realize that their children need them so much.<sup>216</sup>

**Chon, 75-year sentence at 17 years old**

To detach myself from the infectious negativity of prison culture, I pursued an education and participated in available rehabilitative programs. To date, I have earned four college degrees (an AA in Liberal Arts, a BS in Behavioral Science, a MA in Literature, and a MA in Christian Education), a college trade (in Computer Repair), five On-The-Job Vocational Trainings, and nine TDCJ rehabilitative programs (two more of which I am currently enrolled). My prison record testifies of my transformative maturation and self-betterment, exudes my longing desire to rejoin society, and reflects my propensity for success . . . . My survival has largely been fueled by hope of a second chance at life, and I am living proof that youthful offenders are not beyond hope or rehabilitation.<sup>217</sup>

*D. What Would “Second Look” Accomplish?*

The historical parole grant rate for juveniles sentenced to capital murder in Texas is incredibly low, at less than five percent—meaning less than five percent of all Texas juveniles sentenced to life with the possibility of parole since 1962 were released.<sup>218</sup> Additionally, in 2015, Texas law changed to extend the maximum time between parole reviews from five years to ten years for individuals serving a life sentence for a capital felony or who were convicted of aggravated sexual assault.<sup>219</sup> Because of this change, the Board of Pardons and Paroles can now “set off” the reconsideration of parole eligibility for people convicted of certain felonies for up to ten years, which will inevitably result in fewer opportunities for parole consideration for juveniles serving life

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216. *Id.* at 58–60.

217. *Id.* at 62–65.

218. Flynn, *supra* note 208.

219. H.B. 1914, 84th Leg., Reg. Sess. (Tex. 2015).

sentences.<sup>220</sup> It is possible that, by further reducing their opportunities for parole review, Texas will begin to see even lower rates of parole for this population.

This additional restriction on a path to redemption, rather than a widened path, comes with a hefty price tag for taxpayers.<sup>221</sup> As discussed previously, it costs approximately \$2.5 million to incarcerate a juvenile for life, whereas it costs taxpayers approximately \$625,720 to incarcerate a juvenile for 20 years.<sup>222</sup> Early release for inmates who demonstrate that they have sufficiently rehabilitated and matured could save Texas taxpayers approximately \$1,874,280 *per person*.<sup>223</sup> Additionally, a child incarcerated at the age of 16 who is paroled after 20 years served could contribute approximately \$164,010 in tax revenue by working until age 66.<sup>224</sup> In “The Second Look Book,” attorney Elizabeth Henneke stated,

[T]he fact that a juvenile’s sentence is “life” rather than “life without parole” is not a basis for distinguishing *Miller*. While the juvenile will be eligible for parole after forty calendar years, the remote possibility of parole is not sufficient to cure the constitutional infirmities of a system in which 95% of the juveniles given those sentences will die in prison.<sup>225</sup>

Instead, Texas law should motivate youths to focus on rehabilitation and provide an actual path to redemption for those who can prove they merit a second chance.<sup>226</sup> Bryan Stevenson, attorney to the defendant in the *Montgomery* case, remarked after his landmark victory:

I believe that to say to any child that you’re only fit to die in prison is “cruel.” It’s true that some of these crimes are very disturbing, but it’s also true that the lives that many of these children have lived are also disturbing.

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220. *Id.*

221. *See Calculating the Full Price Tag for Youth Incarceration*, JUST. POL’Y INST 18 (Dec. 2014), [http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker\\_shock\\_final\\_v2.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf) [<https://perma.cc/A3D8-H2KR>] (narrowing in on the “substantial expenses” taxpayers are burdened with); *see also Incarcerating Youth Could Cost Taxpayers More Than \$8 Billion a Year*, EJI (Jan. 1, 2015), <https://eji.org/news/incarcerating-youth-could-cost-8-billion-annually/> [<https://perma.cc/9J22-DRC5>] (relaying that the total cost to taxpayers for incarcerating juveniles in the United States is more than \$8 billion a year).

222. Linder, *supra* note 161.

223. *Id.*

224. *Id.*

225. TEX. CRIM. JUST. COAL. ET AL., *supra* note 208 at 5.

226. Linder, *supra* note 161.

They're in many ways some of the most vulnerable kids in society, and we owe them more than to simply throw them away.<sup>227</sup>

#### CONCLUSION

Given everything the United States Supreme Court has stated about the inherent characteristics of adolescence, and with all of the supporting scientific research that the Court considered across cases, a de facto life sentence is cruel and unusual, and is highly inappropriate for juveniles.<sup>228</sup> It is time to return to the juvenile justice system's initial emphasis on rehabilitation—rather than the more punitive and misguided approach of the 1980s and 1990s—and ensure our legislatures and courts establish laws and practices in keeping with the spirit of recent court rulings.<sup>229</sup> Does a more compassionate, rehabilitative, but fair approach to sentencing offer a way in which a person can be held responsible, while not being permanently fixed to their crime?<sup>230</sup> At what point do the human and fiscal costs outweigh whatever punitive retribution society feels it is entitled to?<sup>231</sup> The individual stories in Part VI that elaborated on who these people are and how they have been impacted by such harsh sentences suggest that we must take a “second look” at the inhumanity of de facto life sentences.<sup>232</sup> As Nelson Mandela said, “there can be no

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227. Eva Rodriguez, *Bryan Stevenson Savors Victory in Supreme Court Ruling on Juvenile Life Sentences*, WASH. POST (June 25, 2012), [https://www.washingtonpost.com/lifestyle/style/bryan-stevenson-savors-victory-in-supreme-court-ruling-on-juvenile-life-sentences/2012/06/25/gJQA8Wqm2V\\_story.html](https://www.washingtonpost.com/lifestyle/style/bryan-stevenson-savors-victory-in-supreme-court-ruling-on-juvenile-life-sentences/2012/06/25/gJQA8Wqm2V_story.html) [<https://perma.cc/HTU4-9B7T>].

228. *See id.* (arguing that juveniles differ in their cognitive ability compared to adults, and sentencing them to life in prison is essentially dropping the protections they should be provided under the law); *see also* Robert Kreisman, *De Facto Life Sentence Without Parole Violates the U.S. Constitution's Eighth Amendment*, KREISMAN L. OFF. (July 23, 2019), <https://www.robertkreisman.com/injury-lawyer/de-facto-life-sentence-without-parole-violates-the-u-s-constitutions-eighth-amendment/> [<https://perma.cc/G6C6-VDJZ>] (explaining how a de facto life sentence is violative of an individual's constitutional rights).

229. *See* JUV. L. CTR., *supra* note 57 (recognizing the early juvenile courts' focus on rehabilitation and treatment).

230. *See* ROEDER ET AL., *supra* note 12 (directing the criminal justice system to focus on the personal development of criminal defendants).

231. *See id.* (inferring the true ways to get crime rates to decline—which is not mass incarceration); *see also* Tex. CRIM. JUST. COAL., *supra* note 87 (signifying the high cost and negative consequences of incarcerating juveniles for life); Del Rosario, *supra* note 92 (emphasizing the consequences of a state's lack of effort in ensuring the success of rehabilitation during incarceration).

232. *See* TEX. CRIM. JUST. COAL. ET AL., *supra* note 208 at 12–14 (providing narratives on individuals who are currently serving long sentences in prison and how these individuals are not

keener revelation of a society's soul than the way in which it treats its children."<sup>233</sup>

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properly rehabilitating or feeling any sense of hope for the future); *see also* Blackinger, *supra* note 171 (listing many positive impacts that a Second Look Bill could bring to Texas).

233. SPEECH BY PRESIDENT NELSON MANDELA AT THE LAUNCH OF THE NELSON MANDELA CHILDREN'S FUND (May 8, 1995), [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&itemID=NMS250&txtstr=Mahlamba](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&itemID=NMS250&txtstr=Mahlamba) [<https://perma.cc/494J-7Z62>].