CRIMINAL LAW — SENTENCING — COLORADO SUPREME COURT HOLDS THAT AGGREGATE TERM-OF-YEARS SENTENCES CAN NEVER IMPLICATE EIGHTH AMENDMENT RESTRICTIONS ON JUVENILE LIFE WITHOUT PAROLE. — *Lucero v. People*, 2017 CO 49, 394 P.3d 1128.

To a certain extent, the American criminal justice system recognizes the reality that children are fundamentally different from adults. Indeed, the juvenile criminal system is built around the idea that children who commit crimes can be rehabilitated.[1] This framework for understanding young offenders came to the fore in the past couple of decades in a string of U.S. Supreme Court decisions. In *Roper v. Simmons*,[2] the Supreme Court held that, under the Eighth Amendment's proscription against cruel and unusual punishment, juveniles could not be sentenced to death.[3] Five years later in *Graham v. Florida*,[4] it extended that ban to sentences of life without parole (LWOP) for nonhomicide crimes,[5] followed shortly thereafter by a ban on mandatory LWOP sentences for juveniles who commit homicide in *Miller v. Alabama*.[6] Recently, in *Lucero v. People*,[7] the Colorado Supreme Court held that the bans from *Graham* and *Miller* do not extend to aggregate term-of-years sentences, even when those sentences approach or exceed the juvenile's life expectancy.[8] This decision is at odds with the U.S. Supreme Court's Eighth Amendment jurisprudence. The court should have applied *Graham* and *Miller* protections to Lucero's eighty-four-year sentence, thus extending coverage to de facto LWOP[9] and pushing the legislature to set statutory maximums for juvenile parole eligibility.

In 2005, at the age of fifteen, Guy Lucero, Jr., attended a birthday party.[10] Lucero, who had suffered from mental health problems from a young age, had been off his medication for several months.[11] A member

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1 *See generally* Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019 (2013).

2 543 U.S. 551 (2005).

3 *Id.* at 568.

4 560 U.S. 48 (2010).

5 *Id.* at 74.

6 567 U.S. 460, 479 (2012).

7 2017 CO 49, 394 P.3d 1128, *petition for cert. filed*, No. 17-5677 (U.S. Aug. 18, 2017).

8 *See id.* ¶ 31, 394 P.3d at 1134.

9 "De facto LWOP" refers to term-of-years sentences that are so lengthy, they become the virtual equivalent of LWOP. *See generally* ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 9, 17–18 (2017).

10 *Lucero*, 2017 CO 49, ¶ 5, 394 P.3d at 1130.

11 Motion for Sentence Reduction Under Crim. P. Rule 35(B) & Request for Hearing on the Matter, People v. Lucero, No. 2005CR4442, 2011 WL 10959661 (Colo. Dist. Ct. Aug. 17, 2011), 2010 WL 9564446 [hereinafter Motion for Sentence Reduction].

of the North Side Mafia gang, Lucero got into an argument with a member of a different gang.[12] He left the party but later returned with his father, who was also a member of the North Side Mafia and who had been in and out of prison for the majority of Lucero's life.[13] Lucero's father lured the opposing gang member outside, at which time Lucero rode by in a car and shot a gun at the house.[14] The gang member was not shot, but four others sustained nonfatal injuries.[15]

Lucero was tried as an adult before a jury.[16] After two witnesses testified that Lucero was the shooter, Lucero was convicted "of conspiracy to commit first-degree murder, attempted first-degree murder, and two counts of second-degree assault."[17] The trial court sentenced him to serve consecutive sentences for each conviction, for a total of eighty-four years.[18] The court of appeals affirmed on direct appeal.[19] Lucero filed a motion for sentence reduction, arguing, among other things, that his lengthy aggregate sentence was a de facto LWOP sentence and thus, a violation of the Eighth Amendment under *Graham*.[20] The trial court denied the motion, and the court of appeals affirmed.[21] In rejecting Lucero's Eighth Amendment argument, the appellate court reasoned that he would be eligible for parole before his expected death at age seventy-five.[22] The Colorado Supreme Court granted certiorari.[23]

The Colorado Supreme Court affirmed but disagreed with the court of appeals' reasoning. Writing for the court, Justice Eid[24] emphasized that *Graham* and *Miller* do not apply to aggregate term-of-years sentences.[25] Rather, the court read *Graham* and *Miller* to characterize

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[12] *Lucero*, 2017 CO 49, ¶ 5, 394 P.3d at 1130.

[13] *Id.* ¶¶ 5–6, 394 P.3d at 1130; Motion for Sentence Reduction, *supra* note 11.

[14] Motion for Sentence Reduction, *supra* note 11.

[15] *Lucero*, 2017 CO 49, ¶ 6, 394 P.3d at 1130.

[16] *Id.* ¶ 7, 394 P.3d at 1130.

[17] *Id.*

[18] *Id.*

[19] *Id.*; People v. Lucero, No. 07CA0774, 2009 WL 1915113, at *1 (Colo. App. July 2, 2009).

[20] Motion for Sentence Reduction, *supra* note 11; *see also* Graham v. Florida, 560 U.S. 48, 74 (2010).

[21] *Lucero*, 2017 CO 49, ¶¶ 9–10, 394 P.3d at 1131.

[22] People v. Lucero, 2013 COA 53, ¶¶ 12–13, 2013 WL 1459477, at *3. The court of appeals also noted that it had previously found forty years' imprisonment before parole eligibility to be constitutional; forty-two years — the time at which Lucero would be eligible for parole — was a negligible difference. *Id.* ¶ 16, 2013 WL 1459477, at *4 (citing People v. Banks, 2012 COA 157, ¶¶ 129–131, 2012 WL 4459101, at *21). The court also noted that other states had found similar terms of imprisonment constitutional. *Id.* ¶ 17, 2013 WL 1459477, at *4.

[23] *Lucero*, 2017 CO 49, ¶ 11, 394 P.3d at 1131.

[24] Justice Eid was joined by Chief Justice Rice and Justices Coats, Márquez, Boatright, and Hood.

[25] *Lucero*, 2017 CO 49, ¶ 11, 394 P.3d at 1131. Notably, *Lucero*'s holding did not differentiate between lengthy single and aggregate term-of-years sentences. However, aggregate sentences do raise distinctive questions. *See, e.g.*, Walle v. State, 99 So. 3d 967, 972 (Fla. Dist. Ct. App. 2012) (raising such questions).

LWOP as "a particular type of sentence,"[26] "imposed as punishment for a single crime."[27] Since Lucero was not given the specific sentence of "life without parole," but rather, an aggregated sentence, the court found that the protections of *Graham* and *Miller* did not apply.[28] Thus, the court not only affirmed the judgment of the appellate court but also went further to find that Eighth Amendment LWOP protections did not apply to aggregate term-of-years sentences at all.[29]

Justice Gabriel concurred in the judgment, essentially agreeing with the court of appeals. He first reviewed the string of U.S. Supreme Court cases that quickly expanded protections against life-ending and lifelong sentences, noting the Court's repeated references to the scientific consensus that differences between juveniles and adults mitigate criminal culpability.[30] He also cited cases from other jurisdictions that had found lifelong aggregate sentences to be the functional equivalent of LWOP.[31] This citation included *Budder v. Addison*,[32] in which, just two months prior, the Tenth Circuit had relied on *Graham* to grant habeas relief for a de facto LWOP sentence.[33] To Justice Gabriel, all these cases demonstrated "an unmistakable progression toward providing *more* protection for juvenile offenders facing a potential sentence of life behind bars with

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[26] *Lucero*, 2017 CO 49, ¶ 16, 394 P.3d at 1132 (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).

[27] *Id.* ¶ 19, 394 P.3d at 1133.

[28] *Id.* ¶¶ 20–21, 394 P.3d at 1133. The court also applied reasoning from Colorado case law to bolster its finding, noting that the sentence for each separate offense may undergo proportionality review but the aggregate sentence cannot. *Id.* ¶ 23, 394 P.3d at 1133 (citing Close v. People, 48 P.3d 528, 538–40 (Colo. 2002)). Additionally, Lucero argued that the court of appeals improperly converted his motion under Rule 35(b) of the Colorado Rules of Criminal Procedure to a Rule 35(c) motion, but the court found the conversion to be proper. *Id.* ¶¶ 25–30, 394 P.3d at 1134; *see also* COLO. R. CRIM. P. 35(b)–(c).

[29] The court decided three companion cases on the same grounds. *See* People v. Rainer, 2017 CO 50, ¶¶ 1–3, 394 P.3d 1141, 1142–43 (reversing court below and upholding parole eligibility at age seventy-five), *petition for cert. filed*, No. 17-5674 (U.S. Aug. 19, 2017); Armstrong v. People, 2017 CO 51, ¶¶ 5–6, 395 P.3d 748, 750 (affirming parole eligibility at age sixty), *petition for cert. filed*, No. 17-5700 (U.S. Aug. 18, 2017); Estrada-Huerta v. People, 2017 CO 52, ¶¶ 2–3, 394 P.3d 1139, 1140 (affirming parole eligibility at age fifty-eight).

[30] *Lucero*, 2017 CO 49, ¶¶ 36–45, 394 P.3d at 1135–37 (Gabriel, J., concurring in the judgment). *See generally* Miller v. Alabama, 567 U.S. 460 (2012); *Graham*, 560 U.S. 48; Roper v. Simmons, 543 U.S. 551 (2005).

[31] *Lucero*, 2017 CO 49, ¶ 45, 394 P.3d at 1137 (Gabriel, J., concurring in the judgment); *see, e.g.*, Moore v. Biter, 725 F.3d 1184, 1191–92 (9th Cir. 2013); People v. Caballero, 282 P.3d 291, 293, 295 (Cal. 2012); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1044–45 (Conn. 2015); Henry v. State, 175 So. 3d 675, 679–80 (Fla. 2015); State v. Null, 836 N.W.2d 41, 71 (Iowa 2013); State v. Zuber, 152 A.3d 197, 211–12 (N.J. 2017); State v. Ramos, 387 P.3d 650, 658–59 (Wash. 2017), *cert. denied*, No. 16-9363 (U.S. May 23, 2017); Bear Cloud v. State, 2014 WY 113, ¶¶ 32–33, 334 P.3d 132, 141–42.

[32] 851 F.3d 1047 (10th Cir. 2017).

[33] *Id.* at 1059–60. The Tenth Circuit found that *Graham* created clearly established federal law that required juveniles to have a realistic opportunity for release in their lifetimes, regardless of whether the sentence was LWOP or an aggregate term-of-years sentence. *Id.*

no realistic opportunity for release."[34] Thus, he concluded, protections articulated by the U.S. Supreme Court should be read broadly to extend to de facto LWOP. However, upon such an expansion, Justice Gabriel still had to answer the question: how long is too long? Justice Gabriel promoted the court of appeals' tactic of using life expectancy to cap the upper limit.[35] In a few short sentences, Justice Gabriel confirmed that Lucero would be eligible for parole within his expected lifetime and thus had not received a de facto LWOP sentence.[36]

The *Lucero* court read *Graham* and *Miller* too narrowly, focusing on the formalist distinction between LWOP and term-of-years sentences at the expense of the U.S. Supreme Court's discussion of the special characteristics of juveniles. For Lucero, the implications of the court's decision are troubling: his sentence afforded him no truly meaningful opportunity to prove his rehabilitation, yet he was denied the protections that the Supreme Court has granted to similarly situated juveniles. The Supreme Court's rationales for restricting juvenile LWOP should thus extend to de facto LWOP. However, while various courts have attempted to fashion a rule distinguishing merely lengthy sentences from de facto LWOP, none of the judicially created solutions have been particularly effective. Instead, courts should call on their legislatures to mandate an upper limit for juveniles on years spent in prison before parole eligibility, thus focusing on the possibilities of rehabilitation rather than painstakingly delineating the outer limits of "life."

The Colorado Supreme Court emphasized the "repeated[] and unambiguous[]" discussion of LWOP throughout both *Graham* and *Miller*.[37] It also homed in on the U.S. Supreme Court's use of the phrases "a particular type of sentence"[38] and "particular penalty"[39] to describe LWOP. This reading of *Graham* is far too narrow. The overarching reasoning of *Graham* and *Miller* focused instead on the unique characteristics of juveniles that call for alterations in sentencing. In *Graham*, the Court differentiated its new categorical rule for "an entire class of offenders"[40] from other categorical rules that turn on "the nature of the offense."[41] There are distinctive features about this group of defendants,

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[34] *Lucero*, 2017 CO 49, ¶ 47, 394 P.3d at 1137 (Gabriel, J., concurring in the judgment).
[35] *Id.* ¶ 51, 394 P.3d at 1138.
[36] *Id.* ¶ 54, 394 P.3d at 1138–39.
[37] *Id.* ¶ 20, 394 P.3d at 1133 (majority opinion).
[38] *Id.* ¶ 16, 394 P.3d at 1132 (quoting Graham v. Florida, 560 U.S. 48, 61 (2010)).
[39] *Id.* ¶ 21, 394 P.3d at 1133 (quoting Miller v. Alabama, 567 U.S. 460, 483 (2012)).
[40] *Graham*, 560 U.S. at 61.
[41] *Id.* at 60.

regardless of their crimes, that make LWOP an inappropriate punishment[42] — youth are less culpable and mature,[43] more receptive to rehabilitation,[44] and would suffer longer under an LWOP sentence.[45] As a result, *Graham* held that juveniles should have a "meaningful opportunity to obtain release"[46] and repeatedly emphasized the goal of rehabilitation. *Miller* used the same logic to expand the ban to mandatory LWOP sentences for homicide crimes.[47] *Lucero*'s reading of *Graham* and *Miller*, then, focused purely on the specific sentence of LWOP, without grappling with the fundamental reasoning that the Court employed.

Under this broader reading of *Graham* and *Miller*, the Supreme Court's reasoning about the uniqueness of juveniles applies to de facto LWOP sentences. If it is inappropriate to sentence any juvenile to LWOP for a nonhomicide crime solely because of her status as a juvenile, it is equally inappropriate to sentence the same juvenile to a term-of-years sentence that amounts to a lifetime in prison without the possibility of parole. The exact sentence received does not change one's identity as a juvenile, a status the Supreme Court has already decided should preclude LWOP.

The weightier question before the Colorado Supreme Court, then, was not *whether* lengthy sentences can be considered de facto LWOP, but rather, at what point? While the majority avoided the question entirely, Justice Gabriel proposed a solution in his concurrence. Many other courts have grappled with various options in recent years as well. The solutions have generally been one of two kinds: using life expectancy as an upper limit, or setting a number of years at which all juveniles become parole eligible. However, both types of solutions have their own problems that will generate more litigation in the future.

Although intuitively appealing, Justice Gabriel's approach of using life expectancy is not nuanced enough to identify de facto LWOP and leads to inequality in application. Many courts have used life-expectancy tables[48] to delineate between an acceptably long sentence

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[42] *See id.* at 71 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate — retribution, deterrence, incapacitation, and rehabilitation — provides an adequate justification." (citation omitted)).

[43] *Id.* at 72 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[44] *See id.* at 73–74.

[45] *Id.* at 70–71.

[46] *Id.* at 75.

[47] Miller v. Alabama, 567 U.S. 460, 473 (2012) ("But none of what [*Graham*] said about children . . . is crime-specific. . . . So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile . . . .").

[48] Courts generally use "life tables" produced annually by the Centers for Disease Control and Prevention. *See, e.g.*, Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046 (Conn. 2015). For the most recent publication of the tables, see Elizabeth Arias et al., *United States Life Tables, 2014*, NAT'L VITAL STAT. REP., Aug. 14, 2017, at 1.

and one that becomes de facto LWOP.[49] Unfortunately, there are many reasons why life expectancy is a flawed metric for calculating life sentences: life expectancy estimates the average life span of a *population*, not of an *individual*;[50] it does not take into account the effects of long-term incarceration or medical history on a person's life span;[51] and allowing the first opportunity for parole to run up against a juvenile's expected death does not actually allow for a "meaningful opportunity for release."[52] Indeed, Justice Gabriel did not take into account evidence of Lucero's "difficult childhood [or] his mental health history"[53] when calculating his life expectancy, despite the fact that these factors mean Lucero, like many incarcerated individuals, will probably lead a shorter life than the official life-expectancy estimate. On the other hand, even if judges could personalize each estimate by including every variable for which there is data, there is then inequality in sentencing based on certain characteristics, especially those that are constitutionally protected.[54] Thus, the use of life expectancy is unable to provide a fair solution.

The second solution — setting a maximum number of years before parole eligibility — overcomes the equity issue with which the use of life expectancy is entangled. This is a solution that state legislatures are starting to implement.[55] Based on early evidence, such a statutory maximum on parole eligibility has improved juveniles' access to meaningful

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[49] Some courts set the life expectancy as the ceiling, allowing any sentence that does not exceed the juvenile's life expectancy. *See, e.g.*, People v. Sanchez, No. B230260, 2013 WL 3209690, at *6 (Cal. Ct. App. June 25, 2013); *see also Lucero*, 2017 CO 49, ¶¶ 52–54, 394 P.3d at 1138–39 (Gabriel, J., concurring in the judgment). Others require juveniles to be released a certain amount of time before the expected age of death, emphasizing the requirement for a *meaningful* opportunity for release. *See, e.g.*, *Casiano*, 115 A.3d at 1045–47; State v. Null, 836 N.W.2d 41, 71 (Iowa 2013) ("The prospect of geriatric release . . . does not provide a 'meaningful opportunity' . . . ." (quoting *Graham*, 560 U.S. at 75)).

[50] *See* Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-*Graham *Sentences*, 18 U.C. DAVIS J. JUV. L. & POL'Y 267, 282–83 (2014) (noting that, because expectancy is an average, generally around half of all people will have died before they can be released if release is based on average life expectancy).

[51] *See id.* at 283–87; Krisztina Schlessel, Note, Graham*'s Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027, 1056 (2013).

[52] *See* Schlessel, *supra* note 51, at 1055–56.

[53] *Lucero*, 2017 CO 49, ¶ 8, 394 P.3d at 1130 (internal punctuation omitted); *see also* Motion for Sentence Reduction, *supra* note 11.

[54] Schlessel, *supra* note 51, at 1060–61 (noting that life-expectancy tables require "sentencing courts to rely on factors they are generally prohibited from considering, such as race, sex, and age," *id.* at 1061); *see also* Cummings & Colling, *supra* note 50, at 271 ("[D]isparities in sentencing, should these demographic factors be taken into account, cannot have been intended by the U.S. Supreme Court in *Graham*, and should not be sanctioned by any court.").

[55] *E.g.*, CAL. PENAL CODE § 3051(b)(1) (West Supp. 2017) (requiring that a person convicted of offenses committed before age twenty-three be made eligible for parole during the fifteenth year of imprisonment); *see also* Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82

opportunities for release.[56] However, if courts were to create this type of rule, they would arguably be encroaching on legislative power.[57] Courts attempting to implement something similar have struck down sentences as unconstitutionally long only on a case-by-case basis.[58] This method, however, is slow, and the relief is often mild, as courts strike down only the most extreme cases first, slowly chipping away at the acceptable length of time of imprisonment.

To implement the bright-line solution of setting a maximum number of years before parole eligibility effectively, the *Lucero* court should have set a standard derived from *Graham* and *Miller*, which the legislature would then be called to interpret and implement. In *Graham*, the Supreme Court included language on next steps: "What the State must do . . . is give defendants like Graham *some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*. It is for the State, in the first instance, to explore the means and mechanisms for compliance."[59] From the broad demands of this statement, the actual line drawing then falls to state legislatures, as they are best positioned to "explore the means and mechanisms" through hearings, expert testimony, and other evidence.[60] To comply with the rationale of *Graham* and *Miller*, legislatures would no longer be looking at defining what "life" means, but rather, trying to determine when *rehabilitation* is possible.[61] To do so, legislatures should question how long it would

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FORDHAM L. REV. 3439, 3469–78 (2014) (discussing the California statute and similar measures in Wyoming and Louisiana).

[56] *See* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 272–74 (2016) (finding that, after California's statute came into effect, youth offenders were released at a higher rate and at a lower age than nonyouth offenders).

[57] Schlessel, *supra* note 51, at 1069–71 (noting that, while courts can and should strike down unconstitutional parole statutes, it "is beyond the court's power" to devise new standards and guidelines, *id.* at 1071).

[58] *See, e.g.*, People v. Caballero, 282 P.3d 291, 296 (Cal. 2012) ("[W]e will not provide trial courts with a precise time frame for setting these future parole hearings . . . ."); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1047 (Conn. 2015) (finding that a fifty-year sentence violated *Graham*, but refusing to decide if anything shorter would).

[59] Graham v. Florida, 560 U.S. 48, 75 (2010) (emphasis added).

[60] Courts and commentators traditionally characterize policymaking and line drawing as legislative tasks to which courts are expected to defer. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006) ("[M]aking distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 n.26 (1995)); Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 44–45 (2011) ("[A] court cannot engage in 'quintessentially legislative work' . . . ." *Id.* at 45 (quoting *Planned Parenthood of N. New Eng.*, 546 U.S. at 329).).

[61] Smith v. State, 93 So. 3d 371, 375, 377 (Fla. Dist. Ct. App. 2012) (Padovano, J., concurring) ("[T]he question is not whether the defendant will have a significant part of his life remaining at the end of the sentence; rather, it is whether the defendant will have a reasonable opportunity to

take for a juvenile to grow out of her "transient immaturity"[62] and be effectively rehabilitated, keeping in mind that the maximum governs only parole *eligibility*, not a promise of parole itself.[63] They may need to consult neuroscience and developmental research, legal and policy research,[64] and extant exemplars of statutory maximums[65] to determine at what point juvenile offenders would be able to be rehabilitated. In instituting this standard, the court should have struck down Lucero's eighty-four-year sentence and called upon the Colorado legislature to pass a statute drawing a definitive line[66] with such goals in mind.[67]

The U.S. Supreme Court has made clear that juveniles are a class of their own, especially for the purposes of sentencing, and thus, they must be allowed a "meaningful opportunity for release." Following this reasoning, the *Lucero* court should have extended *Graham* and *Miller* to ban lengthy term-of-years sentences as de facto LWOP. Then, to resolve the difficult question of which sentences constitute de facto LWOP, the court should have pushed the legislature to draw the line, after setting a standard that requires consideration of the special characteristics of juveniles and the goal of rehabilitation. This focus on a meaningful opportunity to prove rehabilitation, rather than defining LWOP in relation to death or based on formal distinctions, advances the goals of *Graham* and *Miller*, honoring the central purpose of the juvenile justice system: rehabilitating young people so that they can lead full lives outside prison walls.

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show that he has been rehabilitated . . . ." *Id.* at 375.), *decision quashed*, No. SC12-1953, 2017 WL 2709772 (Fla. 2017).

62 *Graham*, 560 U.S. at 73 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

63 *Id.* at 75 ("[T]he Eighth Amendment . . . does not require the State to release that offender during his natural life.").

64 *See* Caldwell, *supra* note 56, at 284–85 (advocating release while offenders are in their twenties to early thirties); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 409–12 (2014) (arguing that periodic review starting at ten to fifteen years is a safely constitutional line).

65 *See* CAL. PENAL CODE § 3051(b)(1) (West Supp. 2017) (fifteen years); FLA. STAT. § 921.1402 (2017) (fifteen to twenty-five years, depending on offense and original sentence); LA. STAT. ANN. § 15:574.4(E)(1) (West Supp. 2017) (thirty-five years); W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014) (fifteen years); *see also* MODEL PENAL CODE: SENTENCING § 6.11A(h) (AM. LAW INST., Tentative Draft No. 2, 2011) (ten years).

66 A few courts have already done just this, with some successful results. *See, e.g.*, People v. Caballero, 282 P.3d 291, 296 n.5 (Cal. 2012) (urging the California legislature to enact legislation on juvenile parole eligibility); S. RULES COMM., SENATE FLOOR ANALYSIS, S.B. 260, 2013–2015 Reg. Sess., at 11 (Cal. 2013) (citing *Caballero* and the court's "call[] for legislative action" as support for bill); *see also* Order Requiring Immediate Compliance with *Miller*, Hill v. Snyder, No. 10-14568 (E.D. Mich. Nov. 26, 2013).

67 In the case of a legislature that remains unwilling to comply with a court's directive, it is certainly within the court's power to continue striking down unconstitutionally long sentences, and even interpret *Graham* and *Miller* by drawing a line as well. *Cf.* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (setting constitutional limit for probable cause hearing after arrest at forty-eight hours after unreasonable delays in implementing earlier nonnumerical Court guidance).