



Article

Livable Term Sentences as Alternatives to Juvenile Life Without Parole: A Sentencing Framework Based on *United States v. Grant*

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Abstract

In *Miller v. Alabama* (2012), the United States Supreme Court held that mandatory sentences of life without parole for juveniles are unconstitutional. In *Montgomery v. Louisiana* (2016), the Supreme Court made this holding retroactive, leaving the states to fashion new sentencing schemes for juveniles previously sentenced to life without parole. Complicating this task is the debate around “*de facto*,” or virtual, life sentences, which are term-of-years sentences that extend beyond an individual’s life expectancy. This essay proposes a framework to be used for sentencing juvenile lifers in light of the Supreme Court’s opinions and the Third Circuit Court of Appeal’s decision in *United States v. Grant* (2018). The framework considers an individual’s life expectancy and health, the national retirement age, and the time needed to reconnect with society. The output is a liveable term-of-years sentence that allows persons sentenced to life without parole as juveniles the prospect of release and the achievement of a meaningful life in the free world.

“Incorrigibility is inconsistent with youth.”
—*Graham v. Florida* (2010).

Keywords

de facto life sentence, juvenile, juvenile lifers, life sentence, life without parole, sentencing

It is difficult for most of us, who have never been sentenced to prison, to truly appreciate the reality of a life sentence. “Statistics” about abstractions like a life term “don’t bleed; it is the detail

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which counts” (Koestler, 1945, p. 91). Without prison experience, most of us in society lack the essential details needed to comprehend a life sentence. To most, a life sentence is just another term of punishment proclaimed by a judge or a punishment authorized by lawmakers, but for children subjected to this penalty, a life term means they will spend their entire lives in prison, a remote and alien world, until they die. Life in prison means 24 hours a day, 365 days per year, in one cage or another, among outcasts who sit ostracized from a society that is unwilling to give them a chance to show they have changed.

In considerable measure a consequence of the fear of juvenile “super-predators,” the transfer of juvenile defendants to adult courts increased in the 1990s (Adams & Addie, 2009; Mauer & Nellis, 2018). One salient example of the harsh sentences meted out to juveniles in adult courts is the life-without-parole sanction. Many juveniles were sentenced to this sanction on a mandatory basis. Between 1979 and 1996 alone, the number of juveniles serving sentences of life without the possibility of parole increased from 9 to 160 (Mauer & Nellis, 2018). But, in the 2012 case of *Miller v. Alabama*, the United States Supreme Court declared mandatory sentences of life without parole for juveniles unconstitutional because these sentences do not consider the unique characteristics of juveniles, which make them both less culpable for their crimes and more capable of reform than adults. The Supreme Court made this holding retroactive in *Montgomery v. Louisiana* (2016). Establishing just and viable alternative sanctions is the central issue addressed in this essay.

As a result of the Supreme Court’s decisions, states with juveniles serving mandatory life terms must resentence them or make them eligible for parole. Importantly, a significant number of states have abolished parole, so their remedy would be to resentence individuals or develop a new parole-like scheme that provides these juveniles with an avenue of release if they have matured and developed over the course of their confinement. In addition, the fact that many juveniles are serving, or could be resented to, *de facto* life sentences—terms of years that, as a practical matter, amount to life sentences—necessitates a sentencing scheme that offers a *meaningful* alternative to sentences of life without parole. Although a juvenile could theoretically be resented to life without parole, the Supreme Court has made clear that “[a]fter *Miller*, it will be the rare juvenile offender who can receive that same sentence” (*Montgomery v. Louisiana*, 2016, p. 734).

We propose a sentencing scheme consistent with the original Third Circuit opinion, *United States v. Grant* (2018),¹ which held that non-incorrigible juveniles should have (a) a presumption of release before the age of retirement that (b) allows at least a chance for a fulfilling life in the free world. Our sentencing scheme takes into account the typical age of retirement in the United States, an individual’s life expectancy, and the number of years it will take for a juvenile lifer to reenter society with a meaningful opportunity to fashion a decent life before he or she dies. By following this sentencing framework, courts and states can comply with the United States Supreme

¹ This decision was appealed by the government and heard *en banc* on February 20, 2019, by the Third Circuit Court of Appeals. The Third Circuit’s decision is on hold pending the outcome in *Mathena v. Malvo* (2019), which is set for oral argument before the United States Supreme Court on October 16, 2019 (Order, *United States v. Grant*, 2019).

Court's mandate that only incorrigible juveniles should be subject to life without the possibility of parole.²

Background

De Facto Life Sentences

Supreme Court holdings make it clear that formal life terms are reserved for incorrigible juveniles, eliminating such sentences for non-incorrigible juveniles. However, these laudable holdings can be undermined by term-of-years sentences that technically are not life terms but in all likelihood exceed a juvenile's life expectancy. These sentences, which effectively outlive their recipients, are often referred to as "*de facto*," or "virtual," life sentences (Nellis, 2017). According to Mauer and Nellis (2018), "Nearly 12,000 life sentences have been imposed on individuals who were under the age of eighteen at the time of their offense, including about 2,300 sentenced to life without parole" (p. 15). This number includes those who are serving *de facto* life sentences.

No uniformity is found in regard to which term-of-years sentences constitute *de facto* life sentences. For instance, the United States Sentencing Commission (2018) considers 470 months, which is 39.16 years, the equivalent of a life sentence. The Commission arrived at this number by considering the average age of federal defendants at the time they enter prison, along with life expectancy data from the United States Census Bureau. The Sentencing Project defines a *de facto* life sentence as a sentence of 50 years or more, acknowledging that 50 years is a "conservative estimate" (Nellis, 2017, p. 30). This number was calculated by taking the average age of individuals when they began serving lengthy sentences and using Social Security Administration life tables to ascertain life expectancy. Some state courts have defined *de facto* life sentences through caselaw, but many have not, or have held merely that particular term-of-years sentences constitute *de facto* life sentences. However, these courts do not explicitly state what threshold number of years transforms a sentence into a *de facto* life term. For example, the Connecticut Supreme Court held that a sentence of 50 years without the possibility of parole was a *de facto* life sentence (*Casiano v. Comm'r of Corr.*, 2015), whereas the Wyoming Supreme Court held that a sentence of 45 years was the equivalent of a life sentence (*Bear Cloud v. State*, 2014). One thing that is clear in these cases is that the number of years attached to a *de facto*, or virtual, life sentence depends on the age of the individual in custody because that will determine how many years he or she has left to live.

United States Supreme Court Cases: *Roper*, *Graham*, *Miller*, and *Montgomery*

The United States Supreme Court began its analysis of juveniles as a separate class marked by reduced criminal culpability in the case *Roper v. Simmons* (2005), which held that a sentence of death for those who committed crimes as juveniles constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The Supreme Court highlighted three differences between juveniles and adults: immaturity, vulnerability to the influence of others, and transience of character traits. The Court noted that these essential characteristics of juveniles make it difficult, if not impossible, to achieve the penological goals of

² In some cases (e.g., *Jones v. Commonwealth*, 2017; *State v. Nathan*, 2017), courts have held that the Supreme Court's holding applies only to *mandatory* sentences of life without parole, which is the issue in *Mathena v. Malvo* (2019).

retribution and deterrence. Juveniles have not fully matured, so they are simply less culpable for their behavior and less responsive to efforts to deter misconduct. Thus, in the words of the Court, “When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity” (pp. 573–574).

The case *Graham v. Florida* (2010) involved sentences of life without parole for juveniles convicted of crimes other than homicide. The Court held that a sentence of life without parole for these juveniles constitutes cruel and unusual punishment. The Court pointed to the fact that adolescents are still undergoing brain development during their teenage years. Accordingly, the Court stated that “[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity” (p. 73). This effectively leaves incapacitation as the central purpose of punishment for these juveniles, which is unacceptable to the Court. Juveniles who commit crimes other than homicide are not guaranteed release, but they must be afforded “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” (p. 75). By definition, observed the Court, “Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope” (p.79).

Extending this line of reasoning to its logical outcome, the Court in *Miller v. Alabama* (2012) forbade mandatory sentences of life without parole for all juveniles, including those who commit murder. In this decision, made retroactive by *Montgomery v. Louisiana* (2016), the Court held that “children are different” (p. 480). All children, including those who commit murder, are different. Each child must be assessed individually to assess his or her culpability, as well as capacity for reform. Incurable juveniles can be sentenced to life without parole, but only after due consideration of their individual cases and the determination that they are incurable—the Court used the more evocative word, “depraved,” in *Roper v. Simmons* (2005, p. 570)—and thus beyond redemption.

As previously noted, jurisdictions have handled the implications of Supreme Court holdings in this area differently. The Third Circuit Court of Appeals dealt with juvenile *de facto* life sentences in the case *United States v. Grant* (2018). To clarify what constitutes a “meaningful opportunity for release,” the *Grant* court interpreted the *Graham* statement about what a life without parole sentence denies an individual, writing the following:

This passage conveys the essence of what a “meaningful opportunity for release” is: a non-incorrigible juvenile offender must be afforded an opportunity for release at a point in his or her life that still affords “fulfillment outside prison walls,” “reconciliation with society,” “hope,” and “the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.” That is, the mandate encompasses more than mere physical release at a point just before a juvenile offender’s life is expected to end. (p. 147) (internal citation omitted)

Instructing the lower courts, the Third Circuit noted that sentencing juveniles to lengthy terms of incarceration requires “a factual determination of the juvenile offender’s life expectancy” (p. 149). This determination must be made on an individual basis “so that a juvenile offender who is capable of reform is not sentenced to a term-of-years beyond his or her expected mortality” or beyond the point when the juvenile will have the chance to “reenter society after an opportunity for release” (p. 149). Reentry, in turn, meant that the court had to grapple with the notion of

allowing an adequate amount of time for a juvenile to “meaningfully reenter society” (p. 148). In this context, the California Supreme Court case *People v. Contreras* (2018) is instructive for interpreting *Graham*:

Graham spoke of the chance to rejoin society in qualitative terms—“the rehabilitative ideal”—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The “chance for reconciliation with society[,]” “the right to reenter the community[,]” and the opportunity to reclaim one’s “value and place in society” all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. (p. 147) (internal citations omitted)

The *Grant* court held that to allow for reentry—marked by “reintegration,” “reconciliation,” “belonging,” and “redemption”—“[a] non-incorrigible juvenile offender should presumptively be sentenced *below* the national age of retirement, unless the remaining sentencing factors strongly mitigate against doing so” (p. 153) (emphasis added). The framework below uses the *Grant* case as a model and elaborates on the processes of calculating the individual factors outlined in *Grant*.

The Sentencing Framework

Grant mandates that non-incorrigible juveniles should have a presumption of release in time to entertain the prospect of establishing a meaningful life in the free world. To calculate the appropriate sentence for a given individual, the *Grant* court recommends a determination of the individual’s life expectancy at the outset along with the national age of retirement, and finally an estimate of how long it will take for the person to meaningfully reenter society. As an example, a person might have an estimated life expectancy of 75 years. This means he would be alive at age 65, the typical age of retirement in the United States. In this case, the person would be released before turning 65 because of a presumption of release before the age of 65. If a person had a life expectancy of 60 years and an estimated 5 years to establish reentry, his sentence would be capped at age 55, presuming that he or she was not incorrigible. Thus, our sentencing framework is a three-step process involving the following factors: an individual’s life expectancy, the typical retirement age, and the number of years required for successful reentry into the community. The key elements of our sentencing framework are presented in Figure 1.

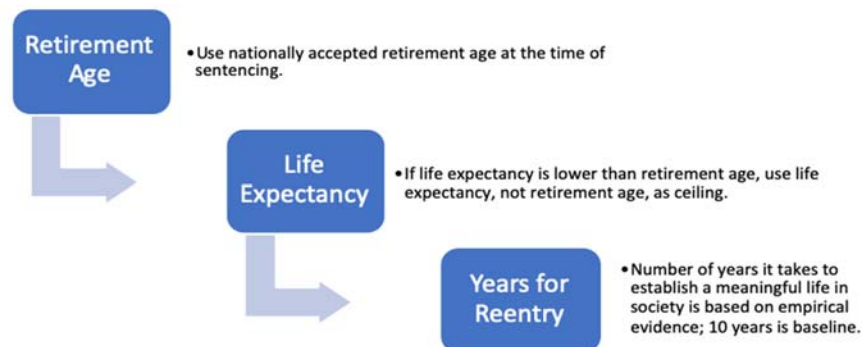


Figure 1. Ripper-Johnson Sentencing Framework

Calculation No. 1: Life Expectancy

Sentencing courts should use medical records and evidence pertaining to an individual's health, and they should hear expert testimony regarding a particular individual's life expectancy. Although this may sound unduly burdensome, courts regularly receive life expectancy evidence in wrongful death and workplace injury cases (e.g., *Deperrodil v. Bozovic Marine, Inc.*, 2016; Singer, 2005). Additionally, actuarial tables should be consulted to determine an individual's life expectancy. However, merely using actuarial tables designed for the general population will not lead to an accurate prediction of an individual's life expectancy (Cummings & Colling, 2014). Thus, actuarial tables should be consulted and used as a guideline, but ultimately, an individual's health situation (which is influenced by the environment in which the person lives) will affect his or her life expectancy. Individuals' particular health issues must be taken into account, and the *Grant* court indeed recommended an individualized approach to sentencing. Factors such as race, socioeconomic status, and shortened life expectancy due to imprisonment must be considered when the life expectancy is calculated for a given juvenile. From the perspective of a sentencing court, however, these factors point to reduced life spans, and it is these reduced life spans, whatever their precise origins, that should guide the resentencing of juveniles with sentences of life without parole, as well as the initial sentencing of juveniles in future cases.

Effect of Imprisonment on Health. In his book entitled *Life and Death in Rikers Island*, Homer Venters (2019), the former chief medical officer of New York City jails, writes that "incarceration brings intrinsic health risks" (p. 1). Indeed, a fair reading of the scholarly work on prisoner health leads to the conclusion that incarcerated individuals have reduced life spans and poor health. Research reveals that the life expectancies on release of individuals who were previously incarcerated are lower than those of comparable individuals in the general population who have not been incarcerated (Binswanger et al., 2007; Kouyoumdjian, Andreev, Borschmann, Kinner, & McConnon, 2017; Spaulding et al., 2011). This finding is reinforced by the study of parolees in New York by Patterson (2013), which shows, on average, a decrease in life expectancy of 2 years for each year of prior incarceration.³ Further, one group of scholars advocates that an "older" prisoner be defined as one who is 55 years of age or older (Williams, Stern, Mellow, Safer, & Greifinger, 2012, p. 1476), which is a testament to the notion that old age comes earlier in prison than in the free world.

Additionally, a report from an American Civil Liberties Union lawyer states that lifers in Michigan who died in prison reached an average age of 58.1 years (LaBelle, n.d.). African American lifers reached an average age of 56 years, and White lifers reached an average age of 60.1 years. Significantly for our purposes, those who were sentenced as juveniles and died in prison reached an average age of 50.6 years. LaBelle does not state how many lifers were still alive at the time of her analysis. This omission complicates the evaluation of in-prison lifer mortality because we do not know the number of individuals who survived past the average age of death. Still, the

³ Patterson explains further that "[t]hose who are able to survive parole without incident eventually return to the before-prison mortality curve" (p. 526).

average age at mortality of lifers sentenced as juveniles offers a cautionary note to those who would uncritically accept general mortality statistics as sentencing guides.

LaBelle's work may be a bellwether for this research area, however imperfect the report may be. Admittedly, it is often difficult to establish the precise effects of imprisonment on mortality because the types of individuals who experience incarceration typically possess other characteristics that lead to an increased mortality rate and poor health. Nevertheless, studies using data from the National Longitudinal Survey of Youth find that individuals who have been incarcerated at some point in their lives are more likely to self-report poor health than are individuals who have never been incarcerated (Massoglia, 2008; Schnittker & John, 2007).

Further, prisons are rife with individuals suffering from life-shortening diseases, such as HIV infection, hepatitis, and tuberculosis (National Commission on Correctional Health Care, 2002). Additionally, individuals who are incarcerated are more likely to have life-shortening conditions like hypertension (Binswanger, Krueger, & Steiner, 2009). Compounding the health problems of the incarcerated is the fact that some prisons lack adequate health care; failure to receive adequate treatment for illnesses can lead to additional health problems (Venters, 2019), which in turn can lead to an increased risk for mortality. Simply put, "incarceration brings a risk of death" (Venters, 2019, p. 23), and this fact must be taken into account during sentencing.

Race. African Americans typically have shorter life expectancies than Whites, both in the free world and in prison (Arias & Xu, 2018; Patterson, 2010; Rosen, Wohl, & Schoenbach, 2011; Spaulding et al., 2011). Paradoxically, and sadly, several studies have shown a situation-specific protective effect of incarceration among male African Americans, whose life expectancy in prison is higher than that of Black men in the free world (Patterson, 2010; Rosen, Wohl, & Schoenbach, 2011; Spaulding et al., 2011). This may be the case because Black men in the free world often live in dangerous environments marked by high rates of homicide, easy availability of weapons, and poor health care. Prisons, although stressful and dangerous, have low rates of homicide and homemade weapons of limited lethality, and they provide mediocre but readily available health care. Key for our purposes, these studies show that once African American prisoners return to the free world, the protective effect of incarceration ceases to exist.

Additionally, the life expectancy of male Hispanics is longer than those of both male African Americans and male Whites in the general population, and the life expectancy of female Hispanics is longer than that of female African Americans and female Whites in the general population (Arias & Xu, 2018). It is important to note that we are not proposing that groups such as females and persons of Hispanic origin should receive longer sentences because of their predicted longer life spans; however, the ailments that affect the longevity of particular races and sexes should be investigated for the purpose of sentencing hearings, at which individuals' life expectancies are calculated.

Socioeconomic Status. The health of people of low socioeconomic status is generally poorer than the health of those of a higher socioeconomic status (CDC, 2012; Williams, Mohammed, Leavell, & Collins, 2010). This is a consequence of lifestyle characteristics and restricted access to health care (CDC, 2012). Further, the life expectancy of less educated people is shorter than that of people with more education (CDC, 2012). For instance, the CDC found a 9.3-year gap in life expectancy between persons without a high school diploma and those who had at least a bachelor's degree. Because most justice-involved individuals are of low socioeconomic

status with limited educational backgrounds, it is essential to factor in this gap when calculating an individual's life expectancy.

Individualized sentencing hearings should take place to establish a person's life expectancy, but to take into account the health problems previously noted, we propose that sentences should be reduced by a minimum of 5 years because of the shorter life expectancies of the formerly incarcerated, which can be seen in the existing body of evidence. Thus, a 5-year sentence reduction should be applied to every person sentenced in conjunction with a consideration of the evidence about that individual's health and estimated life expectancy.

Calculation No.2: Retirement Age

Because the Third Circuit had to fashion a sentence that would allow for personal fulfillment after release from incarceration, it necessarily had to determine an interval of time that would permit such fulfillment. The court held that non-incorrigible juveniles have a presumption of release before the age of retirement because retirement is "the birth of an opportunity for the retiree to attend to other endeavors in life" (*United States v. Grant*, 2018, p. 150). The court added that setting a presumption of release before the age of retirement acknowledges the fact that many individuals sentenced to life are unable to participate in vocational programming while in prison (Nellis, 2012), a deficit they would need time to address on release.

The *Grant* court acknowledged the lack of a definitive national retirement age, but after reviewing Social Security Administration regulations and statutes, as well as research on when Americans tend to retire, the court determined that the current typical age at retirement in the United States is currently 65 years. However, the court noted that the typical retirement age fluctuates, and that lower courts are free to make their own calculation as to the national retirement age. For the purpose of our framework, we agree with the court that there should be a presumption of release by age 65. If individuals begin to retire earlier, then the most current nationally accepted retirement age will reflect that change.

Calculation No. 3: Years Required for a Meaningful Reentry Into Society

Reentering society after a lengthy term-of-years sentence is a daunting task (Durnescu, 2019; Liem, 2016). Reintegration may be more difficult because of the length of time these prisoners have been away from society (Mauer & Nellis, 2018). Thus, a sentence needs to take into account the potentially difficult reentry process that lifers may face when they get to the outside, and how much time is needed to reenter society meaningfully.

The amount of time it takes for reentry into the community will vary from person to person. The "pains of reentry," such as stigma, difficulty finding employment, poor health, and poverty, may preclude the establishment of a meaningful life and take years to resolve (Durnescu, 2019). In her book *After Life Imprisonment: Reentry in the Era of Mass Incarceration*, Marieke Liem (2016) describes interviews with several released lifers. She writes, "For some [lifers], becoming accustomed to the outside world took years, and still continued at the time I talked to them" (p. 122). One lifer stated, "The first six, seven months, you are still getting established" (p. 141).

Getting established is not enough, however. *Grant* and *Graham* mandate more than a reentry experience in which someone is "established"; the individual must have a chance at a fulfilling, meaningful life. As interpreted by the *Grant* court, a "meaningful opportunity for release" means the chance for "fulfillment outside prison walls," "reconciliation with society," "hope," and "the

opportunity to achieve maturity of judgment and self-recognition of human worth and potential” (p. 147) (quoting *Graham v. Florida*, 560 U.S. 48, 79). This includes establishing connections with the community, finding gainful employment, fostering healthy relationships, and perhaps even developing a noncriminal sense of self (Maruna, 2001). These individuals reenter society with felony convictions, which makes it extremely difficult for them to find gainful employment and receive the government assistance that is necessary for them to get back on their feet. A 2008 survey found that the unemployment rate among individuals who had exited jails and prisons less than 2 years before being surveyed was 31.6% (Couloute & Kopf, 2018). About half of the individuals in the reentry study of Western (2018) were unemployed a year after their release. Moreover, connecting with health care providers on the outside, as well as accomplishing basic tasks such as obtaining proper identification and performing the activities required in everyday life, can be burdensome. These burdens likely add to reentry time in the case of lifers who suffer from “post-incarceration syndrome” (Liem & Kunst, 2013), a condition similar to post-traumatic stress disorder. For returning lifers, it takes years to shed their former life and more years to creating a meaningful one.

Although a consideration of the number of years it takes to reconcile mental health and employment issues, as well as reconnect with others, is necessary to our calculation, we believe one part of *Graham* is the most helpful in determining how many years should be allocated for a successful reentry into society—“reconciliation with society.” Arguably, to reconcile with society, one must no longer violate society’s laws. Thus, one definition of rehabilitation is abstaining entirely from criminal activity (Maruna, 2001). One study in particular shows that after a period of 10 to 23 or more years after conviction or release from prison, the likelihood of a returning citizen offending is the same as that of a similar individual in the general population (Bushway, Nieuwbeerta, & Blokland, 2011). The authors explain that the number of years it takes to achieve the same likelihood depends on the age of an individual at the time of conviction or release and the individual’s criminal history. It took about 10 years for those who were convicted of only a single crime and were young at the time of conviction to have a similar offending rate, whereas it took at least 23 years for those who were young and had four or more prior convictions to have an offending rate equal to that of similar individuals in the general population.

We argue that a minimum of 10 years will allow for the possibility of establishing a fulfilling life. This figure reflects the number of years it takes to establish and create a meaningful life as measured by the point at which a convicted person is comparable in risk for criminality with a person with no criminal history. Additionally, if the *Grant* court knew that Grant’s life expectancy was about 72 years of age, and held that he should have a presumption of release before the age of 65, it follows that the court was satisfied with about 8 years for Grant to establish a meaningful life. However, we argue for a 10-year minimum to establish a meaningful life because that number is drawn from research on convicted individuals themselves.

Hypothetical Resentencing Cases

Our sentencing framework, previously described and summarized in Figure 1, can be used as a guide in individual cases to determine term-of-years sentences that are less than a *de facto* life sentence; these sentences in turn can be used in the resentencing of juveniles determined to be non-incorrigible. Such juveniles must be sentenced to terms of less than life and are, as a result,

eligible for release from prison. Note that incorrigible juveniles are still eligible for terms of life without parole and can be resentenced to life in prison.

The Case of an Incorrigible Juvenile

The following is an example of a case in which a court could find incorrigibility and therefore resentence the juvenile to life without parole. Bob Jones, a White male, was 17 years old when he was convicted of three rape-murders. He committed the murders when he was 15 and 16 years old. He chose elderly women as his victims, scanning his neighborhood during the day to see who was home alone. After a lengthy trial, Mr. Jones was found guilty of all three rape-murders and received a mandatory sentence of life without parole. He is now 45 years old and before the court for resentencing. He has committed disciplinary infractions throughout the time he has been incarcerated; his most recent infraction, assaulting a correctional officer, occurred 2 months ago. Although many rehabilitative programs were available to him in prison, including GED (general education diploma) classes, life skills training, and vocational training, Mr. Jones did not attempt to enroll in any of them. At his resentencing hearing, the judge determined that his original sentence of life without parole was proper because his record indicates that Mr. Jones is in fact incorrigible.

The Case of a Non-Incorrigible Juvenile

In an actual resentencing of a juvenile who is non-incorrigible, the court would orchestrate the process by which a new sentence is calculated, starting with a determination of the person's life expectancy. Take the case of an African American man, Dave Smith, from a poor community. He, along with a group of friends, intended to rob a convenience store at gunpoint. Smith was 16 years old at the time. When the cashier of the convenience store did not hand over the contents of the cash drawer as requested, Smith shot and killed him. Mr. Smith is now 36 years of age at the time of resentencing, has served 20 years in prison, has sustained one or more violent assaults, is being treated for depression, has attempted suicide twice, and suffers from chronic hypertension. Additionally, while in prison, he obtained a GED, participated in therapy, and works in the prison kitchen. Evidence is presented by experts that he has "matured and developed" during his incarceration. He is thus eligible for a sentence of less than life. He is not incorrigible.

One set of experts might be called on to consult actuarial tables on race and class to establish an estimate of life expectancy, another set of experts to consider how Mr. Smith's medical conditions affect his life expectancy, and yet another set of experts to assess how his prison experience—marked by his particular pattern of disease, disability, and trauma—affects his life expectancy. Mr. Smith's life expectancy would then be compared with the national retirement age. If his life expectancy is less than 65 years, that number would be used as the baseline from which the final calculation, time to successful reentry, is determined. So, if his life expectancy is 55 years, and he needs approximately 10 years to establish a meaningful life on reentry, he must be released by age 45. If his life expectancy is 65 years or more (e.g., 70), the retirement age of 65 would be used as the baseline from which the final calculation, time to successful reentry, is determined. Deducting 10 years for reentry into society from the retirement age of 65, he would have to be released by age 55.

In an original sentencing of a juvenile, as opposed to a resentencing hearing, the court would make the same determinations regarding incorrigibility, life expectancy, retirement age, and

number of years needed to reenter society meaningfully. However, many states have eliminated the sentence of life without parole for individuals who were juveniles at the time they committed homicide (Rovner, 2019).

Satisfying Other Sentencing Goals

Calculating a number based on life expectancy, retirement age, and years needed to reenter society meaningfully provides a sentence ceiling. This ceiling will effectuate the Supreme Court's prohibition on sentences of life without parole for juveniles and conforms with the sentencing structure presented in *Grant*, allowing for individualized sentences that are not *de facto* life terms. In addition, this formula will yield sentences that fulfill traditional penological goals: incapacitation, deterrence, retribution, and rehabilitation.

Incapacitation

Sentences derived by this formula will satisfy the goal of incapacitation by confining individuals during and beyond the high-risk years for criminal behavior, especially violent criminal behavior (Sweeten, Piquero, & Steinberg, 2013). Mauer and Nellis (2018) write that "the peak age for murder is twenty, a rate that is more than halved by the early thirties and is less than one quarter of its peak by the early forties" (p. 133). Thus, the goal of incapacitation will be satisfied.

Deterrence

Sentences derived from our framework will be sufficiently harsh to deter individuals in society from committing similar crimes and to discourage the convicted individual in question from returning to crime. Notably, what matters most in regard to deterrence is not the severity of punishment, but the certainty of punishment (Mauer & Nellis, 2018). Thus, the fact that a sentence is *reliably imposed* is much more important than the *length* of the sentence. This is in conflict with the present sentencing structure of many states and the federal system, in which severity is the focus of a sentence rather than the timeliness of the imposition of the sentence.

Sentences yielded by the formula will be long, but less than life terms, and should be sufficient to achieve the goal of deterrence. As a general rule, lifers and those who commit homicide serve long terms and have very low recidivism rates. The recidivism rate for 860 individuals convicted of murder in California who were paroled in 1995 was 0.58% (Weisburg, Mukamal, & Segall, 2011). According to a report by the Sentencing Project, "Four of every five (79.4%) lifers released in 1994 had no arrests for a new crime in the three years after their release" (Mauer, King, & Young, 2004, p. 3). The recidivism rates of lifers in Pennsylvania whose sentences were commuted were 2.5%, 7.4%, and 10.9%, depending on which measurement of recidivism was used (Advisory Committee, 2005). Widespread public fear of those convicted of homicide reentering society, perpetuated by the media, belies the tame reality that they are a group at notably low risk for recidivism.

The story of a group of individuals in Maryland called "the Ungers" (because they were released as a result of the case *Unger v. State*, 2012) illustrates successful lifer reentry and the generally low risk for recidivism presented by returning citizens convicted of homicides. The Ungers—most of them lifers who had served long terms and had been convicted of rape and murder as young adults—were released because of a faulty sentencing instruction, not direct evidence of reform. (There is indirect evidence of reform; many lifers show evidence of reform after long years of confinement [see Irwin, 2009]. Had any of these individual committed serious

crimes while in prison, they would likely have been kept in prison to serve terms for those new crimes.) Significantly, virtually all of them went on to reenter society successfully while not threatening public safety (Justice Policy Institute, 2018). Many of the individuals committed their original crimes while they were younger than 21 years, so their experience closely resembles that of the individuals sentenced under our scheme. Their age range on release was between 51 and 85 years; their average time spent in prison was 39 years (Justice Policy Institute, 2018). The extremely low recidivism rate of the Unger cases is proof that successful reentry of long-term prisoners is quite possible.

Retribution

The fact that individuals will be incarcerated for long terms during their formative and adult years, as well as branded a violent felon for life, helps to achieve the goal of retribution. These prisoners suffer greatly (see Johnson & McGunigall-Smith, 2008) but are afforded the possibility of a second chance. One must not forget that most juvenile lifers are victims in their own right. A survey conducted by the Sentencing Project showed that most juvenile lifers are survivors of abuse and witnessed violence at a young age (Nellis, 2012). This sentencing structure must balance the rights and humanity of those who have committed serious crimes with the pain and loss suffered by the victims of those crimes.

Rehabilitation

Under *Miller* and *Montgomery*, individuals may be released on the basis of their “demonstrated maturity and rehabilitation.” This necessarily presumes that individuals will have the opportunity for rehabilitation while incarcerated. It is worth noting that many sentenced to life without the possibility of parole are prevented from participating in rehabilitative programs, as correctional officials reserve seats in programs for those who will one day reenter the community. Still, rehabilitation among lifers can and does occur. Liem (2016) writes, “When I asked them what role prison had played in their lives, a large majority of interviewees replied they had changed into a new, ‘improved self’ in the course of their life sentence” (p. 97). All individuals—even those convicted of homicide—are capable of rehabilitation.

Practical Applications and Modifications

States will have to decide which goals of punishment they wish to accomplish, but this sentencing framework has the ability to satisfy all four traditional goals of punishment. One modification open to decision makers is to take the sentences developed by this framework and compare them with the actual number of years served by individuals in their jurisdiction who were sentenced to life *with* parole. Actual time served could be seen as a benchmark for the definition of *de facto* life terms. Any sentences derived from this formula could be modified as required to make sure they were less than *de facto* life terms in a given jurisdiction. As a guideline, evidence indicates that between 20 and 30 years is the typical amount of time served in states that allow life with the possibility of parole (Ghandnoosh, 2017). Further, policymakers can look to see how states have changed their statutes to comply with *Miller* and *Montgomery* and use those findings as a benchmark for *de facto* life term ceilings.

This sentencing formula can be adopted by legislatures that are using the method of resentencing juvenile cases of life without parole rather than offering immediate eligibility for parole as their means of complying with the Supreme Court's mandates. This formula can also be used to set a ceiling for those who are newly sentenced to a period of life with the possibility of parole. In that instance, we would also propose the suggestion of Johnson (2016) regarding parole eligibility for juveniles at 35 years of age, when the risk for recidivism drops and the likelihood of personal maturation rises. Those convicted of homicide crimes as juveniles would typically serve in the neighborhood of 20 years.

Reentry planning before release is critical. The Ungers are a shining example of a cohort of individuals with a low recidivism rate who are succeeding in the community, and this result can no doubt be attributed to the pre-release planning that they were afforded. Liem (2016) states, "For [lifers], reentry is a long-term process, one that actually starts prior to release and continues well afterward" (p. 210). That process is made more effective with reentry planning and support.

Conclusion

In sum, our sentencing structure assists states in dealing with the problem they face regarding the resentencing of juveniles who were originally sentenced to life without parole. Juveniles who are not incorrigible must have a "meaningful opportunity for release based on demonstrated maturity and rehabilitation" (*Graham v. Florida*, 2010, p. 75). They must also have an opportunity to establish a life outside prison walls, not merely obtain release before death. The framework outlined in *Grant* provides a good start with regard to how to fashion term-of-years sentences to comply with the Supreme Court's mandate. By using life expectancy, age of retirement, and number of years needed to create a meaningful life, we can calculate a ceiling within which to fashion a sentence. We go beyond the *Grant* opinion by focusing on the health of formerly imprisoned individuals, as well as the health ailments of African Americans and persons of low socioeconomic status. After calculating a sentence ceiling along the lines developed in this article, we propose modifications as required in light of the typical number of years served for those convicted of homicide who have been released on parole in a given jurisdiction.

Our sentencing framework can assist both justice-involved individuals and the community. This framework is an example of how a sentencing structure can serve penological goals, preserve human dignity, and protect the community. It is important to note that "[t]he goal of reducing the scale of life imprisonment will require both policy initiatives to change sentencing standards and a cultural shift in thinking about how to produce public safety" (Mauer & Nellis, 2018, p. 83). It is not enough for laws to change; the way society views those who are incarcerated must also change.

The recipients of juvenile life-without-parole sentences have been convicted of murder, a crime that seems to call out for harsh sanctions. Yet we must remember that murderers, especially juvenile murderers, are the products of brutal and brutalizing environments, settings described as "unloving, unstable, unreliable, and replete with occasions of verbal and physical violence" (Johnson, 2019, p. 23). However, being born into an unforgiving environment does not mean that one must be a lost cause, beyond forgiveness by society. People can and do change. Second chances matter. Juvenile lifers have proved themselves capable of change and deserving of new lives in the free world. We hope this sentencing framework will help us navigate the difficult decisions that lie ahead as we try to render justice to juveniles once destined to die in prison under color of law.

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