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What is Life? Geriatric Release and the Conflicting Definitions of "Meaningful Opportunity for Release"

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I. Introduction

The United States Supreme Court has recognized that juveniles are less culpable than adults and therefore "less deserving of the most severe punishments."[1] For example, in

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1. Roper v. Simmons, 543 U.S. 551, 569 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 569); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("[W]e require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

Graham v. Florida,[2] the Supreme Court ruled that sentencing a juvenile to life without parole (LWOP) for non-homicide offenses violates the Eighth Amendment.[3] Additionally, in *Miller v. Alabama*,[4] the Supreme Court found mandatory LWOP sentences for juveniles, in homicide cases, unconstitutional.[5]

Unfortunately, the *Graham* and *Miller* decisions have caused much confusion about how to incorporate these rules into juvenile sentencing.[6] In *Graham*, the Court found that juveniles who commit non-homicide offenses must be afforded a "meaningful opportunity for release" but allowed states to define meaningful opportunity, which has led to many different outcomes.[7] Indeed, the dissenting opinion of Justice Thomas and Justice Scalia predicted that failing to define "meaningful opportunity" would "no doubt embroil the courts for years."[8] For example, state courts have grappled with the issue of whether lengthy term-of-years sentences may violate *Graham* and *Miller* because they *de facto* sentence them to LWOP.[9] Courts have also grappled with the question of whether the prospect for geriatric parole constitutes a meaningful opportunity for release.[10]

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2. *See* Graham v. Florida, 560 U.S. 48 (2010) (holding that life imprisonment without parole for non-homicide crimes committed by juveniles violates the Eighth Amendment).

3. *See id.* at 74 (explaining that juveniles are not as culpable as adults and therefore should not be punished as severely).

4. *See* Miller v. Alabama, 567 U.S. 460 (2012) (holding that life imprisonment without parole for homicide crimes committed by juveniles violates the Eighth Amendment).

5. *See id.* at 465 (explaining how juveniles should be afforded the opportunity to be rehabilitated and return to society).

6. *See* Kelly Scavone, *How Long is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3441–42 (2015) (stating how the rules in *Graham* and *Miller* are unclear and giving an example of lengthy term of years sentences to show how difficult the application of those cases has been).

7. *Graham*, 560 U.S. at 75; *see also* Scavone, *supra* note 6, at 3442 ("Responses in state courts to the issue of virtual LWOP sentences after *Miller* and *Graham* have varied significantly.").

8. *Graham*, 560 U.S. at 123.

9. *See* Scavone, *supra* note 6, at 3441–42 (explaining that lengthy term of years sentences are virtually LWOP sentences due to how young the offenders are).

10. *See* LeBlanc v. Mathena, 2015 U.S. Dist. LEXIS 86090, at *31–32 (E.D. Va. July 1, 2015) (explaining how geriatric release was determined to be

This Note aims to assess whether geriatric parole should constitute a meaningful opportunity for release under *Graham*. The first section will discuss why juveniles are treated differently in the first place. Then, the rule set out in *Graham* will be further analyzed. Third, the issue of lengthy term-of-years sentences will be briefly discussed to exemplify issues the courts have had with the *Graham* rule. Then geriatric parole and parole will be defined and compared. Finally, this Note will analyze how courts have dealt with geriatric parole so far—with a heavy focus on Virginia courts. The Note will conclude with whether geriatric parole should constitute a meaningful opportunity for release.

II. Why Juveniles Are Treated Differently

Graham v. Florida, *Roper v. Simmons*[11] and *Miller v. Alabama* have shaped the framework for treating juveniles differently in our criminal justice system. In *Roper*, the Court considered whether it is permissible under the Eighth Amendment to execute a juvenile for committing a capital offense.[12] At age seventeen, Christopher Simmons discussed murdering someone with his two friends.[13] Simmons assured "[them] they could 'get away with it' because they were minors."[14] Simmons and one other friend proceeded to break into the victim's—Mrs. Cook's—house, and bind her arms and legs and wrap her face in duct tape.[15] Simmons and his friend took Mrs. Cook to a railroad trestle and threw her over into the waters below, leaving her to drown.[16] Simmons confessed to his crimes, and was convicted and sentenced to death.[17] Even with

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compliant with *Graham* but ultimately disagreed with the Virginia Supreme Court); *but see* State v. Zuber, 126 A.3d 335, 346–47 (N.J. Super. Ct. App. Div. 2015) (stating that a defendant's opportunity for geriatric release would satisfy *Graham* and *Miller*).

11. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that capital punishment for crimes committed by juveniles violates the Eighth Amendment).

12. *See id.* at 555–56 (discussing juveniles' culpability for the crimes they committed).

13. *Id.* at 556.

14. *Id.*

15. *Id.*

16. *Id.* at 556–57.

17. *Id.* at 557.

these egregious facts, the Supreme Court of the United States reversed the decision, holding that capital punishment of a juvenile is unconstitutional under the Eighth Amendment due to the mitigating factor of youth.[18]

Miller v. Alabama involved two juveniles, both age fourteen, who committed separate crimes but were both sentenced to mandatory terms of LWOP for homicide offenses.[19] Kuntrell Jackson and two other boys robbed a video store in Arkansas.[20] Initially, Jackson stayed outside as the robbery was taking place but later entered the store to see what was happening.[21] It was not clear whether Jackson then stated, "[w]e ain't playin,'" or instead told his friends, "I thought you all was playin.'"[22] Nevertheless, one of the other boys shot and killed the clerk.[23] Jackson was charged with capital murder and aggravated robbery.[24]

Evan Miller was sentenced to LWOP for a homicide offense.[25] Miller and a friend attempted to steal his neighbor's—Mr. Cannon's—wallet after smoking marijuana with him.[26] Cannon was passed out at the time, but he woke up and grabbed Miller's throat.[27] Miller's friend struck Cannon with a nearby baseball bat and Cannon then released Miller.[28] After that, Miller took the bat and repeatedly struck Cannon.[29] He then placed a sheet over Cannon's head and stated, "I am God, I've come to take your life," and delivered one final blow.[30] Later, the boys returned to the trailer to burn it to get rid of the evidence.[31] Cannon died from

18. *See id.* at 575 (holding capital punishment cannot be imposed upon juveniles).
19. Miller v. Alabama, 567 U.S. 460, 465 (2012).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 466.
24. *Id.*
25. *Id.* at 467.
26. *Id.* at 468.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

smoke inhalation.[32] The Supreme Court remanded the case, reversing the lower courts' sentences of LWOP because it found youth too compelling a factor to allow a mandatory sentence of LWOP.[33]

The Supreme Court has stated three reasons why juveniles should be treated differently than adults in criminal justice cases.[34] First, juveniles lack maturity and have an underdeveloped sense of responsibility when compared to adults.[35] This often results in reckless decision-making.[36] Second, "juveniles are more vulnerable or susceptible [than adults] to negative influences and outside pressures, including peer pressure."[37] Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[38] Accordingly, the Supreme Court determined that juveniles are less culpable for their crimes than adults and may not be a danger to society forever.[39] As a result, a mandatory sentence of LWOP for a juvenile who committed homicide is unconstitutional.[40] Additionally, a juvenile cannot be sentenced to LWOP for a non-homicide offense.[41]

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32. *Id.*

33. *Id.* at 465.

34. *See* cases cited *supra* note 1 (delineating the major reasons to take into consideration when sentencing a juvenile).

35. *See* Roper v. Simmons, 543 U.S. 551, 572 (explaining how it is rare when "a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death").

36. *See id.* at 569 (discussing why a juvenile may commit such a heinous crime).

37. *Id.*

38. *Id.* at 570.

39. *See* Miller v. Alabama, 567 U.S. 460, 472–73 (2012) (explaining incorrigibility is inconsistent with youth and thus it cannot be assumed a juvenile is forever dangerous).

40. *Id.*

41. *See* Graham v. Florida, 560 U.S. 48, 74 (2010) ("This clear line is necessary to prevent the possibility that [LWOP] sentences will be imposed on juvenile nonhomicide offenders who are sufficiently culpable to merit that punishment.").

III. Graham*'s Meaningful Opportunity for Release*

Terrance Graham pled guilty to armed burglary with assault or battery and attempted armed robbery when he was sixteen years old.[42] He was later released on parole.[43] Terrence violated his parole when he was involved in a violent home robbery and fled from the police.[44] Consequently, the trial court sentenced Terrance to life without parole for armed burglary.[45] The Supreme Court reversed the decision, finding it unconstitutional.[46]

After reviewing the mitigating youth factors, the Supreme Court held that a juvenile who commits a non-homicide offense must have some meaningful opportunity for release based on maturity and demonstrated rehabilitation.[47] The Court also specified that a "[s]tate is not required to guarantee eventual freedom to such an offender."[48]

The *Graham* Court did state some examples of what will not qualify as a meaningful opportunity.[49] For example, any "criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed."[50] Furthermore, if there is nothing in the state's law that "prevents its courts from sentencing a juvenile nonhomicide offender to life without parole" it is inconsistent with the Eighth Amendment.[51] The Court did not explain definitively what would constitute a meaningful opportunity.[52]

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42. *Id.* at 53–54.

43. *Id.*

44. *Id.* at 55.

45. *Id.*

46. *See id.* at 81–82 (explaining that due to the juvenile's culpability he may be able to be rehabilitated and return to society).

47. *Id.* at 50; *see also* LeBlanc v. Mathena, No. 2:12cv340, 2015 U.S. Dist. LEXIS 86090, at *29–30 (E.D. Va. July 1, 2015) (citing Angel v. Commonwealth, 704 S.E.2d 386, 401 (Va. 2011)) ("The Virginia Supreme Court concluded that an inmate's opportunity to apply for geriatric release renders a sentence of life without parole for juvenile nonhomicide offenders compliant with *Graham*.").

48. Graham v. Florida, 560 U.S. 48, 50 (2010).

49. *See id.* at 76 (discussing certain situations that will not suffice to meet a meaningful opportunity).

50. *Id.*

51. *Id.*

52. *See id.* at 75 (deciding state courts may define what constitutes a

Two years after *Graham* was decided, in *Miller v. Alabama*, the Supreme Court had an opportunity to clarify what meaningful opportunity means.[53] In *Miller*, as noted above, the Court extended the youth factors to juvenile offenders who committed homicide and invalidated laws that mandated LWOP.[54] Unfortunately, the Court did not clarify what meaningful opportunity means and continued to allow states to decide the matter.[55] In fact, the Supreme Court merely mentioned meaningful opportunity for release in one line of the opinion to help support its decision.[56]

Many states have responded differently to *Graham*.[57] The large disparity among the states indicates how broad and confusing the definition of meaningful opportunity is.[58] For example, Michigan provides for release after a minimum of ten years served, Colorado requires a minimum of forty years served and Virginia has used geriatric parole to satisfy a meaningful opportunity.[59] Other states, such as California, have statutes that permit any inmate, sentenced to LWOP, to seek resentencing after

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meaningful opportunity for release).

53. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders").

54. *See id.* at 473 (considering youth "in determining the appropriateness of a lifetime of incarceration without the possibility of parole").

55. *See id.* at 479 (holding that meaningful opportunity precludes a life in prison but providing little guidance beyond that).

56. *See id.* (citing Graham v. Florida, 560 U.S. 48, 69 (2010)) (referencing the meaningful opportunity language from *Graham*, but ultimately using factors of youth to make the ultimate decision).

57. *See, e.g.*, H.B. 5512, 94th Leg., Gen. Sess. (Mich. 2006) (detailing Michigan's law for dealing with the *Graham* decision); *see also, e.g.*, H.B. 06-1315, 65th Leg., Gen. Sess. (Colo. 2006) (stating Colorado's law for dealing with *Graham*).

58. *See* Rebecca Lowry, *The Constitutionality of Lengthy Term-Of-Years Sentences for Juvenile Non-Homicide Offenders*, 88 ST. JOHN'S L. REV. 881, 912–13 (2014) (giving examples of the variety of different outcomes on how to deal with *Graham*).

59. *See* H.B. 5512 (detailing the disparity in application of the *Graham* rule); H.B. 06-1315.

serving a minimum of fifteen years.[60] Many other states have responded as well but few are exactly alike.[61]

Legislatures are not the only ones *Graham* has left puzzled. State courts have also had difficulties deciding how to interpret a meaningful opportunity.[62] One common point of contention between courts is whether *Graham* requires juveniles to have the opportunity for a "'meaningful life outside of prison' in which to 'engage meaningfully' in a career or raising a family,"[63] or if it merely requires a "meaningful and realistic 'opportunity to obtain release.'"[64] On the one hand, *Graham* would demand a much stricter analysis of sentencing if life after prison is what must be meaningful.[65] On the other hand, some interpret *Graham* as merely requiring a meaningful chance of release regardless of what life may be like after prison.[66] Under a literal translation, it would appear the latter is correct because the Court merely states that there must be a meaningful opportunity for release.[67] But some

60. CAL. PENAL CODE § 1170(2)(A)(1) (2015) ("[D]efendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing.").

61. *A State-by-State Look at Juvenile Life Without Parole*, THE ASSOCIATED PRESS (July 31, 2017), http://abcnews.go.com/amp/US/wireStory/state-state-juvenile-life-parole-48942316 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

62. *See* State v. Zuber, 126 A.3d 335, 346–47 (N.J. Super. Ct. App. Div. 2015) (indicating courts that have struggled with defining meaningful opportunity and what it needs to entail).

63. *Id.* at 347 (citing Graham v. Florida, 560 U.S. 48, 75, 79 (2010)); *see also* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047–48 (Conn. 2015) (stating *Graham* requires a meaningful opportunity for life outside of prison).

64. *Id.* (citing Graham v. Florida, 560 U.S. 48, 82 (2010)); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016) (explaining meaningful does not involve quality of life outside of prison but rather that they are afforded some opportunity of life outside of prison).

65. *See id.* (citing cases that show courts struggling to decide what an opportunity for a reasonable life outside of prison would constitute).

66. *See id.* (describing when courts have struggled to decide whether there was a meaningful opportunity for release even if that opportunity came at a time in the prisoner's life that he would not lead a meaningful life outside of prison).

67. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (concluding *Graham* had to be afforded some opportunity for release but stating nothing about what his life must entail after release or when such opportunity may be granted, thereby indicating that the juvenile merely needs to be given an actual chance for release).

courts have resolved this issue by examining what the *Graham* Court was trying to achieve in its decision.[68]

This contention has also led to further debate on whether life expectancy should be involved in sentencing a juvenile offender—discussed in more detail below.[69] Some courts have used the National Vital Statistics Reports (NVSR) to determine life expectancies.[70] Although neither side has prevailed on what a meaningful opportunity means, both will be useful in assessing whether geriatric release could survive *Graham*.[71]

IV. Other Forms of Release–Lengthy Term of Years Sentences

It is imperative to understand the issue of lengthy term-of-years sentences (lengthy sentences).[72] Many of the issues discussed in lengthy term-of-years cases also appear in geriatric release cases and many more courts have dealt with the former.[73]

A lengthy sentence is precisely what it sounds like: a long sentence that can involve aggregate or concurrent sentencing.[74]

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68. *See Casiano*, 115 A.3d at 1047–48 (stating the Supreme Court wanted the juvenile to a have meaningful opportunity to reenter society or life outside of prison); *see also* People v. Perez, 214 Cal. App. 4th 49, 57–58 (2013) (delineating that there needs to be some "meaningful life expectancy" left after the opportunity for release).

69. *See* State v. Zuber, 126 A.3d 335, 344–45 (N.J. Super. Ct. App. Div. 2015) (discussing the relevance of life expectancy when sentencing a juvenile).

70. *See id.* (explaining how detailed the NVSR is in determining life expectancies).

71. *See id.* at 346–47 (arguing the only opportunity required is the opportunity to obtain release); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 737 (2016) (agreeing with *Zuber*'s reasoning); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046–48 (Conn. 2015) (arguing Graham requires a meaningful opportunity of a life outside of prison); People v. Perez, 214 Cal. App. 4th 49, 57–58 (2013) (expressing similar reasoning to *Casiano*).

72. *See* LeBlanc v. Mathena, No. 2:12cv340, 2015 U.S. Dist. LEXIS 86090, at *44–45 (E.D. Va. July 1, 2015) (discussing that the age an offender must attain to be considered for geriatric release is problematic when determining whether this would constitute a meaningful opportunity for release).

73. *See, e.g.*, *id.* (dealing with a defendant's lengthy term of years sentence).

74. *See, e.g.*, *Zuber*, 126 A.3d at 343 (assuming, without deciding, that *Graham* could be extended "to a situation where a defendant commits a number of offenses . . . and receives a number of term-of-year sentences that are imposed consecutively and result in an aggregate sentence equaling or exceeding the [defendant's] life expectancy . . . .").

Some states have ruled such a sentence is unconstitutional but others have not.[75] For example, California and Iowa have ruled against lengthy sentences because they believe the sentences are de facto LWOP sentences.[76] These two states found that shortening a life in prison sentence to a long number of years was unconstitutional because youth was not taken into consideration and their punishments were essentially LWOP.[77]

Alternatively, states such as Florida and Louisiana are not convinced that lengthy sentences violate *Graham*.[78] Florida and Louisiana's courts reason that creating a bright line rule in this situation is a question better suited for the legislature.[79] Louisiana defended these decisions—without guidance from the Supreme Court or legislature—because it was not the court's place to overrule lengthy sentences, even when numerous convictions added up to more than the juvenile's life expectancy.[80]

Again, one contentious issue that courts are split on is whether "meaningful" should involve life outside of prison or just opportunity for release. This consequently triggers the debate over whether life expectancy should be a part the equation.[81] Some

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75. *See* Scavone, *supra* note 6, at 3457 (detailing different outcomes from different courts trying to resolve the issue of lengthy sentences).

76. *See id.* ("Both states recognize that lengthy term-of-years sentences produce the same results as LWOP and warrant the same concerns as those seen in *Miller*.").

77. *See id.* at 3460 ("In this regard, the Iowa governor simply substituted one sentence for another in order to avoid constitutional issues. No aspects of youth or any other factors were taken into account in the governor's decision to commute the thirty-eight LWOP sentences.").

78. *See id.* at 3463–67 (outlining cases that have been upheld in Florida with sentences of 110 and sixty years for example).

79. *See id.* ("The court noted that the exact point at which a lengthy term-of-years sentence becomes the equivalent of LWOP cannot be determined without drawing some sort of seemingly arbitrary line based on discretionary judgment calls.").

80. *See id.* (focusing on *Graham's* limited holding, the court decided in State v. Brown, 118 So. 3d 332 (La. 2013) that a forty-year sentence without any possibility of parole was constitutional).

81. *See* State v. Zuber, 126 A.3d 335, 347–48 (N.J. Super. Ct. App. Div. 2015) (discussing life expectancy); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 737 (2016) (saying that if a juvenile's crime does not reflect irrevocable corruption, their "hope for some years of life outside prison walls must be restored"); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047 (Conn. 2015) (arguing what meaningful opportunity actually means).

argue that any sentence exceeding a juvenile's life expectancy is *de facto* LWOP and therefore unconstitutional.[82] Yet others argue *Graham* only restricts LWOP sentences, not sentences that are merely lengthy.[83] They argue that life expectancy is not an issue in such circumstances.[84] The main concern is that the facts in *Graham* did not involve multiple felonies that could call for consecutive sentences that aggregate to lengthy sentences.[85] So, a case dealing with aggregate sentences—that could add up to a term that exceeds the juvenile's life expectancy—is distinguishable from *Graham*.[86] This issue is also split in court decisions around the country.[87]

The above dispute is further complicated because even if a lengthy sentence is unconstitutional it is not certain when the opportunity for release must be, regarding the juvenile's life expectancy.[88] One year? Ten years? Unfortunately, these questions have gone unanswered.[89]

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82. *See* Lowry, *supra* note 58, at 898 (noting the Supreme Court of California concluded that a sentence exceeding a juvenile's life expectancy was unconstitutional because it did not give any opportunity for release even though it was not technically a life sentence).

83. *See id.* at 902 (referencing an Arizona opinion which upheld a 139-year sentence because none of his individual sentences would have resulted in a life-without-parole-sentence).

84. *See id.* (discussing an Arizona court that upheld a long sentence that exceeded the juvenile's life expectancy because *Graham* did not prohibit long sentences and the juvenile at hand was being sentenced for consecutive years due to his thirty-seven felony convictions).

85. *Zuber*, 126 A.3d at 343 (assuming, without deciding, that *Graham* could be extended "to a situation where a defendant commits a number of offenses . . . and receives a number of term-of-year sentences that are imposed consecutively and result in an aggregate sentence equaling or exceeding the [defendant's] life expectancy . . . ").

86. *See id.* (describing the circuit split over whether *Graham* applies to aggregate sentences).

87. *See id.* (citing cases that do and do not agree with aggregate lengthy sentences being an issue under *Graham*).

88. *See* cases cited *supra* note 81 (citing cases that argue whether there needs to be essentially no time at all before his life expectancy after the juvenile is afforded an opportunity to be released versus the juvenile being required to have an opportunity for release with significant time left before his life expectancy).

89. *See id.* (citing cases that argue over whether there needs to be essentially no time at all before his life expectancy after the juvenile is afforded an opportunity to be released versus the juvenile being required to have an

Nevertheless, *Graham*, *Roper*, and *Miller* all attempt to make sure that the youthful factors of a juvenile are considered when sentencing.[90] Therefore, sentencing a juvenile near his or her life expectancy negates the juvenile's youthful factors because a significant portion of his or her life will be spent in prison with no real hope for release.[91]

This is not to say that a prison can only assess a juvenile before his life expectancy.[92] Rather, the opportunity for release is meaningful only if the offender is given the chance to demonstrate rehabilitation earlier in his sentence.[93] If the prison decides the juvenile is not ready to reenter society, then the prison may deny his release.[94] This is imperative to keep in mind because many aspects of geriatric parole depend upon age, health, and triggering events to obtain release.[95] This can be compared to the above analysis to determine whether geriatric parole affords a meaningful opportunity for release.[96]

V. Geriatric Release and Parole

This section will define and explain how most geriatric release and parole statutes work. It will then compare the two programs and highlight key differences. This will help further the analysis

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opportunity for release with significant time left before his life expectancy).

90. *See* cases cited *supra* note 1 (citing cases that wanted youth to be assessed because juveniles are different than adults and as they mature they may no longer be threats to society).

91. *See* Mark T. Freeman, Note, *Meaningless Opportunities:* Graham v. Florida *and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 978 (2014) (explaining that lengthy sentences do not afford the juvenile any chance at rehabilitation).

92. *See* Graham v. Florida, 560 U.S. 48, 75 (2010) (explaining a state has the power to determine whether and when a perpetrator is ready to be released).

93. *See id.* at 73 ("It is for legislatures to determine what rehabilitative techniques are appropriate and effective.").

94. *See id.* at 75 (explaining a state has the power to determine whether and when a perpetrator is ready to be released).

95. *See generally* VA. CODE ANN. § 53.1-40.01 (2017).

96. *See* FAMS. AGAINST MANDATORY MINIMUMS, NEW COMPASSIONATE RELEASE RULES: BREAKING IT DOWN 1 (2013), http://famm.org/wp-content/uploads/2013/07/FAMM-explains-new-compassionate-release-rules-FINAL.pdf (discussing basic requirements to be considered for geriatric release) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

of whether geriatric parole should be considered a meaningful opportunity for release. It will become clear that the main differences to focus on are the age minimums and health requirements included in geriatric release programs that do not exist in parole programs.[97]

A. Geriatric Release Defined

Examples of geriatric release statutes may be the clearest way to define the term. One example is the federal statute for geriatric parole, which is codified in the Code of Federal Regulations.[98] Part (a) of 28 C.F.R. § 2.78 has limiting factors that are required before an inmate is eligible for geriatric release.[99] One such factor is that the prisoner must be at least sixty-five years old with health issues related to aging.[100] Another important part to this section is that a commission determines the eligibility for release.[101] Third, such release does not require the inmate to complete his or her minimum sentence.[102]

Part (b) includes further limiting factors for geriatric release.[103] The Commission may approve geriatric parole if it finds there is low risk that the prisoner will commit a new crime, and the "prisoner's release would not be incompatible with the welfare of society."[104] Furthermore, part (c) states that, when determining whether release should be granted, the Commission must consider

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97. *Compare* Va. Code Ann. § 53.1-40.01 (2001), *with* Va. Code Ann. § 53.1-151 (1993).

98. *See* 28 C.F.R. § 2.78 (2003) (defining geriatric parole on the federal level).

99. *See id.* ("Upon receipt of a report from the institution in which the prisoner is confined that a prisoner who is at least 65 years of age has a chronic infirmity, illness, or disease related to aging, the Commission shall determine whether or not to release the prisoner on geriatric parole.").

100. *Id.*

101. *Id.*

102. *See id.* § 2.78(a) ("Release on geriatric parole may be ordered by the Commission at any time, whether or not the prisoner has completed his or her minimum sentence.").

103. *See id.* § 2.78(b) (laying out additional factors for granting geriatric parole).

104. *Id.*

the offender's age at the time the crime was committed as well as the seriousness of the crime.[105]

The remaining subsections of the regulation address specific details related to the Commission's determination of geriatric release.[106] Part (d) allows a prisoner's representative to apply for geriatric parole,[107] while part (e) lists additional factors that the Commission must consider when determining geriatric parole eligibility.[108] These factors, among others, include criminal history and the severity of his or her illness.[109] Part (f) allows the prisoner to appeal the Commission's decision.[110] Finally, part (g) states that prisoners are not eligible for geriatric parole if they were convicted of first degree murder, were armed during the crime's commission, or had the physical or medical condition(s) present at the time of their sentencing hearing.[111]

Virginia's courts have recently dealt with the issue of whether geriatric parole is a meaningful opportunity for release.[112] The Virginia statute for geriatric parole states:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall

105. *Id.*

106. *Id.* §2.78(d)–(g).

107. *Id.* § 2.78(d).

108. *Id.* § 2.78(e).

109. *See id.* (identifying seven distinct factors—including the history and severity of the prisoner's illness—for determining whether to grant geriatric parole).

110. *See id.* § 2.78(f) ("A prisoner, the prisoner's representative, or the institution, may request the Commission to reconsider its decision on the basis of changed circumstances.").

111. *Id.* § 2.78(g)(2).

112. *See* LeBlanc v. Mathena, No. 2:12cv340, 2015 U.S. Dist. LEXIS 86090, at *38–40 (E.D. Va. July 1, 2015) (discussing the issue of whether geriatric parole could substitute for standard parole as a meaningful opportunity for release); *see also* Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011) (agreeing with the Commonwealth that Virginia's geriatric release statute provides juvenile offenders who had not committed homicide with a meaningful opportunity to obtain release).

> promulgate regulations to implement the provisions of this section.[113]

Although this state statute reads much simpler than its C.F.R. counterpart, it differs in several important respects.

First, the Virginia code excludes Class One felons from geriatric release eligibility.[114] But Class One felonies may only attach to perpetrators over eighteen years of age and, therefore, do not apply to this discussion.[115] Second, the Virginia code distinguishes between ages sixty-five and sixty, and further requires prisoners to serve a specified amount of their sentence before becoming eligible for release.[116] Third, the Virginia statue does not require the Commission to consider certain factors related to the prisoner.[117]

Conversely, the federal code does not consider geriatric release for anyone under the age of sixty-five, and does not further impose any time-served requirement for eligible ages.[118] And yet, despite these differences, several key similarities exist between the state code and the relevant C.F.R. provisions. General age requirements largely determine eligibility in both frameworks.[119] Secondly, in either framework, satisfying the age requirement alone does not guarantee eligibility.[120]

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113. *See* VA. CODE ANN. § 53.1-40.01 (2001) (emphasis added).

114. *See id.* § 53.1-40.01 ("Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony . . . may petition the Parole Board for conditional release.").

115. *See id.* § 18.2-10 (defining class one felonies).

116. *See id.* § 53.1-40.01 (stating that prisoners age sixty-five or older must serve five years of their sentence as compared prisoners aged sixty or older, who must serve ten years of their sentence).

117. *Id.*

118. 28 C.F.R.§ 2.78 (2003).

119. *Compare id.* § 2.78 (mandating the individual to be at least sixty-five years old and have a chronic illness), *with* VA. CODE ANN. § 53.1-40.01 (2001) (requiring candidates to be at least sixty-five years old and have served five years or be sixty-years old and served ten years of sentence).

120. *Compare id.* § 2.78 ("[T]he Commission shall determine whether or not to release the prisoner on geriatric parole. Release on geriatric parole may be ordered by the Commission at any time, whether or not the prisoner has completed his or her minimum sentence."), *with* VA. CODE ANN. § 53.1-40.01 (2001) (stating that a Commission will determine eligibility separate from whether the prisoner satisfies the age requirement).

The Bureau of Prisons also created guidelines that detail three categories of prisoners that may be eligible for geriatric release.[121] The first category identifies eligibility on the basis of medical reasons, such as terminal or debilitating illnesses.[122] The second category establishes eligibility on the basis of age.[123] This category further distinguishes seniors with medical conditions from those without.[124] The latter requires that prisoners, who are at least seventy years old, serve thirty years of his or her sentence.[125]

Further, eligible prisoners without medical conditions also include those sixty-five years or older who serve ten years or 75 percent of their sentence.[126] Alternatively, eligible prisoners with medical conditions include those sixty-five or older who serve 50 percent or more of their sentence and suffer from chronic or serious condition.[127] Such conditions may be due to age, deteriorating mental or physical health substantially diminishing the ability to function in prison, or generally those conditions which treatment will not improve.[128] The final group of categories includes non-medical necessity—like taking care of a child or spouse.[129] Again, although some differences exist between these rules and the preceding statutes, age and health remain key factors for determining a person's eligibility for geriatric release.[130]

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121. *See* FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 96, at 1 (describing new rules for compassionate release and reduction in sentencing programs).

122. *See id.* at 1–2 (including within the first category of eligibility prisoners that have a "terminal medical condition" or a "debilitated medical condition").

123. *See id.* at 2 (listing the second category of eligibility as "elderly").

124. *See id.* (dividing the second category of eligibility between "elderly non-medical" and "elderly medical").

125. *See id.* (describing the eligibility requirements for elderly prisoners without medical conditions).

126. *Id.*

127. *See id.* (setting eligibility requirements for elderly prisoners with medical conditions).

128. *See id.* (explaining qualifying medical conditions).

129. *See id.* at 2–4 (describing eligibility categories on the basis of non-medical necessity).

130. *Compare* FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 96, at 2 (considering only candidates who satisfy the elderly medical or elderly no-medical requirements), *with* VA. CODE ANN. § 53.1-40.01 (2001) (requiring the candidate to be over sixty-five and served five years or over sixty and served ten years to be considered), *and* 28 C.F.R. § 2.78 (2003) (basing geriatric parole on the

As of May 2015, only a few states— Illinois, Massachusetts, South Carolina, and Utah—do not have laws regarding geriatric release in their prisons.[131] Comparatively, forty-six states, the federal government, and Washington D.C. all have geriatric-release laws.[132] Many of these states differ on the appropriate procedures and regulations for geriatric parole:

> Only 18 of the states seem to have very specific, strictly defined . . . regulations to follow for parole decisions. The more specific rules include the mechanism, such as who makes the final determination. In addition, 11 states have very clearly written rules governing physician documentation . . . and what factors must be included in their medical letter.
>
> Though all applications are subject to official parole board review, the series of steps in order to reach the parole board and the supporting documentation varies. [M]ost provide for a deputy warden in conjunction with the prison medical director reviewing all documentation prior [to] making a submission to the parole board. Often, the prisoner or his advocate . . . will petition directly [to the board]. The medical director can also petition for early release if the prisoner cannot. The 29 states that have fewer procedures . . . that provide that parole review boards consider all information prior to rendering a final decision. At least 3 states have requirements that the parole board must review the request for early parole within a certain number of days (e.g., 30 days), while most assume the case will be heard in a timely manner or be reviewed by the next meeting of the parole board.[133]

Importantly, with slight variations, each state's law centers around age and health.[134]

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individuals age and whether they are ill).

131. *See* Tina Maschi et al., *Analysis of United States Compassionate and Geriatric Release Laws: Towards a Rights-Based Response for Diverse Elders and Their Families and Communities*, BE THE EVIDENCE INT'L 9 (2015), https://www.prisonlegalnews.org/media/publications/Analysis%20of%20United%20States%20Compassionate%20and%20Geriatric%20Release%20Laws,%20Be%20the%20Evidence%20Press,%202015.pdf (analyzing the laws and regulations related to early releases of prisoners on the basis of advanced age or illness) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

132. *See id.* (identifying all the jurisdictions that have geriatric release laws).

133. *Id.* at 14.

134. *Id.* at 3.

Geriatric release programs have many benefits.[135] Lowered costs and freed-up budgets represent one major justification for releasing people.[136] For example, "[i]t costs around $24,000 a year to house a young prisoner, but the expenses for an aging prisoner can be up to $72,000 per year."[137] This difference largely results from differing medical costs.[138] Furthermore, "[i]nmates are not eligible for federal health insurance programs such as Medicaid and Medicare, but by law are required to receive medical treatment . . . prisons cover all the costs . . . [regardless of] whose responsibility it is to maintain prisons, taxpayers are the ones who pay for it."[139] Thus, considering these costs and the low threat that older prisoners with health problems pose to society, many feel the eligibility for early release is justified.[140]

B. Parole Defined

Parole is essentially a prisoner's release from prison prior to serving his or her entire sentence.[141] Having met certain conditions, paroled prisoners serve the remainder of their sentence outside of prison "under strict supervision."[142] Although these conditions may differ for every person, parole commonly includes:

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135. *See* Valeriya Metla, *Aging Inmates: A Prison Crisis*, L. STREET (Feb. 15, 2015), https://law streetmedia.com/issues/law-and-politics/aging-inmates-prison-crisis/ (detailing the expenses of housing criminals) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Maschi et al., *supra* note 131, at 6 (stating the cost on a nationwide level that elderly prisoners cost nearly $2.1 billion annually as of 2012, about three times the cost of younger prisoners).

136. *See id.* (identifying one rational for early release of prisoners).

137. *Id.*

138. *See id.* (correlating increased expenses for aging prisoner populations with increased prevalence of health issues).

139. *Id.*

140. *See id.* (identifying another rational for early release of prisoners).

141. *See Frequently Asked Questions*, U.S. DEP'T JUSTICE [hereinafter DOJ FAQ], https://www. justice.gov/uspc/frequently-asked-questions#q2 (last updated Sept. 29, 2015) ("When someone is paroled, they serve part of their sentence under the supervision of their community.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

142. FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ABOUT THE LACK OF PAROLE FOR FEDERAL PRISONERS, 1 (Nov. 29, 2012), [hereinafter LACK OF PAROLE FOR FEDERAL PRISONERS] http://famm.org/Repository/Files/FAQ%20Federal%20Parole%2011%2029%2012.pdf (describing

> An agreement not to leave the state/district; [f]requent meetings with a parole officer; [a]n agreement not to be out past a certain hour (also called curfew); [a]n agreement not to use or possess drugs, alcohol, firearms, etc.; [k]eeping a steady job; [a]ttending drug or alcohol addiction treatment programs; [s]ubmitting to frequent or random drug tests; [and] [n]ot associating with people with criminal records.[143]

Comparatively, the United States Department of Justice describes parole as placing someone "under the supervision of their community . . . if (a) the inmate has substantially observed the rules of the institution; (b) release would not depreciate the seriousness of the offense or promote disrespect for the law; and (c) release would not jeopardize the public welfare."[144]

Nevertheless, not all systems allow for parole.[145] Typically, those systems that do not have parole use a similar system called "good time credits," which likewise allows for early release based on good behavior.[146] To elaborate, the Sentencing Reform Act of 1984 (SRA) eliminated federal parole for all prisoners convicted on or after November 1, 1987.[147] Nevertheless, the SRA did not eliminate parole eligibility for prisoners sentenced before that date.[148] The United States Parole Commission therefore retains some authority to grant early release.[149]

The Commission performs parole hearings for a small number of people who fall into one of the following categories: those convicted before November 1, 1987; military code offenders in Bureau of Prisons (BOP) institutions; violators of D.C. law sentenced before August 5, 2000; criminals prosecuted in other

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the process of parole) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

143. *Id.*

144. DOJ FAQ, *supra* note 141.

145. *See* LACK OF PAROLE FOR FEDERAL PRISONERS, *supra* note 142, at 1 ("The alternative is a system in which the sentence cannot be reduced by parole. A sentence must be served in its entirety (though often with reductions for good behavior, set by statute).").

146. *See id.* (describing what happens in "truth in sentencing" systems).

147. *See id.* at 2 (stating that although a statutory federal parole system technically does not exist, a parole board may nonetheless issue parole for prisoners sentenced before November 1, 1987).

148. *Id.*

149. *See id.* (detailing the authority and responsibilities of the United States Parole Commission).

countries, but transferred to the U.S for punishment; and State defendants in the U.S. Marshals Service Witness Protection Program.[150]

Congress abolished the federal parole system partly because of its goal to punish criminal offenders as opposed to rehabilitating them.[151] Furthermore, Congress, like many others, believed that prison could not effectively rehabilitate people.[152] Congress also decided to abolish parole because it caused uncertain and inconsistent prison terms.[153] For example, while two criminals look identical on paper—having committed the same crime, and possessing the same criminal record and corresponding sentence—one may serve far less time than the other due to inconsistent guidelines and rules for parole boards.[154] Finally, Congress was concerned about public fear of releasing a criminal too early who would then commit another crime.[155]

Many states' systems for parole eligibility differ.[156] Nonetheless, most states' parole board will review the prisoner's record and interview him.[157] Some common questions parole boards ask when deciding parole eligibility include: whether they have a stable home to return to, whether the prisoner can immediately support himself with income, the likelihood of recidivism, the seriousness of the offense, whether the prisoner followed prison rules while incarcerated, and if the victims have any strong concerns regarding the prisoner's parole.[158]

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150. *See id.* (listing categories of people eligible for parole on the federal level).

151. *See id.* (identifying Congress' goals for the criminal justice system).

152. *See id.* ("The SRA rejected rehabilitation as the primary goal of our sentencing system. Instead, it stated that the purpose of imprisonment is punishment.").

153. *See id.* ("The public and Congress frowned upon these kinds of inconsistencies and uncertainties.").

154. *See id.* (identifying differences resulting from varying parole board guidelines).

155. *See id.* at 3 ("In the late 1970s, when lawmakers wanted to eliminate federal parole, many polls showed that the public favored longer sentences for prisoners. The public also believed that parole was "setting people free" who were still a danger to society.").

156. *See id.* at 4 ("Every state's process for deciding when a person will be considered for parole is different.").

157. *See id.* ("Typically, the board interviews the prisoner or reviews his record.").

158. *Id.*; *see* Janet Portman, *The Parole Process: An Early Release from Prison*,

Additionally, some states issue tests to those who are applying for parole, such as psychological exams.[159] Notably, most states give full power to the parole board to decide if the prisoner is ready for release; their decision typically cannot be appealed or challenged in any court.[160]

Virginia's parole system is a good example of what such a system with a fully empowered parole board looks like. Virginia's parole system categorizes parole eligibility according to how many prior offenses the prisoner has.[161] For example, first-time offenders may be eligible for parole after serving one-fourth of the sentence, or after serving twelve years of the sentence, if one-fourth of the sentence is more than twelve years.[162] Second-time offenders are eligible for parole after serving one-third of the sentence, or after serving thirteen years of the sentence if one-third of the sentence is more than thirteen years.[163] The time increments then increase to one-half and fourteen years for third time offenders and then three-fourths and fifteen years for fourth time offenders.[164] The

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http://criminal.lawyers.com/parole-probation/parole-an-early-release-fro m-prison.html (last visited April 17, 2018) (explaining additional common concerns about a parole board's review) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

159. LACK OF PAROLE FOR FEDERAL PRISONERS, *supra* note 142, at 4 ("Sometimes, prisoners are given psychological exams or other tests by the board.").

160. *Id.*

161. *See generally* VA. CODE ANN. § 53.1-151(A) (1993).

162. *See id.* § 53.1-151(A)(1) ("For the first time, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years . . . .").

163. *See id.* § 53.1-151(A)(2) ("For the second time, shall be eligible for parole after serving one-third of the term of imprisonment imposed, or after serving thirteen years of the term of imprisonment imposed if one-third of the term of imprisonment imposed is more than thirteen years . . . .").

164. *See id.* § 53.1-151(A)(3) ("For the third time, shall be eligible for parole after serving one-half of the term of imprisonment imposed, or after serving fourteen years of the term of imprisonment imposed if one-half of the term of imprisonment imposed is more than fourteen years . . . ."); *see also id.* § 53.1-151(A)(4) ("For the fourth or subsequent time, shall be eligible for parole after serving three-fourths of the term of imprisonment imposed, or after serving fifteen years of the term of imprisonment imposed if three-fourths of the term of imprisonment imposed is more than fifteen years."); Krawetz v. Murray, 742 F. Supp. 304, 306–07 (E.D. Va. 1990) (explaining how the Virginia statute is applied to a fourth-time offender).

Virginia statute also limits eligibility for parole by preventing certain offenders from applying.[165]

The United States Department of Justice has also stipulated pertinent justifications for parole:

> Parole has a three-fold purpose: (1) . . . a parolee may obtain help with problems concerning employment, residence, finances, or other personal problems which often trouble a person trying to adjust to life upon release from prison; (2) parole protects society because it helps former prisoners get established in the community and thus prevents many situations in which they might commit a new offense; and (3) parole prevents needless imprisonment of those who are not likely to commit further crime and who meet the criteria for parole.[166]

In sum, parole is designed to release those who are ready to return to society and be productive as well as to cut costs for taxpayers who are spending money to incarcerate criminals.

C. Comparing Geriatric Release and Parole

One major difference between geriatric release and parole is the age requirement.[167] Eligibility for geriatric release depends on

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165. *See id.* § 53.1-151(B) ("Persons sentenced to die shall not be eligible for parole. Any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole."); *see id.* § 53.1-151(B1) ("Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole."); *see also id.* § 53.1-151(B2) ("Any person convicted of three separate felony offenses of manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute a controlled substance . . . shall not be eligible for parole."); *id.* § 53.1-151(E) ("A person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.").

166. DOJ FAQ, *supra* note 141.

167. *See* VA. CODE ANN. § 53.1-40.01 (2001) (listing geriatric release candidates as prisoners who are age sixty-five or older, having served five years of their sentence, or sixty or older, having served ten years of their sentence); *see also* 28 C.F.R. § 2.78 (2003) (listing sixty-five as the minimum age for federal geriatric release candidates). *But see* Maschi et al., *supra* note 131, at 12–13 (explaining that age is not a sole, determinative factor for parole); VA. CODE ANN. § 53.1-151 (1993) (providing an example of a state parole system that does not consider age before eligibility for parole).

a minimum age requirement.[168] Conversely, parole does not have an age requirement.[169] This is a considerable difference especially for juveniles. For example, if a sixteen-year-old juvenile is sentenced to life in prison in Virginia, he may be eligible for parole after completing fifteen years of his sentence at age thirty-one.[170] On the other hand, in a system where the same juvenile does not have the opportunity for parole but for geriatric release, he would—by a liberal standard—be eligible for release at age sixty, thereby forcing him to serve at least forty-four years of his life sentence.[171]

Furthermore, not only must the prisoner be elderly to qualify for geriatric release, but in most cases the prisoner must also be in bad health.[172] In contrast, poor health is not a requirement for parole.[173] A parole board's real task is to decide whether the prisoner is ready to re-enter society as a productive human being.[174] As indicated above, parole boards consider other criteria for release that commissions overseeing geriatric release do not consider. For example, parole boards consider where the prisoner

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168. *See id.* § 53.1-40.01 (listing geriatric release candidates as prisoners who are age sixty-five or older, having served five years of their sentence, or sixty or older, having served ten years of their sentence); 28 C.F.R. § 2.78 (2003) (listing sixty-five as the minimum age for federal geriatric release candidates).

169. *See* Maschi et al., *supra* note 131, at 12–13 (explaining that age is not a sole, determinative factor for parole); *see also* VA. CODE ANN. § 53.1-151 (providing an example of a state parole system that does not consider age for eligibility for parole).

170. *See* VA. CODE ANN. § 53.1-151(C) ("Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years . . . .").

171. *See, e.g.*, *id.* § 53.1-40.01 (listing geriatric release candidates as prisoners who are age sixty-five or older, having served five years of their sentence, or sixty or older, having served ten years of their sentence).

172. *See* Maschi et al., *supra* note 131, at 13 ("The age of the applicant is almost always considered a determinant factor only in conjunction with a medical or cognitive condition. The elderly incarcerated are not considered a subset of incarcerated people that justify release in their own right without concomitant ailments.").

173. *See, e.g.*, VA. CODE ANN. § 53.1-151 (1993) (providing an example of a state parole system that does not consider health for eligibility for parole).

174. *See* Maschi et al., *supra* note 131, at 12 ("Many of the states that include vague language around what constellation of factors amount to the likelihood of early release seem to have fewer transparent processes, leaving the decision to the parole board's discretion on a case-by-case basis.").

will stay, whether the prisoner has a source of income, and whether the prisoner is refraining from drug or alcohol use.[175]

Virginia's statistics on parole and geriatric release are useful for comparing the systems. [176] In 2016, the Virginia Parole Board considered 2,451 prisoners for parole.[177] Of these cases, 125 prisoners were granted parole and 2,326 were denied.[178] So about five percent of eligible prisoners were granted parole.[179] In 2016, the Virginia Parole Board reviewed 626 prisoners' cases for geriatric release.[180] Of those 626 prisoners, twenty-six were granted release.[181] Which is a little more than four percent.[182] While the number of cases differ, the probability of release was nearly the same in both systems in 2016.[183]

In 2015, Virginia paroled fourteen percent of applicants for parole and granted only two percent for geriatric release.[184] Nevertheless, 2015 was more of the exception than the rule. For example, in 2014 about 6.6 percent of prisoners were granted parole and about four percent were released for geriatric reasons.[185] In 2013, 3.7 percent were granted parole and 3.3 percent were released for geriatric reasons.[186] In total, for the past four years, the percentage of people that applied for parole and were granted release was about 7.7 percent.[187] The total number

175. *See, e.g.*, DOJ FAQ, *supra* note 141 (explaining that many subjects are considered, including "the details of the offense, prior criminal history, . . . the offender's accomplishments in the correctional facility, details of a release plan, and any problems the offender has had to meet in the past and is likely to face again in the future."); *see also, e.g.*, LACK OF PAROLE FOR FEDERAL PRISONERS, *supra* note 142, at 4 (providing a list of questions that a state parole board might ask a parole candidate).

176. *See generally Parole Decisions*, VA. PAROLE BOARD, https://vpb.virginia.gov/parole-decisions/ (last visited April 17, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

for geriatric release over the same amount of time was about 3.6 percent of those whose cases were reviewed.[188] Remember, the main reason for the large disparity is the 2015 outlier: parole of fourteen percent.[189]

The age and health requirements are the likely reasons for such a drastic difference in case numbers because fewer prisoners are over the age sixty-five than there are under age sixty-five.[190] In fact, it is estimated that only 4,780 prisoners are over age sixty-five, out of the total 182,834 prisoners as February 2018.[191] This means only about 2.6 percent of the prison population is over age sixty-five and even fewer than that would likely meet the health requirements.[192] Even lowering the age requirement to sixty would only increase the percentage of the population to about 5.5 percent.[193]

In brief, eligibility for parole and geriatric release differ.[194] The Supreme Court of Virginia stated: "[t]he determination of a prisoner's eligibility for geriatric release is essentially a mathematical calculation. The age of the prisoner and the years served of the sentence imposed are readily determinable and, thus, not subject to speculation."[195] Thus, geriatric release seemingly serves to save money for taxpayers.[196] Conversely, age and health equations are not determinative for parole[197] because parole was designed to rehabilitate the offender and make them a productive law abiding citizen again.[198] Finally, in Virginia, the probability of

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188. *Id.*

189. *Id.*

190. *See generally* FED. BUREAU PRISONS, *Inmate Age*, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last updated Mar. 24, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Compare* VA. CODE ANN. § 53.1-40.01 (2001) (stipulating geriatric release regulations), *with id.* § 53.1-151(A)(1) (stipulating parole eligibility regulations).

195. Fishback v. Commonwealth, 532 S.E.2d 629, 634 (Va. 2000).

196. *See* DOJ FAQ, *supra* note 141 (noting that parole, in part, serves to end the "needless imprisonment of those who are not likely to commit further crime").

197. *See* Maschi et al., *supra* note 131, at 12–13 (indicating that many states only use age as a factor in decision-making for geriatric release).

198. *See* DOJ FAQ, *supra* note 141 (explaining that supervision within the parole system is geared toward "reintegrating the offender as a productive

release under either geriatric release or parole is about the same, but many more prisoners are considered for parole.[199]

VI. How Courts Have Handled Geriatric Release as a Meaningful Opportunity for Release Thus Far

This section addresses how courts have handled geriatric release as a meaningful opportunity for release. In *State v. Zuber*,[200] Ricky Zuber committed two separate gang rapes when he was seventeen years old.[201] His consecutive sentences totaled 110 years with fifty-five years of parole ineligibility.[202] The court was mainly concerned about the lengthy term-of-years sentence.[203] Zuber argued this was unconstitutional under *Graham* but the Superior Court upheld the sentence.[204] The court stated that it thought geriatric release could meet the standard for meaningful opportunity for release under *Graham*.[205]

In *State v. Null*,[206] Denem Anthony Null was "required to serve at least 52.5 years of his seventy-five-year aggregate sentence for

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member of society").

199. *See generally* VA. PAROLE BOARD, *supra* note 176.

200. *See* State v. Zuber, 152 A.3d 197 (N.J. 2017) (quoting Miller v. Alabama, 567 U.S. 460, 480 (2012)) (holding "that sentencing judges should evaluate the *Miller* factors at that time to 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'").

201. *See id.* at 337 ("Defendant Ricky Zuber was born on April 14, 1964. He committed two separate gang rapes in November and December of 1981, when he was nearly eighteen years old.").

202. *See id.* ("He is currently serving consecutive sentences for numerous offenses arising out of these two criminal episodes. Those sentences total 110 years in prison with fifty-five years of parole ineligibility.").

203. *See id.* ("To apply *Graham* to defendant's sentences, *Graham* would have to be extended to cover terms-of-year sentences, aggregated from consecutive sentences for different crimes, from different criminal episodes, imposed in different sentencing proceedings.").

204. *See id.* ("Even making the assumptions that Graham could be thus extended, we reject the defendant's claim.").

205. *See id.* ("Defendant's sentence of fifty-five years before parole eligibility is not the functional equivalent of life without parole, because it gives him a meaningful and realistic opportunity for parole well within the predicted lifespan for a person of defendant's age.").

206. *See* State v. Null, 836 N.W.2d 41, 72 (Iowa 2013) (holding *Miller*'s principles are applicable "to a lengthy term-of-years sentence as was imposed in

second-degree murder and first-degree robbery."[207] Null was sixteen-years-old when he shot and killed Kevin Bell during a robbery at Bell's apartment.[208] The Iowa Supreme Court affirmed Null's conviction, but vacated his sentence and remanded the case for resentencing.[209] The court decided this lengthy sentence required *Miller* type protections.[210] It reasoned that geriatric release does not escape the rationales of *Graham* because it requires the juvenile to have served nearly half a century in prison before they would be in their sixties.[211] Furthermore, the court stated there is no certainty the juvenile would ever be considered for geriatric release and therefore is not a meaningful opportunity for release.[212]

In the next case, *Bear Cloud v. State*,[213] a sixteen-year-old Wyatt Bear Cloud was convicted of first-degree murder, aggravated burglary, and conspiracy to commit aggravated burglary.[214] Mr. Bear Cloud "stole a gun" and "later broke into a

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this case because an offender sentenced to a lengthy term-of-years sentence should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.").

207. *Id.* at 45.

208. *Id.*

209. *See id.* ("[W]e affirm Null's conviction, but vacate his sentence and remand the case to the district court for resentencing consistent with this opinion.").

210. *See id.* at 71 (concluding that a "52.5-year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery triggers the protections to be afforded under *Miller*—namely, an individualized sentencing hearing to determine the issue of parole eligibility").

211. *See id.* ("Even if lesser sentence than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half a century of incarceration sufficient to escape the rationales of *Graham* or *Miller*.").

212. *See id.* ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter a society as required by *Graham*.").

213. *See* Bear Cloud v. State, 334 P.3d 132, 141–42 (Wyo. 2014) (holding "that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole.").

214. *See id.* at 135 (listing the criminal convictions of the defendant, Bear

home along with two other young men."[215] During the burglary, one of the two other men, Mr. Sen, "shot and killed one of the home's residents with the stolen gun."[216] Mr. Bear Cloud was sentenced to "20–25 years in prison for Aggravated Burglary; life in prison 'according to law' for first-degree murder, to be served consecutively to the aggravated burglary sentence; and 20–25 years in prison for conspiracy to commit aggravated burglary, to be served concurrently with the first-degree murder sentence."[217] The main issue of his appeal was whether the sentence of life in prison without parole, based on the aggregate term of years, violates the Eight Amendment.[218] The Wyoming Supreme Court agreed with the Iowa Supreme Court's reasoning in *Null*, which found that geriatric release was not a meaningful opportunity for release under *Graham*.[219] Thus, the Wyoming Supreme Court remanded the case for resentencing in accordance with *Graham* and *Miller*.[220]

The final set of cases comes from Virginia, where the most recent decisions have been made. One of the first cases that addressed this issue in the Commonwealth was *Angel v. Commonwealth*,[221] in which Rubio Argelio Angel—a seventeen-year-old—was arrested for malicious wounding, abduction with intent to defile, two counts of object sexual penetration, and misdemeanor sexual battery.[222] Angel "was sentenced to three

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Cloud).

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.* at 135 (quoting Bear Cloud v. State, 294 P.3d 36, 40 (Wyo. 2013)) ("On remand, even though the United States Supreme Court had vacated the judgment without restriction, this Court held that '[o]nly the life sentence for first-degree murder is at issue in this appeal.'").

219. *See id.* at 142 ("We find the reasoning of the Iowa Supreme Court [in *Null*] to be persuasive.").

220. *See id.* at 147 ("We reverse and remand to the district court for resentencing in accordance with this opinion.").

221. Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011) (holding that "that the imposition of life sentences without parole in this case is not cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution pursuant to *Graham*").

222. *Id.* at 389.

consecutive life terms and a twenty-year term of imprisonment, plus twelve months in jail."[223]

One of the issues in *Angel* was whether this life sentence, without an opportunity for parole, was valid under *Graham*.[224] The Supreme Court of Virginia reasoned that Angel's sentence did not violate *Graham* because there was an opportunity for release via Virginia's geriatric release program.[225] The Court stated, "[w]hile this statute has an age qualifier, it provides, as the Commonwealth argues, the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment."[226]

In *Vasquez v. Commonwealth*,[227] sixteen-year-old Darien Vasquez and Brandon Valentin broke into a townhouse, raped a college student and "threatened to kill her if she resisted."[228] Vasquez was convicted of eighteen felonies and Valentin of twelve.[229] The defendants argued that their "aggregate term-of-years sentences imposed by the court violated the Eighth Amendment's prohibition of cruel and unusual punishment."[230] The Supreme Court of Virginia decided that the *Graham* rule "does not apply to aggregate term-of-years sentences involving multiple crimes."[231] In the concurring opinion, Justice Mims, with whom Justice Goodwyn joined, stated that *Graham* should have applied to aggregate term of years sentences but that Virginia's geriatric

223. *Id.*

224. *See id.* at 401 (explaining that Angel's petition for appeal and brief on the merits before [the Virginia Supreme Court] "contained an assignment of error claiming that [his] sentences constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution").

225. *See id.* ("The Commonwealth replies that *Graham* does not require the result advanced by Angel because Code § 53.1-40.01 provides for the conditional release of prisoners who have reached a certain age and served a certain length of imprisonment, thus complying with the Supreme Court's decision. We agree with the Commonwealth.").

226. *Id.* at 402.

227. *See* Vazquez v. Commonwealth, 781 S.E.2d 920, 928 (Va. 2016) (holding that "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes").

228. *Id.* at 922.

229. *Id.*

230. *Id.*

231. *Id.* at 928.

release statute would nevertheless make these sentences constitutional even without the opportunity for parole.[232]

The next and most recent case from Virginia is *LeBlanc v. Mathena*.[233] In this case, LeBlanc was found "guilty of rape and abduction."[234] He committed the offenses "when he was sixteen years old."[235] He was sentenced to two life imprisonment terms.[236] Furthermore, he was ineligible for parole pursuant to Va. Code Ann. § 53.1-165.1.[237] The issue here was whether geriatric release could meet the meaningful opportunity that *Graham* requires.[238] The Virginia Supreme Court said the geriatric release statute does satisfy *Graham* so the decision was appealed to the United States District Court of Appeals for the Fourth Circuit.[239]

The Fourth Circuit stated, "Virginia courts unreasonably ignored the plain language of the procedures governing review of petitions for geriatric release, which authorize the State Parole Board to deny geriatric release for any reason, without considering a juvenile offender's maturity and rehabilitation."[240] Accordingly, the court decided that the presence of the geriatric release statute

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232. *See id.* at 935 (Mims, J., concurring) (explaining that "Virginia's geriatric release statute, if applied as written, is capable of providing juveniles with such sentences a meaningful opportunity for release as mandated by *Graham* . . .").

233. *See* LeBlanc v. Mathena, 841 F.3d 256, 273 (4th Cir. 2016) (holding that "the Supreme Court of Virginia unreasonably applied *Graham* when it acknowledged *Graham*'s minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment but concluded that Geriatric Release . . . complied with those requirements").

234. *Id.* at 260.

235. *Id.*

236. *Id.*

237. *See id.* ("Petitioner was ineligible for parole pursuant to Va. Code Ann § 53.1-165.1, which abolished parole for individuals convicted of a felony committed after January 1, 1995.").

238. *See id.* ("In 2011, Petitioner filed a motion to vacate his sentence in state trial court. The motion argued that *Graham* rendered Petitioner's life sentence invalid. In opposition, Respondents asserted that, notwithstanding Virginia's abolition of parole, Petitioner's life sentence did not violate *Graham* . . . .").

239. *See id.* at 259–60 ("[W]e nonetheless conclude that Petitioner's state court adjudication constituted an unreasonable application of Graham. Most significantly, Virginia courts unreasonably ignored the plain language of the procedures governing review of petitions for geriatric release . . . .").

240. *Id.*

did not meet the *Graham* requirements for meaningful opportunity and, therefore, LeBlanc's sentence was unconstitutional.[241]

The Fourth Circuit reasoned that parole and geriatric release were not enough alike for geriatric release to hold up under *Graham*.[242] Some of the differences the court indicated were the age limitation for geriatric release, the prisoner must make the claim for geriatric release—whereas parole is an automatic annual review—geriatric release may be denied before considering any "decision factors," the geriatric release board does not need to interview the prisoner, and geriatric release requires approval by four of the five members whereas parole only requires three.[243]

Finally, the Supreme Court of the United States reviewed the Fourth Circuit's decision and reversed.[244] The Court made it clear that its decision was not based on whether Geriatric release is reasonable under *Graham*, but rather on whether the Fourth Circuit's decision was objectively reasonable "in light of this Court's current case law."[245] Indeed, the Court recognized the arguments for and against geriatric release as a meaningful opportunity for release under *Graham*.[246] The Court then reasoned, "[t]hese arguments cannot be resolved on federal habeas review. . . . Nor does the Court 'suggest or imply that the underlying issue, if presented on direct review, would be insubstantial. The Court today holds only that the Virginia trial court's ruling. . . was not objectively unreasonable. . . ."[247] Consequently, the issue has been left unresolved.

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241. *See id.* (internal citations omitted) ("[I]t was objectively unreasonable for the state courts to conclude that geriatric release affords Petitioner with the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' *Graham* demands. Accordingly, Petitioner is entitled to relief from his unconstitutional sentence.").

242. *See id.* at 268 (explaining that "[f]or several reasons, we agree with Petitioner that his state court adjudication constituted an 'unreasonable application' of *Graham*").

243. *See id.* at 262–63 (detailing differences between parole and geriatric release).

244. *See* Virginia v. LeBlanc, 137 S. Ct. 1726, 1730 (2017) ("For these reasons . . . the judgement of the Court of Appeals is reversed.").

245. *Id.* at 1729.

246. *See id.* (explaining that the standard that no "fairminded people" could disagree on this issue, was not met).

247. *Id.*

VII. Conclusion

In brief, the *Graham* rule intended to eliminate the possibility of LWOP sentences for juveniles in non-homicide cases.[248] The intent behind this rule was largely based on the fact that juveniles are less culpable than adults and lack maturity.[249] This youthful factor is important in sentencing because it is possible the juvenile will mature, learn from their mistakes, and become fully rehabilitated.[250] A LWOP sentence does not consider this factor because the juvenile may never be released from prison regardless of their rehabilitation. This is why the Supreme Court requires a meaningful opportunity for release in these cases.[251]

Unfortunately, the Supreme Court left it to the states to decide what would constitute a "meaningful opportunity for release."[252] Many states have had issues with defining "meaningful opportunity for release" and have come up with various ways to effectively sentence a juvenile to LWOP without literally doing so.[253] For example, some states have contemplated geriatric release as a "meaningful opportunity."[254] Numerous courts have refused to accept that geriatric release satisfies *Graham*.[255]

Some reasons for this may be because geriatric release differs from parole markedly in that it has age and health requirements.[256] So, if a juvenile's only opportunity for release is geriatric parole, they will not be eligible for release until they are

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248. *See* Graham v. Florida, 560 U.S. 48, 74 (2010) (describing the implications of the *Graham* decision for juvenile sentencing).

249. *Id.*at 68.

250. *Id.*

251. *Id.* at 74.

252. *Id.*

253. *See* Lowry, *supra* note 58, at 912–13 (giving examples of the variety of different outcomes on how to deal with *Graham*).

254. Angel v. Commonwealth, 704 S.E.2d 386, 402 (Va. 2011); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014); LeBlanc v. Mathena, No. 2:12cv340, 2015 U.S. Dist. LEXIS 86090, *39 (E.D. Va. July 1, 2015).

255. *See* cases cited *supra* note 254 (citing cases which have not concluded geriatric release as a factor meeting *Graham*).

256. *See* 28 C.F.R. 2.78 (2003) (defining geriatric parole on the federal level); *see also* VA. CODE ANN. § 53.1-40.01 (2001) (defining geriatric release on a state level).

at least sixty-years-old and even then, they need to meet the other requirements.[257] Accordingly, like life without parole sentences, geriatric release does not take the youth factor into account. Therefore, geriatric release should not satisfy the meaningful opportunity for release that *Graham* requires.

257. Va. Code Ann. § 53.1-40.01.