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Juvenile Life Without Parole

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The purpose of this paper is to analyze data, policy trends, and legal concerns on the issue of sentencing juvenile offenders to life without the possibility of parole (LWOP). Policy changes in the 1980s and 90s dramatically changed the sentencing outcomes for juvenile offenders. Significantly departing from the rehabilitative goals established by the juvenile court, states adopted harsher punishments, including LWOP. During this shift, the diminished culpability of youth became insignificant when compared to the nature of their crimes. The recent cases of *Roper v. Simmons* (2005) and *Graham v. Florida* (2010) reinstated the importance of recognizing that juveniles are different from adults, and accordingly should not be subjected to the same punishments. In light of these decisions, the constitutionality of sentencing juveniles to LWOP will be addressed.

Policy Trends and Data

Punitive sentencing trends initiated during the late twentieth century have resulted in an increased application of the sentence of life without the possibility of parole (LWOP) for juvenile offenders. From 1962 to 1981, an average of two juvenile offenders received LWOP sentences each year (Human Rights Watch, 2008). Beginning in 1982, annual increases were reported, peaking at 152 youth in 1996 (Human Rights Watch, 2008). Although crime rates have declined since 1994, it is estimated that the rate at which states sentence youth to LWOP is three times higher than it was in 1992 (Hechinger, 2011). Human Rights Watch (2010) reports that 2,574 individuals are currently serving LWOP for crimes they committed when they were under the age of eighteen.

Today, the United States is the only country in the world that actively sentences juveniles to LWOP (Human Rights Watch, 2008). LWOP conflicts with provisions of international law, including Article 37 of the United Nations Convention on the Rights of the Child (1990) that prohibits life sentences for juveniles. Contrary to global law and practice, forty-four states and the federal government permit juvenile LWOP (Koppel, 2010). All of these states impose LWOP on a mandatory or presumptive basis for certain offenses (e.g. first-degree murder) (Human Rights Watch, 2008).

The following **Table 5.1** breaks down the number of youth serving LWOP by state. California, Florida, Louisiana, Michigan, and Pennsylvania have the

largest number of youth sentenced to LWOP. More than half of all the juveniles sentenced to LWOP are in these five states.

TABLE 5.1

State	# of Juveniles Sentenced to LWOP	State	# of Juveniles Sentenced to LWOP
Alabama	62	Montana	1
Alaska	No LWOP	Nebraska	24
Arizona	32	Nevada	16
Arkansas	73	New Hampshire	3
California	250	New Jersey	0
Colorado	48	New Mexico	No LWOP
Connecticut	9	New York	0
Delaware	7	North Carolina	44
District of Columbia	No LWOP	North Dakota	1
Florida	266	Ohio	2
Georgia	8	Oklahoma	48
Hawaii	4	Oregon	No LWOP
Idaho	4	Pennsylvania	444
Illinois	103	Rhode Island	2
Indiana	2	South Carolina	26
Iowa	44	South Dakota	9
Kansas	No LWOP	Tennessee	4
Kentucky	5	Texas	5
Louisiana	335	Utah	1
Maine	0	Vermont	0
Maryland	13	Virginia	48
Massachusetts	57	Washington	28
Michigan	346	West Virginia	0
Minnesota	2	Wisconsin	16
Mississippi	24	Wyoming	6
Missouri	116	Federal	36

Source: Campaign for the Fair Sentencing of Youth (2009). <http://www.endjwop.org/the-issue/stats-by-state/>

Proponents of juvenile LWOP argue that the sentence is applied sparingly as it is reserved for chronic and violent offenders. From 1980-2008, juvenile offenders committed 44,357 homicides, yet there are only 2,445 juveniles serving LWOP for homicide offenses (Puzzanchera & Kang, 2010). This means that less than six percent of juvenile homicide offenders were sentenced to LWOP. These numbers suggest that the sentence of LWOP has been sparingly applied to juvenile homicide offenders.

However, contrary to proponents' beliefs, juvenile LWOP is not only reserved for the worst of the worst. The majority of

juveniles (59%) sentenced to LWOP are first-time offenders (Human Rights Watch, 2008). Twenty-six percent of juveniles sentenced to LWOP were convicted of felony murder. Felony murder is charged when a youth participated in a robbery or burglary while a co-participant committed murder, without the knowledge or intent of the youth (Human Rights Watch, 2008). Sentencing juveniles to LWOP for felony murder seems particularly harsh considering their inability to foresee long-term consequences of their actions, and their increased susceptibility to peer pressure.

The data also suggests that there may be gender and racial biases in juvenile LWOP sentencing. Males comprise the majority of the juvenile LWOP population. For example, in Massachusetts, all of the youth sentenced to LWOP are males (Monahan, 2009). In Michigan, 98% of juvenile LWOP inmates are male and only 2% are female (LaBelle, Phillips, & Horton, 2004).

The evidence also shows that Black youth are disproportionately sentenced to LWOP when compared to White youth. Black youth are sentenced to LWOP at a rate of ten times that of white youth (Human Rights Watch, 2008). In addition, Human Rights Watch (2008) found that Black youth arrested for murder were sentenced to LWOP at a rate of 1.59 times that of White youth. Although Black offenders are disproportionately a part of both the adult and juvenile justice systems, issues of racial bias deserve additional consideration in LWOP sentencing.

The sentence of LWOP is particularly harsh for juveniles given their vulnerability in adult correctional facilities. According to Monahan (2009), juveniles are vulnerable because of their size, lack of experience in the system, and lack of peer support groups. Compared to youth in juvenile facilities, juveniles incarcerated in adult prisons are five times more likely to be sexually assaulted, and almost twice as likely to be attacked with a weapon by inmates or beaten by staff (Redding, 2010). In order to protect themselves from physical violence, including rape, many youth engage in fights in prison (Human Rights Watch, 2008).

The sentence of LWOP communicates to youth that they are irredeemable and can never reenter society. LWOP inmates may obtain release via sentence commutation or pardon, however this rarely occurs (Leigey, 2010). With little hope of release, juveniles sentenced to LWOP are at risk of self-harm and suicide (Human Rights Watch, 2008). Juveniles in adult facilities are eight times more likely to commit suicide than youth in juvenile facilities (Redding, 2010). In addition, juveniles sentenced to LWOP often lose important family and

pro-social bonds (Butler, 2010). For example, they can be incarcerated in an institution that is far from their family and some prison policies limit phone calls, thus inhibiting visits and communication. Pro-social ties and support help inmates adjust to prison life (Rocque, Bierie, & MacKenzie, 2010). Loss of supportive family members could contribute to their sense of hopelessness.

Leigey (2010) conducted a study addressing the mental health of inmates sentenced to LWOP. Using data from a 2004 survey of inmates in state and federal correctional facilities as well as conducting interviews with twenty-five LWOP inmates in a mid-Atlantic state, Leigey found that the initial stages of incarceration are particularly stressful (Leigey, 2010). This is evidenced by the higher likelihood of reported mental illness among LWOP inmates who had served less than ten and a half years. Respondents reported improved mental health over the course of their incarceration, attributing their mental wellness to a positive outlook and hope of release. Further, the study found that most inmates did not rely on mental health services to help them adjust to prison life. A small subset of respondents reported a smoother transition to prison life because they had already served time prior to their LWOP sentence. However, these inmates admitted that adjusting to a LWOP sentence is different than adjusting to a shorter sentence (Leigey, 2010).

Although this sample did not include inmates who were sentenced to LWOP as juveniles, it provides an outlook on the challenges that juveniles may face in adult correctional facilities. Given the vulnerability of youth in adult prisons, it is likely that they will experience an increased risk of mental health issues during the initial stages of their sentence. Additionally, while the sample size is relatively small, this study provides meaningful qualitative data on the mental state of inmates sentenced to LWOP.

Since individuals serving LWOP are not likely to be released, it is extremely difficult for them to gain entrance to educational or skill-building programs in prison. Monahan (2009) suggested that this is because individuals serving LWOP are not seen as needing to learn or develop skills since they will never be free again. Unfortunately, juveniles sentenced to LWOP are denied opportunities to develop and reform at a time in their life when they most need it.

Sentencing individuals to LWOP assumes that they will be a danger to society for the remainder of their lives. Contrary to this assumption, recidivism rates are low among older inmates, including individuals serving life who are released (Nellis, 2010). Mauer, King, and Young (2004) reported that four out of five individuals serving life who were released in

1994 were not arrested for a new crime three years after their release. Whereas only one third of all offenders released from prison were not arrested within three years of release. These figures suggest that with age, most offenders become less of a danger to society. Research about LWOP sentencing is critical in determining effectiveness and constitutionality. With a comprehensive understanding of relevant data, this paper will now explore the legal issues of sentencing juveniles to LWOP.

Legal Issues of Juvenile LWOP

In *Graham v. Florida* (2010), the majority of the Supreme Court ruled in a 6-to-3 vote that sentencing juveniles to LWOP for non-homicide offenses was a violation of the Eighth Amendment's cruel and unusual punishment clause, and thus unconstitutional. This ruling did not require states to release juvenile non-homicide offenders, but states must afford these offenders meaningful opportunity to get parole based on demonstrated maturity and rehabilitation (*Graham v. Florida*, 2010). *Graham* applied to the 129 prisoners serving LWOP for non-homicide crimes committed as juveniles (Hechinger, 2011).

Prior to the *Graham* decision, the Supreme Court had established two tests, one for capital cases and the other for noncapital cases, to determine if the Eighth Amendment's cruel and unusual punishments clause had been violated. Capital cases employed a categorical approach, whereas noncapital cases used a balancing test. In *Graham*, the Supreme Court applied the categorical approach to a noncapital case, departing from previously established procedures.

Supreme Court Procedures to Determine the Constitutionality of Punishment in Capital and Noncapital Cases

In capital cases, the court requires a two-step test to decide whether certain categories of offenders or offenses should be excluded from the death penalty (Siegler & Sullivan, 2011). At step one, the court determines whether there is a national consensus against the death penalty. To do this, the court looks at the number of jurisdictions that allow the death penalty and how often it is imposed for a particular offense or class of offender.

At step two, the court makes an "independent judgment" on whether the death penalty for a certain crime or class of offenders violates the Eighth Amendment (*Roper v. Simmons*, 2005). In this analysis, the court weighs the nature of the offense and the culpability of the offender against the severity of the punishment. The court also considers the penological justifications for the death penalty (i.e. retribution, deterrence, rehabilitation, and incapacitation). Additionally, the court

takes into account any international consensus against the punishment as an instructive means to interpret the Eighth Amendment's prohibition of cruel and unusual punishment (Siegler & Sullivan, 2011).

In noncapital cases, the court applies a balancing test on a case-by-case basis. The balancing test is used to determine whether a particular punishment is disproportionate to the crime committed (Siegler & Sullivan, 2011). The balancing test consists of two stages.

At stage one, the court determines whether the defendant has established "an inference of gross disproportionality" (*Harmelin v. Michigan*, 1991). In this analysis, the court weighs the nature of the offense and the culpability of the offender against the type of sentence imposed. For example, the court might rule disproportionate a first-time juvenile drug offender sentenced to 50 years in prison. In the rare case that the defendant proves gross disproportionality, the court then moves to stage two (Siegler & Sullivan, 2011).

At stage two, the court considers sentences imposed on other offenders in the same jurisdiction and sentences imposed for the same crime in other jurisdictions (*Solem v. Helm*, 1983). In these analyses, the court looks at both the legislatively permitted sentences and the actual sentencing outcomes (Siegler & Sullivan, 2011).

Supreme Court Jurisprudence in *Graham v. Florida*

In *Graham v. Florida* (2010), the Supreme Court used the categorical approach to come to their decision. First, the court determined that there was a national consensus against sentencing juvenile non-homicide offenders to LWOP. Thirty-seven states and the federal government allowed LWOP for juvenile non-homicide offenders, however the sentence was used infrequently. Florida accounted for 77 of the 109 juvenile non-homicide offenders serving LWOP in 2010 (National Conference of State Legislatures, 2010). The remaining 52 were incarcerated in just ten states and the federal system (*Graham v. Florida*, 2010). These figures demonstrated that youth were disproportionately sentenced to LWOP in a small number of states.

Second, the majority made an "independent judgment" that LWOP for juvenile non-homicide offenders violated the Eighth Amendment. In this analysis, the court weighed the nature of the offense and culpability of the offenders against the severity of the sentence, considered the penological justifications, and took into account international law and practice.

Although non-homicide offenses can be quite violent, they are different from murder in severity and irrevocability. Life is

taken from the victim of a murderer, but the victim of a non-homicide crime still has a chance to live. Writing the majority opinion, Justice Kennedy argued, "the court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers" (*Graham v. Florida*, 2010).

Considering the culpability of juveniles, Justice Kennedy referred to *Roper v. Simmons* (2005). In *Roper v. Simmons* (2005) the court held in a 5-to-4 vote that the Eighth and Fourteenth Amendments categorically prohibit capital punishment for offenders who were under eighteen when they committed the offense. The majority in *Roper* cited scientific and sociological studies on the salient characteristics of juveniles that distinguished them from adults. The court recognized that juveniles lack maturity, have an underdeveloped sense of responsibility, are vulnerable to negative influences (e.g. peer pressure), and have not developed fixed characteristics (*Roper v. Simmons*, 2005).

Further demonstrating the differences in culpability between youth and adults, Justice Kennedy alluded to developments in psychology and brain science. The research in these fields has shown that juveniles are more capable of change because parts of the brain involved in behavior control continue to develop through late adolescence. Justice Kennedy wrote, "because juveniles have lessened culpability they are less deserving of the most severe punishments" (*Graham v. Florida*, 2010).

Regarding the severity of the sentence, Justice Kennedy recognized that LWOP is not the same as the death penalty, yet both sentences share characteristics. Both sentences are irrevocable. In both sentences, those convicted have no hope for restoration, except in the case of an executive clemency, the possibility of which does not make the sentence any less harsh. Both sentences communicate to convicted offenders that they are irredeemable, incapable of change, and will never be fit to reenter society (*Graham v. Florida*, 2010).

Justice Kennedy maintained, "life without parole is an especially harsh punishment for a juvenile" (*Graham v. Florida*, 2010). Juveniles will serve on average more time than adults sentenced to LWOP, making the sentence disproportionately longer for youth. A minor sentenced to LWOP will serve virtually his or her entire life in ignominious confinement (Brief *amicus curiae* of the Juvenile Law Center in *Graham v. Florida*, 2009). The juvenile sentenced to LWOP will never experience free adulthood (Brief *amicus curiae* of the American Psychological Association in *Graham v. Florida*, 2009).

Additionally, the Justice Kennedy determined, “none of the goals of penal sanctions that have been recognized as legitimate – retribution, deterrence, incapacitation, and rehabilitation – provide an adequate justification” for sentencing juvenile non-homicide offenders to LWOP (*Graham v. Florida*, 2010). The purposes of retribution are to express society’s moral condemnation of a crime and to seek restoration of the moral imbalance. *Roper* established that “retribution is not as strong with a minor as with an adult” (*Roper v. Simmons*, 2005). Justice Kennedy argued that retribution does not justify sentencing juveniles to such a harsh punishment given their diminished culpability (*Graham v. Florida*, 2010).

Furthermore, the majority found that deterrence does not justify LWOP for juvenile non-homicide offenders because juveniles are less likely than adults to be discouraged from committing crime. This is because juveniles are less capable than adults to consider the long-term consequences of their actions. When compared to adults, youth are less likely to think about possible punishments when they decide to commit crimes (*Graham v. Florida*, 2010).

The purpose of incapacitation is to ensure public safety by keeping those at high risk to reoffend off the streets. Incapacitation does not justify sentencing juvenile non-homicide offenders to LWOP because if the offender can be rehabilitated, then there is no need to incapacitate that offender. Justice Kennedy argued, “a life without parole sentence improperly denies the juvenile offender a chance to demonstrate change and maturity” (*Graham v. Florida*, 2010). Although a youth may seem at high risk of harming others upon conviction, LWOP erroneously assumes that the youth will always be a high risk. Considering the transient nature of youthfulness, it is wrong to presuppose that a juvenile offender will not change.

Lastly, the majority determined that rehabilitation does not justify LWOP for juvenile non-homicide offenders because the sentence of LWOP denies youthful offenders the right to reenter society. A sentence of LWOP communicates that the juvenile offender is irredeemable. This judgment is not warranted given the capacity of youth to change and their diminished moral culpability. Further, rehabilitation is not accomplished by this sentence because individuals sentenced to LWOP are often denied access to rehabilitative services (e.g. vocational training, education). The denial of rehabilitative services and treatment makes LWOP for juveniles especially severe considering their receptivity and need for rehabilitation (*Graham v. Florida*, 2010).

After the majority considered the penological justifications, it

then took into account international law and practice. Justice Kennedy noted that the United States is the only nation that actively imposes LWOP sentences on juvenile non-homicide offenders (*Graham v. Florida*, 2010). Outside of the United States, only ten countries allow LWOP for juveniles. Only Israel imposes this sentence currently, and in Israel there are only seven prisoners serving LWOP for crimes committed as juveniles (De La Vega & Leighton, 2008). The majority considered international consensus as instructive in making this decision.

Significant Departure from Previous Jurisprudence

In his dissent, Justice Thomas stated, “for the first time in its history, the court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it had previously reserved for death penalty cases alone” (*Graham v. Florida*, 2010). The majority offered three justifications for using the categorical approach, instead of the case-by-case approach, in the case of juveniles facing LWOP for non-homicide crimes.

In their first justification, the majority referred to the general proposition in *Roper* that juveniles are categorically less culpable and more capable of reform than adult offenders. The majority argued that sentencing authorities lack the means to sufficiently identify the few persistent juvenile offenders who might deserve the harshest penalty available (Siegler & Sullivan, 2011). The second justification was that the case-by-case approach does not take into account the difficulties of counsel in representation. Juveniles are generally less able than adults to assist their counsel, resulting in an impairment of the quality of defense. The psychological immaturity of youth impacts the way in which they perceive legal processes and make choices. Adolescents tend to focus on short-term consequences because they lack the ability to think about long-term outcomes. This deficit in decision-making faculties could lead them to make adjudicative decisions (e.g. waive rights, plea bargain) that they would not make as a reasonable adult (Grisso & Schwartz, 2000). The third justification was that the “categorical rule gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform” (*Graham v. Florida*, 2010).

The court chose to use the categorical rule because the case-by-case approach would most likely lead to the imposition of LWOP on juvenile offenders who are not culpable enough to deserve it or who are capable of maturation and rehabilitation (Siegler & Sullivan, 2011). Some juvenile non-homicide offenders may be seen as deserving the harshest available punishment, however most deserve a second chance. Before *Graham*, it was nearly impossible for juvenile offenders in non-

homicide cases to prove their sentences unconstitutional. In fact, under the balancing test only a handful of defendants won relief at the state and federal appellate court level (Siegler & Sullivan, 2011). Thus, the Supreme Court applied the categorical rule in order to protect less culpable juvenile non-homicide offenders from disproportionate sentences.

Application to Juvenile Homicide Offenders

Graham applied to the 129 individuals sentenced to LWOP for non-homicide crimes committed as juveniles. Juvenile non-homicide offenders represented a fraction of the entire population of youth sentenced to LWOP. It is estimated that there are 2,445 individuals currently serving LWOP for homicide offenses committed as juveniles (Human Rights Watch, 2010). If the Supreme Court were to determine the constitutionality of sentencing juvenile homicide offenders to LWOP, the court would have to (1) consider whether there is a national consensus against the sentence, and (2) make an “independent judgment” on whether LWOP for juvenile homicide offenders violates the Eighth Amendment.

There are objective indicators of a national consensus against sentencing juvenile homicide offenders to LWOP. Of the forty-four states that allow LWOP for juvenile homicide offenders, twenty-seven states and the District of Columbia have ten or fewer individuals serving LWOP for committing homicide as juveniles. Only seven states have one hundred or more individuals serving LWOP for crimes committed as juveniles (National Conference of State Legislatures, 2010). This suggests that a minority of states are disproportionately sentencing youth to LWOP.

In making an “independent judgment” on whether LWOP for juvenile homicide offenders violates the Eighth Amendment, the court would weigh the nature of the offense and culpability of the offenders against the severity of the sentence, consider the penological justifications, and take into account international law and practice. *Roper* and *Graham* both support the proposition that juveniles are categorically less culpable. The majority in *Graham* made a distinction between the nature of homicide and non-homicide offenses. It is important to note, however, that in *Graham* the majority was concerned that initial decision makers might give too much weight to the seriousness of the offense and not enough to the reduced culpability of the offender, resulting in many juveniles sentenced to LWOP who arguably do not deserve such a harsh sentence (Siegler & Sullivan, 2011).

In addition, a case could be made that sentencing juvenile homicide offenders to LWOP does not meet the defined penological justifications. All of the rejections of the

penological goals found in *Graham* could be applied to juvenile homicide offenders. Considering youth’s inherent capacity to change and their diminished moral culpability, none of the penological goals justify sentencing juveniles to LWOP.

Furthermore, the international consensus against sentencing juvenile homicide offenders to LWOP should be noted. For example, the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, demands that no one should be subject to cruel or inhumane punishments, that juveniles must be separated from adults in correctional facilities, and that sentencing authorities should promote rehabilitation for juvenile offenders. Although the United States reserves the right to treat juveniles as adults in exceptional circumstances, the number of youth transferred to adult court and sentenced to adult punishments suggests that the United States has abused this right (Hechinger, 2011).

Additionally, the Convention on the Rights of the Child (CRC) prohibits LWOP for juvenile offenders (CRC, 1990). Every self-governing nation in the world has both signed and ratified the CRC. Only the United States and Somalia have failed to ratify the CRC (Hechinger, 2011). Furthermore, in 2007 the United Nations General Assembly called for the abolition of LWOP for juveniles. Out of 184 parties, the United States was the only dissenter (Hechinger, 2011). An international consensus against sentencing juveniles to LWOP is instructive in determining the constitutionality of the sentence.

In the 2011 term, the Supreme Court agreed to hear arguments for two cases dealing with the sentence of LWOP for juvenile homicide offenders. The court will hear these two cases in March 2012 and render a decision likely by the end of June 2012. In the first case, *Jackson v. Hobbs*, the Supreme Court will consider the constitutionality of (1) sentencing a 14-year-old convicted of felony murder to LWOP, and (2) mandatory sentencing schemes that necessarily result in juvenile LWOP. In the second case, *Miller v. Alabama*, the Supreme Court will determine whether sentencing a 14-year-old to LWOP violates the Eighth and Fourteenth Amendments’ prohibition of cruel and unusual punishment. In these cases, the Supreme Court will focus on the specific age group of 13 to 14 year olds. It is not clear how the court will rule. The court may abolish the sentence completely or in limited circumstances (e.g. mandatory sentences, felony murder), or conclude that LWOP for 13- and 14-year-old homicide offenders is constitutional.

In conclusion, there is evidence to suggest that sentencing juveniles to LWOP is unconstitutional. Recent Supreme Court jurisprudence in *Roper* and *Graham* has established that juveniles are less culpable and more amenable to rehabilitation

than adults, and thus they are less deserving of the most severe punishments. Sentencing juveniles to LWOP disregards these developmental differences and treats youth like fully responsible adults. Criminals should be held responsible for their crimes, but not at the expense of constitutional rights.

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