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## Texas Juvenile Justice: The Need for a “Second Look” at Juvenile Prison Sentences

Kyle Jenkins

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## COMMENT

### TEXAS JUVENILE JUSTICE: THE NEED FOR A “SECOND LOOK” AT JUVENILE PRISON SENTENCES

KYLE JENKINS\*

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## I. OVERVIEW

This Comment examines the current parole system in Texas for persons who committed serious crimes when they were juveniles. In Texas, persons under the age of seventeen are treated as juvenile offenders.<sup>1</sup> However, juveniles as young as fourteen can be charged as adults if they commit serious offenses.<sup>2</sup> Currently, the Texas parole process is the same for both juvenile and adult prisoners.<sup>3</sup> While the maximum parole eligibility date for all offenders is forty years,<sup>4</sup> the 2021 Texas Legislature attempted to reduce

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1. *Age Matrix*, INTERSTATE COMM'N FOR JUVS., <https://www.juvenilecompact.org/age-matrix> [https://perma.cc/39EN-ECCX].

2. *See id.* (naming capital murder, aggravated controlled substance felony, or a first-degree felony as such serious offenses).

3. *See* TEX. GOV'T CODE ANN. § 508.145(b) (setting the maximum parole eligibility date at forty years).

4. *Id.* § 508.145(c).

the maximum parole date for juveniles to thirty years.<sup>5</sup> Despite the Texas Legislature's efforts, the "Second Look" bill did not become law.<sup>6</sup>

Several people are currently serving sentences of forty years or more in Texas for crimes they committed as juveniles.<sup>7</sup> For example, Jermaine Hicks was convicted of murder in 1994 and sentenced to life in prison.<sup>8</sup> Jermaine was only fifteen when he was sentenced.<sup>9</sup> Despite not being the "trigger man," Jermaine received a longer prison sentence than the actual killer.<sup>10</sup> Jermaine is only one example of a juvenile who is serving a prison sentence of over forty years in Texas.<sup>11</sup> This Comment examines how a Second Look bill will reform Texas's juvenile sentencing approach and provide justice for offenders like Jermaine.

Part II defines parole and provides a brief history of parole in the United States. Part III examines the parole process in Texas. Part IV discusses federal court decisions about juvenile sentencing and parole, including Supreme Court precedents. Part V stresses the need for reform in Texas.

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5. Tex. H.B. 686, 87th Leg., R.S. (2021).

6. Veto Message of Gov. Abbott, Tex. H.B. 686, 87th Leg., R.S. (2021); *see also* Matt Zdun, *Texas Second Look Bill Vetoed Despite Bipartisan Support*, KWTX (June 24, 2021, 9:34 PM), <https://www.kwtx.com/2021/06/25/texas-second-look-bill-vetoed-despite-bipartisan-support/> [<https://perma.cc/BB84-LQP7>] ("Last week, Gov. Greg Abbott vetoed the so-called Second Look Bill, a chance for some who committed crimes as teenagers, but were tried as adults, to be considered for parole sooner."); Heidi Pérez-Moreno & Farah Eltohamy, *Gov. Greg Abbott Vetoes Criminal Justice Bills, Legislation to Protect Dogs, Teach Kids About Domestic Violence*, TEX. TRIB. (June 21, 2021), <https://www.texastribune.org/2021/06/21/texas-greg-abbott-veto/> [<https://perma.cc/HGW9-SDMJ>] (describing bills vetoed by Gov. Abbott).

7. *See generally* TEX. CRIM. JUST. COAL. ET AL., *THE SECOND LOOK BOOK: A COLLECTION OF STORIES FROM PEOPLE WHO WERE SENTENCED AS KIDS TO ADULT PRISON IN TEXAS*, TEX. CRIM. JUST. COAL. (2017), <https://texascje.org/system/files/publications/The%20Second%20Look%20Book.pdf> [<https://perma.cc/8WX7-6S9C>] (listing the sentences of several juvenile offenders in Texas prisons). *See also* Claudia Lauer & Jamie Dunaway, *12 Texas Inmates are Serving Banned Juvenile Life Sentences*, AUSTIN AM.-STATESMAN (July 31, 2017, 12:01 AM); <https://www.statesman.com/news/20170731/12-texas-inmates-are-serving-banned-juvenile-life-sentence/1> [<https://perma.cc/Y2WN-8E96>] (providing stories of juvenile inmates serving more than forty years in prison).

8. TEX. CRIM. JUST. COAL. ET AL., *supra* note 7, at 9.

9. *Id.*

10. *Id.* ("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.").

11. *See* Lindsey Linder & Justin Martinez, *No Path to Redemption: Evaluating Texas's Practice of Sentencing Kids to De Facto Life Without Parole in Adult Prison*, 22 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 307, 338–41 (2020) (summarizing stories of several juvenile offenders in Texas). *See generally* TEX. CRIM. JUST. COAL. ET AL., *supra* note 7 (providing narratives of Texas prisoners).

Finally, Part VI introduces Second Look bills and examines Texas House Bill 686.<sup>12</sup>

## II. PAROLE IN GENERAL

### A. *Introduction to Parole*

Parole is “the conditional release of a prisoner from imprisonment before the full sentence has been served.”<sup>13</sup> The development of parole intended to address overcrowding in state prisons.<sup>14</sup> The factors determining a prisoner’s eligibility for parole vary drastically from state to state.<sup>15</sup> However, the state parole systems also share some similarities. For example, state parole boards determine an offender’s eligibility in many states.<sup>16</sup> If a prisoner is granted parole, he or she will get out of prison—subject to supervision.<sup>17</sup> As part of the conditions of parole, a parolee will typically be required to have regular meetings with his or her parole officer.<sup>18</sup> Other common conditions require the parolee to: (1) find and maintain employment; (2) abstain from new criminal activity; (3) not consume drugs or alcohol; (4) seek substance abuse counseling; (5) not communicate with victims; and (6) comply with strict travel restrictions.<sup>19</sup> If any of the parole conditions are violated, the offender may be sent back to prison.<sup>20</sup>

Parole is handled at the state level and is controlled by statutes.<sup>21</sup> In many states, a person convicted of a crime—typically a felony offense—is eligible

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12. Tex. H.B. 686, 87th Leg., R.S. (2021).

13. *Parole*, BLACK’S LAW DICTIONARY (11th ed. 2019).

14. See *Probation and Parole: History, Goals, and Decision Making*, JRANK, <https://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html> [<https://perma.cc/V6QV-6DPD>] (indicating the development of parole intended to assist state governors with reducing prison populations).

15. See Jorge Renaud, *Grading the Parole Release System of All 50 States*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html) [<https://perma.cc/2C6Z-ZLXQ>] (highlighting variations in state parole systems).

16. Monica Steiner, *What is Parole? How Does it Work?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-does-parole-work.html> [<https://perma.cc/8GVP-MTN7>].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. 59 AM. JUR. 2D, *Pardon and Parole* § 6 (2023) (noting the effective abolishment of federal parole by the Sentencing Reform Act).

for release after a certain number of years in prison.<sup>22</sup> In Texas, a defendant's eligibility for parole depends on the type of offense committed.<sup>23</sup> While all persons eligible for parole receive a hearing, only a minority of inmates are granted parole.<sup>24</sup> Parole is only granted in those cases where the sentencing authority determines that the defendant has exhibited "good behavior."<sup>25</sup> In Texas, the parole board considers several factors when determining whether to grant a prisoner release.<sup>26</sup> Whatever the state guidelines, states undoubtedly have a strong interest in maintaining parole systems.<sup>27</sup>

In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,<sup>28</sup> the Supreme Court held that a prisoner has no constitutional right to be granted parole.<sup>29</sup> The Court found that state parole systems that provide an "opportunity to be heard" and notify the defendant of the parole decision are constitutionally permissible.<sup>30</sup> However, at least one state supreme court

22. See, e.g., *Current Parole and Mandatory Supervision Eligibility Timeframes*, HABERN L. FIRM, <http://www.paretexas.com/articles/Current%20Parole%20%20Mandatory%20Supervision%20Eligibility%20Timeframes.pdf> [<https://perma.cc/RCN3-9779>] (categorizing the parole eligibility date for certain offenses in Texas).

23. See *id.* (charting parole timelines for various Texas offenses). See generally TEX. GOV'T CODE ANN. § 508.145 (explaining the current Texas parole eligibility guidelines and time computation for parole eligibility dates).

24. From October 2018 to September 2019, 77,505 parole hearings were held. However, parole was only granted in 36.5% (28,308) of cases. TEX. LEGIS. BUDGET BD., MONTHLY TRACKING REPORT—FISCAL YEAR 2020 2 (2020), [https://www.lbb.state.tx.us/Documents/Publications/Info\\_Graphic/812\\_MonthlyReport\\_FY2020.pdf](https://www.lbb.state.tx.us/Documents/Publications/Info_Graphic/812_MonthlyReport_FY2020.pdf) [<https://perma.cc/J6XU-VVCB>]. The approval rate from December 2020–November 2021 increased to 38.1% (37.2% in November 2021). TEX. LEGIS. BUDGET BD., MONTHLY TRACKING OF ADULT CORRECTIONAL POPULATION INDICATORS 2 (Dec. 2021), [https://www.lbb.state.tx.us/Documents/Publications/Info\\_Graphic/812\\_MonthlyReport\\_Dec.pdf](https://www.lbb.state.tx.us/Documents/Publications/Info_Graphic/812_MonthlyReport_Dec.pdf) [<https://perma.cc/KSK8-HRR3>] [hereinafter ADULT CORRECTIONAL POPULATION INDICATORS].

25. *Parole*, BLACK'S LAW DICTIONARY (11th ed. 2019).

26. *Factors Considered in the Voting of a Case*, TEX. BD. PARDONS & PAROLES (Jan. 16, 2013), [https://www.tdcj.texas.gov/bpp/what\\_is\\_parole/vote-factors.htm](https://www.tdcj.texas.gov/bpp/what_is_parole/vote-factors.htm) [<https://perma.cc/P7NZ-BVVK>]; *Revised Parole Guidelines*, TEX. BD. PARDONS & PAROLES, [https://www.tdcj.texas.gov/bpp/parole\\_guidelines/parole\\_guidelines.html](https://www.tdcj.texas.gov/bpp/parole_guidelines/parole_guidelines.html) [<https://perma.cc/H8J2-XSME>].

27. See *In re Reed*, 171 Cal. App. 4th 1071, 1082 (Cal. Ct. App. 2009) ("It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees, including judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge." (internal quotation marks omitted) (quoting CAL. PENAL CODE § 3000(a)(1) (West 2022))).

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

29. See *id.* at 7 ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). See generally NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 6.6 (2d ed. 2022) (describing the history of due process in parole).

30. *Greenholtz*, 442 U.S. at 16.

has held that a prisoner obtains a liberty interest once he or she is granted parole.<sup>31</sup>

## B. *History of Parole*

### 1. English and Irish Common Law

Parole was first developed in English and Irish common law in the 1840s.<sup>32</sup> Under both common law systems, inmates could be released early if they showed good behavior while incarcerated.<sup>33</sup> Before parole was created, prisoners served a set amount of time for their crimes and had no opportunity for early release—except for pardons.<sup>34</sup> Countries and local governments faced mass overcrowdings, so government prison officials were forced to develop creative solutions to this issue.<sup>35</sup> The English and Irish parole systems—specifically the Irish system—were developed to avoid prison overcrowding.<sup>36</sup>

Under the English system, prisoners received “marks” based on their behavior while incarcerated.<sup>37</sup> Once an inmate received enough marks, the opportunity for early release arose.<sup>38</sup> The Irish system was very similar to England’s approach.<sup>39</sup>

### 2. Parole in the United States

New York created the first United States Parole System in 1907.<sup>40</sup> Throughout the twentieth century, many other states began to adopt parole-

31. *McDermott v. McDonald*, 24 P.3d 200, 204 (Mont. 2001) (per curiam) (“Once lawfully sentenced, however, a prisoner is not entitled to release prior to the completion of his full sentence. Parole, therefore, is a *grant of liberty*.”).

32. *Probation and Parole*, *supra* note 14.

33. *See id.* (discussing the English and Irish common law parole systems).

34. *See id.* (“Prior to the mid-nineteenth century most offenders were sentenced to flat or determinate sentences in prison. Under this type of sentencing, an offender received a specific amount of time to serve in prison for a specific crime.” (emphasis omitted)).

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.* (“The earned marks could be used to purchase either goods or a *reduction in sentence*.” (emphasis added)).

39. *See id.* (comparing the English and Irish parole systems).

40. *Dialogue—Issue 37: Parole in the United States: People & Policies in Transition*, DUI HUA, <https://duihua.org/dialogue-issue-37-parole-in-the-united-states-people-policies-in-transition/> [<https://perma.cc/TN5A-JWWH>].

based systems.<sup>41</sup> Every United States jurisdiction had a parole system by 1942.<sup>42</sup> Over seventy percent of inmates were granted parole in 1977.<sup>43</sup>

In the early 1900s, states established individual juvenile justice systems.<sup>44</sup> In the juvenile courts, states focused on rehabilitation rather than strict punishment guidelines.<sup>45</sup> States “safeguard[ed], train[ed], and educate[d]” child delinquents and did not prosecute juveniles for their crimes.<sup>46</sup> As crime rates began to increase, the American public began to criticize parole.<sup>47</sup> Many people argued that parole took power away from Congress, which makes laws and determines prison sentencing guidelines.<sup>48</sup> These criticisms began to change the structure of parole systems, but parole remains vital in American criminal justice systems.<sup>49</sup>

For states that have not abolished their parole systems, parole serves three important functions in criminal justice.<sup>50</sup> First, parole boards can adjust the time a defendant serves in prison.<sup>51</sup> Second, parole officers supervise released persons for a specified timeframe.<sup>52</sup> Finally, parole officers have

41. *Id.*; see also Jeremy Travis & Sarah Lawrence, *Beyond The Prison Gates: The State of Parole in America*, URBAN INST. 2 (Nov. 2002), [http://webarchive.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://webarchive.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf) [<https://perma.cc/5AKQ-N4X3>] (describing the history of parole in the United States).

42. *Dialogue—Issue 37: Parole in the United States: People & Policies in Transition*, *supra* note 40.

43. *Id.*

44. Charles Doyle, *Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters*, CONG. RSCH. SERV. 1, <https://sgp.fas.org/crs/misc/RL30822.pdf> [<https://perma.cc/JM2E-UJ26>].

45. *See id.* (“In the early twentieth century, the states established juvenile court systems so that children accused of conduct that would be criminal [for] an adult might be processed apart from the criminal justice system in an environment more closely attuned to their rehabilitative needs.”).

46. *See id.* (internal quotations omitted).

47. *See Dialogue—Issue 37: Parole in the United States: People & Policies in Transition*, *supra* note 40 (examining the criticisms of parole); see also Travis & Lawrence, *supra* note 41, at 2 (“As rising crime rates fueled public calls for tough anti-crime measures, parole became more closely aligned with the law enforcement community.”).

48. *See* U.S. CONST. art. I § 8 (granting Congress power to make laws); see also *Dialogue—Issue 37: Parole in the United States: People & Policies in Transition*, *supra* note 40 (pointing to sentencing judges and parole boards as non-legislative branch actors affecting the parole system).

49. *See Dialogue—Issue 37: Parole in the United States: People & Policies in Transition*, *supra* note 40 (detailing some of the changes to state parole systems); see also *A Parole System ‘Report Card’ Gives Most States Failing Grades*, CRIME REP. (Feb. 27, 2019), <https://thecrimereport.org/2019/02/27/a-parole-system-report-card-gives-most-states-failing-grades/> [<https://perma.cc/9WTE-P84S>] (noting thirty-four states have parole systems).

50. *See* Travis & Lawrence, *supra* note 41, at 2 (detailing three functions of parole).

51. *Id.*

52. *Id.*



authority to revoke a convict's parole if the conditions of parole are violated.<sup>53</sup> Despite its critiques, parole has undoubtedly remained an integral part of American law.

### 3. History of the Federal Parole System

In 1867, the United States government adopted the first law allowing early release to federal prisoners with good behavior while incarcerated.<sup>54</sup> The statute authorized prison wardens to reduce a convict's sentence by one month for each year the person served in prison.<sup>55</sup> For example, the warden could lessen a defendant's sentence by five months if the defendant served five years.<sup>56</sup> The law was eventually limited in scope.<sup>57</sup> After its creation in 1870, the Department of Justice took over the responsibility of federal early release programs in 1872.<sup>58</sup>

The first United States parole statute took effect in 1910, and the law applied to all federal prisoners serving a sentence of at least one year.<sup>59</sup> An inmate was qualified for parole after serving thirty-three percent of a sentence.<sup>60</sup> The new system created several parole boards.<sup>61</sup> The parole boards had the power to accept or suspend an inmate's parole.<sup>62</sup> A prisoner superintendent and anyone else the attorney general deemed appropriate served on each respective parole board.<sup>63</sup>

Over the next decades, the federal parole system underwent substantial changes.<sup>64</sup> For example, the parole board made two sweeping changes in 1932.<sup>65</sup> First, a parolee could no longer deduct good time in prison from the time served on parole.<sup>66</sup> Second, a prisoner granted early release—without being granted parole—also had to serve the rest of the sentence under

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53. *Id.*

54. U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 5 (May 2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> [<https://perma.cc/HTF4-A7V2>].

55. *Id.*

56. *See id.* (detailing the prison reduction statute of 1867).

57. *See id.* (analyzing parole law changes in 1870).

58. *Id.*

59. *Id.* at 6.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 6–34 (providing a timeline of the federal parole system).

65. *See id.* at 9 (detailing changes in parole law in 1932).

66. *Id.*

a form of supervised release.<sup>67</sup> Both of the new provisions meant that an inmate was not truly “free” until the prisoner’s sentence expired.

The federal parole system also focused on juvenile rights. In June 1938, Congress passed the Federal Juvenile Delinquency Act (formerly 18 U.S.C. § 5041).<sup>68</sup> This Act allowed the Federal Parole Commission to grant a juvenile parole “at *any time* after commitment.”<sup>69</sup> In the early 1970s, the law expanded further and granted juvenile offenders “basic procedural rights” when they are charged with federal crimes.<sup>70</sup> The Juvenile Delinquency Act was repealed as part of the Comprehensive Crime Control Act of 1984,<sup>71</sup> which eventually eliminated the federal parole commission.<sup>72</sup>

Given the effect of the Federal Delinquency Act, it could be argued that Texas’s current parole system is inconsistent with the intent of the Act. While the Juvenile Delinquency Act set the parole board hearing at the discretion of the parole board,<sup>73</sup> Texas makes no differentiation in the parole eligibility date of persons who committed crimes as juveniles and were moved to the adult criminal system—except in capital felony cases.<sup>74</sup>

### III. THE JUVENILE PAROLE PROCESS IN TEXAS

#### A. *Brief Introduction to the Juvenile Justice Process*

Texas defines a child as one who is between the ages of ten and seventeen, or one who is between seventeen and eighteen years old and has been accused of “delinquent conduct” before turning seventeen.<sup>75</sup> In 1973, Texas created its juvenile justice system, which is captured in Title 3 of the Texas Family Code.<sup>76</sup> The legislature enacted the original version of the Family

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67. *Id.*

68. *See id.* at 10.

69. *Id.* (emphasis added).

70. William H. Sessions, & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY’S L.J. 509, 509–10 (1983).

71. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

72. *See* U.S. PAROLE COMM’N, *supra* note 54, at 26 (“The Parole Commission was to be abolished five years from the date the sentencing guidelines took effect.”).

73. *Id.* at 10.

74. *See generally* TEX. GOV’T CODE ANN. § 508.145 (defining parole eligibility dates for offenders in Texas).

75. TEX. FAM. CODE ANN. § 51.02(2).

76. *See* OFF. OF THE ATT’Y GEN. OF TEX., 2020 JUVENILE JUSTICE HANDBOOK: A PRACTICAL REFERENCE GUIDE INCLUDING UPDATES FROM THE 86TH LEGISLATIVE SESSION 1 (June 2020), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/juvenile->

Code to rehabilitate juvenile offenders.<sup>77</sup> However, the focus of Texas juvenile law shifted to promoting public safety and punishment in the mid-1990s.<sup>78</sup> Today, the major focus of Texas law remains retribution, rather than rehabilitation.<sup>79</sup>

If a child is convicted of a crime in Texas, the juvenile courts typically have sole jurisdiction to sentence the juvenile.<sup>80</sup> Normally, this means a juvenile must be released before his or her nineteenth birthday.<sup>81</sup> However, prosecutors have discretion to sentence a juvenile to a fixed term—which may exceed the date the juvenile turns nineteen—for serious criminal offenses.<sup>82</sup>

While juvenile courts normally have control over juvenile sentencing, the prosecution can also move to certify a child offender as an adult if the offender's crime and age meet certain criteria.<sup>83</sup> To determine if a juvenile should be treated as an adult, the juvenile court must consider the juvenile's: (1) offense; (2) maturity level; (3) prior record; (4) threat to society; and (5) chances of rehabilitation.<sup>84</sup> If the judge finds against the defendant, the juvenile will go through the adult criminal process.<sup>85</sup>

If a juvenile is not tried as an adult, the sentence may be for a determinate<sup>86</sup> or indeterminate<sup>87</sup> amount of time.<sup>88</sup> However, determinate

justice/JuvenileJusticeHandbook.pdf [https://perma.cc/9QUZ-Y2XA] (providing a detailed evolution of the juvenile justice system in Texas).

77. *See id.* (listing the original purpose of juvenile law in Texas).

78. *See id.* (discussing the motivations of the juvenile justice code).

79. *See* TEX. FAM. CODE ANN. § 51.01(2)(B) (codifying the purpose of Title 3 of the Texas Family Code).

80. OFF. OF THE ATT'Y GEN. OF TEX., *supra* note 76, at 24.

81. *Id.*

82. TEX. FAM. CODE ANN. § 53.045(a); OFF. OF THE ATT'Y GEN. OF TEX., *supra* note 76, at 24.

83. *See generally* FAM. § 53.045 (codifying offenses eligible for a determinate sentence). *See* OFF. OF THE ATT'Y GEN. OF TEX., *supra* note 76, at 25 (requiring, if rehabilitation efforts fail, "the offender to complete his or her sentence in the adult prison or parole system").

84. TEX. FAM. CODE ANN. § 54.02(f)(1)–(4).

85. OFF. OF THE ATT'Y GEN. OF TEX., *supra* note 76, at 25.

86. Janet Portman, *Indeterminate vs Determinate Prison Sentences Explained*, NOLO, <https://www.criminaldefenselawyer.com/determinate-sentences.cfm> [https://perma.cc/2N3F-45W5] ("A determinate sentence is a jail or prison sentence that has a defined length and can't be changed by a parole board or other agency.").

87. *Id.* ("By contrast, an indeterminate sentence is one that consists of a range of years . . .").

88. *See generally* Sarah Bruchmiller & Hans Nielsen, *Determinate Sentencing for Juveniles*, TDCAA (July–Aug. 2017), <https://www.tdcaa.com/journal/determinate-sentencing-for-juveniles/> [https://perma.cc/FQG5-XB4U] (outlining several sentencing options for juvenile offenders in Texas).

sentencing can be used in only limited instances.<sup>89</sup> Prosecutors must go before a grand jury if they wish to impose a determinate sentence on a juvenile offender; however, this process can be waived by defense counsel.<sup>90</sup> If the jury does not vote in favor of the state, the prosecution still has the option of indeterminate sentencing.<sup>91</sup> If the determinate sentence petition is successful, the juvenile can be sentenced for up to forty years—depending on the type of crime committed.<sup>92</sup>

## B. *Brief Overview of Texas's Parole Process*

### 1. Parole Eligibility

Texas follows the rule set out in *Greenholtz* that inmates do not have a due process right to a parole hearing.<sup>93</sup> Further, an inmate is not entitled to a written statement explaining the parole board's decision if he or she is denied parole.<sup>94</sup> To receive a parole hearing, an inmate must be deemed eligible for parole.<sup>95</sup> Parole eligibility in Texas is governed by Section 508.145 of the Texas Government Code.<sup>96</sup> An offender's eligibility date varies by the type of offense committed.<sup>97</sup> Currently, some offenses are exempt from parole eligibility—meaning the offender must serve the entire sentence.<sup>98</sup>

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89. See *The Juvenile Justice System in Texas*, TEX. JUV. JUST. DEPT., <https://www.tjjd.texas.gov/index.php/juvenile-system#sentencing> [<https://perma.cc/XC2F-GGTV>] (providing crimes where determinate sentencing is allowed).

90. Bruchmiller & Nielsen, *supra* note 88 (outlining several sentencing options for juvenile offenders in Texas).

91. *Id.*

92. *The Juvenile Justice System in Texas*, *supra* note 89; see also Bruchmiller & Nielsen, *supra* note 88 (“A first-degree felony that has been approved as a determinate habitual felony conduct offense would have a disposition (punishment) range of up to 40 years, a second-degree would have a range up to 20 years, and a third-degree would be up to 10 years.”).

93. DAVID P. O'NEIL, WHAT DEFENSE ATTORNEYS SHOULD KNOW ABOUT PAROLE IN TEXAS 2 (Apr. 2016), <http://www.paroletexas.com/articles/Defense%20Attorneys.pdf> [<https://perma.cc/2JVR-X9HX>]; see also *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 8 (1979) (noting an inmate has no right to early release from prison).

94. O'NEIL, *supra* note 93, at 23; see also *Johnson v. Wells*, 566 F.2d 1016, 1017 (5th Cir. 1978) (“[T]he lack of a written statement of the reasons for the Board's decision, do not amount to the deprivation of constitutional rights.” (first citing *Shaw v. Briscoe*, 541 F.2d 489 (5th Cir. 1976); and then citing *Cook v. Whiteside*, 505 F.2d 32 (5th Cir. 1974))).

95. TEX. GOV'T CODE ANN. § 508.141(a)(3).

96. See generally *id.* § 508.145 (addressing “Eligibility for Release on Parole” and the “Computation of [a] Parole Eligibility Date”).

97. See *Current Parole and Mandatory Supervision Eligibility Timeframes*, *supra* note 22 (providing Texas parole timelines).

98. GOV'T § 508.145(a).

Some of these offenses include certain trafficking-of-persons<sup>99</sup> and sexual-abuse of a minor cases.<sup>100</sup>

Offenders sentenced to a capital felony<sup>101</sup> are eligible for parole after forty years—excluding good time calculations—if the inmate was under the age of eighteen at the time of the offense.<sup>102</sup> The punishment for adults who commit capital felonies is life without parole.<sup>103</sup> Offenses under Article 42.054(a) of the Code of Criminal Procedure are subject to a possible thirty-year parole eligibility timeframe.<sup>104</sup> Most other inmates are eligible for parole within fifteen years, based on a statutory calculation of actual time served plus good conduct time.<sup>105</sup>

## 2. Parole Board Hearing and Decision

Once an offender is eligible for parole, the Texas Board of Pardons and Paroles (parole board) determines whether to grant parole.<sup>106</sup> The parole board also determines the post-sentencing conditions and whether to rescind parole if the conditions are violated.<sup>107</sup> The board consists of seven members appointed by the governor and confirmed by the Texas Senate.<sup>108</sup> The board members also appoint fourteen commissioners to assist with board duties—including voting on parole and revocation.<sup>109</sup> Currently, there are no formal requirements for Parole Board membership or composition;<sup>110</sup> however, proposed legislation would change membership requirements.<sup>111</sup>

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99. *Id.* § 508.145(a)(1). *See generally* TEX. PENAL CODE ANN. § 20A.03 (defining continuous trafficking of persons).

100. GOV'T § 508.145(a)(2). *See generally* TEX. PENAL CODE ANN. § 21.02 (criminalizing continuous sexual abuse of a minor).

101. *See generally* TEX. PENAL CODE ANN. § 12.31 (describing sentencing guidelines for those found guilty of a capital felony).

102. GOV'T § 508.145(b); PENAL § 12.31(a)(1).

103. PENAL § 12.31(b)(2).

104. TEX. GOV'T CODE ANN. § 508.145(d)(1)–(2); TEX. CODE CRIM. PROC. ANN. art. 42A.054(a)(1)–(17).

105. GOV'T § 508.145(f).

106. *See* TEX. BD. OF PARDONS & PAROLES, TEX. DEP'T OF CRIM. JUST. PAROLE DIV., ANSWERS TO COMMON QUESTIONS 3 (2019), [https://www.tdcj.texas.gov/documents/pd/PIT\\_English.pdf](https://www.tdcj.texas.gov/documents/pd/PIT_English.pdf) [<https://perma.cc/C634-7BYH>] (outlining the functions of the Texas Parole Board).

107. *Id.*

108. *Id.*

109. *Id.*

110. TEX. GOV'T CODE ANN. § 508.031(a)–(b).

111. TEX. H.B. 1328 87th Leg., R.S. (2021); TEX. H.B. 1844 87th Leg., R.S. (2021).

The Board begins considering an offender for parole several months before the inmate's eligibility date.<sup>112</sup> Before an offender's hearing, the Board will collect the following information on the offender: (1) criminal background; (2) educational and counseling achievements while incarcerated (e.g., bachelor's degree and anger management classes); (3) drug abuse history; and (4) disciplinary history since being incarcerated, such as fights or gang membership.<sup>113</sup> The inmate may also be interviewed by a board representative during this stage.<sup>114</sup>

After reviewing its initial findings, the board will hold a hearing to determine if the prisoner will be released on parole.<sup>115</sup> The parole board will normally hold the hearing within one month of the offender's eligibility date.<sup>116</sup> The defendant's case is heard by a panel of three persons.<sup>117</sup> The panel is comprised of at least one board member, and the other members are parole commissioners.<sup>118</sup> The panel considers a number of factors to determine if the offender should be granted parole, including the time the offender has been in prison, the offender's age, and support or protest letters.<sup>119</sup> While age is a factor, the board considers the defendant's age at the time of the hearing—not age at the time of arrest.<sup>120</sup>

The panel does not simply vote to deny or approve an inmate's parole.<sup>121</sup> Instead, the parole board has a variety of options, from approving release to the general population to granting parole once the defendant completes rehabilitation or counseling programs.<sup>122</sup> For many prisoners, an FI-1 is the most desirable option because release is possible without having to complete any programs.<sup>123</sup> The board's ultimate decision often depends on the members of the voting panel.<sup>124</sup> If the board denies parole, the defendant will be "set off" for a next review between one and ten years, depending on offense

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112. TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 13.

113. *Id.*

114. *Id.*

115. *Id.*

116. O'NEIL, *supra* note 93, at 11.

117. TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 13.

118. *Id.*

119. *Factors Considered in the Voting of a Case*, *supra* note 26.

120. *See id.* (noting the factors considered in parole voting); TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 13 (listing current age as a dynamic factor to be considered).

121. TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 16.

122. *See id.* at 16–17 (including the parole board voting options).

123. *Id.* at 16 (explaining the FI-1 voting option).

124. Marie Gottschalk, *No Star State: What's Right and Wrong About Criminal Justice Reform in Texas*, 19 SEATTLE J. FOR SOC. JUST. 927, 972–73 (2021).

type.<sup>125</sup> An inmate may also request a special review hearing prior to the next parole review date in limited circumstances.<sup>126</sup>

#### IV. FEDERAL COURT PRECEDENT

##### A. *Supreme Court*

In 2005, the U.S. Supreme Court recognized cognitive differences between adult and juvenile offenders.<sup>127</sup> In *Roper v. Simmons*,<sup>128</sup> the Supreme Court held states cannot impose the death penalty onto juvenile offenders.<sup>129</sup> Simmons and another juvenile murdered Shirley Crook by covering her mouth with duct tape and throwing her in the Mississippi River.<sup>130</sup> A short time after his arrest, Simmons admitted to murdering Mrs. Crook.<sup>131</sup> Simmons was convicted and sentenced to death.<sup>132</sup>

Simmons appealed his sentence that the Missouri Supreme Court found unconstitutional.<sup>133</sup> The U.S. Supreme Court agreed, finding that juveniles are different from adults for three reasons.<sup>134</sup> First, juveniles are immature and tend to be more reckless than adults.<sup>135</sup> Second, juvenile offenders are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”<sup>136</sup> Finally, the character traits of juveniles are not fully formed.<sup>137</sup> Due to these three differences, the Court held that

125. *Who Can Get a Multi-Year Review Period?*, TEX. BD. OF PARDONS & PAROLES, [https://www.tdcj.texas.gov/bpp/what\\_is\\_parole/set-off.htm](https://www.tdcj.texas.gov/bpp/what_is_parole/set-off.htm) [<https://perma.cc/F4B3-97N6>].

126. TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 19.

127. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

128. *Roper v. Simmons*, 543 U.S. 551 (2005).

129. *Id.* at 578; U.S. CONST. amend. VIII.

130. *Simmons*, 543 U.S. at 556–57.

131. *See id.* at 557 (“After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment of the crime scene.”).

132. *Id.* at 558 (2005).

133. *Id.* at 559–60 (2005).

134. *Id.* at 569.

135. *Id.* The Court stated:

First, as any parent knows and as scientific and sociological studies . . . confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

*Id.* (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

136. *Id.* (citing *Eddings*, 455 U.S. at 115).

137. *See id.* at 570 (“The personality traits of juveniles are more transitory, less fixed.”).

juveniles under the age of eighteen cannot be classified as the “worst offenders” and cannot be sentenced to death.<sup>138</sup>

The Supreme Court further recognized the differences between juveniles and adults in *Graham v. Florida*.<sup>139</sup> In *Graham*, the Court found that juveniles cannot be sentenced to life without parole, unless the juvenile was convicted of homicide.<sup>140</sup> The petitioner, Terrance Graham, robbed a restaurant at the age of sixteen.<sup>141</sup> He was sentenced to probation.<sup>142</sup> Soon after being placed on probation, Graham committed another robbery.<sup>143</sup> Graham was resentenced and given a term of life in prison without the possibility of parole.<sup>144</sup> In reaching its conclusion, the Court echoed the same reasoning as *Roper* and found that juveniles and adult offenders must be treated differently.<sup>145</sup> The Court went even further in *Graham* by finding that juvenile offenders who do not commit murders should be punished more leniently than juveniles who do commit murders.<sup>146</sup>

The majority also noted that life in prison is not appropriate for young offenders because juveniles are more susceptible to change and rehabilitation.<sup>147</sup> Given that juvenile homicide offenders are different and the consequences of a life sentence are grave, the Court found that life sentences should not be imposed on nonhomicide juvenile offenders.<sup>148</sup>

However, the Court did not find that juvenile life sentences always violate the Eighth Amendment.<sup>149</sup> *Graham* requires states to “give defendants . . . some meaningful opportunity to obtain release based on demonstrated

138. *Id.* at 568.

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

140. *Id.* at 82.

141. *Id.* at 53.

142. *Id.* at 54.

143. *Id.* at 54–55.

144. *Id.* at 57.

145. *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

146. The Court stated:

Although an offense like robbery or rape is ‘a serious crime deserving of serious punishment,’ . . . those crimes differ from homicide crimes in a moral sense. It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a *twice* diminished moral culpability. The *age* of the offender and the *nature* of the crime each bear on the analysis.

*Id.* at 69 (quoting *Enmund v. Florida* 458 U.S. 782, 797 (2010)) (emphasis added).

147. *See id.* at 74 (finding juvenile nonhomicide offenders have a greater “capacity for change”).

148. *Id.*

149. *See id.* at 75 (“A State is not required to *guarantee* eventual freedom to a juvenile offender convicted of a nonhomicide crime.” (emphasis added)).



maturity and rehabilitation.”<sup>150</sup> The opinion hinted that parole can be used to reduce an offender’s sentence.<sup>151</sup>

The Supreme Court considered the constitutionality of mandatory life sentences for juvenile offenders in *Miller v. Alabama*.<sup>152</sup> Two juvenile offenders, Kuntrell Jackson and Evan Miller, were arrested and charged with murder.<sup>153</sup> Both Jackson and Miller received sentences of life imprisonment.<sup>154</sup> In both situations, the sentencing judge had no discretion and life imprisonment was the only possible punishment.<sup>155</sup>

Both boys appealed their sentences, alleging that their punishments violated the Eighth Amendment and were inconsistent with the Court’s holding in *Roper v. Simmons*.<sup>156</sup> Alabama and Arkansas defended their mandatory sentencing statutes on two grounds.<sup>157</sup> First, the states argued that banning mandatory life sentences for juvenile offenders would be inconsistent with prior Supreme Court precedent.<sup>158</sup> In *Harmelin v. Michigan*,<sup>159</sup> the Court struck down a defendant’s claim that life imprisonment for drug offenses violates the Eighth Amendment.<sup>160</sup> The Supreme Court in *Miller* rejected the states’ first argument, holding once again that juvenile offenders should be treated differently than adults who commit similar crimes.<sup>161</sup>

Second, Arkansas and Alabama argued that because most states allowed mandatory life sentences for juveniles, the law cannot be unconstitutional.<sup>162</sup> Indeed, at the time *Miller* was decided, over half the states had statutes forcing juvenile offenders who committed murder to be sentenced to life

150. *Id.*

151. *See id.* at 70 (recognizing the possibility of parole gives an offender some hope of release).

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

153. *Id.* at 465.

154. *Id.*

155. The Court stated:

In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate.

*Id.*

156. *See id.* at 466, 469 (summarizing the Alabama appellate court history for Miller’s case).

157. *Id.* at 480.

158. *Id.*

159. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

160. *Id.* at 994.

161. *See Miller*, 567 U.S. at 481 (“*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders.”).

162. *Id.* at 482.

imprisonment.<sup>163</sup> However, the Court refused to adopt this reasoning.<sup>164</sup> The Court noted the fact that many states allowed life imprisonment for juveniles “d[id] not preclude [the] determination that mandatory life without parole violates the Eighth Amendment.”<sup>165</sup>

The Court ultimately decided that juvenile mandatory life sentencing statutes violate the Eighth Amendment.<sup>166</sup> The Court did not ban this punishment outright but noted that states must consider mitigating circumstances before sentencing a juvenile to life imprisonment.<sup>167</sup> Those circumstances include the age of the offender and circumstances surrounding the crime.<sup>168</sup>

In the 2016 case *Montgomery v. Louisiana*,<sup>169</sup> the Supreme Court strengthened its holding in *Miller*. Specifically, the Court found that the prohibition on mandatory juvenile life sentences must be applied retroactively.<sup>170</sup> This means that children sentenced before the Court’s holding in *Miller* must be resentenced and given a chance for release. The Court noted that allowing convicted juveniles a chance at a parole hearing is a possible alternative.<sup>171</sup> Further, the court reasoned that “[e]xtending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions.”<sup>172</sup> *Montgomery* and *Miller* do not require a juvenile to be released from prison; they simply require that a juvenile receive a parole hearing.<sup>173</sup>

Finally, in *Jones v. Mississippi*,<sup>174</sup> the Supreme Court addressed whether the sentencing court must find that a juvenile is “permanently incorrigible” before being sentenced to life imprisonment.<sup>175</sup> The defendant, Brett Jones,

163. *Id.*

164. *Id.*

165. *Id.* at 487.

166. *Id.* at 489.

167. *See id.* at 489 (“[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”).

168. *See id.* (indicating age and “nature of their crimes” are relevant when courts determine an appropriate sentence for juvenile homicide offenders).

169. *Montgomery v. Louisiana*, 557 U.S. 190 (2016).

170. *See id.* at 212 (“The Court now holds that *Miller* announced a *substantive rule* of constitutional law.”) (emphasis added).

171. *Id.* (citing WYO. STAT. ANN. § 6-10-301(c) (2013)).

172. *Id.*

173. *See id.* (“Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*’s central intuition—that children who commit even heinous crimes are capable of change.”).

174. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

175. *See id.* at 1311 (introducing Jones’s claims and their relation to the Court’s stance of permanently incorrigible defendants).

repeatedly stabbed his grandfather.<sup>176</sup> Jones's grandfather died as a result of his injuries.<sup>177</sup> A jury convicted Jones on one count of murder.<sup>178</sup> Initially, the court sentenced Jones to a mandatory life sentence.<sup>179</sup> After *Miller* was decided, Jones received a new sentencing hearing.<sup>180</sup> The trial judge upheld Jones's original sentence.<sup>181</sup>

Jones appealed, claiming "a sentencer who imposes a life-without-parole sentence must *also* either (i) make a separate factual finding of permanent incorrigibility, or (ii) at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility."<sup>182</sup> The Court rejected the first claim because nothing in *Miller* forced judges to make a finding of "permanent incorrigibility."<sup>183</sup> The Court also found that the second claim lacked merit because "an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth."<sup>184</sup> Notably, the Court did not consider the proportionality of Jones's sentence.<sup>185</sup> The Court ended its opinion by noting that while the courts will not accept his challenges, Jones still had other options available to change his prison sentence.<sup>186</sup>

Even though the Supreme Court opinions only address life imprisonment and the death penalty, they have recognized several differences between adults and juveniles.<sup>187</sup> State statutory guidelines must adhere to these differences. Further, *Graham* shows that juvenile offenders must have a "meaningful opportunity to obtain release."<sup>188</sup> One way to conform to these strict requirements is to give juvenile offenders an earlier parole

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176. *Id.* at 1312.

177. *Id.*

178. *Id.*

179. *Id.* (first citing MISS. CODE ANN. § 97-3-21 (2000); then citing § 47-7-3(g) (2004); and then citing *Parker v. State*, 119 So.3d 987, 996–97 (Miss. 2013)).

180. *Id.* (citing *Jones v. State*, 122 So.3d 698 (Miss. 2013)).

181. *Id.* at 1313.

182. *Id.*

183. *Id.* at 1318.

184. *Id.* at 1319.

185. *Id.* at 1322 (citing *Harmelin v. Michigan*, 501 U.S. 957, 996–1009 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

186. *Id.* at 1323.

187. *See* *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005) (analyzing the significant differences between adults and children); *Miller v. Alabama*, 567 U.S. 460, 472–80 (2012) (explaining some of the differences between juvenile and adult offenders); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (finding juvenile nonhomicide offenders have a greater "capacity for change").

188. *Graham*, 560 U.S. at 75.

hearing date than adult offenders. While the Supreme Court has not determined the constitutionality of parole statutes that fail to differentiate between adult and juvenile offenders, it likely will at some point.

One could argue that the *Jones* holding finds that such statutes are constitutional. However, *Jones* does not preclude a claim based on parole eligibility guidelines. A defendant who is challenging parole eligibility statutes is likely to bring an as-applied challenge to the *length* of his or her sentence and not of the sentencing process itself. The *Jones* Court expressly left open claims based on the proportionality of a defendant's sentence.<sup>189</sup> This author believes that an as-applied challenge is likely to succeed under *Graham* because parole guidelines that do not differentiate between adults and juveniles fail to give juvenile offenders a meaningful opportunity to be released from prison.<sup>190</sup>

## B. Lower Federal Courts

### 1. Third Circuit

The Third Circuit examined an offender's sentence under *Miller* in *United States v. Grant*.<sup>191</sup> In the early 1990s, a federal judge sentenced the defendant, Corey Grant, to a mandatory life imprisonment sentence for murder.<sup>192</sup> After the Supreme Court decided *Miller*, the sentencing court afforded Grant a new sentencing hearing.<sup>193</sup> The court factored in Grant's young age and found that Grant is not incorrigible.<sup>194</sup> The judge resentenced Grant to a term of sixty-five years in prison.<sup>195</sup>

Grant appealed his sentence, arguing that sixty years is a de facto life sentence and effectively violates *Miller*.<sup>196</sup> The Third Circuit examined the meaning of "meaningful opportunity for release" and determined that

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189. See *Jones*, 141 S. Ct. at 1322 ("Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence." (citing *Harmelin*, 501 U.S. at 996–1009 (Kennedy, J., concurring in part and concurring in judgment))).

190. See *Graham*, 560 U.S. at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

191. *United States v. Grant*, 887 F.3d 131 (3d Cir.), *reh'g granted and vacated en banc*, 905 F.3d 285 (3d Cir. 2018), *aff'd in part, vacated in part on reh'g en banc*, 9 F.4th 186 (3d Cir. 2021).

192. *Id.* at 134.

193. *Id.* at 134–35.

194. *Id.*

195. *Id.*

196. *Id.*

judges should consider the age of retirement when sentencing a juvenile offender.<sup>197</sup> While there is dispute over the age of retirement, the court determined that sixty-five is the appropriate age for courts to consider.<sup>198</sup>

One author went even further than the Third Circuit and argued corrigible juveniles must be afforded a parole hearing date before they turn sixty-five.<sup>199</sup> However, an en banc panel of the Third Circuit reversed the *Grant* decision in 2021.<sup>200</sup> The court reasoned that because the sentencing court used Grant's age in imposing its sentence, Grant had no argument under *Miller*.<sup>201</sup> While the Third Circuit did overturn its decision in *Grant*, other circuit courts have held that de facto life sentences violate the Eighth Amendment.<sup>202</sup>

## 2. Fifth Circuit

The Fifth Circuit examined an offender's sentence under *Miller* when it decided *United States v. Sparks*.<sup>203</sup> The defendant, Tony Sparks, appealed his thirty-five-year prison sentence.<sup>204</sup> In 1999, Sparks and two other gang members attempted to carjack an individual.<sup>205</sup> Police stopped the gang member's efforts because Sparks violated the Killeen curfew law.<sup>206</sup> However, Sparks and his friends planned another carjacking the next day.<sup>207</sup> Sparks and his fellow gang members went to a convenience store to find a ride.<sup>208</sup> The gang convinced two youth ministers, Todd and Stacey Bagley,

197. *See id.* at 145–53 (discussing “meaningful opportunity for release” and the national retirement age).

198. *Id.*

199. *See* Mackenzie E. Brennan, Note, *A Hopeful Retirement From Prison: The Third Circuit's Evolving Definition of A “Meaningful Opportunity to Obtain Release from Prison” Offers Corrigible Juvenile Offenders a Second Chance in United States v. Grant*, 64 VILL. L. REV. 599, 627 (2019) (“To preserve juvenile rights under *Graham* and *Miller*, the Third Circuit ought to be a pioneer and guarantee automatic parole hearings for all corrigible juvenile offenders at or before the national age of retirement.”).

200. *See United States v. Grant*, 9 F.4th 186, 200 (3d Cir. 2021) (en banc) (“Regardless of whether it yields an aggregate sentence of de facto LWOP, we will affirm Grant's 60-year sentence . . .”).

201. *Id.* at 199.

202. *See Linder & Martinez, supra* note 11, at 329 (listing three other circuit courts who have overturned lengthy sentences for juvenile offenders).

203. *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019).

204. *Id.* at 750.

205. *Id.*

206. *Id.*

207. *Id.* at 751.

208. *Id.*

to give them a ride.<sup>209</sup> The gang dropped Sparks off at home.<sup>210</sup> The other gang members shot and killed Todd and burned Stacy alive.<sup>211</sup>

Sparks plead guilty to aiding and abetting a carjacking and hoped for a reduced sentence.<sup>212</sup> However, Sparks did not receive a light sentence because he attempted to escape prison before his sentencing hearing.<sup>213</sup> Sparks was sentenced to life imprisonment.<sup>214</sup> Sparks received a new hearing after the *Miller* decision.<sup>215</sup> The district court examined several factors, including his age and extensive disciplinary history.<sup>216</sup> In its twenty-six page analysis, the court found Sparks was violent and resentenced him to thirty-five years.<sup>217</sup>

On appeal, Sparks argued that his sentence was unconstitutional under the Eighth Amendment.<sup>218</sup> The Fifth Circuit examined the procedural and substantive aspects of Sparks's sentence.<sup>219</sup> The court found that *Miller* only applied to life sentences and rejected the substantive claim.<sup>220</sup> Many appellate and state courts have reached the same conclusion.<sup>221</sup> The Fifth Circuit also rejected Sparks's procedural claim and held that *Miller* does not require sentencing courts to follow any new procedures.<sup>222</sup> This conclusion also seems to conform with the recent decision in *Jones*.<sup>223</sup> While the Fifth Circuit rejected Sparks's claim, Sparks relied on an argument under *Miller*, not *Graham*'s "meaningful opportunity [for] release" standard.<sup>224</sup>

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209. *Id.*

210. *Id.*

211. *Id.* at 752.

212. *Id.* (citing U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2018)).

213. *Id.*

214. *Id.*

215. *Id.* (citing *In re Sparks*, No. 16-50973 (5th Cir. Nov. 18, 2016)).

216. *Id.* at 753.

217. *Id.*

218. *Id.*; see also U.S. CONST. amend. VIII (banning cruel and unusual punishment).

219. See *Sparks*, 941 F.3d at 753–56 (analyzing Sparks's Eighth Amendment challenge).

220. See *id.* at 754 ("Thus, if a sentencing court has the option to choose a sentence other than life without parole, it can choose life without parole without violating *Miller*").

221. See *id.* at 753–54 (internal citations omitted) (collecting cases reaching the same conclusion as the Fifth Circuit).

222. *Id.* at 755.

223. See *Jones v. Mississippi*, 141 S. Ct. 1307, 1318 (2021) (finding sentencing judges do not have to find that a juvenile offender is permanently incorrigible to sentence the defendant to life imprisonment).

224. *Sparks*, 941 F.3d at 753; *Graham v. Florida*, 560 U.S. 48, 75 (2010).

## V. THE NEED FOR REFORM IN TEXAS

A. *Issues with Texas's Parole System*

## 1. Texas Law and Supreme Court Precedent

In its current form, the Texas parole system is possibly inconsistent with Supreme Court precedent, particularly the holdings of *Miller* and *Graham*. Texas parole statutes only differentiate between juvenile and adult offenders on one occasion—capital felony cases.<sup>225</sup> The Texas Government Code allows juveniles a parole date within forty years, while adult offenders do not have an opportunity for parole.<sup>226</sup>

Several authors have argued that the forty-year guideline is unconstitutional because it denies a meaningful opportunity for release.<sup>227</sup> For example, one author argued that juveniles must receive an initial hearing within thirty years.<sup>228</sup> She noted that this timeframe is the midpoint of other state guidelines.<sup>229</sup> Additionally, the argument goes that parole boards should use a new scoring matrix in determining whether an offender should be granted parole.<sup>230</sup> While this argument is interesting, it is beyond the scope of this Comment. The first issue that Texas must address is the lengthy parole timeline for juvenile offenders, and changing the parole statutes is the most logical option. This author agrees that the maximum time an offender must serve before a parole board hearing should be thirty years.<sup>231</sup>

Texas Government Code Section 508.145 also violates the holding in *Graham* because it fails to account for age under certain circumstances.<sup>232</sup>

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225. See generally TEX. PENAL CODE ANN. § 12.31 (outlining punishment for capital felony cases); TEX. GOV'T CODE ANN. § 508.145 (codifying Texas parole eligibility timelines).

226. PENAL § 12.31(a)(1–2); GOV'T § 508.145(b).

227. See Brianna Weis, Comment, *Meaningful Opportunity for Release: Parole Board Standards for Juveniles Under Graham, Miller, and the Eighth Amendment*, 52 TEX. TECH L. REV. 411, 413 (2020) (“Because the possibility of parole is in name only, these [long] sentences do not provide a meaningful opportunity for release.”); Linder & Martinez, *supra* note 11, at 329 (“The issue with a de facto life sentence is that it fails to offer a ‘meaningful opportunity’ at release and life.”); see also Brennan, *supra* note 199, at 627 (arguing in favor of automatic parole hearings for juvenile offenders).

228. Weis, *supra* note 227, at 426.

229. *Id.*

230. See *id.* at 428–34 (describing a possible approach parole boards can use to determine parole decisions).

231. *Id.* at 426.

232. See generally TEX. GOV'T CODE ANN. § 508.145 (drawing attention to the absence of any mention of age as a factor).

The Court's opinion in *Graham* indicates that all laws must consider age.<sup>233</sup> The Texas parole eligibility statute does not mention age;<sup>234</sup> however, juvenile offenders are treated differently for capital cases under the Texas Penal Code.<sup>235</sup> *Graham* also indicates that juveniles have a high chance of rehabilitation.<sup>236</sup> Failing to account for age violates *Graham* and denies a juvenile offender a meaningful opportunity for release.<sup>237</sup> The Supreme Court of Iowa has made a similar ruling.<sup>238</sup> Additionally, other states have guidelines that require parole boards to consider youthfulness when determining parole eligibility.<sup>239</sup>

## 2. *Miller* in Texas Courts

The *Miller* holding has also caused confusion among Texas courts, particularly whether the holding extends to those with mental disabilities.<sup>240</sup> The Texas Court of Criminal Appeals resolved the controversy in *Avalos v. State*.<sup>241</sup>

In *Avalos*, a trial judge sentenced the defendant to two mandatory life sentences for murdering several women.<sup>242</sup> The defendant argued that his sentence was unconstitutional because it was mandatory, thus violating *Miller*.<sup>243</sup> The trial court rejected the defendant's claims, and the defendant appealed to the Fourth Court of Appeals.<sup>244</sup> The appellate court agreed with *Avalos* and held that *Miller* applies to the intellectually disabled.<sup>245</sup> The state

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233. See *Graham v. Florida*, 560 U.S. 48, 76 (2010) (“An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”).

234. See generally GOV'T § 508.145 (noting the absence of any mention of age).

235. TEX. PENAL CODE ANN. § 12.31(a)(1)–(2), (b)(1)–(2).

236. See *Graham*, 560 U.S. at 74 (indicating juveniles have a high “capacity for change and limited moral culpability”).

237. See *id.* at 75 (finding most juvenile offenders must be give a meaningful opportunity for release).

238. See *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (holding *Miller* protections extend to “a lengthy term-of-years sentence”).

239. See ARK. CODE ANN. § 16-93-621(b)(2)(A)–(I) (2023) (listing factors the parole board must consider); CAL. PENAL CODE § 4801(c) (West 2023).

240. See *Avalos v. State*, 635 S.W.3d 660, 661–62 (Tex. Crim. App. 2021) (identifying two appellate court decisions reaching different results on the issue of whether *Miller* extends to intellectually disabled people).

241. *Avalos v. State*, 635 S.W.3d 660 (Tex. Crim. App. 2021).

242. *Id.* at 661 (citing TEX. PENAL CODE ANN. § 12.31(a)(2)).

243. *Id.* at 661 n.1.

244. *Id.* at 661.

245. *Id.*



appealed to the Court of Criminal Appeals and argued that *Miller* does not apply because Avalos was an adult when he committed his crimes.<sup>246</sup>

The Court of Criminal Appeals began by analyzing prior Supreme Court cases—including *Roper*, *Graham*, *Miller*, and *Harmelin*.<sup>247</sup> The court then examined the similarities and differences between juvenile and intellectually disabled individuals.<sup>248</sup> While the two classes of persons are strikingly similar, the court found one distinctive trait in juvenile offenders.<sup>249</sup> The main difference is that juveniles typically “mature out of their dangerous proclivities.”<sup>250</sup> Since intellectually disabled offenders do not age out of crime, and the defendant was an adult, the court reversed the Fourth Circuit and upheld the defendant’s sentence.<sup>251</sup>

The *Avalos* opinion shows that juvenile offenders are specifically distinct, even more so than offenders who are intellectually disabled.<sup>252</sup> The author of this Comment agrees that juveniles are a distinct class of offenders that must be treated differently from *any* other offender. While the Supreme Court and Texas Court of Criminal Appeals have held that juveniles age out of crime, neither has determined precisely when (after how much time in prison, what age, etc.) a young offender is less likely to commit crimes.<sup>253</sup> In fact, the Supreme Court has left open the possibility of an as-applied challenge based on the length of a juveniles sentence.<sup>254</sup> This issue has caused mass confusion and inconsistent results in other states.<sup>255</sup> Given the

246. *Id.* at 662.

247. *See generally id.* at 662–64 (discussing Supreme Court precedent).

248. *See id.* at 670 (examining why juvenile and intellectually disabled offenders are different).

249. *See id.* (distinguishing juveniles from intellectually disabled people).

250. *Id.* at 671.

251. *Id.* at 671–72.

252. *See id.* at 671 (“Juvenile offenders may—by the simple process of aging—mature out of their dangerous proclivities, but the intellectually disabled offender will not.”).

253. *See State v. Null*, 836 N.W.2d 41, 67–68 (Iowa 2013) (“[The Supreme Court] did not indicate when such an opportunity must be provided or provide guidance regarding the nature or structure of such a second-look or back-end opportunity. Instead, the Court left it to the states ‘to explore the means and mechanisms for compliance.’” (footnote omitted) (citing *Graham v. Florida*, 560 U.S. 48, 74 (2010)); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (listing differences between juveniles and adults); *see also Avalos*, 635 S.W.3d at 671 (recognizing juvenile offenders are less likely to commit crime as they get older).

254. *Jones v. Mississippi*, 141 S. Ct. 1307, 1323 (2021) (“Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones’s Sentence.”).

255. *See* Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with Miller v. Alabama*, 13 CONN. PUB. INT. L.J. 143, 149 (2013) (discussing “[s]tate [a]pproaches to *Miller v. Alabama*”). *Compare Null*, 836 N.W.2d at 71 (finding *Miller* protections apply in cases where a juvenile

confusion, the Supreme Court will likely examine this issue soon and may find that Texas's current parole system is unconstitutional.

### 3. How Does Texas's Minimum Parole Date Compare to Other States?

While Texas should receive credit for eliminating life without parole for juvenile offenders,<sup>256</sup> its maximum parole eligibility date of forty years is a harsh outlier among states.<sup>257</sup> For example, in Nevada, juvenile inmates are eligible for parole after serving a maximum of twenty years in prison.<sup>258</sup> Additionally, juveniles who commit murder are eligible for parole after thirty-years maximum in Arkansas.<sup>259</sup> The state of Wyoming has also given juveniles a parole date within twenty-five years in most circumstances.<sup>260</sup> Sentencing a person to a forty-year imprisonment is also prohibited in other countries.<sup>261</sup>

Texas is a harsh outlier, which is significant because the courts will consider other state approaches when determining if a statute violates the Eighth Amendment.<sup>262</sup> The Court engaged in a lengthy analysis in *Graham* discussing state approaches to juvenile life sentences.<sup>263</sup> In *Graham*, the state argued that juvenile life sentences did not violate the Eighth Amendment

is sentenced to fifty years in prison), *and* State v. Pearson, 836 N.W.2d 88, 97 (Iowa 2013) (vacating a juvenile's sentence because the trial judge did not take into account "the mitigating factors of youth"), *with* Cutts v. State, 225 So. 3d 244, 245 (Fla. Dist. Ct. App. 2017) (failing to follow Iowa's decision in *Pearson*).

256. See TEX. GOV'T CODE ANN. § 508.145 (defining Texas parole eligibility); *see also* TEX. PENAL CODE ANN. § 12.31 (providing the penalty for capital offenses).

257. See GOV'T § 508.145(b) (setting the parole eligibility date for capital offenses at forty years); Weis, *supra* note 227, at 426 (claiming a parole eligibility of thirty years is the midpoint of other state statutes); *50-State Examination*, ASSOCIATED PRESS (July 31, 2017), <https://www.ap.org/explore/locked-up-for-life/50-states> [<https://perma.cc/GF92-JXKF>] (explaining other state parole system and eligibility guidelines).

258. NEV. REV. STAT. § 176.025 (2015); *50-State Examination*, *supra* note 257.

259. ARK. CODE ANN. § 16-93-621(a)(2)(A).

260. WYO. STAT. ANN. § 6-10-301; *50-State Examination*, *supra* note 257.

261. See AM. CIV. LIBERTIES UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 14 (Nov. 2016), <https://static1.squarespace.com/static/5f3432423616a51739896a2f/t/603dd28c2a1cf65e57dae114/1614664333293/False+Hope+Report+ACLU.pdf> [<https://perma.cc/8ZS3-WK8X>] ("In many countries, and particularly in Europe, [twenty] years is the maximum sentence an individual can receive.").

262. See *Graham v. Florida*, 560 U.S. 48, 61 (2010) ("[Courts] first consider[] 'objective indicia of society's standards, as expressed in legislative enactments and *state practice*,' to determine whether there is a national consensus against the sentencing practice at issue." (emphasis added) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005))).

263. See *id.* at 61–67 (describing different state approaches to juvenile sentencing).

because most states allowed young offenders to be sentenced to life imprisonment.<sup>264</sup> However, the Court rejected this argument because life sentences for young offenders were rarely imposed.<sup>265</sup>

The Court's reasoning helps an offender challenging a forty-year eligibility date in Texas.<sup>266</sup> Since most other states have a shorter parole eligibility timeline, most juvenile offenders are not in prison for forty years before receiving a parole hearing.<sup>267</sup> The Supreme Court will consider the vast differences in Texas's parole eligibility guidelines if a juvenile challenges his or her sentence, and it is possible that the Court will find the Texas forty-year guideline is unconstitutional.<sup>268</sup>

#### 4. Recidivism Rates in Texas

Recidivism rates also play an important role in Eighth Amendment challenges.<sup>269</sup> In *Graham*, the Court noted that recidivism may be a legitimate interest to confine juveniles for short periods of time, but it may not be a sufficient justification for long-term incarceration.<sup>270</sup> In fact, the Court found that the Eighth Amendment prevents states from holding defendants in prison longer than necessary.<sup>271</sup> However, the Court did not rule that states must eventually release every juvenile offender.<sup>272</sup>

Texas defines recidivism as “a return to criminal or delinquent activity.”<sup>273</sup> Texas tracks numerous statistics to calculate state recidivism rates.<sup>274</sup> While the state does calculate other recidivism statistics, the focus of this Comment is on reconviction rates and parole revocation numbers. The number

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264. *Id.* at 62.

265. *Id.* at 62–63.

266. *See id.* at 61 (considering a categorical approach to a term-of-years sentence). A defendant challenging the Texas parole statute would also bring an as-applied challenge to his sentence.

267. *50-State Examination*, *supra* note 257.

268. *See Graham*, 560 U.S. at 67 (noting courts may find other state statutes relevant to Eighth Amendment challenges).

269. *See id.* at 72 (“Recidivism is a serious risk to public safety, and so incapacitation is an important goal.” (citing *Ewing v. California*, 123 S. Ct. 1179 (2003))).

270. *See id.* at 73 (describing how an offender does not pose a threat to society forever).

271. *See id.* (“Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.”).

272. *Id.* at 75.

273. TEX. LEGIS. BUDGET BD., STATEWIDE CRIMINAL AND JUVENILE JUSTICE RECIDIVISM AND REVOCATION RATES 1 (Jan. 2021), [https://www.lbb.state.tx.us/Documents/Publications/Policy\\_Report/6293\\_CJDA\\_Recidivism-Revocation.pdf](https://www.lbb.state.tx.us/Documents/Publications/Policy_Report/6293_CJDA_Recidivism-Revocation.pdf) [<https://perma.cc/Q7LB-J72S>].

274. *Id.*

of juvenile parole revocations has steadily fallen since 2015.<sup>275</sup> The parole board revoked 30% of juvenile offenders in 2015 and slightly under 19% in 2020.<sup>276</sup> Additionally, 11.7% of the 2020 revocation rate (approximately 39 offenders) was due to “technical violations.”<sup>277</sup> Technical violations occur when juveniles break parole without committing new crimes.<sup>278</sup> It follows that 88.3% of juveniles whose probations were revoked in 2020 committed a new crimes.<sup>279</sup> While some of the reduction may be attributed to Covid-19,<sup>280</sup> the improvement is still promising for juvenile offenders.

Texas also tracks the number of adults on parole supervision.<sup>281</sup> In 2020, 83,703 adults were on parole.<sup>282</sup> Only 2,722 adults (3.2%) were revoked because they committed new crimes.<sup>283</sup> Adult revocation rates slightly declined in 2020.<sup>284</sup>

Texas calculates the number of parolees who commit new crimes by tracking reconviction rates over three years and dividing offenders into “cohorts.”<sup>285</sup> The 2016 group had the highest reconviction rate, making up about one-third of parolees.<sup>286</sup> The state also categorizes reoffenders by gender, race, age group at release, and offense level of initial sentence.<sup>287</sup> The reconviction rate drops to approximately 35% when an offender reaches the age of thirty-five.<sup>288</sup> Further, parolees aged forty-five or older have a reconviction rate of approximately 22%.<sup>289</sup> Persons who commit violent crimes are also less likely to offend than other classes of offenders.<sup>290</sup>

Because offenders aged forty-five or older are the least likely to reoffend, giving prisoners a parole hearing before they turn forty-five is a reasonable option.<sup>291</sup> The youngest age a juvenile can be sentenced as an adult in Texas

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275. *Id.* at 31.

276. *Id.*

277. *Id.* at 30.

278. *Id.* at 21, 35.

279. *Id.* at 30–31.

280. *See id.* at 3 (explaining the effects of COVID-19 on recidivism).

281. *Id.* at 21.

282. *Id.*

283. *Id.*

284. *See id.* at 21.

285. *See id.* at 19 (diagramming parole revocation rates from 2015–2017 groups).

286. *See id.* (providing the number of parolees who were reconvicted of new crimes in 2016).

287. *See id.* at 43.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

is fourteen, so this would mean revising the Texas parole guidelines to give offenders a parole date within thirty years.<sup>292</sup> Additionally, the parole board rarely grants parole—especially at initial hearings.<sup>293</sup> To remedy this, it would be ideal to give an offender two parole hearings before their forty-fifth birthday. Since Texas can set off the next review date for a maximum of ten years, an offender would receive a hearing before they turn thirty-five (approximately twenty years).<sup>294</sup> Providing a parole hearing to juveniles within twenty to thirty years would account for age and provide youthful prisoners a “meaningful opportunity” to be released from prison.<sup>295</sup> Additionally, the new guidelines would place Texas roughly in the middle of other state parole milestones.<sup>296</sup>

## VI. “SECOND LOOK” BILLS

### A. *What are Second Look Bills?*

During incarceration, many offenders are rehabilitated; some even obtain employment and advanced college degrees.<sup>297</sup> Even though they are rehabilitated, several offenders are forced to stay in prison for a specified amount of time, such as offenders in Texas who must serve specified amounts of time before parole hearings.<sup>298</sup> Many politicians, including former presidents, have sought to reduce extraordinarily long sentences.<sup>299</sup> Second Look bills allow offenders serving long sentences to have their punishments re-examined and force parole boards to consider rehabilitation at hearings.<sup>300</sup>

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292. See *Age Matrix*, *supra* note 1 (noting fourteen-year-olds can be charged as adults in Texas).

293. See ADULT CORRECTIONAL POPULATION INDICATORS, *supra* note 24, at 2 (providing the average parole approval ratings in Texas).

294. *Who Can Get a Multi-Year Review Period?*, *supra* note 125.

295. See Weis, *supra* note 227, at 426 (noting most states provide juveniles initial parole hearings within thirty years).

296. *Id.*

297. See Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 83, 84–85 (2019) (telling the story of Matthew Charles, an inmate who took college classes while working as the law clerk in the prison law library); Linder & Martinez, *supra* note 11, at 338–41 (providing stories of several juvenile offenders in Texas).

298. See Hopwood, *supra* note 297, at 86 (providing an example of a mandatory sentence); TEX. GOV'T CODE ANN. § 508.145 (codifying Texas's parole guidelines).

299. See, e.g., Hopwood, *supra* note 297, at 87 (explaining the First Step Act).

300. Sorell Grow, *Texas Groups Fighting Against Long Prison Sentences*, KIDS IMPRISONED (July 9, 2020), <https://kidsimprisoned.news21.com/blog/2020/07/texas-groups-fighting-against-long-prison-sentences/> [https://perma.cc/FY4Q-E3ER].

Second Look efforts have been used throughout the nation's history.<sup>301</sup> Recently, harsh juvenile sentences have received special attention in Texas.<sup>302</sup>

#### B. *Second Look Bill Efforts in Other States*

In addition to Texas, other states and the District of Columbia have also enacted Second Look legislation to change juvenile sentencing guidelines.<sup>303</sup> For example, Washington, D.C. changed its law to allow juveniles to petition a judge to reconsider their sentences after serving fifteen years in prison.<sup>304</sup> The new D.C. law applies to anyone convicted before turning twenty-five.<sup>305</sup>

Nevada also passed a Second Look bill in 2015.<sup>306</sup> This Nevada law allows juvenile defendants to receive a parole date within twenty years.<sup>307</sup> Additionally, the legislation eliminated juvenile life sentences.<sup>308</sup> The law obligates Nevada courts to consider the differences in juvenile offenders recognized in *Roper* at the sentencing phase.<sup>309</sup> The Nevada bill was passed unanimously and received support from some juvenile advocacy groups.<sup>310</sup>

#### C. *Examination of Texas House Bill 686*

Texas also attempted to enact a Second Look bill in 2021 with House Bill 686.<sup>311</sup> The proposed legislation would have changed the maximum juvenile parole date to thirty years in most circumstances.<sup>312</sup> The only exception to the thirty-year requirement is if a juvenile murdered a police officer or firefighter in the line of duty or murdered multiple persons.<sup>313</sup> In these

301. Hopwood, *supra* note 297, at 90.

302. See Grow, *supra* note 300 (noting support groups for juvenile offenders are growing); see also Tex. H.B. 686, 87th Leg., R.S. (2021) (providing the text of Texas's Second Look bill).

303. NEV. REV. STAT. § 176.025 (2015); D.C. CODE § 24-403.03 (2021). See generally *50-State Examination*, *supra* note 257 (explaining several states' reactions to *Miller*).

304. D.C. CODE § 24-403.03 (2021).

305. *Id.*

306. NEV. REV. STAT. § 176.025 (2015).

307. *Id.*

308. *Id.*

309. *Id.*; see also *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (describing general differences in juvenile offenders).

310. See Michael Haugen, *With Passage of AB 267, Nevada Has Abolished Life Without Parole Sentences for Juveniles*, RIGHT ON CRIME (May 27, 2015), <https://rightoncrime.com/2015/05/with-passage-of-ab-267-nevada-has-abolished-life-without-parole-sentences-for-juveniles/> [https://perma.cc/M5DQ-QHY5] (showing support from the Campaign Fair Sentencing of Youth).

311. Tex. H.B. 686, 87th Leg., R.S. (2021).

312. *Id.*

313. *Id.*; see also TEX. GOV'T CODE ANN. § 19.03(a)(1), (7) (explaining crimes exempted under H.B. 686).

circumstances, the parole date would remain forty years.<sup>314</sup> House Bill 686 also attempted to create a new section of the Texas Government Code, which would have forced parole boards to consider “the hallmark features of youth” when determining if a juvenile offender should be released.<sup>315</sup> The intent of this law is clearly *Graham* conformity, given that it specifically uses the words “meaningful opportunity to obtain release.”<sup>316</sup>

House Bill 686 is not Texas's first attempt at Second Look legislation.<sup>317</sup> However, it was the only bill to pass committee consideration.<sup>318</sup> House Bill 686 also had strong bipartisan support.<sup>319</sup> Despite strong support for the legislation, Governor Abbott ultimately vetoed it in June 2021.<sup>320</sup> Governor Abbott praised the bill for its progressive take on juvenile justice but vetoed because it would lead to “confusion and needless, disruptive litigation” and cause “disparate results in parole eligibility for juvenile offenders.”<sup>321</sup> Governor Abbott's main objections stemmed from the language of the bill itself rather than the content.<sup>322</sup>

Regardless, House Bill 686 would have radically changed Texas's juvenile sentencing scheme. First, the law would have forced boards to consider age and rehabilitation at parole hearings.<sup>323</sup> While the board does consider age, it does not consider age at the time of arrest or rehabilitation.<sup>324</sup> Second, the bill would allow a significant majority of juvenile offenders to have their case heard before the parole board within thirty years.<sup>325</sup> While the bill may cause change to the Code of Criminal Procedure and additional litigation,<sup>326</sup> it is a small price to pay for improvements in juvenile justice.

314. Tex. H.B. 686, 87th Leg., R.S. (2021).

315. *Id.*

316. *See id.* (“The board shall adopt a policy establishing factors for a parole panel to consider when reviewing for release on parole an inmate to whom this section applies to ensure that the inmate is provided a *meaningful opportunity to obtain release.*” (emphasis added)); *Graham v. Florida*, 560 U.S. 48, 75 (2010).

317. Zdun, *supra* note 6; *see also* Linder & Martinez, *supra* note 11, at 333–35 (describing Texas's prior Second Look efforts).

318. Zdun, *supra* note 6.

319. *Id.*

320. Veto Message of Gov. Abbott, Tex. H.B. 686, 87th Leg., R.S. (2021).

321. *Id.*

322. *Id.*

323. Tex. H.B. 686, 87th Leg., R.S. (2021).

324. *Factors Considered in the Voting of a Case*, *supra* note 26 (noting the factors considered in parole voting).

325. Tex. H.B. 686, 87th Leg., R.S. (2021).

326. *See* Veto Message of Gov. Abbott, Tex. H.B. 686, 87th Leg., R.S. (2021) (discussing the reasons H.B. 686 was vetoed).

## VII. CONCLUSION

It is time for Texas to take a stand and fight for juvenile offenders. Under the current parole scheme, juvenile offenders are treated unjustly—and perhaps unconstitutionally. First, most states do not require an offender to stay in prison for forty years before receiving a parole hearing and a “second chance.”<sup>327</sup> Next, forty years is inconsistent with Texas’s recidivism rates.<sup>328</sup> Recidivism and other state statutes matter because both were specifically discussed in Supreme Court precedent.<sup>329</sup> Finally, age and retribution are not factors considered in the Texas parole statute or at parole hearings.<sup>330</sup> These factors must be considered because they are precisely what make juvenile offenders different from adults.<sup>331</sup>

While the U.S. Supreme Court or the Texas Court of Criminal Appeals could find that Texas’s sentencing practices violate the Eighth Amendment, it is more directly up to the state legislature to change criminal procedure laws until the courts decide the issue. Enacting a Second Look bill like House Bill 686 is the most efficient option for Texas at this point. This Comment is not advocating for the release of all young offenders after thirty years—this Comment is advocating that juveniles should have an opportunity for review after serving thirty years of their lives in prison, if not sooner. The parole board will retain the ultimate authority to decide parole.<sup>332</sup> As D.C. Councilman Charles Allen described Second Look legislation:

This [bill] is about understanding how people, especially young people, can change as they grow into adulthood. The men who have come home already are doing remarkably well. Some have gotten married and started a family,

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327. See Weis, *supra* note 227, at 426 (reporting a parole eligibility of thirty years is the midpoint of other state statutes). See generally *50-State Examination*, *supra* note 257 (explaining other state parole system and eligibility guidelines).

328. See generally TEX. LEGIS. BUDGET BD., STATEWIDE CRIMINAL AND JUVENILE JUSTICE RECIDIVISM AND REVOCATION RATES 1 (Jan. 2021), [https://www.lbb.state.tx.us/Documents/Publications/Policy\\_Report/6293\\_CJDA\\_Recidivism-Revocation.pdf](https://www.lbb.state.tx.us/Documents/Publications/Policy_Report/6293_CJDA_Recidivism-Revocation.pdf) [<https://perma.cc/Q7LB-J72S>] (providing Texas reconviction rates).

329. See, e.g., *Graham v. Florida*, 560 U.S. 48, 62–67, 72–73 (2010) (analyzing sentencing disparity and retribution in juvenile life sentences).

330. TEX. GOV’T CODE ANN. § 508.031; *50-State Examination*, *supra* note 257.

331. See *Graham*, 560 U.S. at 76 (“An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”); see also *Avalos v. State*, 635 S.W.3d 660, 670 (Tex. Crim. App. 2021) (pointing to case law differentiating juveniles from intellectually disabled persons).

332. TEX. BD. OF PARDONS & PAROLES, *supra* note 106, at 3.



others are working as violence interrupters and youth mentors, and others are starting small businesses. They are a testament to the values of hope, promise, and hard work . . . [.] Many of the men and women who would be eligible under the Second Look provisions of the bill have been in federal prison longer than they were alive on the outside. They're completely different people. We should recognize the value of mercy and rehabilitation, particularly as most of our incarcerated neighbors will be coming home at some point regardless, and stop paying to incarcerate people who don't pose a danger to the community.<sup>333</sup>

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333. *DC Council Passes Second Look Amendment Act of 2019*, WASH. D.C. (May 19, 2021), <https://cic.dc.gov/release/dc-council-passes-second-look-amendment-act-2019> [https://perma.cc/84VJ-XALL].