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# Providing a Meaningful Opportunity for Release: A Proposal for Improving Washington's Miller-Fix

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# PROVIDING A MEANINGFUL OPPORTUNITY FOR RELEASE: A PROPOSAL FOR IMPROVING WASHINGTON'S *MILLER*-FIX

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*Abstract: Miller v. Alabama*[1] set forth new constitutional requirements that necessitated changes in Washington State's sentencing law for children. In response, the Washington legislature passed RCW 9.94A.730: a parole statute that presumptively releases children who committed crimes after they have served twenty years. Unless the parole board finds they are more likely than not to commit a future crime if released, the *Miller*-fix statute requires that eligible petitioners are released. The parole board has wide discretion in determining whether someone is more likely than not to commit a future crime because the statute provides no guidance about how to make this prediction. It is nearly impossible to determine what someone will do in the future, and justifications for continuing to incarcerate an individual convicted of a crime as a child after they have served a twenty-year sentence are limited. Therefore, this Comment argues that the Washington legislature should instead require that sentences for children are twenty years or shorter.

## INTRODUCTION

In 1996, after fifteen-year-old Gail Brashear flagged down a pickup truck for a ride, she shot and stabbed the driver, Dan Varnell, to death.[2] Ms. Brashear was convicted of first-degree murder and sentenced to fifty-one years in prison.[3] The sentencing judge—who was forty-eight years old at the time—told Ms. Brashear that she would be a lot older than him by the time she got out of prison.[4] But in 2018, after twenty-one years of confinement, the Court of Appeals ordered the release of thirty-seven-year-old Ms. Brashear.[5]

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1. 567 U.S. 460 (2012).

2. *In re* Brashear, 6 Wash. App. 2d 279, 430 P.3d 710 (2018); Rikki King, *Court Orders State to Release Snohomish County Killer*, HERALD NET (Dec. 7, 2018), https://www.heraldnet.com/news/court-orders-state-to-release-snohomish-county-killer [https://perma.cc/9G9J-NZKD].

3. *In re Brashear*, 6 Wash. App. at 279, 430 P.3d at 710.

4. *Teen Girl Sentenced to 51 Years*, KITSAP SUN (May 9, 1997), https://products.kitsapsun.com/archive/1997/05-09/0007_teen_girl_sentenced_to_51_years.html [https://perma.cc/X6AQ-V53D] [hereinafter *Teen Girl Sentenced to 51 Years*].

5. *See In re Brashear*, 6 Wash. App. 2d 279, 430 P.3d 710.

In the twenty years between Ms. Brashear's sentencing and the order for her release, constitutional and Washington state law regarding how to sentence children changed enormously.[6] Most notably, in *Miller v. Alabama*,[7] the United States Supreme Court held that sentencing schemes that require courts to sentence children to life without parole violate the Eighth Amendment.[8] *Miller* required twenty-nine jurisdictions to change their sentencing practices to comply with the Constitution, including Washington.[9]

Washington passed a law commonly referred to as the "*Miller*-fix": a statute that creates the right to a parole hearing after twenty years for people who committed crimes as children, like Ms. Brashear.[10] Under the *Miller*-fix, there is a presumption of release.[11] The Indeterminate Sentencing Review Board (ISRB), a quasi-judicial board within the Washington Department of Corrections (DOC),[12] determines whether a potential juvenile parolee is more likely than not to commit another crime if released. Unless the person is found to be more likely than not to commit a future crime, they must be released.[13]

Like the law, Ms. Brashear had changed.[14] She had no serious infractions since 2008, when she remembers experiencing a shift in her thinking.[15] She sought and received mental health treatment.[16] A psychological risk evaluation tool described her as a low risk to re-offend.[17] Ms. Brashear participated in a great deal of cognitive-behavioral programming, such as Stress and Anger Management, Re-Entry Life Skills, Beyond Trauma, a mindfulness and meditation course, conflict resolution, and victim awareness classes.[18] Ms. Brashear also achieved

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6. *See, e.g.*, WASH. REV. CODE § 9.94A.730 (2019); Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

7. 567 U.S. 460 (2012).

8. *Id.*

9. Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 93 (2015).

10. WASH. REV. CODE § 9.94A.730; Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 993 (2014).

11. WASH. REV. CODE § 9.94A.730.

12. *See Indeterminate Sentence Review Board,* DEP'T CORR.: WASH. STATE, https://www.doc.wa.gov/corrections/isrb/default.htm [https://perma.cc/2J5R-2TDS] [hereinafter *Indeterminate Sentence Review Board*].

13. WASH. REV. CODE § 9.94A.730.

14. *See, e.g.*, *In re* Brashear, 6 Wash. App. 2d 279, 430 P.3d 710, 713 (2018) ("Brashear has been a model inmate since making a turnaround in 2008.").

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

significant academic accomplishments while incarcerated: she completed an AA degree and a braille translation certification, and worked in the Correctional Industries' Braille program.[19] Even so, Mr. Varnell's family and the prosecutor opposed her release, citing the impact of the crime.[20]

Which, if any, of these facts best predicts what Ms. Brashear will do in the future? Which should be considered to determine whether Ms. Brashear should be released?

This Comment addresses how the ISRB should decide whether a juvenile eligible for Washington's *Miller*-fix is more likely than not to commit a future crime within the broader context of nationally changing juvenile sentencing norms. Part I places extreme sentences for children in the historical context of juvenile sentencing. Part II explains recent United States Supreme Court jurisprudence that requires additional protections for children receiving severe sentences, particularly *Miller v. Alabama*, and other protections for children established in Washington. Part III describes the mechanics of the *Miller*-fix statute, RCW 9.94A.730, and what the ISRB currently considers in making release decisions. Part IV argues that because just and accurate prediction of future activity is impossible and there is no compelling reason for children to serve sentences longer than twenty years, all sentences served by children should be shorter than twenty years. Part IV also suggests that if future prediction must play a role in the release decision process, specific factors should be provided by the legislature to ensure fair and predictable release decisions.

## I. THE CRIMINAL LEGAL SYSTEM HAS RECOGNIZED THAT CHILDREN ARE LESS CULPABLE THAN ADULTS SINCE THE NINETEENTH CENTURY

The idea that children who cause harm are less culpable than adults has played a role in how we treat juvenile crime since the nineteenth century.[21] Extreme sentences for juveniles, such as the fifty-one-year sentence received by Ms. Brashear,[22] are a relatively recent phenomenon.[23] Long sentences for juvenile offenders in the adult system emerged in the 1980s and 1990s.[24] This section describes the creation of separate, less punitive

19. *Id.*

20. *Id.*

21. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 19–20 (1999).

22. *Teen Girl Sentenced to 51 Years*, *supra* note 4.

23. *See* FELD, *supra* note 21.

24. *Id.* at 20.

juvenile courts in the nineteenth century and the rise of harsher sentencing for juveniles in the adult system at the end of the twentieth century.

### *A. How Children Departed From the Adult System*

Before the nineteenth century, the concept of childhood in the United States did not exist as it does today.[25] By early puberty, young people were often integrated into the workforce through institutions such as apprenticeships; thus, most young people learned all of the skills necessary to be adult economic contributors in an informal setting.[26] Accordingly, young people who were accused of crimes during this period were tried and sentenced in adult courts and were incarcerated in adult prisons.[27] The common law provided a *mens rea* defense for infants—children so young that they were incapable of speech—because they lacked the understanding of right from wrong.[28] However, children as young as seven could be found to have the capacity to commit crimes.[29]

In the early nineteenth century, a new social view of childhood emerged.[30] The economy was changing: the United States transformed from a largely rural, agricultural society into an urban, industrial society.[31] Modernization lengthened the time that children remained economically dependent on their families, especially in upper and middle-class households.[32] Children were seen as more vulnerable and innocent than adults.[33] This extended concept of childhood aligned with and was supported by Victorian-era gender norms: a man's world was at his workplace, and a woman's place was in the home, raising children.[34] This new cultural understanding of childhood fueled opposition to the prosecution and imprisonment of young offenders in adult courts and prisons.[35]

As views of childhood shifted, new ideas about what caused criminal behavior also emerged.[36] Nineteenth-century positive criminologists

25. *Id.*

26. *Id.* at 21.

27. Matthew Razo, *Fair and Firm Sentencing for California's Youth: Rethinking Penal Code Section 190.5*, 41 W. ST. U. L. REV. 429, 430 (2014).

28. FELD, *supra* note 21, at 48.

29. *Id.*

30. *Id.* at 23.

31. *Id.*

32. *Id.* at 28.

33. *Id.* at 23.

34. *Id.* at 48.

35. *Id.*

36. PETER CORDELLA & LARRY J. SIEGEL, READINGS IN CONTEMPORARY CRIMINOLOGICAL

believed that human behavior largely was the result of external forces, such as a person's environment and social context.[37] This understanding implied that the root causes of criminal behavior could be cured and the behavior corrected.[38]

Influenced by emerging positivist theories and the new social view of childhood, progressive reformers known as "child savers" believed that child misbehavior was caused by the "'unwholesome environment, especially the baneful influence of squalid urban life,'"[39] and that an appropriate intervention by the state would solve the problem.[40] Child savers blamed immigration, urbanization, and poverty for juvenile crime.[41] They believed an appropriate state intervention would espouse the era's "Rehabilitative Ideal."[42] The "Rehabilitative Ideal" consisted of three beliefs: (1) that children are capable of rehabilitation; (2) that rehabilitation requires intervention; and (3) that the goal of rehabilitation was for all Americans to become middle-class Americans.[43]

Child savers advocated for separate juvenile courts and institutions.[44] Separate institutions for juveniles, such as Houses of Refuge (Refuges) and reform schools, preceded juvenile courts.[45] Refuges first appeared in large Northeastern cities: New York and Boston in 1825, and Philadelphia in 1828.[46] These institutions fed, sheltered, and educated young people to prevent future criminal or otherwise antisocial behaviors.[47] Children perceived as salvageable were "proper objects" for admission to a Refuge.[48]

States relied on the doctrine of parens patriae to commit young people to Refuges.[49] Under this doctrine, the state had the right and obligation to control children where the parents were unable or unwilling to do so, or

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THEORY 6–7 (1996).

37. *Id.* at 6.

38. FELD, *supra* note 21, at 48.

39. Robin W. Sterling, *Fundamental Unfairness:* In Re Gault *and the Road Not Taken,* 72 MD. L. REV. 607, 618 (2013).

40. *Id.*

41. FELD, *supra* note 21, at 49.

42. *Id.* at 48.

43. Sterling, *supra* note 39, at 618.

44. FELD, *supra* note 21, at 48.

45. *Id.*

46. *Id.* at 49.

47. Sterling, *supra* note 39, at 617.

48. *Id.*

49. FELD, *supra* note 21, at 52.

where the child was causing trouble in their community.[50] The doctrine formally entered American jurisprudence and solidified the legitimacy of the Refuge system in *Ex parte Crouse*,[51] a Pennsylvania Supreme Court case decided in 1838.[52] In *Crouse*, the court committed Mary Ann Crouse to a Refuge on her mother's petition, but her father objected to her confinement without a jury trial.[53] The court upheld the commitment citing parens patriae, stating that not only was Mary Ann's commitment lawful, but also that "it would be an act of extreme cruelty to release her from it."[54]

Refuges exercised broad jurisdiction over young people. Their jurisdiction applied to children who committed criminal offenses, as well as those perceived in need of state supervision, such as orphans, neglected or unsupervised children, disobedient children, or children seen as troubled.[55] In a Refuge, the state isolated children from their friends and relatives.[56] Managers of Refuges imposed strict discipline, including a labor routine intended to teach work discipline.[57]

During the mid-nineteenth century, reform schools emerged as a second type of institution.[58] Reform schools were set in a rural environment and sought to reform children through agricultural labor.[59] Although presented as home-like rehabilitative institutions, commitment to a reform school was "'coercive, labor intensive incarceration.'"[60] By the end of the civil war, both reform schools and Refuges essentially warehoused poor and immigrant children.[61]

The rehabilitative ideal and the institutions inspired by the rehabilitative ideal largely failed to protect Black children.[62] When child savers built Refuges, slavery was legal. Black children in the South accused of crimes were subject to harsh and violent "'plantation

50. *Id.*

51. *Ex parte* Crouse, 4 Whart. 9 (Pa. 1839).

52. *See* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1511–12 (2012).

53. *Crouse*, 4 Whart. at 9; *see also* FELD, *supra* note 21, at 52.

54. *Crouse*, 4 Whart. at 12.

55. *See* FELD, *supra* note 21, at 51.

56. *Id.* at 53–54.

57. *Id.*

58. *Id.* at 54.

59. *Id.*

60. Nanda, *supra* note 52, at 1511.

61. FELD, *supra* note 21, at 55.

62. Sterling, *supra* note 39, at 623.

discipline.'"[63] Rehabilitation in the North was reserved for white children.[64] Refuges that admitted Black children to separate "colored sections" often excluded Black children from rehabilitative services.[65] Refuges without separate facilities for Black children did not accept them at all; instead, Black children were placed in adult prisons.[66]

The same rehabilitative ideal that inspired separate institutions for juveniles led to the creation of the nation's first juvenile court in Cook County, Illinois in 1899.[67] Advocates for juvenile courts envisioned them as more of a social welfare agency than a court system.[68] Instead of determining innocence or guilt, judges would determine what was in the best interest of the child and individualize a sentence designed to rehabilitate the child.[69] Sentences in juvenile court were guided by the "'best interests'" of the child, because the offense was seen as a symptom of their underlying needs.[70] As a result, sentences were indeterminate, not proportional to the offense, and could continue until a child reached the age of majority, at which point the juvenile system lost jurisdiction.[71]

According to Judge Richard S. Tuthill, the judge who presided over the first juvenile court, the purpose of juvenile court was to ensure "'[t]hat no child under 16 years of age shall be considered or be treated as a criminal; that a child under that age shall not be arrested, indicted, convicted, imprisoned, or punished as a criminal.'"[72]

But these benefits did not extend to all children. There was racial disproportionality from the early days of juvenile courts. Black children were less likely to have their cases dismissed, more likely to experience corporal punishment, and more likely to come into contact with the juvenile court at an earlier age.[73]

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63. *Id.* at 623–24. Like all aspects of chattel slavery, "plantation discipline" was harsh, violent, and dehumanizing. The most widely used punishment on plantations was whipping. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 560 (1983).

64. Sterling, *supra* note 39, at 623.

65. *Id.* at 623–24.

66. *Id.*

67. FELD, *supra* note 21, at 55.

68. Sterling, *supra* note 39, at 619.

69. *Id.*

70. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991) (internal citation omitted).

71. *Id.*

72. David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 665 (2002) (internal citation omitted).

73. Sterling, *supra* note 39, at 632–33.

Just as juvenile courts had a different purpose than criminal courts, early juvenile courts had different procedures. They lacked formality and many procedural protections.[74] The informality was theoretically intended to create proceedings that were non-adversarial and rehabilitative.[75] In practice, a lack of formal procedural protections often resulted in children experiencing "condescension, inconsistency, hypocrisy, favoritism, or whimsy" in juvenile courts.[76]

Despite concerns about the absence of procedural protections, juvenile courts quickly spread. By 1925, all but two states had separate juvenile courts.[77] The early twentieth-century juvenile court in Illinois had original and exclusive jurisdiction over all cases of any male child under seventeen-years-old, and any female child under eighteen-years-old, including serious and violent offenses.[78] An informal agreement with the state attorney's office allowed some cases to be passively transferred to criminal court, and a few cases—less than 1% between 1915 and 1919—were actively transferred.[79] As a result, the juvenile court heard the vast majority of offenses committed by children, including serious and violent offenses such as homicides.[80]

### *B. How Children Returned to the Adult System*

During the 1980s and early 1990s, the United States experienced a sharp uptick in violent juvenile crime.[81] Between 1980 and 1994, juvenile arrests for murder jumped by 99%.[82] Juvenile crime was the subject of significant attention by policy makers, the media, and the general public.[83] During this time, Black children were arrested for violent crimes at a rate about five times higher than white children.[84] The media commonly used sensationalized descriptions of Black youth, such as animalistic, wild, and predatory.[85] For example, the New York Times infamously referred to

74. *Id.* at 619.

75. *Id.*

76. ANTHONY M. PLATT, THE CHILD SAVERS 160 (1997).

77. Sterling, *supra* note 39, at 622.

78. Tanenhaus & Drizin, *supra* note 72, at 646–47.

79. *Id.* at 647–48.

80. *Id.* at 648.

81. JEFFREY BUTTS & JEREMY TRAVIS, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2 (2002), https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF [https://perma.cc/XK45-TD2L].

82. *Id.* at 2.

83. *Id.*

84. FELD, *supra* note 21, at 203.

85. Michael Welch et al., *Youth Violence and Race in the Media: The Emergence of "Wilding" as*

five Black teenagers accused of raping a woman in Central Park as a "wolf pack."[86] This racism fueled public response to the rise in crime.[87]

In 1996, then First Lady Hillary Clinton referred to young people who committed crimes as "super predators," kids with "no conscience, no empathy."[88] The term was coined by political scientist John DiLulio, who predicted that the rise in crime would continue. "Tens of thousands of severely morally impoverished juvenile super-predators" were on the horizon, "capable of committing the most heinous acts of physical violence for the most trivial reasons."[89]

"Adult time for adult crime" became a common refrain for advocates of tough-on-crime reform.[90] Between 1992 and 1999, forty-nine states and the District of Columbia amended their transfer statutes, making it easier to try juveniles in adult court.[91] These changes included expanding or creating a list of offenses that automatically transferred juveniles to adult court, transferring discretion from the juvenile court to the prosecutor, and lowering the minimum age of transfer.[92] In adult court, children were subject to other tough-on-crime reforms, such as mandatory minimums and truth-in-sentencing laws.[93] Following these changes, many children received very long sentences.[94] For example, juveniles transferred to adult court who were convicted of murder received, on average, sentences two and a half years longer than adults convicted of the same crime.[95]

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*an Invention of the Press*, 11 RACE, GENDER & CLASS 36, 37–38 (2004).

86. Opinion, *The Jogger and the Wolf Pack*, N.Y. TIMES (Apr. 26, 1989), https://www.nytimes.com/1989/04/26/opinion/the-jogger-and-the-wolf-pack.html [https://perma.cc/NVR4-TR5B]. The Central Park Five were convicted with no physical evidence based on confessions they claim were coerced. They were exonerated based on DNA evidence in 2002. *See* Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html [https://perma.cc/V88H-KZQB].

87. FELD, *supra* note 21, at 203.

88. C-SPAN, *1996: Hillary Clinton on "Superpredators" (C-SPAN)*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=j0uCrA7ePno [https://perma.cc/R4CT-E28N].

89. John DiLulio, *The Coming of the Super—Predators*, WASH. EXAMINER (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/6TV5-5GRC].

90. Tanenhaus & Drizin, *supra* note 72, at 664.

91. John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 584–85 (2016).

92. *Id.*

93. Tanenhaus & Drizin, *supra* note 72, at 665.

94. *Id.*

95. *Id.*

The predicted wave of juvenile crime never came.[96] After peaking in 1994, juvenile violent crime rapidly dropped.[97] By 2000, the juvenile arrest rate for violent crimes had returned to almost as low as it had been in 1980.[98] Some research suggests that the spike and fall of violent crime was caused by childhood exposure to lead, commonly added to gasoline between the end of World War II until the 1970s.[99] Other explanations for this drop are an increase of after-school programs, such as Boys and Girls Club, and increased norms of pre-natal care resulting in a lower prevalence of Fetal Alcohol Syndrome.[100] Despite its non-arrival, the tough sentencing and transfer laws that passed to prepare for the "super-predator" wave remain in effect in most states today.[101]

## II. AFTER *MILLER*, THE CONSTITUTION REQUIRES THAT THE CRIMINAL LEGAL SYSTEM TREAT CHILDREN WHO COMMIT SERIOUS CRIMES DIFFERENTLY THAN ADULTS

In the two-decade period between Ms. Brashear's conviction[102] and the order for her release in 2018,[103] juvenile sentencing throughout the United States underwent a sea change.[104] In 2014, the Washington State Legislature enacted the "*Miller*-fix" statute, RCW 9.94A.730, which provides an opportunity for parole to juveniles that have served twenty years of their original sentences.[105] This statute followed the United States Supreme Court's decision in *Miller v. Alabama.*[106] In *Miller*, the Court held that sentencing schemes that resulted in mandatory life without parole sentences were unconstitutional.[107] This holding affected twenty-nine jurisdictions, including Washington.[108] *Miller* follows in the footsteps of two other Supreme Court cases that impacted the types of

96. Mills et al., *supra* note 91, at 585.

97. BUTTS & TRAVIS, *supra* note 81, at 5.

98. *Id.*

99. Kevin Drum, *Lead: America's Real Criminal Element*, MOTHER JONES (Feb. 2013), https://www.motherjones.com/environment/2016/02/lead-exposure-gasoline-crime-increase-children-health/ [https://perma.cc/WN3L-XTAN].

100. UNIV. OF PA., UNDERSTANDING THE "WHYS" BEHIND JUVENILE CRIME TRENDS 11 (2012).

101. Razo, *supra* note 27, at 441.

102. *Teen Girl Sentenced to 51 Years*, *supra* note 4.

103. *In re* Brashear, 6 Wash. App. 2d 279, 430 P.3d 710 (2018).

104. *See* Montgomery v. Louisiana, 577 U.S. __, 136 S. Ct. 718, 733–34 (2016) (describing the evolution of constitutional restrictions on juvenile sentencing in the 2000s).

105. *See* WASH. REV. CODE § 9.94A.730 (2019).

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

107. *Id.*

108. *Id.*

sentences juveniles can receive:[109] *Roper v. Simmons*[110] and *Graham v. Florida*.[111]

This section explains the constitutional requirements for juvenile sentencing under the cases leading up to *Miller*. Then, it addresses the logic of and impact of *Miller*. Finally, it discusses additional restraints on juvenile sentencing imposed by Washington courts following *Miller*.

### *A. After* Roper *and* Graham*, the United States Constitution Places Substantive Limits on the Sentences That Children Can Receive*

The idea that children are less culpable than adults and must receive different treatment when they commit criminal offenses is hundreds of years old.[112] But before 2000, most United States Supreme Court jurisprudence concerning juveniles only addressed procedural protections.[113] Contemporary scientific research confirms that children's brains are still developing until about age twenty-five, making them less culpable for their actions and more capable of reform.[114]

Citing this research, the Supreme Court acknowledged a substantive right unique to children in *Roper v. Simmons*[115] in 2005.[116] In *Roper*, the Supreme Court held that executing people for crimes they committed before their eighteenth birthdays violated the Eighth Amendment.[117] The Court explained that the death penalty is the most severe punishment our society uses and must therefore be limited to those who have committed the worst crimes and are the most culpable.[118] Children exhibited three major differences from adults such that they "cannot with reliability be classified among the worst offenders."[119] First, scientific and sociological

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109. Straley, *supra* note 10, at 968.

110. 543 U.S. 551 (2005).

111. 560 U.S. 48 (2015).

112. *See supra* section I.A.

113. *See, e.g.*, Schall v. Martin, 467 U.S. 253 (1984) (addressing due process of juvenile pretrial detention statute); Fare v. Michael C., 442 U.S. 707 (1979) (addressing juvenile *Miranda* rights); Breed v. Jones, 421 U.S. 519 (1975) (addressing double jeopardy in juvenile court); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (addressing right to jury trial in juvenile court); *In re* Winship, 397 U.S. 358 (1970) (addressing right to proof beyond a reasonable doubt in juvenile court); *In re* Gault, 387 U.S. 1 (1967) (addressing juvenile right to notice, right to counsel and privilege against self-incrimination).

114. Straley, *supra* note 10, at 970.

115. 543 U.S. 551 (2005).

116. *Id.* at 578.

117. *Id.*

118. *Id.* at 568.

119. *Id.* at 569.

research confirmed that children are immature, often resulting in poorly-considered actions.[120] Next, children are more susceptible to their peers or other negative influences.[121] Finally, children's identities are not fully formed, and their personality traits continue to change as they grow.[122]

Because of these differences, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crimes reflects irreparable corruption."[123] This difficulty required a categorical ban on the death penalty for children, to prevent the chance that a child who is less than the most culpable would be put to death.[124]

The *Roper* Court noted that these same traits that lessen children's culpability when they commit crimes similarly lessen the penological justifications for the death penalty.[125] The two goals of the death penalty are retribution and deterrence of capital crimes.[126] "Retribution 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."[127] As to deterrence, there is no evidence that the existence of a juvenile death penalty has any deterrent effect on children who might commit crimes.[128] The immaturity and lack of insight that make children less culpable for their criminal behavior also suggest that children are less susceptible to deterrence.[129]

Five years later, in *Graham v. Florida*,[130] using similar reasoning, the Supreme Court held life without parole sentences are unconstitutional when given to juveniles who have committed crimes other than homicide.[131] Experts have noted that it was unusual that the *Graham* Court applied logic from *Roper*, a death penalty case, in a non-death context.[132] Although the Eighth Amendment requires extremely careful scrutiny of

120. *Id.*

121. *Id.*

122. *Id.* at 570.

123. *Id.* at 573.

124. *Id.*

125. *Id.* at 571.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 571–72.

130. 560 U.S. 48 (2010).

131. *Id.* at 75.

132. Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 459 (2012).

the death penalty, but historically, review of noncapital cases "has been 'so deferential to state interests as to make Eighth Amendment challenges to excessive incarceration essentially non-starters.'"[133] Outside of the juvenile context, courts have held that life without parole sentences do not violate the Eighth Amendment.[134]

Terrance Jamar Graham, the defendant in *Graham*, had a challenging start at life. His parents were addicted to crack cocaine and continued to use drugs during his childhood.[135] He began drinking alcohol and smoking cigarettes at nine years old, and using marijuana at age thirteen.[136] At age sixteen, Mr. Graham and three similarly aged friends unsuccessfully attempted to rob a barbeque restaurant.[137] He pleaded guilty, and the court withheld adjudication and gave Mr. Graham three years of probation.[138] Mr. Graham was arrested again about six months later, after a police officer signaled him to stop, and he continued to drive at high speed until he crashed into a telephone pole.[139]

Three handguns were found in the car, and the state alleged that Mr. Graham had been involved in several home invasion burglaries that night.[140] Mr. Graham's parole officer filed an affidavit with the court asserting Mr. Graham had violated the conditions of his probation for the earlier robbery.[141] While Mr. Graham denied involvement with the burglaries, claiming he had met up with the alleged accomplices after the burglaries, the trial court found he had violated his probation conditions by fleeing, having possession of the handguns, committing a home invasion, and being in association with people engaged in criminal activities.[142] For violating his probation conditions, Mr. Graham was sentenced to life without the possibility of parole.[143]

The Court held that the Eighth Amendment prohibits a punishment as severe as life without parole in cases like that of Mr. Graham, where the

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133. *Id.*

134. *Compare* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (holding sentence of life without parole for possession of drugs did not violate Eighth Amendment), *with* Coker v. Georgia, 433 U.S. 584, 599 (1977) (holding death sentence for rape violated Eighth Amendment because it was disproportionate).

135. *Graham*, 560 U.S. at 53.

136. *Id.*

137. *Id.*

138. *Id.* at 54.

139. *Id.* at 54–55.

140. *Id.* at 55.

141. *Id.*

142. *Id.*

143. *Id.* at 57.

defendant is a child and the crime is not a homicide.[144] Life without the possibility of parole is the "second most severe penalty permitted by law."[145] Like the death penalty, life without parole permanently alters the condition of the one who receives it.[146] The Court noted that a life without parole sentence is an especially harsh punishment for a child because such a great percentage of a child's life will be spent in prison if they are given this sentence.[147]

As in *Roper*, the Court found that characteristics of adolescence such as immaturity, vulnerability to outside influences, and still-forming identities make children less culpable, and therefore less worthy of the most severe punishments.[148] The Court noted that developments in brain science since *Roper* have continued to show differences between juvenile and adult brains, such as that "parts of the brain involved in behavior control continue to mature through late adolescence."[149] Regardless of age, defendants who have committed non-homicide crimes are less culpable and therefore less deserving of punishment, than those that have caused the death of another.[150] Thus, children who have committed nonhomicide crimes have two types of lessened culpability: lessened culpability due to their age, and lessened culpability because their crime is not a homicide.[151]

The Court found the penological justifications of the punishment could not support the sentence either. Retribution "cannot support the sentence at issue here,"[152] because it was not proportionate to Mr. Graham's culpability, which is lessened by the nonhomicidal nature of the crime, as well as Mr. Graham's age.[153] Just as in *Roper*, deterrence could not justify the sentence because deterrence is not effective for children.[154] Incapacitation did not justify the severity of life without parole because that justification is premised on the assumption that a child who commits

144. *Id.* at 82.

145. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part)).

146. *Id.*

147. *Id.* at 70.

148. *Id.* at 68.

149. *Id.* (citing Brief for Am. Medical Ass'n et al. as Amicus Curiae in Support of Neither Party at 16–24, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621); Brief for Am. Psychological Ass'n et al. as Amicus Curiae Supporting Petitioners at 22–27, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

150. *Id.* at 69.

151. *Id.*

152. *Id.* at 71.

153. *Id.*

154. *Id.* at 72.

non-homicide crimes cannot be reformed.[155] Finally, rehabilitation cannot justify life without parole, because life without parole "forswears altogether the rehabilitative ideal."[156] Someone who will never reenter society has no reason to be rehabilitated.

For these reasons, the Court held that although the Constitution did not require juveniles convicted of a nonhomicide crime to be eventually freed, they must be given a meaningful opportunity for release.[157]

### *B. After* Miller*, the United States Constitution Limits the Sentences That State Law May Impose on Juveniles*

In *Miller v. Alabama*, the Supreme addressed whether state law can require the imposition of a life without parole sentence on children.[158] The Court consolidated two cases to determine whether the sentencing schemes that require courts to sentence children to life without parole are consistent with the Eighth Amendment.[159] In so ruling, the Court invalidated the sentencing schemes of twenty-nine jurisdictions.[160]

The first case involved Kuntrell Jackson, who was fourteen-years-old when he and two other boys decided to rob a video store.[161] On the way to the store, Mr. Jackson discovered that one of the boys was carrying a sawed-off shotgun.[162] Mr. Jackson waited outside the store while the other two boys entered the store and demanded money from the store clerk.[163] When the store clerk threatened to call the police, the boy with the sawed-off shotgun shot and killed her.[164] Mr. Jackson was convicted of felony murder and aggravated robbery.[165] Under Arkansas law, the only punishment the court could give was life without parole.[166]

The second case was that of Evan Miller, was also fourteen years old when he committed his crime.[167] Mr. Miller grew up in and out of foster care—his mother struggled with alcoholism and drug addiction, and his

155. *Id.*
156. *Id.* at 74.
157. *Id.* at 75.
158. Miller v. Alabama, 567 U.S. 460, 465 (2012).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 466.
165. *Id.*
166. *Id.*
167. *Id.* at 467.

stepfather abused him.[168] Mr. Miller had attempted suicide four times, the first time when he was six-years-old.[169] One night, a neighbor purchased drugs from Mr. Miller's mother.[170] Mr. Miller and a friend accompanied the neighbor to his trailer.[171] The three of them smoked marijuana and played drinking games until the neighbor passed out.[172] Mr. Miller stole the neighbor's wallet, and split the contents with his friend, but the neighbor awoke and grabbed Mr. Miller by the throat.[173] Mr. Miller's friend struck the neighbor with a nearby baseball bat, causing the neighbor to release Mr. Miller.[174] Once released, Mr. Miller grabbed the bat and struck the neighbor repeatedly.[175] Mr. Miller and the friend lit a fire at the neighbor's trailer to cover up the crime, and the neighbor died of his injuries and smoke inhalation.[176] Mr. Miller was charged and convicted of murder in the course of arson, which in Alabama carried a mandatory minimum of life without parole.[177]

Addressing the constitutionality of these sentences, the Court followed the same logic it developed in *Roper* and *Graham*[178]: "Children are constitutionally different from adults for the purposes of sentencing"[179] because they are immature, impulsive, vulnerable to outside influences, and have a greater capacity for change.[180] Juveniles are often less able to remove themselves from brutal or dysfunctional situations than adults.[181] These differences reduce the penological justifications for a life without parole sentence: the case for retribution is not as strong where culpability is reduced, deterrence is unlikely to affect juvenile behavior, incapacitation assumes that juveniles will never change, and rehabilitation is not a goal of a life without parole sentence.[182]

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 469.

178. *See id.* at 470 ("Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.").

179. *Id.* at 471.

180. *Id.*

181. *Id.* at 477.

182. *Id.* at 472–73.

The Court recognized that a life sentence without parole is a severe penalty, and found a life sentence especially harsh for juveniles, who would spend more total years and a greater percentage of their lives incarcerated than a similarly-situated adult.[183] Mandatory sentencing schemes prevent the sentencer from considering a young defendant's age, circumstances, and the possibility of rehabilitation.[184] For example, the trial court could not consider that Kuntrell Jackson's age made him susceptible to peer pressure when he continued to the store even after becoming aware of his co-defendant's gun.[185] Similarly, the trial court could not base any part of its decision on the fact that that Evan Miller was a child who was high on drugs and alcohol provided to him by an adult, that he had been physically abused and neglected, and had first attempted suicide as a six-year-old.[186]

The Court found that because children are different, a mandatory sentencing scheme creates too great a risk of disproportionate punishment.[187] While juveniles could still be given life without parole sentences for homicide cases, the Court held that the law could not require sentencing judges to give life without parole sentences without considering the child's age.[188] The "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[189]

After *Miller*, the twenty-nine jurisdictions with unconstitutional sentencing schemes had to interpret the impact of *Miller* and determine whether its holdings applied retroactively.[190] By 2015, eleven jurisdictions had decided *Miller* was retroactive; six had decided it was not; five were undecided; two, including Washington, had addressed the issue through legislation; and one had determined it was not a mandatory sentencing scheme in need of reform.[191]

In 2016, the Supreme Court addressed the issue of retroactivity in *Montgomery v. Louisiana*.[192] Henry Montgomery was convicted of a murder he committed when he was seventeen-years-old, in 1963.[193] Under

183. *Id.* at 474–75.

184. *Id.* at 477–78.

185. *Id.* at 478.

186. *Id.* at 479.

187. *Id.*

188. *Id.* at 480.

189. *Id.* at 474.

190. Chang et al., *supra* note 9, at 93.

191. *Id.*

192. 577 U.S. __, 136 S. Ct. 718 (2016).

193. *Id.* at 723.

Louisiana law, the trial court was required to impose a life without parole sentence.[194] Mr. Montgomery had no opportunity to present mitigation evidence, such as evidence of how his age may have impacted his judgement, capacity for foresight, and potential for rehabilitation.[195] After spending nearly fifty years in prison, Mr. Montgomery challenged his sentence, arguing it was unconstitutional after *Miller*'s ruling.[196] The Court held that *Miller* was retroactive because it announced a substantive rule of constitutional law.[197]

The Court noted that to alter unconstitutional penalties given to juveniles who were sentenced before *Miller*, state courts are not required to resentence those juveniles. A state may remedy those sentences by allowing juveniles who were given a life without parole sentence before *Miller* to have an opportunity for parole.[198]

After winning his case in the Supreme Court, Mr. Montgomery went up before the Louisiana Committee on Parole.[199] The Committee denied release, stating that Mr. Montgomery had not participated in enough education programs.[200] As an individual serving a life sentence, Mr. Montgomery did not have access to educational programs for the first three decades that he was incarcerated.[201] After educational programs became available, Mr. Montgomery, whose IQ has been estimated to be in the seventies, attempted to earn his GED, but he struggled to keep up and was deemed ineligible.[202] Mr. Montgomery took the classes available to him, such as anger management and victim awareness.[203] Mr. Montgomery only had two infractions in the last seventeen years: one for

194. *Id.*

195. *Id.* at 726.

196. *Id.*

197. *Id.* at 736.

198. *Id.* ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.")

199. Grace Toohey, *After 55 Years in Prison, Baton Rouge Man Key to Supreme Court Ruling Again Denied Freedom*, THE ADVOCATE (Apr. 11, 2019), https://www.theadvocate.com/baton_rouge/news/courts/article_00ea4dd4-5c10-11e9-81e9-8b553bae84c3.html [https://perma.cc/P5Z6-TMKF].

200. *Id.*

201. Samantha Michaels, *A 72-Year-Old Juvenile Lifer Won a Landmark Supreme Court Ruling, But Louisiana Won't Let Him Out of Prison*, MOTHER JONES (Apr. 12, 2019), https://www.motherjones.com/crime-justice/2019/04/henry-montgomery-juvenile-lifer-louisiana-denied-parole/ [https://perma.cc/CF4V-XYM6].

202. *Id.*

203. *Id.*

smoking in an unauthorized space, and one for not putting his clothes away properly.[204] Mr. Montgomery is now seventy-three-years-old.[205]

### *C. Washington State Courts Have Expanded Protections for Children Based on* Miller

Washington courts addressed several issues emerging from *Miller.* For example, in *State v. Ronquillo*,[206] a Washington court determined that term of year sentences that are functional life sentences cannot be mandatory without violating *Miller.*[207] Specifically, the *Ronquillo* Court held that a 51.3-year sentence that would keep a sixteen-year-old in prison until he was sixty-eight was a de facto life sentence. As a result, the court could not impose it without considering the offender's youth.[208] By adopting a broad meaning of life without parole, the *Ronquillo* Court required that a greater number of children receive the protections in *Miller*.

In *State v. Houston-Sconiers*,[209] the Washington State Supreme Court clarified that the principles of *Miller* apply any time an adult court sentences children.[210] On Halloween night in 2012, then-seventeen-year-old Zyion Houston-Sconiers and a friend committed a series of robberies with a silver revolver.[211] "They robbed mainly other groups of children, and netted mostly candy."[212] The State recommended an exceptional sentence of zero months on the substantive charges but argued the additional firearm enhancements were mandatory.[213] The trial court accepted that recommendation, sentencing Mr. Houston-Sconiers to thirty-one years in prison, all based on the mandatory firearm enhancements.[214] The sentencing court expressed frustration about its inability to apply greater discretion but thought it was bound by the mandatory nature of the firearm enhancement.[215] On appeal, the Washington Supreme Court held that courts sentencing juveniles must

204. *Id.*
205. *Id.*
206. 190 Wash. App. 765, 361 P.3d 779 (2015).
207. *Id.* at 774–77, 361 P.3d at 784.
208. *Id.* at 775, 361 P.3d at 784.
209. 188 Wash. 2d 1, 391 P.3d 409 (2017).
210. *Id.* at 21, 391 P.3d at 420.
211. *Id.* at 11, 391 P.3d at 414.
212. *Id.* at 8, 391 P.3d at 413.
213. *Id.*
214. *Id.* at 13, 391 P.3d at 416.
215. *Id.*

have complete discretion to consider youth as a mitigating factor, including otherwise mandatory sentencing enhancements.[216]

The following year, in *State v. Scott*,[217] the Court clarified that *Houston-Sconiers* did not require resentencing for children sentenced prior to *Houston-Sconiers*, because parole through the *Miller*-fix was an adequate remedy.[218] However, in concurrence, Justice Gordon McCloud left open the possibility that, under the Washington Constitution, resentencing could be required.[219] She observed that it is particularly important that unlike a reviewing court, a parole board is not required to consider a petitioner's youth and characteristics at the time of their crime.[220]

### *D. The Washington Constitution Provides Additional Protections to Children*

In addition to its broad application of *Miller*, the Washington Supreme Court has held that the Washington Constitution protects juveniles in sentencing matters more than the United States Constitution.[221] In *State v. Bassett*,[222] the Washington State Supreme Court considered whether article I, section 14 of the state constitution was more protective than the Eighth Amendment and whether article I, section 14 ever permits life without parole for juveniles.[223]

When Brian Bassett was sixteen-years-old, he lived in a "shack" after he was kicked out of his family home.[224] He suffered from an adjustment disorder, and struggled to cope with the stressors of homelessness.[225] At a family counseling session, Mr. Bassett attempted to reconcile with his parents and return home, but his parents rejected the idea.[226] Mr. Bassett snuck back into the family home and killed his mother, father, and younger brother.[227] Mr. Bassett was convicted of three counts of

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216. *Id.*

217. 190 Wash. 2d 586, 416 P.3d 1182 (2018).

218. *Id.* at 588, 416 P.3d at 1183.

219. *Id.* at 610, 416 P.3d at 1194 (Gordan McCloud, J., concurring).

220. *Id.*

221. State v. Bassett, 192 Wash. 2d. 67, 82, 428 P.3d 343 (2018); *see also* WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.").

222. 192 Wash. 2d 67, 428 P.3d 343 (2018).

223. *Id.* at 82, 428 P.3d at 350.

224. *Id.* at 73, 428 P.3d at 345–46.

225. *Id.* at 75, 428 P.3d at 347–48.

226. *Id.*

227. *Id.* at 73 428 P.3d at 345–46.

aggravated first-degree murder.[228] In 1996, at the time of his sentencing, life without the possibility of parole was a mandatory sentence for aggravated first-degree murder.[229]

When *Miller* rendered Mr. Bassett's original sentence unconstitutional in 2012, he was given a resentencing hearing so that the court could take into account mitigating factors.[230] Mr. Bassett, now in his thirties, submitted over 100 pages of mitigation documentation.[231] Mr. Bassett expressed that at the time of the crimes, he was unable to comprehend the long-term consequences of his actions.[232] For example, he stated that when he was arrested for his parents murder, his first thought was about how much trouble he would be in with his parents when they found out he was in jail.[233] He also submitted significant evidence that he had matured, including taking classes about stress and family violence.[234] Mr. Bassett had not had an infraction since 2003.[235] Nonetheless, the trial court again sentenced Mr. Bassett to three consecutive sentences of life without the possibility of parole.[236]

On appeal, the Court held that article I, section 14 is more protective than the Eighth Amendment, and under article I, section 14, categorically, no child can be sentenced to life without parole.[237] The Eighth Amendment limits the circumstances under which a child can be sentenced to life without parole, but article I, section 14 prohibits such a sentence altogether.[238]

The Court used Mr. Bassett's resentencing as an example that judgements about an individual's behavior and circumstances are highly subjective.[239] At the initial post-*Miller* resentencing, the judge concluded that Mr. Bassett's homelessness at the time of his crime made him more mature than other children.[240] Another judge could have found that the

228. *Id.*

229. *Id.*; *see also* WASH. REV. CODE § 10.95.030 (1996) ("[A]ny person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole.").

230. *Bassett*, 192 Wash. 2d at 74, 428 P.3d at 346.

231. *Id.* at 75, 428 P.3d at 346–47.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 82, 428 P.3d at 350.

238. *Id.* at 74, 90, 428 P.3d at 346, 354.

239. *Id.* at 89, 428 P.3d at 353–54.

240. *Id.*

stress of homelessness made Mr. Bassett less able to control his emotions and behaviors than other children.[241]

Judgements about rehabilitation are similarly subjective.[242] The resentencing court found that Mr. Bassett's twelve years of infraction-free time did not demonstrate rehabilitation, because "prisoners have incentives to follow the rules,"[243]and similarly found that Mr. Bassett's academic achievements were "less evidence of rehabilitation and more evidence that . . . he is simply doing things to make his time in prison more tolerable."[244] Another judge could have reasoned that Mr. Bassett's institutional behavior and academic record showed that Mr. Bassett had gained the ability to control his behavior and had taken active efforts to make personal growth.[245]

The Washington Supreme Court reasoned that given the reduced culpability of juveniles that underlies the decisions in *Miller*, *Roper*, and *Graham*, and the "imprecise and subjective judgments a sentencing court could make regarding transient maturity and irreparable corruption,"[246] sentencing juveniles to life without parole is a cruel punishment that is categorically unconstitutional under article I, section 14.[247]

## III. AFTER *MILLER*, WASHINGTON STATE MADE ITS JUVENILE SENTENCING SCHEME CONSTITUTIONAL BY ENACTING "*MILLER*-FIX" LEGISLATION

*Miller* rendered Washington's sentencing scheme unconstitutional.[248] To fix it, the state legislature passed Second Substitute Bill 5064, known as the "*Miller*-fix" bill in 2014.[249] The bill provides for resentencing hearings in some cases, and parole eligibility after twenty or more years of incarceration for people who committed crimes as children.[250] The

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* ("Some judges may find an infraction-free record from the last 12 years evidence of rehabilitation, but Bassett's judge concluded it didn't 'carr[y] much weight' because 'prisoners have some incentive to follow the rules.'").

246. *Id.* at 89, 428 P.3d at 353–54.

247. *Id.* at 90, 428 P.3d at 354.

248. *See, e.g.*, WASH. REV. CODE § 10.95.030 (2010) (amended 2015), *invalidated by* Miller v. Alabama, 567 U.S. 460 (2012) (requiring any person convicted of aggravated murder to be sentenced to life without parole or death, resulting in mandatory life without parole sentence for juveniles, who cannot be sentenced to death under *Roper*).

249. 2d Substitute S.B. 5064, 63d Leg., Reg. Sess. (Wash. 2014).

250. *Id.*

parole portion of the bill is codified as RCW § 9.94A.730.[251] This section will explain the basic mechanism of "*Miller*-fix" parole and discuss the process by which release decisions are made.

### *A. An Overview of the* Miller*-fix Statute*

Under the *Miller*-fix, children convicted of crimes other than aggravated murder are eligible for parole after they have served twenty years.[252] Children convicted of aggravated murder who were under sixteen at the time of the crime are sentenced to a twenty-five-to-life term and become eligible for parole after twenty-five years.[253] Children who were sixteen- or seventeen-years-old at the time of the crime have an individualized sentencing hearing, and the court has the discretion to set a minimum term.[254] That minimum term cannot be a de facto life sentence.[255]

After the minimum time has been served, a person who was convicted of a crime before their eighteenth birthday "may petition the indeterminate sentence review board for early release," so long as that person has not committed another crime as an adult or received a serious infraction in the year before their petition.[256]

The ISRB is a quasi-judicial board housed within the DOC.[257] The ISRB predates the *Miller*-fix. Prior to the passage of Washington's Sentencing Reform Act (SRA) in 1981, Washington had indeterminate sentencing, with parole decisions governed by the Board of Prison Terms and Pardons.[258] In 1986, the Board of Prison Terms and Pardons was re-designated the ISRB, and the legislature provided that the ISRB would parole, revoke, and supervise people sentenced prior to the SRA took effect.[259] The legislature planned to phase out the ISRB, turning its duties over to the superior courts in 1992. The legislature delayed the termination of the ISRB several times as people with pre-SRA sentences dwindled, but in 2001, new legislation created a new type of indeterminate sentence, thus requiring the continued presence of the ISRB.[260] Since 2001, people

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251. WASH. REV. CODE § 9.94A.730 (2019).
252. *Id.*
253. *Id.*
254. *Id.*
255. *See* State v. Bassett, 192 Wash. 2d 67, 90, 428 P.3d 343 (2018).
256. WASH. REV. CODE § 9.94A.730(1).
257. *Indeterminate Sentence Review Board*, *supra* note 12.
258. H.B. Rep. 2957 (Wash. 2010).
259. *Id.*
260. *Id.*

convicted of sex crimes in Washington are subject to "determinate plus" sentencing: after serving a minimum term, the ISRB considers their release.[261] In 2011, the ISRB was moved into the DOC.[262] The ISRB is currently comprised of four members appointed by the Governor to five-year terms.[263]

Five years before the date an offender becomes eligible for release, DOC conducts an assessment of the offender and identifies programming and services that would be appropriate to prepare the offender for release. DOC must make the programming available "[t]o the extent possible."[264] Individuals who may become eligible for release under the *Miller*-fix bill are given priority for programs and treatment so that they can complete it before the date that they become eligible for release.[265]

After someone petitions for release, the DOC conducts a psychological examination of the parole petitioner, which includes conducting several psychological risk assessments.[266]

The ISRB then holds a hearing for the petitioner before making its release decision.[267] Because it is not a court proceeding, the rules of evidence do not apply to the hearing.[268] Washington's Administrative Procedure Act—which has provisions that govern adjudicative proceedings by state agencies—does not apply because it specifically exempts the ISRB.[269] The only written procedures for ISRB hearings at all are contained in a DOC policy that is less than two pages long.[270] This policy requires that the hearing is held at the facility where the petitioner is incarcerated by at least two members of the ISRB, that hearings are reviewed and voted on by the whole board, that the ISRB give notice to petitioners before scheduled hearings, and that a petitioner's corrections officer attends the hearing and submit certain documents.[271] There are no

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261. Kate Young, 2015 ISRB Release Decisions (2017) (unpublished Master's Capstone Project on file with the University of Washington).

262. H.B. 2957 (Wash. 2010).

263. *Board Members,* DEP'T CORRECTIONS: WASH. ST., https://www.doc.wa.gov/corrections/isrb/board-members.htm [https://perma.cc/S3PH-ZRL7].

264. WASH. REV. CODE § 9.94A.730(2) (2020).

265. WASH. STATE DEP'T CORR., POLICY DIRECTIVE 320.120: JUVENILE BOARD OFFENDERS (2015), https://www.doc.wa.gov/information/policies/files/320120.pdf [https://perma.cc/HE4N-BLP8].

266. WASH. REV. CODE § 9.94A.730(3).

267. WASH. REV. CODE § 9.94A.730.

268. WASH. R. EVID. 101.

269. WASH. REV. CODE § 34.05.030(1)(c).

270. *See* WASH. STATE DEP'T CORR., POLICY DIRECTIVE 320.100: INDETERMINATE SENTENCE REVIEW BOARD (2019), https://www.doc.wa.gov/information/policies/files/320100.pdf [https://perma.cc/2U2K-QTQU] ("III. Board Hearings").

271. WASH. STATE DEP'T CORR., POLICY DIRECTIVE 320.100: INDETERMINATE

limits on what types of questions board members can ask during a hearing.[272] The ISRB may ask questions about what was going through a petitioner's head during an underlying crime, a petitioner's plans for the future if released, or even about a petitioner's past and present romantic relationships.

A petitioner is not provided with an attorney unless the ISRB determines that cognitive issues prevent that individual from participating in the hearing, although petitioners may hire attorneys at their own expense.[273] ISRB decisions cannot be appealed; to challenge a decision not to release, a petitioner must file a personal restraint petition.[274] A personal restraint petition does not afford the same protections as a direct appeal.[275] For example, when a party appeals a constitutional error, on appeal, the State has the burden to prove the constitutional error was harmless, whereas a personal restraint petition requires the petitioner to show they were "actually and substantially prejudiced" by "constitutional error."[276]

To make release decisions in *Miller*-fix cases, the ISRB must determine whether the petitioner is more likely than not to commit a future crime.[277] If the petitioner is *not* more likely than not to commit a future crime, the ISRB must order the petitioner released.[278] The statute does not provide any guidance as to how the ISRB should determine whether a petitioner is more likely than not to commit a future crime.[279] The ISRB can order any conditions of release it deems appropriate.[280] The ISRB cannot fail to release a petitioner unless it finds that by a preponderance of the evidence,

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SENTENCE REVIEW BOARD (2019), https://www.doc.wa.gov/information/policies/files/320100.pdf [https://perma.cc/2U2K-QTQU].

272. *Id.*

273. *Id.* Paying for a private attorney is not a realistic option for many incarcerated individuals. Individuals who grew up very poor are disproportionately represented in incarcerated populations. For example, boys who grew up in families making less than $14,000 a year are more than twenty times more likely to be incarcerated in their thirties than boys who grew up in families making more than $143,000 a year. *See* ADAM LOONEY & NICHOLAS TURNER, THE BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION (2018).

274. State v. Delbosque, 195 Wash. 2d 106, 456 P.3d 806, 819 (2020).

275. *Id.* at 129–30, 456 P.3d at 819.

276. *Id.*; *In re* Markel, 154 Wash. 2d 262, 267, 111 P.3d 249, 251 (2005).

277. WASH. REV. CODE § 9.94A.730 (2020).

278. *Id.*

279. *Id.*

280. *Id.* For example, the board could order an individual to abstain from drugs and alcohol, if it deems that such a condition was necessary to prevent a petitioner from committing another crime. *See also* WASH. STATE DEP'T CORR., POLICY DIRECTIVE 390.600: IMPOSED CONDITIONS (2011), https://www.doc.wa.gov/information/policies/files/390600.pdf [https://perma.cc/S6L5-GXXP].

even with appropriate conditions, "it is more likely than not that the person will commit new criminal law violations if released."[281]

### *B. What the ISRB Considers in Making Release Determinations*

It is not clear what the board should consider to determine whether someone is more likely than not to commit a future crime if released.[282] The statute does not provide any guidance as to how the ISRB should make the determination, leaving the ISRB with an enormous amount of discretion.[283] There is no published DOC policy explaining how the ISRB makes this determination. The Author of this comment requested information about the ISRB's decisionmaking process, and received a one-page document the ISRB uses to structure its decisions.[284] This document suggests that the ISRB considers a wide range of factors, including measurable factors such as institutional behaviors and criminal history, as well as more subjective factors such as a defendant's "ability to control behavior," "level of engagement," and the quality of their submitted release plan.[285] The ISRB is informed by the DOC's psychological evaluation, the defendant's testimony and submissions, infraction history, and the correction counselor's testimony. Additionally, because victims and survivors have a statutory right to make statements to the ISRB, it may have heard remarks from victims or survivors.[286]

#### *1. The ISRB Cannot Use Evidence of Impact of the Crime*

The court of appeals limited how the ISRB can use evidence of the impact of a crime when it reviewed the board's decision not to release Gail Brashear.[287] When Ms. Brashear was fifteen-years-old, she was camping with her boyfriend and another young man, when the three of them decided to steal a car.[288] Ms. Brashear flagged down an adult man and asked for a ride. When she got in the passenger seat, she shot him twice. [289] The young men came to the truck, and Ms. Brashear stabbed the

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281. WASH. REV. CODE § 9.94A.730 (2020).

282. *See, e.g.*, *Frequently Asked Questions*, DEP'T CORRECTIONS, https://www.doc.wa.gov/corrections/isrb/faq.htm#determine-release [https://perma.cc/U4HP-4N78].

283. *See* WASH. REV. CODE § 9.94A.730.

284. INTERMEDIATE SENTENCE REVIEW BD., ISRB CASE REVIEWS-STRUCTURED DECISION MODEL [hereinafter ISRB CASE REVIEWS-STRUCTURED DECISION MODEL] (on file with author).

285. *Id.*

286. WASH. REV. CODE § 9.94A.730 (2020).

287. *In re* Brashear, 6 Wash. App. 2d 279, 430 P.3d 710 (2018).

288. Gail Brashear, ISRB No. 765306 (Wash. St. Dep't of Corr. Apr. 21, 2017).

289. *Id.*

victim several times.[290] Ms. Brashear pleaded guilty to first-degree murder, first-degree assault, and first-degree burglary.[291] The court sentenced her to fifty-one years in 1997.[292] Under the juvenile parole statute, Ms. Brashear became eligible for and petitioned for parole in 2017.[293]

At the time of her ISRB hearing, Ms. Brashear's last serious infraction was nearly a decade earlier, in 2008.[294] She had participated in many programs, seminars and groups while incarcerated, including: Stress and Anger Management; Re-Entry Life Skills; Beyond Trauma; a mindfulness and meditation course; conflict resolution; victim awareness; and a host of others.[295] Additionally, she had completed an AA degree, and a braille translation certification, and was working in the Correctional Industries Braille program.[296] Her counselor testified that Ms. Brashear was a model inmate and has strong community support.[297] The psychology evaluation conducted by the DOC stated that Ms. Brashear had received mental health therapy, had been stable for years, and "[o]verall . . . is at a low risk to reoffend."[298] However, the prosecutor strongly requested that Gail be denied release.[299] The victim's family was required by statute to have the opportunity to make a statement to the ISRB.[300] What the victim's family shared is private, but the family publicly opposed Ms. Brashear's release.[301]

The board acknowledged the progress Ms. Brashear has made, but found her not releasable because she "has committed horrible crimes that have left lasting impacts to many of the survivors of her victims," "has served a relatively small portion" of her sentence, and the prosecutor

290. *Id.*

291. *In re Brashear*, 6 Wash. App. 2d at 281, 430 P.3d. at 712.

292. *Teen girl sentenced to 51 years*, *supra* note 4.

293. *In re Brashear*, 430 P.3d. at 712.

294. Gail Brashear, ISRB No. 765306 (Wash. St. Dep't of Corr. Apr. 21, 2017).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. WASH. REV. CODE § 9.94A.730 (2020).

301. *Dan Varnell's Life Mattered . . . Deny Early Release of His Murderer, Gail Brashear!*, CHANGE.ORG, https://www.change.org/p/dan-varnell-s-life-mattered-deny-the-early-release-of-dan-varnell-s-murderer [https://perma.cc/59WD-GYX6].

opposed her release.[302] The ISRB did not consider any conditions of release that would reduce Ms. Brashear's risk of reoffending.[303]

Ms. Brashear challenged the board's decision with a personal restraint petition to the Court of Appeals.[304] The court held that the ISRB abused its discretion by relying on Ms. Brashear's underlying crimes, their impact on victims, and the small portion of her sentence served.[305] The court also noted that the ISRB failed to discuss appropriate conditions of release or explain why even with those conditions, Ms. Brashear was more likely than not to reoffend.[306] The court affirmed that under RCW 9.94A.730, there is a presumption of release, and that the board must order petitioners released unless it is more likely than not that they will commit a future crime.[307] Further, the court commented on the inclusion of victim statements to the board: they are properly considered only as to "what community release conditions are appropriate or whether the offender is likely to reoffend."[308] Factors such as the heinousness of the underlying crime, the impact of the crime, and the portion of a sentence served cannot demonstrate the likelihood that someone will reoffend.[309]

Because the ISRB had no evidence suggesting Ms. Brashear was more likely than not to commit a future crime, the court reversed and remanded to the ISRB to order the release of Ms. Brashear and determine appropriate conditions.[310] Ms. Brashear was released in the summer of 2019.[311] Moving forward, the ISRB cannot consider evidence from victim statements, unless that evidence suggests that the offender is more likely than not to commit a crime in the future.[312]

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302. Gail Brashear, ISRB No. 765306 (Wash. State Dep't of Corr. Apr. 21, 2017).

303. *Id.*

304. *In re* Brashear, 6 Wash. App. 2d 279, 285, 430 P.3d 710 (2018).

305. *Id.* at 288, 430 P.3d at 715.

306. *Id.* at 287, 430 P.3d at 714–15.

307. *Id.*

308. *Id.* at 288, 430 P.3d at 715.

309. *Id.* at 289, 430 P.3d at 715–16.

310. *Id.* at 790, 430 P.3d at 716.

311. Gail Brashear, ISRB No. 765308 (Wash. State Dep't of Corr. Sept. 11, 2019).

312. *In re Brashear*, 6 Wash. App. 2d at 289. Most victim evidence responds to the impact of a crime and will not include evidence regarding what an offender will do in the future, but a hypothetical example of victim evidence that could be helpful in determining whether or not an offender will commit a future crime is evidence that an offender has violated a no contact order and has made threats to the victim while incarcerated.

### 2. *The ISRB Looks to the Psychological Evaluation and Risk Assessments*

The ISRB structured decisionmaking sheet indicates that the ISRB considers several risk assessments conducted as part of DOC's psychological evaluation.[313] These include both a clinical assessment and actuarial risk assessment tools.[314] Clinical risk assessment requires a clinician to make predictions based on their own experience, judgement, and reasoning.[315] Because clinicians are vulnerable to cognitive biases,[316] this type of unstructured professional judgement is frequently inaccurate.[317] Studies have shown that unstructured clinical predictions of violence are more likely to be wrong than right.[318]

In an attempt to remove bias and improve violent risk assessment, researchers developed actuarial risk assessments.[319] Actuarial risk assessments make predictions based on demographic data.[320] Researchers have serious doubts about whether actuarial risk assessment tools can accurately predict risk for future violence.[321] Although there is some peer-reviewed and published research suggesting that these tools can predict violence,[322] a meta-analysis of published violence risk assessment data found that studies where the developer of the tool studied their own tool, that study was twice as likely to find positive predictive findings.[323]

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313. ISRB CASE REVIEWS-STRUCTURED DECISION MODEL *supra* note 284.

314. *Id.*

315. *Clinical Risk Assessment*, APA DICTIONARY PSYCHOL., https://dictionary.apa.org/clinical-risk-assessment [https://perma.cc/XJX8-ZRJC].

316. Itiek Dror & Daniel Murrie, *A Hierarchy of Expert Performance Applied to Forensic Psychological Assessments*, 24 PSYCHOL., PUB. POL'Y & L. 11, 14 (2017).

317. JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47–49 (1981).

318. Monahan, *supra* note 317, at 47–49.

319. Matthew Large & Olav Nielssen, *The Limitations and Future of Violence Risk Assessment,* 16 WORLD PSYCHIATRY 25, 25 (2017).

320. *Actuarial Risk Assessment*, APA DICTIONARY PSYCHOL., https://dictionary.apa.org/actuarial-risk-assessment [https://perma.cc/28AD-LMU7].

321. Stephen Hart, Christine Michie & David Cooke, *Precision of Actuarial Risk Assessment Instruments: Evaluating the 'Margins of Error' of Group v. Individual Predictions of Violence*, 190 BRITISH J. PSYCHIATRY (supp. 49) 60, 60 (2007) (discussing how actuarial risk assessment instruments "cannot be used to estimate an individual's risk for future violence with any reasonable degree of certainty and should be used with great caution or not at all").

322. *See, e.g.*, Anthony Glover et al., *A Cross-Validation of the Violence Risk Appraisal Guide—Revised (VRAG–R) Within a Correctional Sample,* 41 L. & HUM. BEHAV. 507, 507 (2017).

323. Jay P. Singh, Martin Grann & Seena Fazel, *Authorship Bias in Violence Risk Assessment? A Systemic Review and Meta-Analysis*, 8 PLOS ONE 1, 6–7 (2013).

Two of the actuarial risk assessment tools used by DOC clinicians are the Violence Risk Appraisal Guide (VRAG-R),[324] the revised Psychopathy Checklist (PCL-R).[325] The PCL-R is a twenty-item checklist first published by Dr. Robert Hare in 1980 (revised in 1991 and again in 2003) to detect psychopathic personality disorder.[326] The PCL-R is based on file information and an optional interview. It categorizes personality traits (such as "lack of remorse" or "grandiose sense of self-worth") as well as social history into four larger factors (interpersonal, affective, lifestyle, and antisocial).[327] Dr. Hare and other proponents of the PCL-R believe the PCL-R can assess psychopathy and predict recidivism.[328]

There is disagreement about both whether psychopathy exists, and whether the PCL-R can effectively test it.[329] Despite an oversized presence of the psychopath in the popular imagination,[330] psychopathic personality disorder does not appear in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM).[331] The closest diagnosis is antisocial personality disorder.[332] Opponents of the PCL-R argue that psychopathy is not a useful diagnostic category and that the PCL-R is unreliable to predict future violence and recidivism and should not be used "where life and liberty decisions are at stake."[333] Nevertheless, the PCL-R is widely used in psychiatric and prison settings.[334] In 2011, a guide to "passing" the PCL-R was published, citing concerns about false positives.[335]

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324. GRANT T. HARRIS ET AL., VIOLENT OFFENDERS APPRAISING AND MANAGING RISK (3d ed).

325. ROBERT D. HARE, HARE PSYCHOLOGY CHECKLIST REVISED: PCL-R (2d ed. 2003); *see* ISRB CASE REVIEWS-STRUCTURED DECISION MODEL, *supra* note 284.

326. Kent Keihl & Morris Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics,* 51 JURIMETRICS 355, 362 (2011).

327. *Id.*

328. *Id.* at 370.

329. *See* Sarah Marshall, *The End of Evil*, BELIEVER (Feb. 1, 2018), https://believermag.com/the-end-of-evil/ [https://perma.cc/E3C9-3DEG].

330. Gabriel Gavin, *Psychopaths: The Worst People Who Don't Exist*, PSYCHOL. TODAY (Aug. 4, 2014), https://www.psychologytoday.com/us/blog/wiring-the-mind/201408/psychopaths-the-worst-people-who-don-t-exist [https://perma.cc/7CG6-Q8YU].

331. Keihl & Hoffman, *supra* note 319, at 359.

332. *Id.* at 359.

333. Willem H.J. Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High Risk of Misuse, and Lack of Reliability*, 27 MED. & L. 449, 453 (2008).

334. Inge Jeandarme et al., *PCL-R Field Validity in Prison and Hospital Settings*, 41 L. & HUM. BEHAV. 29 (2017).

335. *See generally* ABRAHAM GENTRY, PASS THE PCL-R: YOUR GUIDE TO PASSING ARE PSYCHOPATHY CHECKLIST-REVISED AKA THE PSYCHOPATH TEST (2011) (claiming to provide informational material enabling readers to "pass" the PCL-R).

The VRAG-R is a purely actuarial tool intended to predict the risk of future violent offenses based on twelve data points about an individual.[336] A higher VRAG-R score indicates a higher risk to reoffend.[337] The VRAG-R is a static tool tied to the date of the underlying offense, meaning that an ISRB petitioner's VRAG-R score will be the same the day they are sentenced as it is twenty years later when they become eligible to seek parole.[338] Scored items include: whether the individual lived with both parents until age sixteen, marital status at the time of the offense, and age at the underlying offense.[339] For example, a petitioner who committed a crime at fourteen and was convicted and incarcerated before age sixteen would have a higher VRAG-R score because they did not live with their parents until age sixteen, were presumably unmarried at the time of the offense and were under twenty-six-years-old at the time of the offense.[340]

Both clinical and actuarial risk assessments lack transparency. The clinician who conducted the examination is not at the ISRB hearing and cannot be cross-examined.[341] The petitioner and members of the board do not know what factors determined the petitioner's risk, or how heavily different factors were weighted.[342] This becomes especially problematic when a heavily weighted risk factor is a petitioner's youth at the time of the crime, the very fact that entitles Miller-fix parolees to a parole hearing.[343]

### *3. The ISRB Assesses Behavior While Incarcerated*

The ISRB looks to institutional behavior, including the seriousness and recency of infractions.[344] Serious infractions include violent behaviors, such as committing an aggravated assault, but also includes behaviors that would not be considered dangerous behaviors outside of a prison context,

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336. GRANT T. HARRIS, MARNIE RICE, VERNON L. QUINSEY & CATHERINE A. CORMIER. VIOLENT OFFENDERS: APPRAISING & MANAGING RISK (2015).

337. Harris et al., *supra* note 243.

338. *Id.*

339. *See* MELANIE DOUGHERTY, N.Y. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, RISK ASSESSMENT TOOL: VRAG-R SCORING TEMPLATE, http://www.vrag-r.org/wp content/uploads/2016/12/VRAG-R-scoring-sheet-1.pdf [https://perma.cc/PN9E-6GPE].

340. Jeremiah Borgeouis, *Why I Am Not a Recidivist*, CRIME REP. (Jan. 22, 2018), https://thecrimereport.org/2018/01/22/why-i-am-not-a-recidivist/ [https://perma.cc/A2GZ-BL4F].

341. WASH. STATE DEP'T CORR., POLICY DIRECTIVE 320.100: INDETERMINATE SENTENCE REVIEW BOARD (2019), https://www.doc.wa.gov/information/policies/files/320100.pdf [https://perma.cc/2U2K-QTQU].

342. Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth,* 96 WASH U. L. REV. 681, 682 (2018).

343. *See* Stevenson & Slobogin, *supra* note 341, at 682.

344. ISRB CASE REVIEWS-STRUCTURED DECISION MODEL, *supra* note 284.

such as possessing more than five dollars without permission,[345] organizing or participating in an unauthorized group meeting;[346] or misusing or wasting more than ten dollars' worth of supplies.[347] Minor infractions similarly include conduct that would not be cause for concern in the outside world, such as hugging a visiting relative without permission,[348] or smoking tobacco in the wrong place.[349]

The ISRB also looks to "responsivity to programming."[350] Programming includes therapeutic and support programming, such as substance abuse treatment, as well as academic and vocational classes.[351] There is evidence that some programming reduces the likelihood of future criminal behavior—the National Institute of Justice considers cognitive behavioral therapy programs to be effective at reducing recidivism in some cases.[352] Similarly, academic and vocational programming reduces recidivism rates by over 40%.[353]

In Washington prisons, many programs are volunteer operated, some by religious organizations.[354] In 2017, the ISRB found that Jeremiah Bourgeois was more likely than not to commit a future crime, and recommended that he participate in faith-based "Bridges to Life" or other cognitive behavioral therapy-based programming before petitioning again.[355] "Bridges to Life" is a Christian program that includes a "healing process based on teachings of the Bible."[356] No secular cognitive behavioral therapy was available.[357] Mr. Bourgeois, a secular humanist, felt that he was required to participate in Bridges to Life to obtain release

345. WASH. ADMIN CODE § 137-25-030 660 (2020).

346. *Id.* § 137-25-030 708.

347. *Id.* § 137-25-030 755.

348. *Id.* § 137-28-220 309.

349. *Id.* § 137-28-220 251.

350. ISRB CASE REVIEWS-STRUCTURED DECISION MODEL, *supra* note 284.

351. *See Current Programming*, DEP'T CORRECTIONS: WASH. ST., https://www.doc.wa.gov /corrections/pro grams/descriptions.htm#therapy-support [https://perma.cc/VR26-KK2H] [hereinafter *Current Programming*].

352. Thomas Feucht & Tammy Holt, *Does Cognitive Behavioral Therapy Work in Criminal Justice? A New Analysis From CrimeSolutions.gov*, 277 NAT'L INST. J. 15–16 (2016).

353. Michelle Chen, *Prison Education Reduces Recidivism by Over 40 Percent. Why Aren't We Funding More of It?* NATION (Aug. 17, 2015), https://www.thenation.com/article/archive/prison-education-reduces-recidivism-by-over-40-percent-why-arent-we-funding-more-of-it/ [https://perma.cc/W8CD-YS56].

354. *Current Programming, supra* note 351.

355. Jeremiah Borgeouis, *The Tribulations of Miller's Children: How Cruel and Unusual Punishments Led to Establishment Clause Violations*, 46 AM. J. CRIM. L. 1, 5 (2019).

356. Borgeouis, *supra* note 354, at 8.

357. *Id.*

from the ISRB.[358] Mr. Bourgeois chose to participate in Bridges to Life and was found releasable at his subsequent hearing.[359]

### *4. The ISRB Uses Its Subjective Judgement*

Many of the factors considered on the structured-decisionmaking document rely on the subjective judgements of board members.[360] The ISRB makes determinations about a petitioner's intelligence and the motivation with which a petitioner participates in programming, the petitioner's callousness and social behaviors, and about whether a petitioner's release plan is realistic.[361] These considerations all rely on the subjective judgement of board members.

For example, a board member could find that a petitioner who began to participate in programming after the passage of the *Miller*-fix bill in 2014 was only motivated by a desire to be released. A different board member could find that the same petitioner reached a certain level of maturity in 2014 and became more interested in programming. One board member could hear a petitioner speak in a detached way about their underlying criminal act and determine that the petitioner is callous or unfeeling. Another board member could hear the same thing and determine that the petitioner is recalling an event that was traumatic. One board member could determine that a release plan where a petitioner relies on a spouse is realistic, because marriage lowers recidivism rates. Another board member could determine that same release plan is unrealistic, because many prison marriages end in divorce.

Because the ISRB decisionmaking is structured to include these determinations, the ISRB must engage in making subjective judgements in order to make release decisions.

## IV. THE *MILLER*-FIX STATUTE SHOULD REDUCE THE SENTENCES OF JUVENILES TO THEIR MINIMUM TERM

The *Miller*-fix statute is a substantial step towards more fair and proportionate dealings with juveniles convicted of crimes. In addition to "fixing" Washington's unconstitutional aggravated murder sentence, the *Miller*-fix ensures that every child convicted of a crime has an eventual opportunity for release.[362] By creating the presumption of release, unless

358. *Id.*

359. Jeremiah Borgeouis, ISRB No. 708897 (Wash. State Dep't of Corr. Jul. 17, 2019).

360. ISRB CASE REVIEWS-STRUCTURED DECISION MODEL, *supra* note 284.

361. *Id.*

362. WASH. REV. CODE § 9.94A.730 (2019).

it is more likely than not that a juvenile offender will commit another crime, the legislature determined that twenty years is a long enough sentence for the penological goals of retribution and deterrence in all juvenile cases.[363]

But the task of determining what an individual will do in the future is difficult, and the ISRB has been given broad discretion and little statutory guidance.[364] Instead of asking the ISRB to peer into the crystal ball and use subjective judgements to make release determinations, the legislature should cap sentences for juveniles at twenty years. Alternatively, the legislature should provide the ISRB with specific criteria to use when making release decisions that are within a juvenile offender's control and are in line with the ethos of *Miller*.

### *A. A Proposal: Replace an Opportunity for Release with Release*

Instead of creating an opportunity for release, the Washington legislature should amend its sentencing laws[365] to ban long sentences for juvenile offenders categorically. By enacting the *Miller*-fix bill and setting a presumption of release hinged on future conduct, the Washington state legislature identified twenty years as sufficient time for the penological goals of retribution and deterrence. After twenty years, a person who committed a crime as a child has served their time. Therefore, sentences for juveniles should be capped at twenty years. Additionally, individuals currently serving sentences for crimes committed as juveniles that are longer than twenty years should have their sentences reduced to twenty years.

The *Bassett* Court observed that it is difficult for a sentencing court to fairly determine whether an individual has been rehabilitated, because it is highly subjective.[366] Evidence of institutional behavior can be interpreted to mean that an individual has matured and changed, or can be interpreted to mean little because "prisoners have some incentive to follow the rules."[367] Evidence of participation in educational programming can be interpreted to mean that an individual has been rehabilitated, or it can be interpreted to mean that individual "is simply doing things to make his time in prison more tolerable."[368]

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363. *See id.*

364. *Id.*

365. *Id.* § 9.94A.

366. State v. Bassett, 192 Wash. 2d 67, 89, 428 P.3d 343, 354 (2018).

367. *Id.*

368. *Id.*

The ISRB similarly makes subjective judgements about a petitioner's rehabilitation based on factors that are open to interpretation.[369]

However, unlike a sentencing court, most petitioners do not have the benefit of counsel before the ISRB.[370] Petitioners must face similarly subjective judgements without the benefit of an advocate.[371] And if the ISRB makes an unfounded decision, petitioners do not have a right to a direct appeal.[372] Decisions made by the ISRB about whether a petitioner has been rehabilitated are as unfairly subjective as similar decisions made by sentencing courts, and are additionally unfair in that they lack the procedural protections of sentencing courts.

It is almost impossible to determine what an individual who has spent their entire adult life incarcerated will do in the future on the outside. Predicting future dangerousness to an acceptable degree of certainty may be impossible.[373] All that the ISRB has to make this determination are their own subjective impressions, faulty risk assessment tools, and institutional behaviors that may have no bearing on life outside of prison. As the resentencing court in *Bassett* observed, "prisoners have some incentive to follow the rules." On the other side of the coin, there are rules in prison that do not translate in any meaningful way to law-abiding behavior outside of prison. For example, if an individual kisses a visiting spouse goodbye without permission, that could result in an infraction, but has little bearing on their dangerousness. Mr. Montgomery's two infractions over seventeen years, for smoking in the wrong area and putting his clothes away incorrectly[374] are unlikely to be predictive of future criminal behavior.

By replacing the opportunity for release with an actual release, Washington can eliminate serious concerns about both procedural fairness[375] and substantive justice when decisionmakers are asked to make decisions based on predictions about the future.[376] Instead, the DOC

369. ISRB CASE REVIEWS-STRUCTURED DECISION MODEL, *supra* note 284.

370. WASH. REV. CODE § 9.94A.730.

371. *Id.*

372. State v. Delbosque, 195 Wash. 2d 106, 129, 456 P.3d 806, 819 (2020).

373. Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 909 (2009).

374. Michaels, *supra* note 201.

375. *See* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 606 (2019) ("In summary, parole board punishment proceedings fall far short of delivering the constitutional procedural protections promised in a court of law. Whether or not jury determinations would be required during an in-court hearing, the processes provided in parole proceedings generally, and *Miller*-fix matters specifically, are insufficient to satisfy constitutional procedural protections for sentencing.").

376. *See* Addington v. Texas, 441 U.S. 418, 429–30 (1979); Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 743–44 (1972).

should prepare juveniles for release while they are imprisoned. For example, the DOC should continue to assess individuals five years before release and provide them with access to recommended programming.

Some juvenile offenders will go on to commit crimes as adults. Recidivism is a serious problem in the criminal legal system, but it cannot and should not be solved by preventative detention. Even the current *Miller*-fix parole system assumes that some *Miller* parolees will commit future crimes. Because the ISRB must release individuals unless they are more likely than not to commit a crime, theoretically, individuals who have a 50 percent chance of committing future crimes should be released. Half of these individuals will then commit future crimes. To prevent future criminal activity from *Miller* parolees and all other formerly incarcerated individuals reentering the community, we should focus on policy choices that data shows lower recidivism rates, for example, funding education programs and reentry assistance.[377]

Extreme sentences for juveniles are a relatively recent phenomenon, developed mainly in response to racially charged panic about a juvenile crime wave that never came.[378] Before these "tough on crime" reforms, juveniles who committed serious crimes would be reentering the community when they reached the age of majority.[379] The long tradition of a less punitive juvenile system with much shorter sentences demonstrates that there is no need to sentence children to terms longer than twenty years.

### *B. An Alternative Proposal: Criteria by Legislature*

At a minimum, the legislature should provide specific guidance to the ISRB, instructing it on how it should determine whether a juvenile offender is more likely than not to commit another crime if released. Factors that can be considered to the board should be specified by statute and limited to those that can reasonably take into account the way that an individual juvenile has changed. A parole applicant whose objective behaviors demonstrates that they have changed should be released, regardless of the ISRB's subjective impressions of that individual's personality.

All measures of a petitioner's risk are flawed and open to interpretation, but perhaps the most objective is a petitioner's institutional behavior. Two decades of infraction history and participation in recommended

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377. Ari Kohn, *From Prison to College to Success*, SEATTLE TIMES (Feb. 15, 2017), https://www.seattletimes.com/opinion/from-prison-to-college-to-success/ (last visited March 30, 2020).

378. Mills et al., *supra* note 91, at 584–85.

379. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

programming allow the ISRB to look objectively at an individual's growth trajectory since their childhood crime and determine whether that individual has passed through their "transient immaturity."[380] The ISRB should consider programming in the context of what is available and what is appropriate; petitioners should not be penalized for nonparticipation in programming that is inconsistent with their religious beliefs.[381] Infraction history should be limited to behaviors that would be cause for concern outside of prison.

The ISRB should not use clinical risk assessment and actuarial assessment tools, such as the PCL-R and the VRAG-R to make *Miller* parole release decisions. There is serious debate about the accuracy of these tools. Individuals have no control over their risk assessment scores and no meaningful way to challenge or contextualize their meaning. This is particularly concerning because of the limited due process at a parole hearing. Finally, because they rely on static data points, actuarial risk assessment tools rely in whole or in part on who a juvenile offender was at the time of their crime. *Miller* was decided because of the unique capacity of young people to mature and change.[382] Tools that cannot reflect that capacity have no place in *Miller* parole hearing.[383]

Community support does measurably prevent recidivism; an individual with strong family support and related family resources is less likely to commit a crime after release.[384] However, it is grossly unfair to continue to incarcerate individuals because they have fewer resources outside of prison. The DOC already takes on the responsibility of providing individuals leaving complete confinement with the guidance, support, and programming they need to transition successfully back to the community.[385] Children who grew up in its custody should not be the exception.

## CONCLUSION

The Washington State legislature has taken an important step to remedy Washington's sentencing under *Miller* by enacting a parole statute with a presumption of release after twenty years for people who committed

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380. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) (first quoting Roper v. Simmons, 543 U.S. 551, 573 (2005); and then quoting Graham v. Florida, 560 U.S. 48,68 (2010)).

381. Jeremiah Borgeouis, *The Tribulations of Miller's Children: How Cruel and Unusual Punishments Led to Establishment Clause Violations,* 46 AM. J. CRIM. L. 1, 5 (2019).

382. *Miller*, 567 U.S. at 734.

383. Borgeouis, *supra* note 340.

384. Ryan Shanahan & Sandra Villalobos, *The Family and Recidivism,* AM. JAILS 17, 17 (Sept./Oct. 2012).

385. *Supervision in the Community*, DEP'T CORRECTIONS: WASH. STATE, https://www.doc.wa.gov/ corrections/community/supervision.htm[ https://perma.cc/FC8P-Q3ZM].

crimes as children. The ISRB is responsible for determining whether a person who committed a crime as a child is more likely than not to commit future crimes as an adult, and to release those who are not. While ensuring that individuals who committed crimes as children have an opportunity for release is constitutionally required, this specific release mechanism should be reconsidered.

Because the determination "more likely than not to commit a crime if released" looks to future behavior, it is nearly impossible to make a fair and accurate judgment. The ISRB is forced to rely in part on questionable predictive tools and its subjective impressions. The legislature should instead cap sentences for juveniles at twenty years. Alternatively, some concerns about fairness would be addressed if the legislature instructed the ISRB to consider only objective factors within a juvenile's control. Because the future is not static, the legislature can reduce recidivism from released juvenile offenders by ensuring they have access to programming while incarcerated and funding supportive transition programs.