Yale Law School

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NYS Board of Parole
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October 29, 2016

Dear Chairwoman Stanford,

I write to provide comments on the proposed amendments of sections 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR.

I. Proposed regulations for persons sentenced to life for a crime committed as a juvenile

As one of the two attorneys on Hawkins v. Department of Corrections and Community Supervision, 30 N.Y.S.3d 397 (3d Dept. 2016), I will focus my comments, submitted in conjunction with my cosignatories, on the proposed regulations for so-called "minor offenders" under § 8002.1 (c). Parole hearings for life-sentenced juvenile offenders is a pressing issue in New York. We are one of only two states in the nation to automatically prosecute all young people as adults upon their 16th birthday (North Carolina is the only other state to do so). Furthermore, children at the ages of 13, 14, and 15 accused of murder and certain other violent crimes automatically are sent to criminal court where they are prosecuted as adults and sentenced as "juvenile offenders." NY Criminal Procedure Law § 1.20(42). The *required* maximum sentence for children as young as 13-years-old for the crime of murder is life imprisonment. N.Y. Penal Law § 70.05 (2)(a). Although DOCCS has refused repeated FOIL requests to disclose the exact number of people serving indeterminate life sentences for crimes committed as juveniles, credible estimates say there are between 500 and 600 currently in New York State correctional custody. More enter every year as the state has declined to follow the national and international norms and raise the age of criminal responsibility.

The United States Supreme Court has held that, in all but the most extraordinary cases, a life sentence for a crime committed as a juvenile without a meaningful opportunity for parole violates the Eighth Amendment. It is therefore the constitutional responsibility of the New York Board of Parole to ensure that the opportunity for parole is "meaningful." Unfortunately, the proposed regulations utterly fail to remedy the constitutional infirmities of New York's parole statute and practice towards persons serving indeterminate life sentences for crimes committed as juveniles. The proposals are inadequate for two reasons, one substantive and one procedural.

A. All persons sentenced to life for a crime committed as a juvenile are constitutionally entitled to a parole release hearing substantively focused on demonstrated maturity and rehabilitation.

The proposed regulations fail to codify the constitutionally required *standard* that parole boards must embrace in order to afford life-sentenced juvenile offenders what they are due under the Eighth Amendment of the United States Constitution, namely a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham v. Florida, 560 U.S.

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48, 75 (2010); Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012).

The holdings in Graham and Miller are founded on the *substantive principles of proportionality* in punishment for juvenile offenders based on their diminished culpability and enhanced capacity for reform. The Court has recognized a substantial volume of neuroscience evidence demonstrating the undeveloped nature of the adolescent brain, psychological science showing that teenagers are more impulsive, more susceptible to peer pressure, and more lacking in foresight than adults. This scientific evidence led the Court to conclude that "children are constitutionally different from adults for purposes of sentencing….[b]ecause juveniles have diminished culpability and greater prospects for reform [] 'they are less deserving of the most severe punishments.'" Miller, 132 S. Ct. at 2464 (internal citations omitted). In Montgomery, decided this year, the Supreme Court made clear that the proportionality principles behind Graham and Miller constitute a substantive constitutional right and are therefore retroactively applicable to the states. The Court reasoned, "The 'foundation stone' for Miller's analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles…. Protection against disproportionate punishment is the *central substantive guarantee of the Eighth Amendment* and goes far beyond the manner of determining a defendant's sentence." Montgomery v. Louisiana, 136 S. Ct. 718, 732-33 (2016) (emphasis added). The Supreme Court held that proceedings bearing on life sentences for juvenile offenders must, in order to avoid being categorically unconstitutional, "afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." Montgomery, 136 S. Ct. at 724.

In April 2016, the Third Department applied the Supreme Court's recent Eighth Amendment cases and held that "[a] parole board is no more entitled to subject an offender to the penalty of life in prison in contravention of this rule than is a legislature or a sentencing court." Hawkins v. New York State Dep't of Corr. & Cmty. Supervision, No. 521536, 2016 WL 1689740 (3d Dep't. April 28, 2016). The appellate court found that the Board had violated Mr. Hawkins's constitutional right to have a meaningful opportunity for release in which youth and its attendant characteristics structure the inquiry both in relationship to (I) the commission of the crime for which Mr. Hawkins is serving an indeterminate life sentence and (II) in relationship to his capacity for reform and rehabilitation. The proposed regulations for so-called "minor offenders," however, fails to codify the constitutionally mandated substantive standard to which a parole board must be bound in order to afford a meaningful opportunity for release.

Proposed regulation § 8002.1(c)(1) reduces youth to another "factor" to be considered among the many others. There are two reasons this is inappropriate. First, the Board has long argued in court, sometimes successfully, that it has boundless, unstructured, and unreviewable discretion with respect to how it considers the "factors" enumerated in § 259-i in making the release decision. It has argued that it is not required to explicitly mention or discuss all factors in the hearing; that it can give any weight it chooses whatsoever to factors including infinitesimally close to zero weight; that in comparing different factors in order to make the final determination it can always conclude that the crime outweighs other positive factors; that courts cannot pierce their veil of expert weighing of factors to ever tell the Board the outcome it reached was

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objectively irrational based on the record; and finally, that it does not even have to mention much less discuss in substance the factors its decision to deny parole. If we are to give the term "factor" the meaning the Board—and some reviewing courts—have given the term, it is patently clear youth cannot be reduced to a factor.

Second, consideration of youth as a mere factor was already required under 259i(2)(c)(A)(vii) under the catchall of "any mitigating…factors." N.Y. Exec. Law § 259-i (McKinney). The Board argued this very point in its briefing for the Hawkins case, saying that it considers youth as a mitigating factor but maintains the discretion to afford the factor whatever weight it fancies and is not required to explain its weighing to anyone, including the person seeking parole or a reviewing court. The dissenting opinion in Hawkins adopted the Board's mistaken position, arguing that 259i(2)(c)(A)(vii) satisfies the Board's constitutional obligation merely by subsuming youth as a possible mitigating factor. The Board of Parole lost Hawkins and the dissenting opinion is not controlling case law in New York. Yet, shockingly, the Board has decided to codify its losing argument and the dissenting opinion in Hawkins in the proposed regulation § 8002.1(c)(1), by listing youth as yet another factor to be thrown into the mix, considered, and weighed at the unreviewable discretion of the Board.

The Supreme Court's Eighth Amendment cases on juvenile punishment make clear that youth is not a factor that sentencing bodies or parole boards can cursorily "consider" in making their decisions. Rather, youth is a constitutionally relevant status that makes certain forms of punishment unlawful and that triggers a whole host of procedural protections. Further, the attributes of youth are both comprehensive and fluid, and they bear on all aspects and stages of sentencing. The role of youth under the Eighth Amendment cannot be reduced to a list of factors; the way that youth affects culpability, responsibility, and rehabilitation potential is not a checklist. What the constitution mandates, therefore, is a parole release process that is structured to discern whether, after a juvenile offender has served his or her statutory minimum sentence, the person's crime reflects "unfortunate yet transient immaturity," Roper, 543 U.S., at 573. A life sentence for a juvenile offender is unconstitutional unless he or she is afforded "a meaningful opportunity for release based on demonstrated maturity and rehabilitation." Yet, countless cases demonstrate that the Board continues to operate as if it were a sentencing body deciding what amount of incarceration is enough for a given crime or crime victim based upon its own opinions and inclinations. The proposed regulation fails to instruct the Board that a parole release hearing is not a resentencing and that the only question in the parole interview must be whether the individual demonstrates maturation and rehabilitation and is safe to release into the community.

B. All persons sentenced to life for a crime committed as a juvenile are constitutionally entitled to certain procedural rights at a parole release hearing

The proposed regulations intended to address juvenile offenders under § 8002.2 (c) fail to afford the requisite *procedural protections* that are constitutionally required in order to give life-sentenced juvenile offenders a meaningful opportunity for release. A person that entered prison as a child of 13, 14, 15, 16 or even at the age of 17 will not, as an adult, have the family, community, financial, social and cultural resources to be an adequate advocate for him or herself at a parole hearing. At a bare minimum, assistance of counsel is necessary to assist life-sentenced

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juvenile offenders to marshal evidence about the distinctive attributes of youth as it pertains to culpability and rehabilitation. Those attributes depend on an understanding of neuro- and social science expertise that won't be intuitive or accessible to a lay person, much less a person incarcerated as a teenager. Hearings should be conducted in person and counsel must be given the opportunity to make opening and closing remarks. Funds must be available for appointed attorneys to conduct psychological assessments and social history investigations. Absent these minimum procedural protections, the parole petitioner will have no means of evincing and evaluating the salient features of youth as applied to his or her case, and the promise of Miller, Graham, and Montgomery will be hollow.

There are many other procedural protections the Board should have included to ensure life-sentenced juvenile offenders are given a meaningful opportunity for release. Consider the fact that developmental disabilities, such as intellectual disabilities, specific learning disabilities, and attention deficit/hyperactivity disorder; autism spectrum disorder; and mental disorders, such as post-traumatic-stress-disorder, emotional disturbances, or childhood depression, tend to exacerbate the hallmark features of youth, especially by increasing susceptibility to influence and peer pressure, and decreasing the ability to consider consequences. The prevalence of mental impairments among juvenile offenders is substantially higher than adolescents who are not justice-involved. Resources must be available to hire psychological experts to determine trauma or cognitive impairment. Counsel is a necessity to properly ensure this protection.

The Board must also be instructed to evaluate the parole petitioner's disciplinary record in light of the fact that juveniles develop psychologically and neurologically through the mid-twenties and that the prison environment hampers development. In recognition that the hallmark features of youth continue to exert an influence after age eighteen, and that this is especially the case among those incarcerated at a young age, misconduct in early adulthood does not tend to demonstrate parole unsuitability for youth offenders. Additionally, infractions should be evaluated for the hallmarks of adolescent behavior and should be weighted with less significance. Prison is a source of unique trauma for youth, who are more vulnerable to violent and sexual attack. For these reasons, too, counsel and experts are necessary to contextualize prison infractions.

If parole is denied, the Board must state in detailed, non-conclusory fashion the exhaustive list of reasons for denial. The decision must point to specific evidence in the record to support its conclusions. Namely, the Board must specify which of the parole release criteria the petitioner does not meet and render specific findings of fact in support of its decision. If parole is denied, the written decision must specifically show *why* the Board has determined that, if an inmate is released, he will not live and remain at liberty without violating the law or that his release is incompatible with the welfare of society. The Board may not, under Miller, Graham and Montgomery, continue to hold a juvenile offender beyond his or her minimum sentence for the sole reason that release "will so deprecate the seriousness of his crime as to undermine respect for law." The seriousness of the crime is a static factor and reliance on that factor to deny release after the juvenile offender has served the minimum sentence takes all "meaningful opportunity" out of the parole release process. This must be made explicitly clear in the new regulations. If parole is denied, the Board should, in addition, offer recommendations to the petitioner of what

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he or she can do between the current hearing and the next hearing to meet the release criteria. Such procedures are necessary to genuinely ensure a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Otherwise the parole hearing is nothing more than a cruel exercise in false hope.

Other states have recognized the necessity of essential procedural protections to effectuate the right of a meaningful opportunity for release for life-sentenced juveniles, such as California and Massachusetts.[1] In fact, California recently set itself out as a national leader by recognizing that, "neurological and developmental changes are occurring in people who are in their late teens through early adulthood."[2] One bill raised the age of eligibility for youth offender parole hearings from eighteen to age twenty-three and another required the Department of Corrections and Rehabilitation to classify youth offenders up to age 25 at lower security facilities with greater access to rehabilitative programs.[3]

New York, too, is now presented with the opportunity to be a national leader in forging parole practices for all young offenders, with sentences of any length, that reflect both developments in psychology and neuroscience and evolving standards of decency and fairness in punishment. While we laud the Board's intent in issuing proposed regulations, as currently written those proposed regulations don't even meet the bare minimum to ensure that the constitutional rights of juveniles offenders are protected in its parole practices. We urge the Board to revisit the entire section of the proposed regulations dedicated to "minor offenders" to codify the requisite standard and procedures that life-sentenced juvenile offenders are due under the Eighth Amendment of the United States Constitution.

C. Proposed language under § 8002.1(c)(2)

Not only does juvenile status as the time of offense trigger constitutional substantive and procedural rights, but the Board must be exceedingly careful that it does not intentionally or unintentionally treat the hallmark features of youth as aggravating factors in its interviewing or decision-making processes. For example, many young people involved in the criminal justice system have histories of extreme deprivation, violence, and trauma. It is essential that Board members be instructed through both regulations and formal training that if a "minor offender" presents evidence of an unstable social history as a juvenile or a criminal history that demonstrates the hallmark features of youth, such evidence cannot be used against the person as showing, for example, a history of violence. We do not know if youthful offending is currently being used as an aggravator in the risk and needs tool because COMPAS scoring is not transparent.

Insofar as the Board relies on psychological assessments and a risk and needs tool, these

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[1] Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12 (2015); Sarah French Russell & Tracy L. Denholtz, Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation, 48 Conn. L. Rev. 1121 (2016); Sarah French Russell, Review *Id.* at § 1(c)(2).

[2] *Id.* at § 1(c)(2).

[3] See Stats. 2014, ch. 590 (A.B. 1276). Stats. 2015, ch. 471 (S.B. 261), eff. Jan. 1, 2016. Available at, ttp://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB261

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tools must consider the diminished culpability of juveniles and the hallmark features of youth. Specifically, the Board should re-evaluate the COMPAS instrument to assure that youth is not being treated as an aggravating factor—for example, by counting as negative not having a job prior to incarceration, not being married, the age of first offense, and so on. The Board should also look into whether the tool has actually been validated for (a) juvenile offenders and (b) those serving very long sentences. Consideration should be given to the use of a risk assessment tool specifically to be used for juvenile offenders in OCFS facilities.

The proposed language under § 8002.1(c)(2) attempts to instruct the Board that youth cannot be used in any way as an aggravating factor. As noted, the intent of the language in its original use was to emphasize that a person seeking during a parole interview to vindicate the constitutional rights set out in Miller must not be seen as evading responsibility for the offense. Unfortunately, many people read the current text as though it states the opposite of this proposition. It could be interpreted to mean that consideration of the hallmark features of youth may *not* override the circumstances of the crime or that consideration of the hallmark features of youth does *not* diminish responsibility for the offense in the sense of the weight it receives in the eyes of the parole commissioners. Such an interpretation would contravene Miller, Montgomery, Hawkins, and other relevant Eight Amendment cases.

Because some people find the proposed language grammatically and syntactically confusing, we recommend that the first sentence of § 8002.1(c)(2) be deleted and replaced with the following language:

> "2. Evidence of an unstable social history as a juvenile, or of a criminal history that demonstrates the hallmark features of youth, does not tend to show unsuitability for release. Evidence that the hallmark features of youth contributed to the commitment offense, and thus that the prisoner bears diminished culpability for the offense, must not be taken to reflect a lack of acceptance on the part of the prisoner of his or her role in or responsibility for the committed the offense."

While the proposed regulations correctly identify some of the hallmark features of youth, such as "immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures," that defining language should precede any use of the phrase "hallmark features of youth" elsewhere in the regulations because it clarifies how the hallmark features of youth affect capacity for reform and diminished culpability. It should also be clear that the listed juvenile traits are not an exhaustive list of the hallmark features of youth.

II. General consideration regarding risk and needs principles

It is encouraging to see that the Board is revising the current regulation § 8002.3, which as it stands undermines the will of the Legislature evidenced by two rounds of revision to the Executive Law by adding as undifferentiated *factors* what the Legislature intended as a *framework* for assessing whether the inmate has presumptively met the standard for release. The proposed regulations are a positive first step but are beset by confusing drafting. We propose the following changes.

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A. Correct the heading of § 8002.2.

Strike extraneous phrase in heading of § 8002.2: Parole release decision-making~~: factors to be considered.~~ This is self-explanatory. The heading should encompass both elements in the section: 8002.2 (a) "Risk and Needs Assessment," which is not a "factor to be considered," and 8002.2 (b), the mandatory statutory factors from the Executive Law.

B. The language under (a) should be amended to say that that the Board shall be guided by "risk and needs principles," not scores, consistent with the statute. N.Y. Exec. Law § 259-c (4).

This correction will make clear that the Legislative mandate behind the two rounds of statutory amendments of the Executive Law was to shift the focus of parole boards to a forward-looking paradigm, to evaluating whether an inmate is rehabilitated and ready for release. The Legislature wanted to bring regularity, accountability, and rationality to the parole release decision-making process by using risk and needs principles to measure rehabilitation and risk. Thus, the scores themselves must be evaluated in light of forward-looking concerns with rehabilitation and risk. If, for example, an inmate has a high score for "History of violence" that is not a good reason to deny someone release who has served his minimum sentence, taken full responsibility for the crime of conviction, made concerted efforts at rehabilitation, and poses low risk to the welfare of society. The proposed § 8002.2 language would read (new words in italics):

> "(a) Risk and Needs Assessments: In making a release determination, the Board shall be guided by ~~the inmate's~~ risk and need *principles* ~~scores~~ *including* the inmate's scores generated by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") assessment if prepared by the Department of Corrections and Community Supervision. …."

C. Factors included in COMPAS cannot be re-weighed to an unfavorable conclusion

Although the proposed regulation correctly specifics that the risk and needs tool will presumptively measure whether an inmate meets the release standard, it confusingly re-lists some of the very factors that are already included in the COMPAS for reconsideration under § 8002.2(b). The regulation should make clear that consideration of these factors must also be guided by risk and needs principles and that statutory factors already weighed in the COMPAS assessment may not be re-weighted by the Board to an unfavorable conclusion. For example, the COMPAS tool incorporates consideration of factors such as institutional record and the severity of the commitment offense. Yet, in many cases the COMPAS score indicates a low score for "Prison Misconduct" but the Board will re-introduce consideration of infractions some 5 to 25 years old to arrive at the manifestly irrational conclusion that parole ought to be denied based on consideration of the very factors that the COMPAS already weighed and decided were not predictive of future risk. The regulations should be clear such unreasonable administrative action is disallowed.

D. The Board may not rely on unnamed or secret reasons to deny parole.

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Although the statute allows the Board to treat victim or victim representative (defined narrowly as "the crime victim's closest surviving relative") statements as confidential, the Board is not authorized to refuse to detail reliance on such statements or on other non-confidential opposition letters as *reasons* for denial. Secretive decision-making based on unstated reasons is anathema to due process and fundamental fairness. The proposed § 8002.3(b) should be amended to read (new words in italics):

> "(b) Denial of Release. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. Reasons for the denial of parole release shall be *exhaustive*, given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable factors listed in 8002.2 were considered in the individual's case. …"

In sum, portions of the proposed regulations are an encouraging first step yet the proposed sections on "minor offenders" fail to remedy the constitutional problems with New York's parole statute and practice for persons serving life sentences for crimes committed as juveniles.

Respectfully Submitted,

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* This has been prepared by someone affiliated with Yale Law School, but does not purport to present the school's institutional views, if any