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“We Can’t Just Throw Our Children Away”: A Discussion of the Term-of-Years Sentencing of Juveniles and What Can Be Done in Texas

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COMMENTS

“WE CAN’T JUST THROW OUR CHILDREN AWAY”¹: A DISCUSSION OF THE TERM-OF-YEARS SENTENCING OF JUVENILES AND WHAT CAN BE DONE IN TEXAS

By: Anjelica Harris*

ABSTRACT

In the words of Supreme Court Justice Elena Kagan, children are different.² The issue of how to sentence juvenile offenders has long been controversial. Although psychology acknowledges the connection between incomplete juvenile brain development and increased criminality, the justice system lags behind in how it handles juvenile offenders. A prime example is the case of Bobby Bostic, who at the age of sixteen was charged with eighteen offenses and sentenced to 241 years in prison. This sentence, known as a term-of-years or virtual life sentence, essentially guarantees that no matter what Bobby does or who he proves himself to be as an adult, he will die in prison. Since Bobby’s sentencing in 1997, the Supreme Court has held that sentencing juveniles to death violates the Eighth Amendment and has banned life without parole for juvenile offenders. Despite landmark Supreme Court decisions, a gap in the law continues to exist when it comes to juvenile non-homicide offenders who are certified and tried as adults. Thousands of juvenile offenders are now trapped in the legal gap that exists in the distinction, or lack thereof, between life without parole and lengthy term-of-years sentences. This Comment will explore the gap in the law, the various ways the States have chosen to handle this issue, and will propose a possible solution for Texas.

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1. Bobby Bostic, *We Can’t Just Throw Our Children Away*, FREE BOBBY BOSTIC, <http://www.freebobbybostic.com/we-cant-just-throw-our-children-away.html> (last visited Jan. 2, 2020) [<https://perma.cc/E9MQ-7MHV>].

2. *Miller v. Alabama*, 567 U.S. 460, 481 (2012).

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I. “BOBBY BOSTIC, YOU WILL DIE IN THE DEPARTMENT OF CORRECTIONS”

December 12, 1995. At around 5:30 p.m., six co-workers were exiting their vehicles in St. Louis.³ Their arms were loaded with stacks of gifts—Christmas gifts they had purchased as part of an “Adopt-a-Family” program⁴—which included a Christmas tree and presents for three children. One of the women in the group looked up from the items she was removing from her trunk to see two African-American boys walking towards her.⁵ One of them was holding a gun.⁶ This young man was sixteen-year-old Bobby Bostic. Bobby demanded the woman give him all of her money or he would shoot her.⁷ The woman’s boyfriend jumped out of his truck, and Bobby again demanded

3. Liliana Segura, *Retired Missouri Judge Who Sentenced Juvenile to 241 Years: “I Hope He Gets Out,”* INTERCEPT (Feb. 10, 2018), <https://theintercept.com/2018/02/10/missouri-sentencing-judge-juvenile-bobby-bostic> [<https://perma.cc/Z88N-NLUB>]; see also Petition for Writ of Certiorari at 2, *Bostic v. Pash*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *2.

4. Segura, *supra* note 3.

5. *Id.*

6. *Id.*

7. *Id.*

money, this time receiving \$500 in cash from the man.⁸ Then, Bobby fired his gun, the bullet grazing the man’s torso.⁹ Another member of the group was shot by the other young man, eighteen-year-old Donald Hutson.¹⁰ The police stated that had it not been for the thick winter coats the men were wearing, their injuries could have been much worse.¹¹

The acts of violence committed by the two young men that night did not end there. Less than an hour later, and only a few blocks away from the first incident, Hutson and Bobby kidnapped Regina Davis, who was also out that evening delivering Christmas donations.¹² The boys forced Davis into her own car—with Hutson’s gun pointed to her head—and demanded she take off her jewelry and give them all of her money.¹³ Bobby drove the vehicle while Hutson rifled through Davis’s clothing, including putting his hands into her bra and pants to check her underwear for money.¹⁴ Davis feared that she would be raped.¹⁵ Notably, it was Bobby who eventually convinced Hutson to let Davis go.¹⁶ Bobby and Hutson threw their guns into the river and used the stolen money to buy marijuana.¹⁷ Shortly thereafter, Bobby, still driving Davis’s vehicle, was pulled over by police, bringing the night of violence to its end.¹⁸

Bobby, at sixteen-years-old, was certified as an adult and charged with and convicted of eighteen offenses: eight counts of armed criminal action, three counts of robbery, three counts of attempted robbery, two counts of assault, one count of kidnapping, and one count of possession of marijuana.¹⁹ Although his defense attorney asked that the judge order his sentences to run concurrently, Circuit Judge Evelyn Baker sentenced Bobby to a “term-of-years” sentence of 241 years to run consecutively.²⁰ Bobby received thirty years per robbery, fifteen years per attempted robbery, fifteen years for each assault count,

8. *Id.* See also Kim Bell, *Two Teenagers Charged in Attack on Donors*, ST. LOUIS POST-DISPATCH (Dec. 14, 1995), https://www.stltoday.com/news/local/crime-and-courts/two-teenagers-charged-in-attack-on-donors/article_52a3bc1e-b786-555a-b456-fac44aebd730.html [<https://perma.cc/MF2N-AED8>].

9. Segura, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; Bell, *supra* note 8.

14. See Transcript on Appeal Vol. 2 at 22a–23a, *State v. Bostic*, No. 951-4205A (Mo. Ct. App. 1997), https://www.aclu-mo.org/sites/default/files/aclu_appendix_e-file_dec_20_2017.pdf [<https://perma.cc/5P6U-H5CF>] [hereinafter Transcript on Appeal Vol. 2].

15. *Id.* at 25a.

16. *Id.* at 24a.

17. Petition for Writ of Certiorari at 3, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *3.

18. *Id.* at *3, 2017 WL 6606886, at *3.

19. *Id.*, 2017 WL 6606886, at *3.

20. *Id.*, 2017 WL 6606886, at *3.

five years for six of the armed criminal actions, fifteen years for two of the armed criminal actions, fifteen years on the kidnapping count, and one year for the possession of a controlled substance.²¹ Bobby would not be eligible for parole until 2091, at which time he would be 112 years old.²²

Although advised by his attorney to accept the offered plea deal of a “baby life” sentence (which typically meant thirty years),²³ Bobby refused at the urging of his father, who told him he needed to “be a man.”²⁴ Bobby wrote a number of letters to the court, both apologizing for his sullen—and at times disrespectful—behavior during trial and asking for leniency from the judge.²⁵ Those pleas were ignored. During sentencing, Judge Baker told Bobby:

You are the biggest fool who has ever stood in front of this Court. You have expressed no remorse. You feel sorry for Bobby. Bobby doesn't want to do this time. Bobby doesn't want to do this. Bobby's feelings are hurt. Poor little Bobby You made your choice. You're gonna have to live with your choice, and you're gonna die with your choice because, Bobby Bostic, you will die in the Department of Corrections. Do you understand that? Your mandatory date to go in front of the parole board will be the year 2201. Nobody in this room is going to be alive in the year 2201.²⁶

In stark contrast, Bobby's co-defendant Donald Hutson accepted a plea bargain for thirty years and was eligible for parole in 2018.²⁷ Hutson²⁸ also admitted that he was the “aggressor and instigator that night” and that he felt guilty because he put Bobby “in that predica-

21. *Id.*, at 4, 2017 WL 6606886, at *4.

22. *Id.*

23. Jennifer S. Mann, *Life Sentence Reform for Juveniles May Pass by St. Louis Robber Serving 241 Years*, ST. LOUIS POST-DISPATCH (Aug. 10, 2014), https://www.stltoday.com/news/local/crime-and-courts/life-sentence-reform-for-juveniles-may-pass-by-st-louis/article_f2c41a67-e3a0-55d4-a560-6a187d467370.html [<https://perma.cc/TGC7-82TX>].

24. *She Sentenced a Teen to 241 Years in Prison. Now She Wants Her Decision Overturned*, NPR WEEKEND EDITION SATURDAY (Feb. 17, 2018, 8:08 AM), <https://www.npr.org/2018/02/17/586575834/she-sentenced-a-teen-to-241-years-in-prison-now-she-wants-her-decision-overturne> [<https://perma.cc/2BSL-2RTB>].

25. Petition for Writ of Certiorari at 3, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *3.

26. *Id.* at 4, 2017 WL 6606886, at *4.

27. Doyle Murphy, *Bobby Bostic, Sentenced as a Teen to 241 Years, Appeals to U.S. Supreme Court*, RIVERFRONT TIMES (Dec. 21, 2017, 7:21 AM), <https://www.riverfronttimes.com/newsblog/2017/12/21/bobby-bostic-sentenced-as-a-teen-to-241-years-appeals-to-us-supreme-court> [<https://perma.cc/U76J-2DL4>]; see also Petition for Writ of Certiorari at 4, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *4.

28. Donald Hutson died in the Missouri Department of Corrections in September 2018. Shahla Farzan, *Missouri Inmates Are Overdosing on Drugs. How Are They Getting Them?*, ST. LOUIS PUB. RADIO (Aug. 12, 2019), <https://news.stpublicradio.org/post/missouri-inmates-are-overdosing-drugs-how-are-they-getting-them#stream/0> [<https://perma.cc/6NLJ-BUNV>].

ment in the first place.”²⁹ This sentiment was reiterated by the victims of Bobby’s crimes who testified at trial that Hutson was in fact the main aggressor and that it was only at Bobby’s urging that Hutson did not rape Regina Davis but rather decided to let her go.³⁰ Bobby is currently serving the longest sentence of any juvenile offender in Missouri.³¹

Both the Missouri Court of Appeals³² and the Missouri Supreme Court have denied Bobby’s petitions for a writ of habeas corpus.³³ Furthermore, Bobby has never received an opinion from any court addressing the merits of his constitutional claims for habeas relief stemming from his argument that his sentence violates the Eighth Amendment.³⁴ In early 2018, the American Civil Liberties Union (“ACLU”) filed a petition for writ of certiorari to the United States Supreme Court.³⁵ An amicus brief from twenty-six former judges and prosecutors, including the sentencing judge, Judge Evelyn Baker, was filed in support of Bobby.³⁶ Judge Baker, who has since retired, wrote in an op-ed for the *Washington Post* that she “deeply regret[s]” the sentence she gave to Bobby, explaining that:

Imposing a life sentence without parole on a child who has not committed murder—whether imposed in a single sentence or multiple sentences, for one crime or many—is wrong. Bostic was immature, and I punished him for that. But to put him, and children like him, in prison for life without any chance of release, no matter how they develop over time, is unfair, unjust and, under the Supreme Court’s 2010 decision, unconstitutional.³⁷

On April 23, 2018, the Supreme Court denied Bobby’s petition.³⁸ Bobby’s attorneys have not given up and are currently pursuing federal habeas corpus relief.³⁹

29. Mann, *supra* note 23.

30. Transcript on Appeal Vol. 2, *supra* note 14, at 24a-25a.

31. *Id.*

32. State v. Bostic, 963 S.W.2d 720, 721 (Mo. Ct. App. 1998); *see also* Petition for Writ of Certiorari at 4, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886.

33. Petition for Writ of Certiorari at 6, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886 at *1.

34. *Id.*

35. Megan A. Moore, *A Distinction Without a Difference: Bostic v. Dunbar*, WORDPRESS (Mar. 9, 2018), <https://meganamoore.wordpress.com/2018/03/09/a-distinction-without-a-difference-bostic-v-pash/> [<https://perma.cc/2PT8-VFRX>].

36. *Id.*

37. Evelyn Baker, *I Sentenced a Teen to Die in Prison. I Regret It*, WASH. POST (Feb. 13, 2018), https://www.washingtonpost.com/opinions/i-sentenced-a-teen-to-die-in-prison-i-regret-it/2018/02/13/20e731ba-103a-11e8-8ea1-c1d91fccc3fe_story.html?utm_term=.4e3bc9e98610 [<https://perma.cc/57B2-D65J>].

38. Megan A. Moore, *Bostic v. Dunbar: Petition Denied. What’s Next?*, WORDPRESS (Sept. 10, 2018), <https://meganamoore.wordpress.com/2018/09/10/bostic-v-dunbar-case-closed-whats-next/> [<https://perma.cc/2ESD-YL4C>]; *see also* *Bostic v. Dunbar*, 138 S. Ct. 1593 (2018).

39. Moore, *supra* note 38.

This Comment will address the legal gap that exists in sentencing juvenile non-homicide offenders who are certified and tried as adults. A discussion of the evolution of the juvenile justice system in America, from a focus on caring for “children in need,” to getting tough in the 1990s, to the Supreme Court finding that “children are different” will follow. This Comment will highlight how juvenile non-homicide offenders like Bobby are treated differently depending on the state in which they committed their offense, as well as propose a Texas-specific solution that involves earlier and more frequent parole review requirements for juveniles certified as adults and a prohibition against sentences that equate to virtual life sentences for *all* juveniles—regardless of whether they were tried as an adult or not.⁴⁰

II. “ADULT TIME FOR ADULT CRIMES”⁴¹: FROM FEAR OF THE “SUPERPREDATOR” TO THE NEED FOR REHABILITATION

The circumstances and events in the life of Bobby Bostic that led to this fateful night of violence are, tragically, all too common. Bobby was raised by a single mother who had the first of her four children when she was still a teenager herself.⁴² In a 2013 letter asking for clemency on behalf of her brother, Bobby’s older sister said of their mother that “when things got hard she’d turn to drugs and alcohol which would make life hard for us . . . there were times when Bobby would have to go out to steal food for us to eat.”⁴³ According to Bobby’s brother, the family was at times homeless and their father was not in their lives.⁴⁴ At ten years old, Bobby began using marijuana and soon moved on to PCP and was drinking alcohol by age twelve.⁴⁵ The year before these offenses occurred, Bobby dropped out of school

40. It should be noted that juvenile court proceedings utilize different terminology than adult criminal courts. For example, juveniles are “adjudicated” guilty, rather than “convicted.” An adjudication of delinquency is “analogous to an adult ‘conviction,’ [and] is a formal finding by the juvenile court, after an adjudicatory hearing or the entering of a guilty plea/admission, that the juvenile has committed the act for which he or she is charged.” Additionally, in juvenile court the term “disposition” is analogous to receiving a “sentence” in adult court. For purposes of consistency and reader clarity, this Comment utilizes the more familiar terms of “guilty” or “sentence,” although such terms are typically not used in the juvenile context. For a more complete list of juvenile court terms and definitions, see *Juvenile Court Terminology*, NAT’L JUV. DEFENDER CTR., <https://njdc.info/juvenile-court-terminology/> (last visited Jan. 2, 2020) [<https://perma.cc/SG3R-VHP3>].

41. David L. Hudson Jr., *Adult Time for Adult Crimes*, ABA J. (Nov. 2, 2009, 2:20 AM), http://www.abajournal.com/magazine/article/adult_time_for_adult_crimes/ [<https://perma.cc/9Z6T-DQAY>].

42. Segura, *supra* note 3.

43. *Id.*

44. *Id.*

45. Mann, *supra* note 23.

following a drug arrest.⁴⁶ Shortly thereafter, his younger brother was shot and paralyzed in a gang shooting.⁴⁷

Bobby also happened to come of age in the 1990s, a time in which the juvenile justice system’s focus shifted from the best interests of the juvenile offender to focusing on protecting the public from a perceived growing crime wave in the inner cities.⁴⁸ Michael Wolff, the former chief justice of the Missouri Supreme Court, summed up the general sentiment of the time when he said, “We were terrified of juveniles back then.”⁴⁹ As this fear of juvenile criminals spread across the country during the 1980s and 1990s, states across the nation began passing what were called the “adult crime, adult time” statutes that involved harsher punishments and allowed for the easier transfer of juvenile offenders to be tried in adult criminal courts.⁵⁰

Prior to the 1967 decision in *In re Gault*, the juvenile justice system in America was largely underdeveloped. Juveniles were often treated as “miniature adults” rather than viewed as immature and psychologically undeveloped youths.⁵¹ But since the landmark decision in *Gault*,⁵² the juvenile justice system has transformed from a “nominally rehabilitative social welfare agency into a more formal, criminal-like and punitive system for young offenders.”⁵³ In *Gault*, the Supreme Court held for the first time that juveniles facing criminal prosecution have the same rights as adults, including such key rights as the right to an attorney, the right to remain silent, the right to notice of the charges against them, and the right to have a full hearing.⁵⁴

The 1980s and 1990s saw a rise in juvenile crime, particularly in larger, urban areas like Bobby’s hometown of St. Louis.⁵⁵ Coinciding with the so-called “War on Drugs” declared by President Richard Nixon in 1973, and later reinvigorated by First Lady Nancy Reagan in

46. *Id.*

47. *Id.*

48. Segura, *supra* note 3; *see also* NAT’L RESEARCH COUNCIL INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 2 (Joan McCord et. al. eds., 2001), <https://www.nap.edu/catalog/9747/juvenile-crime-juvenile-justice> [<https://perma.cc/5CMZ-Z5HF>].

49. Segura, *supra* note 3.

50. Hudson, *supra* note 41.

51. BARRY C. FELD & PERRY L. MORIEARTY, JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL 5 (4th ed. 2018).

52. *In re Gault*, 387 U.S. 1 (1967).

53. FELD & MORIEARTY, *supra* note 51, at 2.

54. *In re Gault*, 387 U.S. at 33–34, 41, 55, 57; *see also In re Gault*, NAT’L JUV. DEFENDER CTR., <http://njdc.info/practice-policy-resources/united-states-supreme-court-juvenile-justice-jurisprudence/in-re-gault/> (last visited Jan. 10, 2020) [<https://perma.cc/E5XC-KBN6>].

55. *See* JEFFREY BUTTS & JEREMEY TRAVIS, THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000 2 (2002), <https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.pdf> [<https://perma.cc/64VU-UTBN>].

1984 with her “Just Say No” campaign,⁵⁶ many urban, largely minority, teenagers found themselves living in the midst of the drug war.⁵⁷ Young men, like Bobby, felt that carrying a gun was necessary to protect themselves.⁵⁸ The nightly news began featuring stories about dangerous juveniles committing crime.⁵⁹ Professor and former aide to President George W. Bush, John DiLulio Jr., even coined the term “superpredators” in 1995.⁶⁰ In an op-ed, DiLulio described his experiences with juvenile offenders as a “buzz of impulsive violence, the vacant stares and smiles, and the remorseless eyes were at once too frightening and too depressing (my God, these are children!) for me to pretend to ‘study’ them.”⁶¹

The term “superpredator” gained national recognition when then First Lady Hillary Clinton infamously used it while advocating for President Clinton’s 1994 Crime Bill, which attempted to crack down on inner-city and juvenile crime.⁶² It should be noted that the fear of a coming wave of juvenile “superpredators” turned out to be unfounded—the juvenile arrest rate for all offenses reached its zenith in 1996 and has declined by 74% since.⁶³ The public outcry for legislators to be tough on crime resulted in statutory changes in the 1990s that led to harsher and longer punishments for juvenile offenders.⁶⁴ Bobby was sentenced in 1997, amidst this environment of a heightened fear of hardened, urban juveniles who were thought to be violent dangers to society.⁶⁵ The nature of Bobby’s crimes, not to mention his past brushes with the law—which involved assault and drug offenses—placed him neatly into the category of a threat to “the protection of the public and public safety.”⁶⁶

However, during the early- to mid-2000s as the public outcry for stricter juvenile sentencing subsided, the Supreme Court began issuing

56. *War on Drugs*, HISTORY, <https://www.history.com/topics/crime/the-war-on-drugs> (last updated Dec. 17, 2019) [<https://perma.cc/UJ8P-4U7P>].

57. *See id.*; *see also* Fatema Gunja, *Position Paper: Race & the War on Drugs*, ACLU (May 2003), <https://www.aclu.org/other/race-war-drugs> [<https://perma.cc/2WRP-TU3B>].

58. NAT’L RESEARCH COUNCIL INST. OF MED., *supra* note 48, at 43.

59. *See id.* at 25.

60. John DiLulio, *The Coming of the Super-Predators*, WASH. EXAMINER (Nov. 27, 1995, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [<https://perma.cc/3DKL-DN6Z>].

61. *Id.*

62. *See* Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial*, BBC NEWS MAG. (Apr. 18, 2016), <https://www.bbc.com/news/world-us-canada-36020717> [<https://perma.cc/Y33Z-TYHV>]. The so-called “Clinton Crime Bill” is officially titled the Violent Crime Control and Law Enforcement Act of 1994, Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. ch. 136 (2012).

63. *Juvenile Arrest Rate Trends*, OFF. JUV. JUST. & DELINQ. PREVENTION, DEP’T JUST. (Oct. 31, 2019), https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 [<https://perma.cc/Q9SN-T44W>] (data refers to juveniles ages 10 to 17).

64. *See* Lussenhop, *supra* note 62.

65. *See* DiLulio, *supra* note 60.

66. *See* Segura, *supra* note 3; *see also* TEX. FAM. CODE ANN. § 51.01(1).

a series of landmark decisions related to juvenile justice. In 2005, in *Roper v. Simmons*, the Supreme Court found that juveniles cannot be sentenced to death because the death penalty is a disproportionate punishment for juveniles who are typically immature, more likely to succumb to peer pressure, and have a greater capacity for reform than adults.⁶⁷ The Court in *Roper* discussed three main ways in which juveniles are different: (1) they lack maturity and have an underdeveloped sense of responsibility, the combination of which can result in “impetuous and ill-considered actions and decisions”;⁶⁸ (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”;⁶⁹ and (3) “the character of a juvenile is not as well formed as that of an adult” and their personality traits are less established.⁷⁰ All of these elements mean that juveniles, because they are not yet fully formed in their traits and dispositions, are far more responsive to rehabilitation.⁷¹

The *Roper* decision is also notable because it was the first time the Court held that sentencing a juvenile to death violates the Eighth Amendment’s prohibition on “cruel and unusual punishment.”⁷² Justice Kennedy, writing for the majority, highlighted that what constitutes cruel and unusual punishment is based on the “evolving standards of decency that mark the progress of a maturing society.”⁷³ Justice Kennedy elaborated that punishments become cruel and unusual when they are disproportionate to the offense committed.⁷⁴ For the reasons listed above, the Court found that imposing the most serious of punishments, the death penalty, was “disproportionate punishment for offenders under 18.”⁷⁵ The Court’s decision in *Roper* left life without parole as the most severe sentence available for juvenile defendants.⁷⁶

Five years later, the Supreme Court held in *Graham v. Florida* that sentencing juvenile non-homicide offenders to life without parole also violates the Eighth Amendment’s prohibition on “cruel and unusual

67. *Roper v. Simmons*, 543 U.S. 551, 568–71 (2005); see also JOSH ROVNER, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 1 (July 23, 2019), <https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf> [<https://perma.cc/6SER-NK5U>].

68. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

69. *Id.*

70. *Id.* at 570.

71. *United States Supreme Court Juvenile Justice Jurisprudence*, NAT’L JUV. DEFENDER CTR., <http://njdc.info/practice-policy-resources/united-states-supreme-court-juvenile-justice-jurisprudence/> (last visited Jan. 23, 2020) [<https://perma.cc/684N-C526>]; see also *Roper*, 543 U.S. at 570.

72. U.S. CONST. amend. VIII; see also *Roper*, 543 U.S. at 568.

73. *Roper*, 543 U.S. at 560–61 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

74. *Id.*

75. *Id.* at 575.

76. See *id.*

punishment.”⁷⁷ In *Graham*, the Court held that because proportionality between punishment and offense is central to the Eighth Amendment, the most severe punishments must be reserved only for the most serious offense—homicide.⁷⁸ Thus, the Court found that sentencing juvenile non-homicide offenders to life without parole was “especially harsh” and as such violated the Eighth Amendment.⁷⁹ Limiting the imposition of life without parole to homicide offenses did not guarantee that non-homicide offenders would be released from prison, only that they now had a “meaningful opportunity” for release.⁸⁰ Notably, the Court did not define what constitutes a “meaningful opportunity.”⁸¹ However, it is important to note that the Court found that a “meaningful opportunity” for release does not mean that a state must guarantee the offender is eventually released.⁸² A state must only provide “some realistic opportunity to obtain release” before the end of their sentence of life without parole.⁸³

In *Miller v. Alabama*, the Supreme Court reiterated its holding in *Graham* that mandatory life without parole for juveniles violates the Eighth Amendment.⁸⁴ The Court found that discretion should be given to judges in sentencing juveniles because judges must be permitted the freedom to consider the individual characteristics and background of each juvenile when sentencing.⁸⁵ Thus, one-size-fits-all sentencing simply is not applicable to juvenile offenders.⁸⁶ Finally, in *Montgomery v. Louisiana*, the Court found that the holding in *Miller* should be applied retroactively to juvenile offenders who had been mandatorily sentenced to life without parole.⁸⁷

These landmark cases relied on the presentation of evidence from psychologists and childhood-development researchers who have proven that children are different than adults.⁸⁸ The studies of both psychologists and criminologists have found that criminal activity is most likely to peak around the age of seventeen, which makes sense because the human brain typically does not reach complete develop-

77. *Id.*; *Graham v. Florida*, 560 U.S. 48, 74 (2010); U.S. CONST. amend. VIII.

78. *Graham*, 560 U.S. at 59.

79. *Id.* at 70.

80. *Id.* at 75.

81. *Id.*

82. *Id.*

83. *Id.* at 82.

84. ROVNER, *supra* note 67, at 3; *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

85. ROVNER, *supra* note 67, at 3; *Miller*, 567 U.S. at 470.

86. ROVNER, *supra* note 67, at 3; *Miller*, 567 U.S. at 470.

87. ROVNER, *supra* note 67, at 3; *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016).

88. For further discussion of how the Supreme Court has come to view the different status of juvenile offenders, see Justice Sotomayor’s Opinion for the Majority in *J.D.B. v. North Carolina*, 564 U.S. 261, 264–81 (2011). Justice Sotomayor reiterates that a “child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates commonsense conclusions about behavior and perception.’” *Id.* at 272 (citations omitted).

ment until the age of twenty-five.⁸⁹ Consequently, at seventeen years old the human brain is not fully developed, making teenagers more prone to making decisions using their amygdala—the emotional control center of the brain—rather than their pre-frontal cortex—where rational decision making occurs.⁹⁰ Laurence Steinberg, a professor of psychology at Temple University, has argued that:

It is not that unusual for our justice system to criminalize what I think most of us would consider to be, you know, stupid adolescent behavior . . . They come into contact with a system that just has stopped viewing them as what they are, which is kids. They are not adults. We need to go back to an earlier point in our history where we had a separate juvenile justice system that didn’t have such a porous border with the adult system, which is what we have right now.⁹¹

However, this lack of brain development also makes many juvenile offenders more amenable to rehabilitative efforts.⁹² Juveniles, through education and treatment programs for mental health and substance abuse issues, are more able to be rehabilitated due to this very brain elasticity.⁹³

Although there has been progress over the last decade in reforming how juvenile offenders are sentenced, a large gap in the law currently exists in the form of term-of-years or virtual life sentences—particularly as applied to juveniles certified as adults.⁹⁴ A virtual life sentence

89. ALEX R. PIQUERO ET AL., SERIES: STUDY GROUP ON THE TRANSITIONS BETWEEN JUVENILE DELINQUENCY AND ADULT CRIME 2–3 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242932.pdf> [<https://perma.cc/XY7N-QFUK>].

90. Carl Zimmer, *You’re an Adult. Your Brain, Not So Much.*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html> [<https://perma.cc/7BF2-94JH>]; see also Michael N. Tennison & Amanda C. Pustilnik, “*And If Your Friends Jumped Off a Bridge, Would You Do It Too?*”: *How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533, 556–61 (2015).

91. Emily Kaiser, *6 Facts about Crime and the Adolescent Brain*, MPR NEWS (Nov. 14, 2012), <https://www.mprnews.org/story/2012/11/15/daily-circuit-jvenile-offenders-brain-development> [<https://perma.cc/UP98-5W2R>].

92. MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 17–18 (2009), <https://law.utexas.edu/faculty/publications/2009-From-Time-Out-to-Hard-Time-Young-Children-in-the-Adult-Criminal-Justice-System/download> [<https://perma.cc/R2HA-JG6W>]; see also *Graham v. Florida*, 560 U.S. 48, 74 (2010) (reiterating juvenile offenders “are most in need of and receptive to rehabilitation”).

93. DAVID GOTTESMAN & SUSAN WILE SCHWARZ, JUVENILE JUSTICE IN THE U.S.: FACTS FOR POLICYMAKERS 1 (July 2011), http://www.nccp.org/publications/pdf/text_1038.pdf [<https://perma.cc/C2RJ-2DC9>]; Carly Loomis-Gustafson, *Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders*, 55 DUQ. L. REV. 221, 228–29 (2017).

94. Virtual life sentences are referred to in a number of ways: term-of-years sentences, aggregate sentences, de facto life sentences. For clarity, this Comment uses both “term-of-years sentence” and “virtual life sentence.”

is when an individual receives a sentence that is so long that, even though the offender has not been formally sentenced to life or life without parole, he is likely to die in prison.⁹⁵ Virtual life sentences have been defined as sentences of fifty years or more.⁹⁶ According to research done in 2017 by The Sentencing Project, 44,311 individuals nationwide are serving virtual life sentences, of which almost 12,000 were sentenced to life or virtual life sentences for offenses committed as juveniles.⁹⁷ Many of these individuals are serving these sentences for non-violent offenses.⁹⁸ These numbers are especially concerning because data shows that as many inmates age, the likelihood that they would commit new crimes if released declines.⁹⁹ Experts agree that prisoners, particularly those who were juveniles at the time of their offense can “age out” of criminality, which explains how a juvenile offender can become a low-risk to public safety by the age of thirty.¹⁰⁰

Although the Supreme Court found in *Graham* and reaffirmed in *Miller* that life without parole is an inappropriate and unjust sentence for juveniles who commit non-homicide offenses, those decisions failed to specifically address virtual life sentences. This means that juveniles, although they are protected from being sentenced to life without parole, are still able to be subjected to sentences so long that the juvenile is essentially guaranteed to die in prison. States around the nation have held that sentencing juveniles to virtual life sentences does not violate the Supreme Court’s holdings in *Graham* and *Miller*.¹⁰¹ In Texas specifically, juvenile non-homicide offenders certified as adults are still vulnerable to receiving virtual life sentences.¹⁰²

95. See ASHLEY NELLIS, STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [<https://perma.cc/9VSQ-GF7M>].

96. Ashley Nellis & Elizabeth Henneke, *Texas Should Stop Spending Billions to Incarcerate So Many People for Life*, TRIBTALK (July 20, 2017), <https://www.tribtalk.org/2017/07/20/texas-should-stop-spending-billions-to-incarcerate-so-many-people-for-life/> [<https://perma.cc/ZS7Z-VQWE>].

97. NELLIS, *supra* note 95, at 5.

98. *Id.*

99. Nellis & Henneke, *supra* note 96; see also Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY 391–92 (2014), https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf [<https://perma.cc/SU2M-SCNV>].

100. Nellis & Henneke, *supra* note 96; see also Ulmer & Steffensmeier, *supra* note 99, at 391–92.

101. ROVNER, *supra* note 67, at 2–3.

102. See Jordon Calvert Greenlee, *Victims of Youth: Equitable Sentencing Reform for Juvenile Offenders in the Wake of Miller v. Alabama and Jackson v. Hobbs*, 33 L. & INEQ. 263, 277–78 (2015).

III. HOW ARE JUVENILES SENTENCED IN TEXAS?

A. *Texas Family Code – Purpose of Juvenile Justice from Texas Family Code*

Texas is one of several states that has transitioned from focusing on the best interest of the juvenile offender to prioritizing the protection of the public and public safety. Pursuant to the Texas Juvenile Justice Code, the primary purpose of the juvenile justice system is “to provide for the protection of the public and public safety.”¹⁰³ This prioritization of public safety stems from the aforementioned nation-wide move towards focusing on public safety over the well-being of the juvenile offender. Perhaps even more telling is the second enumerated purpose of the juvenile justice system in Texas, which is to “promote the concept of punishment for criminal acts and to remove, where appropriate, the taint of criminality from children committing certain unlawful acts.”¹⁰⁴ The second priority goes on to express some concern for the best interest or rehabilitation of the juvenile offender through the goal of providing “treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child’s conduct.”¹⁰⁵ It is not until the third enumerated priority that the code specifically focuses on the well-being of the juvenile. Thus, it is subsequent to both protecting the public and promoting punishment for criminal acts that the state aims to “provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions.”¹⁰⁶

Not only does the Juvenile Justice Code prioritize public safety over the well-being of the juvenile, but Texas courts share a similar sentiment. In *Burnell v. State*, the Texas Court of Appeals upheld a twenty-five-year sentence for an aggravated robbery committed by a juvenile who was certified and tried as an adult.¹⁰⁷ In that instance, Burnell argued that his twenty-five-year sentence violated his right under both the Eighth Amendment and the Texas Constitution to be free from cruel and unusual punishment.¹⁰⁸ The court disagreed with Burnell because the Eighth Amendment does not mandate “strict proportionality between crime and sentence; rather, it forbids only extreme sentences that are grossly disproportionate to the crime.”¹⁰⁹ The court responded that Burnell, who was sentenced to twenty-five years, ignored the fact that the holding in *Graham* applied only to juveniles

103. TEX. FAM. CODE ANN. § 51.01(1).

104. *Id.* § 51.01(2)(A)–(B).

105. *Id.* § 51.01(2)(C).

106. *Id.* § 51.01(3).

107. *Burnell v. State*, No. 01–10–00214–CR, 2012 WL 29200, at *1 (Tex. App.—Houston [1st Dist.] Jan. 5, 2012, pet. ref’d) (mem. op.).

108. *Id.* at *8.

109. *Id.*; U.S. CONST. amend. VIII; *Ewing v. California*, 538 U.S. 11, 23 (2003).

sentenced to life without parole.¹¹⁰ The court also reiterated that Texas courts have found that as long as a punishment falls within the limits prescribed by a valid state statute, the punishment “cannot be considered excessive, cruel, or unusual.”¹¹¹ *Burnell* is relevant to this Comment because it reiterated Texas’s stance that as long as a punishment term is within the statutorily defined range, it does not violate the prohibition against cruel and unusual punishment. Thus, the practice of condemning certified juvenile non-homicide offenders to life sentences is accepted and allowed in Texas because life sentences fall within the statutorily defined punishment range for adults.

However, Texas has been somewhat ahead of the national movement away from the harsh sentencing of juveniles. In 2009, the Texas Legislature acted on this issue and eliminated life without parole for juveniles tried as adults and juveniles tried for capital murder.¹¹² Also in 2009, the Texas Legislature allowed for parole eligibility for juvenile capital offenders after serving forty years.¹¹³ These decisions were made prior to the Supreme Court’s decision in *Graham*. Texas also banned life sentences for juveniles sixteen and younger.¹¹⁴ In 2013, Texas expanded the ban on life sentences to include seventeen-year-old offenders, although this ban did not apply to juveniles certified as adults.¹¹⁵ The current policy in Texas is that juvenile offenders can be sentenced to life with the possibility of parole after forty years.¹¹⁶

Following the Supreme Court decisions in *Miller* and *Montgomery*, other states have chosen to resentence juvenile offenders; however, Texas has problematically decided that each inmate must apply individually for review.¹¹⁷ The most recent numbers reported by the Texas Department of Corrections in July of 2017 indicate that there are currently twelve inmates in Texas serving life sentences without the possi-

110. *Burnell*, No. 01–10–00214–CR, 2012 WL 29200, at *8; see also *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972).

111. *Burnell*, No. 01–10–00214–CR, 2012 WL 29200, at *8; see also *Samuel*, 477 S.W.2d at 614.

112. TEX. FAM. CODE § 54.02 (juveniles who are certified and tried as adults); TEX. PENAL CODE § 12.31(a)(1) (juvenile certified and tried for capital felony under this statute cannot be sentenced to life without parole and can only be sentenced to the maximum of life with a possibility of parole in 40 years).

113. FAM. § 54.04(d)(3)(A); see also TEX. GOV’T CODE § 508.145(b).

114. Robert Downen, *Case Highlights How Juveniles Fare in Texas Criminal Justice System*, SAN ANTONIO EXPRESS-NEWS (Dec. 2, 2017), <https://www.expressnews.com/news/local/article/Case-highlights-how-juveniles-fare-in-Texas-12401020.php> [<https://perma.cc/TS9N-5EV7>].

115. *Id.*; see also TEX. PENAL CODE § 12.31; TEX. CODE CRIM. PROC. ANN. § art. 37.071.

116. Downen, *supra* note 114; see also ACLU, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES 161 (Nov. 2016), https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlinesingle.pdf [<https://perma.cc/44UQ-QPWZ>].

117. Downen, *supra* note 114.

bility of the parole for offenses committed before the age of eighteen.¹¹⁸

B. *The Modern Juvenile Justice Code in Texas*

The Texas Legislature enacted Title 3 of the Family Code in 1973, thereby creating the statutory basis for juvenile justice in Texas.¹¹⁹ The stated goals from 1973 were as follows: “(1) to provide for the care and development of a child; (2) to remove the stigma of criminality from the unlawful acts of a child; (3) to separate a child from his or her parents only when necessary and to give the child needed care; and (4) to provide a simple judicial procedure to ensure a fair hearing and enforcement of constitutional rights.”¹²⁰ These goals attempted to balance the concern for the juvenile offender with the need to provide for the safety of the community.¹²¹ However, as the type of crimes committed by juveniles began to change, it became clear to the Texas Legislature that these goals were failing both to protect the public and to best serve juvenile offenders.¹²² In 1995, in the midst of the amplified fear of the “superpredator,” the Texas Legislature created the Juvenile Justice Code as part of the Texas Family Code.¹²³ It was this enactment of the Juvenile Justice Code that stated as its first priority the strengthening of public safety.¹²⁴ It is not until the fourth—and final priority—that the purpose is to “provide treatment, training, and rehabilitation” for juvenile offenders.¹²⁵ Beginning in 2011, the Texas Juvenile Justice Department (“TJJD”) became the single state agency responsible for supervising and providing the necessary rehabilitative services in the juvenile justice system.¹²⁶

The Juvenile Justice Code defines a “child” as someone who is older than ten and younger than seventeen, or someone between the ages of seventeen and eighteen “who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.”¹²⁷ Juvenile courts generally lose their jurisdiction when a person turns eighteen.¹²⁸ Additionally, Texas juvenile courts have jurisdiction over two types of juvenile misconduct—conduct indicating a need for supervi-

118. *Id.*

119. TEX. ATTORNEY GEN., 2018 JUVENILE JUSTICE HANDBOOK 1 (2018), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/juvenile-justice/JuvenileJusticeHandbook.pdf> [<https://perma.cc/6TDE-SD3T>].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1–2.

127. TEX. FAM. CODE ANN. § 51.02(2)(A)–(B); TEX. ATTORNEY GEN., *supra* note 119, at 5.

128. TEX. ATTORNEY GEN., *supra* note 119, at 5.

sion (“CINS”) and delinquent conduct.¹²⁹ CINS offenses involve the less serious criminal offenses, other than traffic offenses, as well as certain status offenses.¹³⁰ Section 51.03 of the Juvenile Justice Code defines CINS offenses as any fineable-only offense, running away from home, inhalant abuse, expulsion for violating a district’s student code of conduct, prostitution, and sexting.¹³¹ If a juvenile is convicted of committing a CINS offense, the juvenile may be placed on various levels of probation but cannot be sentenced to confinement in TJJD, which are the state juvenile corrections facilities that range from low-to-high security and function more like prisons.¹³²

Of greater import to this Comment are the juveniles convicted of Delinquent Conduct under section 51.03(a) of the Juvenile Justice Code.¹³³ Delinquent Conduct covers the more serious offenses and does allow for a juvenile to be confined to TJJD. Delinquent Conduct consists of: (1) any felony offenses or jailable misdemeanors; (2) violation of a lawful court order that would constitute contempt of court; (3) driving, flying, or boating while intoxicated; (4) intoxication assault; (5) intoxication manslaughter; and (6) a third offense of driving under the influence of alcohol.¹³⁴ There are a variety of sentencing options available to juvenile courts in Texas: indeterminate sentences, determinate sentences, and waiver of the juvenile court’s jurisdiction to an adult criminal court, known as certification.

C. Indeterminate Sentences

One type of sentence utilized in Texas is so-called “indeterminate sentencing,” which essentially means that juvenile offenders do not receive a specific term of years that they have to spend in TJJD, but rather they may remain in TJJD custody until they turn nineteen unless they qualify for early release.¹³⁵ Upon initial arrival at TJJD, a juvenile receives a minimum length of stay (“MLOS”) between nine and twenty-four months.¹³⁶ The MLOS is determined by (1) the severity of the juvenile’s offense, as determined by the felony level of the offense and the presence of any aggravating factors, such as the use of

129. *Id.* at 23; FAM. § 51.03(a)–(b).

130. FAM. § 51.03(b).

131. *Id.*; TEX. ATTORNEY GEN., *supra* note 119, at 23.

132. FAM. § 54.04(o)(1); TEX. ATTORNEY GEN., *supra* note 119, at 23. *See generally* *The Juvenile Justice System in Texas*, TEX. JUV. JUST. DEP’T, <http://www.tjjd.texas.gov/index.php/juvenile-system#overview> (last visited Jan. 25, 2020) [<https://perma.cc/3CHQ-VV4Z>] (for a full explanation of how juveniles in Texas move through TJJD from court appearance to parole).

133. FAM. § 51.03(a).

134. *Id.*

135. *Determining Stay—Indeterminate Commitments*, TEX. JUV. JUST. DEP’T, <http://www.tjjd.texas.gov/index.php/juvenile-system#indeterminate-commitments> (last visited Jan. 10, 2020) [<https://perma.cc/4AWT-LRZY>]; TEX. ATTORNEY GEN., *supra* note 119, at 20.

136. *Determining Stay—Indeterminate Commitments*, *supra* note 135.

a weapon; and (2) the risk the juvenile poses to the community based on any past criminal history.¹³⁷ Based on past criminal history, juveniles receive an assessment rating of high, medium, or low, and their overall MLOS will then be determined by where their offense severity rating and community threat assessment rating intersect.¹³⁸ A juvenile with an indeterminate sentence becomes eligible for release on parole once the MLOS, any required treatment, or other rehabilitative programs are completed.¹³⁹ However, if a juvenile completes the MLOS but fails to complete any required treatment or other rehabilitation, a TJJD Review Panel will review the juvenile’s progress to determine if the juvenile needs further treatment in a residential setting.¹⁴⁰

D. *Determinate Sentences*

In situations involving the most serious felony offenses, Texas juvenile courts have the option of either utilizing determinate sentencing or certifying the juvenile as an adult and transferring the case to adult criminal court.¹⁴¹ Texas took a progressive stance on this issue in 1987 by implementing determinate sentencing for some juvenile offenders as an alternative to lowering the age at which all juveniles would be tried as adults.¹⁴² In most juvenile cases, the juvenile justice system can only retain jurisdiction over the juvenile for a limited amount of time—if the juvenile is placed on probation, the probation must end on or before the juvenile turns eighteen.¹⁴³ If a juvenile is committed to TJJD, that sentence must be completed on or before the day the juvenile turns nineteen.¹⁴⁴ However, determinate sentences can result in a juvenile’s sentence extending beyond his nineteenth birthday.¹⁴⁵ Texas has implemented sentencing guidelines for determinate sentences, in which a capital felony, first degree felony, or an aggravated controlled substance felony may result in a maximum sentence of forty years.¹⁴⁶ Similarly, a second degree felony can result in a max-

137. *Determining Stay—Calculating Minimum Length of Stay for Indeterminate Commitment of Youth*, TEX. JUV. JUST. DEP’T, <http://www.tjjd.texas.gov/index.php/juvenile-system#calculating-minimum-length-of-stay-for-indeterminate-commitment-of-youth> (last visited Jan. 10, 2020) [<https://perma.cc/M8F6-HD9B>].

138. *Id.*

139. *Determining Stay—Indeterminate Commitments*, *supra* note 135.

140. *Id.*

141. TEX. FAM. CODE ANN. § 53.045 (Offenses Eligible for Determinate Sentence); FAM. § 54.02 (Waiver of Jurisdiction and Discretionary Transfer to Criminal Court); TEX. ATTORNEY GEN., *supra* note 119, at 25.

142. *Sentenced Offenders and Determinate Sentencing*, TEX. JUV. JUST. DEP’T, <http://www.tjjd.texas.gov/index.php/juvenile-system#sentenced-offenders-and-determinate-sentencing> (last visited Jan. 10, 2020) [<https://perma.cc/G8F3-VSLS>].

143. FAM. § 54.04(l) (“probation may not continue on or after the child’s 18th birthday”); TEX. ATTORNEY GEN., *supra* note 119, at 24.

144. FAM. § 54.04(d)(3); TEX. ATTORNEY GEN., *supra* note 119, at 24.

145. FAM. § 54.04(d)(3); TEX. ATTORNEY GEN., *supra* note 119, at 24.

146. FAM. § 54.04(d)(3)(A); TEX. ATTORNEY GEN., *supra* note 119, at 24.

imum sentence of twenty years, and a third degree felony can result in a sentence of up to ten years.¹⁴⁷

In order for a determinate sentence to be considered by the court, the prosecutor must file a petition for determinate sentence, the court must be informed at the time charges are filed, and the prosecutor must seek approval from the grand jury for the determinate sentence.¹⁴⁸ Pursuant to the Juvenile Justice Code, the most serious offenses—murder, capital murder, manslaughter, aggravated assault, and aggravated robbery—are available for determinate sentencing.¹⁴⁹ Age, however, is not a factor considered when seeking a determinate sentence—rather, only the *type* of offense is considered.¹⁵⁰ With determinate sentences, Texas has also delineated parole eligibility guidelines.¹⁵¹ For example, for the offense of capital murder, a juvenile must remain incarcerated for a minimum of ten years before becoming parole-eligible.¹⁵²

If a juvenile is sentenced to probation, the sentence cannot exceed ten years, and if the probation period extends beyond the juvenile turning nineteen, the juvenile court must either discharge the probation altogether or transfer supervision of the probation to the adult system.¹⁵³ The decision regarding whether to transfer to the adult system or discharge the probation is based in part on whether the offender has responded to rehabilitative efforts and whether the individual continues to pose a threat to public safety—which is partly determined by behavior while incarcerated.¹⁵⁴ It is important to note that if a court transfers the juvenile's probation to the adult system,

147. FAM. § 54.04(d)(3)(B)–(C); TEX. ATTORNEY GEN., *supra* note 119, at 24.

148. FAM. § 53.045(a)–(b); TEX. ATTORNEY GEN., *supra* note 119, at 24.

149. FAM. § 53.045(a). Pursuant to section 53.045(a) of the Texas Family Code, the full list of offenses for which a juvenile may receive a determinate sentence includes: Murder (TEX. PENAL CODE § 19.02); Capital Murder (PENAL CODE § 19.03); Manslaughter (PENAL CODE § 19.04); Aggravated Kidnapping (PENAL CODE § 20.04); Sexual Assault (PENAL CODE § 22.011) or Aggravated Sexual Assault (PENAL CODE § 22.021); Aggravated Assault (PENAL CODE § 22.02); Aggravated Robbery (PENAL CODE § 29.03); Injury to a Child, Elderly or Disabled Individual (PENAL CODE § 22.04) (if the offense is punishable as a felony, other than a state jail felony); Felony Deadly Conduct (PENAL CODE § 22.05(b)) (by discharging a firearm); First Degree or Aggravated Controlled Substances Felony (Ch. 481, Health and Safety Code); Criminal Solicitation (PENAL CODE § 15.03); Indecency with a Child (PENAL CODE § 21.11(a)(1)); Criminal Solicitation of a Minor (PENAL CODE § 15.031); Criminal Attempt (PENAL CODE § 15.01) (if the offense attempted was murder, capital murder, or an offense listed under article 42A.054(a) of the Criminal Procedure Code); Arson (PENAL CODE § 28.02) (if bodily injury or death occurs); or Intoxication Manslaughter (PENAL CODE § 49.08).

150. Sarah Bruchmiller & Hans Nielsen, *Determinate Sentencing for Juveniles*, TEX. DISTRICT & COUNTY ATT'YS ASS'N, <https://www.tdcaa.com/journal/determinate-sentencing-juveniles> (last visited Jan. 11, 2020) [<https://perma.cc/4SQ8-P2MS>].

151. *Id.*

152. *Id.*

153. FAM. §§ 54.04(q), 54.051; TEX. ATTORNEY GEN., *supra* note 119, at 24.

154. TEX. ATTORNEY GEN., *supra* note 119, at 24–25.

there are several restrictions and minimum probation terms that do not apply.¹⁵⁵ Moreover, if the judge were to revoke the juvenile’s probation, the judge would have the discretion to reduce the sentence to any amount of time without consideration of the minimum terms that are required of adult offenders.¹⁵⁶ Determinate sentencing is typically used as an alternative to certification as an adult in situations in which the juvenile commits a serious felony offense but lacks any prior criminal history.¹⁵⁷

Through its adoption of determinate sentencing, Texas has made strides to address the issue of virtual life sentences for juveniles because under a determinate sentence, the juvenile will have a mandatory parole review—the minimum length of incarceration before parole eligibility depends on the offense committed—and a maximum sentence of forty years.¹⁵⁸ This attempts to satisfy *Graham*’s requirement that a juvenile have a “meaningful opportunity” for release because these juveniles know that good behavior and demonstrated efforts to reform themselves, no matter how serious their offense was, help increase the likelihood of being released on parole at a young enough age to still have a meaningful adult life.¹⁵⁹ Although a forty-year sentence likely seems interminable to juvenile offenders, the very fact that their behavior and choices while incarcerated will have an impact on their ability to be released can help fulfill one of the ultimate purposes of incarceration—rehabilitation.¹⁶⁰ If a juvenile is sentenced to a virtual life sentence, the juvenile completely lacks any incentive to make efforts at rehabilitation while incarcerated. The next Section will discuss the specific legal gap this Comment addresses: what happens to juvenile non-homicide offenders who do not receive determinate sentences, but rather are certified as adults.

E. Certification as an Adult

Although Texas has adopted determinate sentencing for some juvenile offenders, a gap in the law continues to exist regarding juvenile non-homicide offenders who are certified and tried in adult courts. Texas juvenile courts may certify children fourteen and older to be tried as adults by waiving their exclusive original jurisdiction and transferring the juvenile to adult criminal district court.¹⁶¹ Juveniles

155. *Id.*

156. FAM. § 54.051(e-1)–(e-2); TEX. ATTORNEY GEN., *supra* note 119, at 24.

157. Bruchmiller & Nielsen, *supra* note 150.

158. *Id.*; TEX. ATTORNEY GEN., *supra* note 119, at 24.

159. *Graham v. Florida*, 500 U.S. 48, 51 (2010).

160. TEX. FAM. CODE ANN. § 51.01(2)(C).

161. *Id.* § 54.02(a); TEX. ATTORNEY GEN., *supra* note 119, at 25. A podcast discussing the case of fifteen-year-old Miguel Navarro, who was tried and certified as an adult and sentenced to ninety-nine years, can be found at *Adult Crime, Adult Time: How Texas Fast-Track Kids to Life in Prison*, TEX. STANDARD (Dec. 18, 2016),

between the ages of fourteen and fifteen can only be certified for capital felonies, aggravated controlled substance felonies, and first-degree felonies.¹⁶² Juveniles fifteen and older at the time of the offense can be certified for any felony offense, including state jail felonies.¹⁶³

In Texas, certification is ideally only used in cases involving the most serious felony offenses.¹⁶⁴ However, there remains a common misconception that only “the worst of the worst” of juvenile offenders are certified as adults, an idea that is not supported by the facts.¹⁶⁵ A comprehensive 2011 report from the LBJ School of Public Affairs at the University of Texas at Austin highlights this fallacy.¹⁶⁶ The report revealed that certified juveniles are “neither more violent nor more persistent in their criminal behavior than the determinate sentence juveniles.”¹⁶⁷ Additionally, as of the data available at that time, about 15% of certified juveniles had been charged with non-violent offenses; the vast majority of certified juveniles did not have prior violent criminal histories, and for more than one-fourth of the certified population, the offense they were certified for was the first time they had ever been involved with the justice system.¹⁶⁸ Although there are certainly violent offenders amongst the certified population, due to the exercise of prosecutorial discretion in seeking waivers to adult criminal court, not every child who stands trial in an adult criminal court—and receives an adult sentence—is violent, and they are certainly not unredeemable.¹⁶⁹

Once certified as adults, juveniles are forever treated as adults, and the judge or jury may sentence the juveniles as such.¹⁷⁰ This does come with the important exception that even certified juveniles may not be sentenced to death or mandatory life without the possibility of parole, which an adult who committed the same offense could have received.¹⁷¹ Notably, life imprisonment is still available.¹⁷²

The prosecution seeks certification through a petition to the juvenile court to waive its exclusive original jurisdiction and transfer the

<https://www.texasstandard.org/stories/adult-crime-adult-time/> [perma.cc/5MFG-L3JH].

162. FAM. § 54.02(a)(2)(A).

163. *Id.* § 54.02(a)(2)(B).

164. *Id.*

165. MICHELE DEITCH, JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM IN TEXAS 32 (Mar. 2011), <https://lbj.utexas.edu/sites/default/files/file/news/juveniles-texas-final.pdf> [perma.cc/L9BC-XN4U].

166. *Id.*

167. *Id.*

168. *Id.*

169. NELLIS, *supra* note 95, at 5.

170. *See* TEX. ATTORNEY GEN., *supra* note 119, at 26.

171. *See id.*

172. Bruchmiller & Nielsen, *supra* note 150.

case to the appropriate adult criminal court.¹⁷³ Before a juvenile can be certified, the juvenile court must order and obtain a diagnostic study, social evaluation, and full investigation into the juvenile, the juvenile’s circumstances, and the circumstances of the alleged offense.¹⁷⁴ The Texas Legislature has not established specifically what these diagnostic studies must include, but they are to be used by the court in determining whether to waive jurisdiction.¹⁷⁵ Typically these diagnostic studies include a forensic examination of the offender by a clinical psychologist or psychiatrist and a social investigation by the juvenile probation department to address issues like the juvenile’s sophistication, maturity, background, and family history.¹⁷⁶

In determining whether to waive jurisdiction, the juvenile court must consider (1) whether the juvenile committed the alleged offense against a person or property (typically only offenses committed against a person are sufficient for certification), (2) the juvenile’s sophistication and maturity, (3) the previous history and record of the juvenile, and (4) the ongoing danger the juvenile poses to the public and the likelihood of rehabilitation with the resources currently available to that juvenile court.¹⁷⁷

Another component of certification is “mandatory certification,” which is essentially the idea that once a juvenile has been certified, he is always certified.¹⁷⁸ This mandatory certification is not an automatic certification procedure—rather, the prosecutor has discretion to decide whether to seek a mandatory certification.¹⁷⁹ However, if the prosecutor chooses to seek a mandatory certification, and the statutory requirements are met, the juvenile court must waive the case to adult court.¹⁸⁰ “Mandatory transfer requires (1) the child was previously transferred to criminal court for criminal proceedings; and (2) the child has allegedly committed a new felony offense before becoming seventeen years old.”¹⁸¹ This means that if the juvenile was previously certified as an adult and convicted of that offense and also has allegedly committed another felony offense, the juvenile court must waive jurisdiction.¹⁸² The purpose behind mandatory certification is to

173. TEX. FAM. CODE ANN. § 54.02(a); TEX. ATTORNEY GEN., *supra* note 119, at 25.

174. TEX. ATTORNEY GEN., *supra* note 119, at 26; FAM. § 54.02(d).

175. FAM. § 54.02(d); *see also* KAMERON D. JOHNSON, CERTIFICATIONS IN TEXAS: A GENERAL OVERVIEW 8 (Feb. 26, 2018), <https://juvenilelaw.org/wp-content/uploads/2018/02/05-Certifications.pdf> [perma.cc/H687-NS74] (citing *R.E.M. v. State*, 532 S.W.2d 645 (Tex. App.—San Antonio 1975, writ ref’d)).

176. JOHNSON, *supra* note 175, at 9.

177. FAM. § 54.02(f)(1)–(4); TEX. ATTORNEY GEN., *supra* note 119, at 26.

178. FAM. § 54.02(m)–(n); *see also* JOHNSON, *supra* note 175, at 15.

179. JOHNSON, *supra* note 175, at 15.

180. *Id.*

181. FAM. § 54.02(m); JOHNSON, *supra* note 175, at 15.

182. JOHNSON, *supra* note 175, at 15.

save time and resources in adjudicating a juvenile who has previously been convicted in an adult court.¹⁸³

In Texas, the issue of juveniles receiving virtual life sentences arises in the context of juveniles that are certified as adults. Juvenile non-homicide offenders may receive vastly different sentences depending on whether they are tried as juveniles and receive a determinate sentence or whether they are certified and tried in the adult system. Take for example, a situation in which two juveniles commit an aggravated robbery.¹⁸⁴ One was sixteen-years-old and his case was handled by the juvenile court.¹⁸⁵ In contrast, the other had recently turned seventeen, just weeks before the offense, and as a result now faced the adult system.¹⁸⁶ The sixteen-year-old received a determinate sentence of probation in which he was closely monitored but still able to graduate high school, begin online college classes, complete in-patient drug treatment, receive therapy and family counseling, and participate in community service.¹⁸⁷ In stark contrast, his seventeen-year-old co-defendant was tried as an adult, sentenced to prison, and thus had far fewer resources available for rehabilitation both during his incarceration and after his release.¹⁸⁸

Nationally, there are 2,000 people serving virtual life sentences for crimes committed as juveniles.¹⁸⁹ Of these 2,000 people, nearly 450 of them are in Texas.¹⁹⁰ More than a quarter of the juvenile offenders serving virtual life sentences in Texas were convicted of a non-homicide offense—aggravated assault.¹⁹¹ Only 17% of certified juveniles in Texas committed homicide.¹⁹² The number of juvenile cases that have been waived into adult criminal courts has fluctuated over time.¹⁹³ A record high of 311 cases were waived into adult court in 2000, which was followed by a general decline that peaked again in 2006 at 293 cases.¹⁹⁴ An all-time low of seventy-nine cases were waived in 2015, only to nearly double to 156 in 2016.¹⁹⁵ The trend towards more certi-

183. *Id.*

184. Bruchmiller & Nielsen, *supra* note 150.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Ashley Nellis, *Life Sentences, Long Sentences Imposed on Youth Need 2nd Look*, JUV. JUST. INFO. EXCHANGE (Aug. 2, 2017), <https://jjie.org/2017/08/02/life-and-long-sentences-imposed-on-youth-need-a-second-look/> [https://perma.cc/HVA3-H7R5].

190. *Id.*

191. NELLIS, *supra* note 95, at 18.

192. DEITCH, *supra* note 165, at X.

193. *Texas: Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., <http://www.jggs.org/jurisdictional-boundaries/texas#transfer-provisions?age=-1&offense=-1&policy=1&year=2016> (last visited Jan. 11, 2020) [https://perma.cc/T57L-FGYC].

194. *Id.*

195. *Id.*

fications continued between 2016 and 2017, which saw a 5.6% increase in the number of juveniles certified, accompanied by an 8.5% increase in the number of certified commitment dispositions.¹⁹⁶ These fluctuations demonstrate that Texas has not clearly delineated what types of cases and circumstances merit waiver into adult court, and thereby, which juveniles merit certification as adults to face potential virtual life sentences.

The discretion afforded to prosecutors and juvenile courts in Texas in determining whether a juvenile is certified as an adult has contributed to the legal gap that allows some juvenile non-homicide offenders to receive virtual life sentences in adult criminal courts. In contrast, other juvenile offenders, including homicide offenders, receive determinate sentences that mandate parole review, and potential release, after a maximum of forty years. Although forty years may seem like an eternity to a juvenile offender, a fifteen-year-old who receives the maximum determinate sentence of forty years, will, at the latest, be released at the age of fifty-five, which provides an opportunity for a meaningful and productive life. In contrast, a certified juvenile who commits the same offense could be sentenced to life imprisonment and remain incarcerated well into the juvenile’s elder years.

F. *Attempts at Reform in Texas*

There are a number of groups in Texas, including the Texas Criminal Justice Coalition,¹⁹⁷ advocating for “Second Look” bills that would make juvenile inmates eligible for release after twenty years—which essentially would mean mandatory parole review after twenty years.¹⁹⁸ This type of reform would conform with the Supreme Court’s holding in *Graham* that juvenile offenders must have a “meaningful opportunity” for release because people sentenced as juveniles could potentially be released in their thirties, rather than their mid-fifties or later, thereby giving them a more meaningful chance to have a life after prison.¹⁹⁹ During the 2017 legislative session, the Juvenile Justice and Family Issues Committee of the Texas House of Representatives considered HB 1274.²⁰⁰ This bill aimed to lower the parole eligibility from thirty years or one-half of the sentence, whichever is less, to

196. TEX. JUVENILE JUSTICE DEP’T, THE STATE OF JUVENILE PROBATION ACTIVITY IN TEXAS 10 (2018), <http://www.tjjd.texas.gov/index.php/doc-library/send/334-state-of-jvenile-probation-activity/1255-the-state-of-jvenile-probation-activity-in-texas-2017> [https://perma.cc/LK55-3V2B].

197. Lindsey Linder, *Support a Meaningful Opportunity for Release for Youth Sentenced to Adult Facilities*, TEX. CRIM. JUST. COALITION (2017), <https://www.texascjc.org/system/files/publications/HB%201274%20Fact%20Sheet%20%28Second%20Look%29.pdf> [https://perma.cc/RH64-AAQH].

198. Downen, *supra* note 114.

199. *Graham v. Florida*, 560 U.S. 48, 74 (2010).

200. Tex. H.B. 357, 78th Leg., R.S. (2017).

twenty years or one-half of the sentence, whichever is less.²⁰¹ HB 1274 survived out of House Committee on Criminal Jurisprudence, but died on the House floor.²⁰²

Texas is one of only five states that classify juveniles as adults after they reach their seventeenth birthday.²⁰³ Another bill, HB 344, a “Raise the Age Bill” aimed to re-classify seventeen-year-olds as juveniles for all offenses.²⁰⁴ The House had not voted on this bill by the end of the 2019 legislative session.²⁰⁵ In 2017, HB 316, which sought to address this issue by strictly classifying seventeen-year-olds as juveniles, died in the Senate.²⁰⁶ In 2015, five bills were filed in the Texas Legislature aimed at raising the age of “adulthood” for juvenile offenders from seventeen to eighteen—all died in the Senate.²⁰⁷ Most recently, during the 2019 legislative session, SB 155 and HB 256 did not make it out committee.²⁰⁸ Both bills proposed changing parole eligibility for juveniles convicted of certain offenses from thirty-five to twenty years.²⁰⁹ To successfully enact any juvenile justice reform measures, a strong advocate in the Texas Senate will likely need to help push any such legislation through. During the 2019 legislative session, there was no pending legislation that sought to address the issue of juvenile non-homicide offenders certified as adults receiving virtual life sentences in Texas.²¹⁰

IV. EXAMINATION OF JUVENILE JUSTICE CODE IN MISSOURI

In Missouri, where Bobby committed his offenses, the state Juvenile Code asserts that its purpose is to “facilitate the care, protection and

201. *Id.*

202. *Id.*; see generally Downen, *supra* note 114.

203. TEX. FAM. CODE ANN. § 51.02(2)(A)–(B); Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. ST. LEGISLATURES (Jan. 11, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx> [https://perma.cc/3DWZ-VDS6].

204. Tex. H.B. 344, 86th Leg., R.S. (2019).

205. *Id.*; Adela Uchida, *New Bill Would Put 17-Year-Old Inmates in Juvenile Detention Center Instead of Jail*, CBS AUSTIN NEWS (Dec. 14, 2018), <https://cbsaustin.com/news/local/new-bill-would-put-17-year-old-inmates-in-juvenile-detention-center-instead-of-jail> [https://perma.cc/L7MR-4AAH]; *Research from the LBJ School Informs Raise the Age Bill*, TEX. LBJ SCH. (Apr. 27, 2017), <https://lbj.utexas.edu/research-lbj-school-informs-raise-age-bill> [https://perma.cc/7YDJ-CE3Q].

206. Tex. H.B. 316, 85th Leg., 1st C.S. (2017).

207. *Research from the LBJ School Informs Raise the Age Bill*, *supra* note 205.

208. Tex. S.B. 155, 86th Leg., R.S. (2019); Tex. H.B. 256, 86th Leg., R.S. (2019).

209. *Id.* (SB 155 and HB 256 would have been applicable to juveniles convicted of: Continuous Trafficking of Persons (TEX. PENAL CODE § 20A.03), Continuous Sexual Abuse of Young Child or Children (TEX. PENAL CODE § 21.02), Indecency with a Child (TEX. PENAL CODE § 21.11(a)(1)), Aggravated Sexual Assault (TEX. PENAL CODE § 22.021), or offenses classified as Repeat and Habitual Felony Offenders on Trial for First, Second, or Third-Degree Felony (TEX. PENAL CODE § 12.42(c)(2))).

210. *86th Legislation Wrap-Up*, NAT’L ASS’N SOCIAL WORKERS (last visited Feb. 3, 2020), https://www.naswtx.org/page/PubPol_LegTrack2 [https://perma.cc/5MQQ-B6Z6].

discipline of children who come within the jurisdiction of the juvenile court” and that the “child welfare policy of this state is what is in the best interests of the child.”²¹¹ Despite the purposes set forth by the Missouri Juvenile Code, juveniles in Missouri are still sentenced to life without parole for some offenses, and adult inmates serving life without parole who committed their offenses as juveniles are left without much guarantee of relief.²¹² In 2016, Missouri passed a law that makes juvenile offenders eligible for parole after twenty-five years.²¹³ Despite this measure, however, twenty of the twenty-three juveniles sentenced to life without parole who have sought release on parole have been denied.²¹⁴ It appears that even though Missouri lawmakers prioritize the best interest of the child in statute, the laws in Missouri, when carried out in practice, prioritize the perceived safety of the public, even though it is arguable whether some juvenile offenders actually constitute a threat to public safety.

A. *The Irony of the “Missouri Miracle”*

Ironically, Missouri has been dubbed the “Missouri Miracle” because of the growing success of its juvenile justice system since the 1980s.²¹⁵ The Missouri juvenile justice system has focused on placing some offenders in small facilities rather than prisons.²¹⁶ These facilities typically hold anywhere between ten and thirty juveniles and are run by highly trained staff that work in small groups with the juveniles.²¹⁷ These facilities utilize a “rehabilitative and therapeutic model that works towards teaching the young people to make positive, lasting changes in their behavior.”²¹⁸ The use of these smaller and more rehabilitation-focused centers has led Missouri to have some of the best outcomes for juvenile offenders, with fewer than 8% of the juveniles returning after release and fewer than 8% going on to serve time in prison.²¹⁹ One-third of the juveniles return home with a high school diploma or GED, and 50% of them are able to successfully reintegrate into school.²²⁰ These facilities do not only serve what have been called “lightweight” offenders who have committed only minor

211. MO. REV. STAT. § 211.011 (2016).

212. *A State-by-State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 31, 2017), <https://apnews.com/9debc3bdc7034ad2a68e62911fba0d85> [<https://perma.cc/R5VX-9VWZ>].

213. *Id.*

214. *Id.*

215. Marian Wright Edelman, *Juvenile Justice Reform: Making the ‘Missouri Model’ an American Model*, CHILD. DEF. FUND (Mar. 12, 2010), <https://www.childrensdefense.org/child-watch-columns/health/2010/juvenile-justice-reform-making-the-missouri-model-an-american-model/> [<https://perma.cc/X8XT-3E55>].

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

offenses.²²¹ Juvenile offenders who have committed serious crimes are also sent to these facilities.²²² The “Missouri Model” is currently being considered for implementation by other cities and states around the country.²²³ Despite the existence of these facilities at the time Bobby was sentenced, the vagaries inherent in our nation’s juvenile justice system allowed Bobby to be sentenced to 241 years rather than any attempts be made to rehabilitate him in one of these facilities.

V. HOW STATES HAVE RESPONDED: THE STATES ARE SPLIT

States around the nation are currently split in how they handle virtual life sentences that contravene *Graham*’s prohibition on juvenile life without parole.

A. *States Holding Graham Does Not Apply to Virtual Life Sentences*

A prime example of this split can be seen in *Willbanks v. Missouri Department of Corrections*, a case from Bobby’s home state of Missouri.²²⁴ In *Willbanks*, a juvenile non-homicide offender was sentenced to several hundred years in prison for seven felonies and was not eligible for parole until the age of eighty-five.²²⁵ The *Willbanks* majority found that *Graham* “held that the Eighth Amendment barred sentencing a juvenile to a *single* sentence of life without parole for a nonhomicide offense. Because *Graham* did not address juveniles who were convicted of *multiple* nonhomicide offenses and received multiple fixed-term sentences, as *Willbanks* had, *Graham* is not controlling.”²²⁶ However, the three dissenting judges in *Willbanks* had a more persuasive argument—*Willbanks*’ virtual life sentence did violate *Graham* because it did not provide a “meaningful opportunity for release.”²²⁷ The dissent’s reasoning is correct—a virtual life sentence in which persons will only have an opportunity for parole when they are elderly, perhaps even over 100 years old, can by no stretch of the imagination qualify as “meaningful opportunity for release” and provides no incentives for troubled young people in prison to attempt rehabilitation. The likelihood that the Supreme Court in *Graham* intended that a release from prison at the age of eighty-five constituted a “meaningful opportunity” for release is unlikely and borders on absurd.

Like Missouri, Louisiana is another state in which state law does not conform with the Supreme Court’s ruling that life without parole

221. *Id.*

222. *Id.*

223. *Id.*

224. *Willbanks v. Dep’t of Corr.*, 522 S.W.3d 238 (Mo. 2017).

225. *Id.* at 240–42.

226. *Id.* at 239–40.

227. *Id.* at 270.

sentences for juveniles are unconstitutional.²²⁸ In 2017, a Louisiana bill that would have eliminated juvenile life without parole was rewritten and watered down to the point of making it ineffective.²²⁹ This bill would have impacted 300 inmates in Louisiana and made them eligible for parole after serving twenty-five years.²³⁰ The rewritten bill actually does the opposite of what it was intended to do: it now allows the life without parole sentences to stand, and gives courts the discretion to continue sentencing juveniles convicted of first-degree murder to life without parole.²³¹ It is important to note that the main arguments against the earlier version of the bill came from political lobbying by district attorneys in the state who opposed such reform.²³²

Following Louisiana and Missouri, Michigan is yet another state in which juveniles continue to be sentenced to life without parole.²³³ Yusef Qualls-El, at the age of sixteen, participated in a violent crime spree that led him to be charged with two counts of first-degree premeditated murder, assault with intent to murder, first-degree home invasion, and a felony firearm possession.²³⁴ All of these are serious offenses, particularly for a sixteen-year-old.²³⁵ However, Qualls-El was only the driver.²³⁶ A Michigan state court sentenced Qualls-El to life without parole after he declined a plea deal for twenty-two years.²³⁷

Michigan, the state in which Qualls-El was sentenced, has the second highest number of juvenile offenders sentenced to life without parole.²³⁸ Despite the decisions of the Supreme Court, prosecutors in Michigan filed motions to uphold life without parole in 229 of the 363 appeals cases.²³⁹ As of 2018, fewer than 10% of those sentenced to life without parole as juveniles have been released.²⁴⁰ Thus, despite the Constitutional ban on life without parole sentences for juveniles, Michigan—as well as states such as Colorado and Virginia—continue to impose these sentences.²⁴¹

228. Carimah Townes, *Justice Scuttled: Louisiana Was About to Fix One of the State’s Most Shameful Laws, but Politics Got in the Way*, SLATE (May 25, 2017), <https://slate.com/news-and-politics/2017/05/why-wont-louisiana-reform-its-shameful-juvenile-life-without-parole-laws.html> [<https://perma.cc/GVZ3-3XCX>].

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Kenneth R. Rosen, *Re-Educating a Life, in Sentences*, PAC. STANDARD (Mar. 26, 2018), <https://psmag.com/social-justice/re-educating-a-life-in-sentences> [<https://perma.cc/G9GP-798R>].

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *A State-by-State Look at Juvenile Life Without Parole*, *supra* note 212.

B. *States Holding Graham Applies to Virtual Life Sentences*

By contrast, Ohio joined the ranks of states banning life without parole sentences for juveniles in 2016. In *Ohio v. Moore*, the Ohio Supreme Court considered the potential resentencing of Brandon Moore, who at fifteen years old was certified as an adult and convicted of armed kidnapping, robbery, and the gang rape of a twenty-two-year-old woman.²⁴² Moore was sentenced to 112 years in prison, a sentence so long that it was clearly a virtual life sentence.²⁴³ In December of 2016, the Ohio Supreme Court overturned Moore's sentence, holding that it violated *Graham* and finding that the imposition of a 112-year sentence constituted cruel and unusual punishment.²⁴⁴ The Ohio Supreme Court found that "functional life sentences," referring to sentences "long enough that the inmate would likely not live to see his or her parole date," were unconstitutional for juvenile offenders.²⁴⁵ Moore was resentenced and will now be eligible for release when he is ninety-two years old.²⁴⁶

California has also found that a virtual life sentence is equivalent to life without parole and thus violates the Supreme Court's holding in *Graham*.²⁴⁷ In February 2018, the California Supreme Court held in a 4–3 ruling in *People v. Contreras* that "a sentence of 50 years to life is functionally equivalent to [life without parole]."²⁴⁸ Justice Liu wrote that "a young person who knows he or she has no chance to leave prison for 50 years 'has little incentive to become a responsible individual.'"²⁴⁹ This case resulted from the brutal attack of two teenage girls in San Diego in 2011 by Leonel Contreras and William Rodriguez, who were both sixteen at the time.²⁵⁰ Tried as adults, Rodriguez received a sentence of fifty-years-to-life and Contreras received fifty-eight-years-to-life.²⁵¹ The Court found that such long sentences equated to cruel and unusual punishment because they deprived the

242. Stephen Wilaj, *Man Serving 112-years for Raping YSU Student to be Resentenced*, WKBN LOC. NEWS (Oct. 2, 2017), <https://www.wkbn.com/local-news/man-serving-112-years-for-raping-ysu-student-to-be-resentenced/1097730633> [https://perma.cc/CF7E-H8D4].

243. *Id.*

244. *Id.*

245. Eric Heisig, *Ohio Supreme Court Says "Functional Life Sentences" for Juveniles are Unconstitutional*, CLEVELAND.COM (Dec. 22, 2016), https://www.cleveland.com/court-justice/index.ssf/2016/12/ohio-supreme-court-says_functi_1.html [https://perma.cc/CQS4-3NGW]; see also *State v. Moore*, 76 N.E.3d 1127, 1141 (Ohio 2016).

246. Heisig, *supra* note 245.

247. Maura Dolan, *California's Top Court Strikes Down 50-Year Sentences for Juveniles*, L.A. TIMES (Feb. 26, 2018), <http://www.latimes.com/local/lanow/la-me-ln-juvenile-sentences-court-20180226-story.html> [https://perma.cc/WXS6-U6K2].

248. *Id.*; *People v. Contreras*, 411 P.3d 445, 455 (Cal. 2018).

249. *Contreras*, 411 P.3d at 454 (quoting *Graham v. Florida* 560 U.S. 48, 79 (2010)).

250. *Id.* at 446.

251. *Id.*; see also Dana Littlefield, *Teens Get 50 Years to Life in Park Rape*, SAN DIEGO UNION-TRIB. (Jan. 31, 2013, 10:57 AM), <https://www.sandiegouniontribune>

offenders of a chance at parole until their elder years.²⁵² Justice Liu emphasized that this ruling does not minimize the heinousness of the offenders’ crimes and that they have a great deal of work to do in order to persuade a parole board in the future that they should be released.²⁵³

Florida has also expanded upon the Supreme Court’s holding in *Graham*, finding that any juvenile serving a life sentence, even with the possibility of parole, must have his sentence re-examined in light of *Graham*.²⁵⁴ Florida law now requires that juvenile offenders have their sentences automatically reviewed by a circuit court judge after fifteen, twenty, or twenty-five years served—depending on the offense.²⁵⁵ The new rule applies to offenders incarcerated before the new law took effect.²⁵⁶ This mandatory review process, however, has been slow-moving, primarily due to lack of funding and disagreements about which types of sentences are affected.²⁵⁷ As of 2017, eighty-five homicide offenders have been resentenced and eighty non-homicide offenders have been resentenced.²⁵⁸

VI. WHAT CAN BE DONE IN TEXAS?: THE NEED FOR “MEANINGFUL OPPORTUNITY” FOR RELEASE

Currently in Texas, juvenile non-homicide offenders certified as adults, as Bobby was, are not provided a meaningful opportunity for release, as required by *Graham*. Unlike juveniles who receive determinate sentences, juveniles certified as adults can be sentenced to life sentences in adult criminal court that equate, or at the very minimum come close to equating, to the prohibited sentence of life without the possibility of parole. Although there is hope amongst juvenile justice advocates that the U.S. Supreme Court may take up the issue of virtual life sentences for juveniles at some point, this wish provides no relief for those currently serving sentences that meet or exceed their life expectancy. Despite being required by the Supreme Court’s holding in *Graham*, Texas currently provides no “meaningful opportunity” for release for juvenile non-homicide offenders certified as adults.²⁵⁹ Possible solutions include earlier and more frequent mandatory parole

.com/sdut-teens-park-kidnap-rape-2013jan31-story.html [https://perma.cc/U4N6-K3YZ]; Dolan, *supra* note 247.

252. *Contreras*, 411 P.3d at 451.

253. *Id.* at 462–63; Dolan, *supra* note 247.

254. Gary Fineout, *Few Florida Juvenile Lifers Resentenced Despite US Mandate*, U.S. NEWS (July 31, 2017), <https://www.usnews.com/news/best-states/florida/articles/2017-07-31/few-florida-juvenile-lifers-resentenced-despite-us-mandate> [https://perma.cc/Q6CK-WZMK].

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *See supra* Section III.E.

review requirements for *all* juvenile offenders, including those certified as adults, as well as a prohibition against virtual life sentences for *all* juveniles.

A. *Earlier and More Frequent Parole Review for Juveniles Certified as Adults*

If and until the Supreme Court speaks on what specifically constitutes a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,”²⁶⁰ the issue of sentencing juvenile offenders will largely be left to the states. Thus, Texas can take action by enacting legislation that mandates earlier and more frequent parole review for *all* juveniles, including those certified as adults. This parole review, similar to what was proposed by the aforementioned HB 1274²⁶¹ and the method used in Florida,²⁶² could occur at statutorily defined time periods, such as at fifteen, twenty, and twenty-five years served. Such parole review, conducted earlier and more frequently than is currently allowed for, would create the possibility of a “meaningful opportunity” for release for certified juveniles. The opportunity for release at a relatively young age, particularly for non-violent offenders and other offenders who are amenable to rehabilitative efforts, provides an incentive for certified juveniles to rehabilitate and educate themselves that simply does not exist if they have little to no hope for release until their elder years.

In 2018, 758 juveniles were committed to TJJD.²⁶³ Of those juveniles, 156 were certified as adults, which was a 13% increase in the number of juveniles certified as adults from 2017.²⁶⁴ Seventy-five percent of those certified were seventeen or younger at the time of their offense.²⁶⁵ Thus, while the number of juveniles committed to TJJD decreased by 7% between 2017 and 2018, the number of juveniles certified as adults increased by 13% during the same period.²⁶⁶

These certified juveniles, in contrast to other juvenile offenders, do not receive the same rehabilitative services and typically face worse outcomes as a result of being confined with adult offenders.²⁶⁷ Juveniles certified as adults have worse outcomes than juveniles who receive determinate sentences for a variety of reasons, including: (1) being housed with adult offenders (depending on the facility), (2) lack

260. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

261. *Tex. H.B. 1274*, 85th Leg., R.S. (2017).

262. *Fineout*, *supra* note 254.

263. *TEX. JUVENILE JUSTICE DEP’T, CMTY. JUVENILE JUSTICE APPROPRIATIONS, RIDERS AND SPECIAL DIVERSION PROGRAMS 12* (Dec. 2018), https://www2.tjtd.texas.gov/publications/reports/16_AnnualReport_for_Governor-LegBudgetBoard.pdf [<https://perma.cc/R8QV-PGE9>].

264. *Id.*

265. *Id.*

266. *Id.* at 14.

267. *See* DEITCH, *supra* note 165, at XI.

of access to education programs targeted at youth (they have access to the programs that are available to the general adult population of the facility), (3) lack of vocational training and recreation, (4) lack of therapy programs targeted at youth, and (5) potential placement in an adult state jail if their offense was a state jail felony.²⁶⁸

Juveniles who receive determinate sentences are placed in facilities designed for juvenile commitment and are offered educational, vocational, and therapeutic programming targeted at people their age.²⁶⁹ There are also special treatment programs, like the Capital and Serious Violent Offender Treatment program, that have been highly effective in reducing recidivism amongst the most serious of juvenile offenders.²⁷⁰ This program is only offered at the Giddings State School and the Ron Jackson facility, which both exclusively house juveniles.²⁷¹ Not surprisingly, certified juveniles who are housed with adults are at a higher risk of violence, particularly sexual violence, and are thirty-six times more likely to commit suicide than juveniles housed in juvenile-only facilities.²⁷² Part of this results from the need to house juveniles in isolation for twenty-three hours a day, depending on the facility, in an effort to keep them out of sight and sound from adults.²⁷³ Thus, while the two groups of juvenile offenders—those certified as adults and those who receive determinate sentences—are essentially very similar in terms of demographics and even offenses committed, the opportunities for rehabilitation they have are significantly different.²⁷⁴ This reality makes earlier and more frequent parole review even more essential for certified juveniles who are already facing longer sentences, with fewer options for rehabilitation than other juveniles. Because certification is available for even non-violent juvenile offenders, the parole system needs to include a mechanism, such as earlier and more frequent parole review, that provides incentives for reform and an opportunity for juveniles to put their poor adolescent choices behind them and demonstrate maturity and growth, with the ultimate goal of release and an opportunity for a meaningful adult life.

B. *Prohibition of Sentences That Equate to Virtual Life*

No matter what they are called—virtual, de facto, term-of-years, aggregate—these sentences deprive juveniles of any facsimile of a “meaningful opportunity” for release as required under *Graham*. A sentence that lasts from the time a child is a teenager until his elder

268. DEITCH, *supra* note 165, at 6–8.

269. *Id.* at 25–26.

270. *Id.* at 28.

271. *Id.* at 27.

272. *Id.* at 7–8.

273. *Id.* at 8.

274. *See id.* at 6–8.

years—or even exceeds the child’s life expectancy—provides no incentive or motivation for the alleged rehabilitative purpose behind juvenile confinement. It is merely semantics that distinguish life without parole from virtual life sentences. Having the opportunity to be released at the age of 112, like Bobby,²⁷⁵ is by no definition a “meaningful opportunity” for release. Such long sentences clearly deprive juvenile offenders of an opportunity to have an adult life outside of prison walls. If one of the purposes of the juvenile justice system in Texas is to rehabilitate juvenile offenders, as is stated in the Juvenile Justice Code, the imposition of a life sentence on any juvenile, including those certified as adults, should have no place in the equation, particularly when even non-violent juvenile offenders are allowed to be certified. If juvenile offenders prove themselves to be unable to be rehabilitated and present a continued threat to public safety, the parole review process would prevent their release regardless, while allowing other offenders who are amenable to rehabilitation a meaningful opportunity at not only release from confinement, but a productive adult life. If “children are different,” then *all* children—*all* juveniles—are different, and *all* should be free from sentences so long that they have no legitimate hope for release before their elder years.

VII. CONCLUSION

Bobby Bostic committed multiple serious crimes as a sixteen-year-old. Bobby has also, by all accounts, rehabilitated himself in prison. While incarcerated, Bobby has obtained both his high-school equivalency and a paralegal diploma, has published works of fiction and poetry,²⁷⁶ and continues to take college-level business classes.²⁷⁷ Bobby even aspires to start a non-profit to mentor youth like him who are on the path to prison themselves.²⁷⁸

There is a legal gap that does not address juvenile non-homicide offenders certified as adults—like Bobby. Due to this gap in the law, there are thousands of prisoners nationwide who will not be provided the “meaningful opportunity” for release required by *Graham* to prove they have turned their lives around. While Bobby continues to live his life behind bars, other juvenile offenders who committed

275. Petition for Writ of Certiorari at 4, *Bostic v. Pash*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *4.

276. Bobby Bostic, *In the Garden*, PLOUGH, <https://www.plough.com/en/topics/justice/social-justice/criminal-justice/in-the-garden> (last visited Jan. 12, 2020) [<https://perma.cc/QAG9-MWLM>].

277. Christine Petrova, *241 Years in Prison for Teenage Crimes. The Story of Bobby Bostic*, USA REALLY (July 17, 2018), <https://usareally.com/733-241-years-in-prison-for-teenage-crimes-the-story-of-bobby-bostic> [<https://perma.cc/4ZAT-4QWJ>].

278. Akshay Pai, *The Strange Case of Bobby Bostic, The Man Handed a 241-Year Sentence for Crimes He Committed When He Was 16*, MEAWW (Apr. 24, 2018), <https://meaww.com/bobby-bostic-st-louis-241-year-sentence-crime> [<https://perma.cc/4Z4L-Y2GN>].

homicide or violent sexual offenses—who did not receive virtual life sentences—have been granted parole hearings and have even been released. The harsh reality is that Bobby, who has done everything that one can be expected to do while in prison, could potentially be more likely under the current system to be released had he killed someone on that fateful night.

The gap in the law that does not specifically address juvenile non-homicide offenders certified as adults must be clearly and specifically filled. As argued by Bobby’s attorneys in his petition to the Supreme Court, the Missouri courts have guaranteed that because of actions committed as a “child in the eyes of the law,” Bobby will likely die in prison “no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes.”²⁷⁹

279. Petition for Writ of Certiorari at 7, *Bostic*, No. 17-912 (U.S. 2017), 2017 WL 6606886, at *7; *Graham v. Florida*, 560 U.S. 48, 79 (2010).

