SULLIVAN/GRAHAM AMICUS BRIEF

ARGUMENT

I. COURTS HAVE A SPECIAL DUTY TO ENSURE THAT THE EIGHTH AMENDMENT ADEQUATELY PROTECTS YOUTH

That minors are different than adults – and must be treated differently under the Constitution – is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights in both civil and criminal law.

This Court's constitutional jurisprudence confirms that a sentence of life without parole must be assessed in light of the unique developmental status and categorical culpability of youth. While this Court has, of course, considered the constitutionality of the death penalty as applied to youth, *see, e.g., Roper v. Simmons,* 543 U.S. 551 (2005), *Thompson v. Oklahoma,* 487 U.S. 815 (1988), *Stanford v. Kentucky,* 492 U.S. 361 (1989), to date, this Court has not

considered an Eighth Amendment challenge to a term of years sentence by a juvenile offender.[1]

This Court has previously raised the concern that the federal courts must be provided with objective factors with which to assess the constitutionality of criminal sentences. Thus, the difficulty of assessing the gravity of an offense – or comparing the gravity of offenses in various jurisdictions – may pose a barrier to the Court's willingness to determine whether a particular term of years sentence is constitutional. *See, e.g., Harmelin*, 501 U.S. at, 959 (*Kennedy, concurring in part and concurring in the judgment*) ("proportionality review by federal courts should be informed by objective factors to the maximum extent possible."); *Ewing v. California,* 538 U.S. 11, 23 (describing the "principles of proportionality review" Kennedy laid out in *Harmelin* as guiding the Court's "application of the Eighth Amendment"); *Coker v. Georgia,* 433 U.S. 484, 592 (1977) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.") Here, however, this Court's previous application of the Constitution to adolescents, informed by medical, scientific and adolescent development research, provides objective factors to guide the Court's reasoning.

[1]Because this case rests upon this Court's jurisprudence on youth, it does not require the Court to reach the question of whether in other contexts "death is different" such that death penalty cases require a different and more rigorous analysis under the Eighth Amendment.

This Court's previous cases require the recognition that youth are different from adults and less culpable, in large part because of their capacity to change. Criminal sentences that disregard this central distinction between adolescents and adults, including the death penalty and life without parole, are unconstitutional. In contrast, a sentence of life with the possibility of parole would be constitutional under appropriate circumstances because it would allow for a later assessment of the culpability and dangerousness of a juvenile offender. Moreover, the depth of an adolescent's capacity to change, and in fact the inevitability of change and maturation for an adolescent, distinguishes youthful defendants from all other types of defendants. Indeed, this Court has already established that for the purpose of reduced culpability, the appropriate age to draw the line is age 18. *Roper,* 543 U.S. at 1186 ("While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest.").

A. Supreme Court Constitutional Jurisprudence Recognizes Minors' Unique Developmental Status and therefore Provides Additional Protections to Youth.

1. This Court's Constitutional Jurisprudence Recognizes the Importance of the Transitory

Nature of Adolescence to Both Criminal Culpability and Criminal Procedure.

The distinctive emotional and psychological status of youth was critical to *Roper v. Simmons*, 543 U.S. 551 (2005), this Court's landmark ruling abolishing the juvenile death penalty. In prohibiting the execution of offenders under the age of eighteen as a violation of the Eighth Amendment's ban on cruel and unusual punishment, this Court relied on medical, psychological and sociological studies, as well as common experience, which all showed that children under age eighteen are less culpable and more amenable to rehabilitation than adults who commit similar crimes. *Id.* at 568-76. Echoing the original founders of the juvenile court, this Court in *Roper* reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness.

Central to this Court's determination about juvenile culpability in *Roper* was its understanding that the personalities of adolescents are "more transitory" and "less fixed" than those of adults. *Id.* at 570. The Court further explained that

> Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson, supra,* at 368, 113 S.Ct. 2658; see also Steinberg & Scott 1014 ("For most teens, [risky or

> antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Id. The Court noted that this transient nature of a youth's personality was confirmed by psychological and psychiatric practice:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev.2000); see also Steinberg & Scott 1015.

Id. at 573. As a result, the Court's holding rested in part on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. "[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. The Court underscored that the state was not permitted to extinguish the juvenile's "potential to

attain a mature understanding of his own humanity." *Id.* at 573. Thus, the Court concluded that the Constitution required states to protect youth – even those who would otherwise be considered culpable of the most brutal crimes – so as to allow for the child to mature.

Roper brought a new scientific lens to this Court's Constitutional jurisprudence, relying on recent – and highly informative – developments in research on adolescent development. While *Roper* altered the constitutional analysis by embedding its reasoning in science, it also built upon this Court's long history of recognizing that youth are different from adults, and warrant different treatment under the Constitution. This Court has consistently made clear that courts must recognize developmental differences between adolescents and adults, and that governmental power must be wielded to protect juveniles in the juvenile or criminal justice system.

For example, in *Haley v. Ohio,* this Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. Because minors are generally less mature and more vulnerable to coercive interrogation tactics than adults, they deserve heightened protections under the Constitution. 332 U.S. 596 (1948) (holding unconstitutional the statement of a fifteen-year old defendant). The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and

> overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Id. at 599.

This Court has also been explicit that constitutional rights themselves may be – and often must be – defined with reference to an individual's age and developmental status. In *Gallegos v. Colorado*, for example, this Court, considering the admissibility of a juvenile's statement, observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions…. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962). *See also Haley,* 332 U.S. at 601 ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.") *See also In re Gault,* 387 U.S. 1, 48 (1967) (observing that confessions may be particularly problematic when taken from "children from an early age through adolescence" and that without procedural protections, a confession may be "the product of ignorance of rights or of adolescent fantasy, fright or despair.")

Similarly, this Court has recognized the particular importance of Constitutional protections to youth in other criminal and juvenile contexts. For example, the Court has acknowledged that a child has a particular need for the "guiding hand of counsel at every step in the proceedings against him." *Id.* at 35 (extending key constitutional rights including the right to counsel to minors subject to delinquency proceedings in juvenile court). This Court has also sought to promote the well-being of youth by ensuring

their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court); *Bellotti v. Baird,* 443 U.S. 622, 635 (1979) ("Our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.")

2. This Court's Constitutional Jurisprudence in Civil Cases Also Takes Account of the Unique Developmental Needs of Youth

This Court's special treatment of youth is not limited to the juvenile and criminal justice systems. Decisions analyzing children's rights in civil cases likewise reflect this Court's persistent view that children are simply different from adults, and therefore warrant greater protection under the Constitution. In a series of cases upholding greater state restrictions on minors' exercise of reproductive choice, for example, this Court concluded that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," *Bellotti*, 443 U.S. at 635, as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences." *Id*. at 640; *see also Hodgson v.*

Minnesota, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."). As a result, this Court has held that a state may choose to require that minors consult with their parents before obtaining an abortion and may take other "reasonable step[s] in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent." *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502 (1990). . *See also Hodgson*, 497 U.S. at 483, (Kennedy, J., concurring in part) ("Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice."); *id* at 458 (O'Connor, J., concurring in part) (holding that the liberty interest of a minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack the ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (holding that because minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

This Court has also adopted a distinctive First Amendment analysis in cases involving children, recognizing that children will sometimes require more protection than adults. In *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), this Court recognized that, due to minors' immaturity, protecting them from harmful images on the Internet is a compelling government interest. *Id.* at 661, 683

(Breyer, J., dissenting).[2] Previously, in *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), this Court upheld a state statute restricting the sale of obscene material to minors. *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944).

The protection of youth in light of their developmental status is also central to this Court's school prayer cases, which rely specifically on children's vulnerability in adopting a more protective stance toward children. Thus, in holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, this Court in *Lee v. Weisman*, 505 U.S. 577, 586 (1992), underscored how youth informed the constitutional analysis. Choice regarding prayer, the *Lee* Court concluded, would be more appropriate when those "affected . . . are mature adults," rather than "primary and secondary school children," who are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id*. at 593. Similarly, in *Santa Fe Independent School District v. Doe*, 530

[2] The Court split only on whether the Child Online Protection Act used the least restrictive means, consistent with adults' First Amendment freedoms, for achieving that end. *Id.* at 673; 675 (Stevens, J., concurring); 676 (Scalia, J., dissenting); 677 (Breyer, J., dissenting).

U.S. 290, 317 (2000), this Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The opinion stressed "the immense social pressure" on students, *Id*. at 311, observing that "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Id*. at 312. By contrast, this Court has upheld against an Establishment Clause challenge the delivery of prayers at the start of legislative sessions, where the audience that is present invariably is made up almost exclusively of adults who would not be subject to the same pressures to conform as would youth. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee*, 505 U.S. at 597 (distinguishing between the "atmosphere" at legislative sessions and public high schools).

In a wide variety of contexts, this Court's constitutional rulings on children "have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults." *Bellotti,* 443 U.S. at 635.

3. Social Science Research and the Stories of Individual Youth Confirm the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation.

This Court's emphasis on the transitory nature of youth finds support in social science literature.

"Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

> The period is *transitional* because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships…. Even the word "adolescence" has origins that connote its transitional nature: it derives from the Latin verb *adolescere,* to grow into adulthood.

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. See Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOLOGY 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011 (2003). These findings are shored up not only by behavioral research, but also through brain imaging techniques,

which show that areas of the brain relating to impulse control and the processing of social and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68.[3] As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal…." As one report explained,

> More than 30 percent of boys examined in one study committed one or more acts of serious violence by age 18. Few of these youth were ever arrested for violent offenses, but more than three-fourths nonetheless terminated their violence by age 21. Other research has found that the criminal careers of most violent juvenile offenders span only a single year. Understanding this self-correcting dynamic is crucial in any attempt to combat juvenile crime. Most juvenile offenders – even those

[3] While it is beyond the scope of this brief to explore the adolescent psychology research comprehensively, it is worth noting that one of the clearest visual representations of these differences can be found at http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse, an interactive web-based link allowing visitors to compare brain development in various areas (such as judgment) at different ages. The research demonstrates that while the seventeen year old brain is fairly developed, it is not until age twenty-one that a youth experiences "tremendous gains in emotional maturity, impulse control and decision-making [that will] continue to occur into early adulthood." *Id.* Thus, while there are distinctions between the development levels of older adolescents' brains and those of younger teens, the maturation process does not finish until a child reaches his or her mid-twenties.

> who commit serious acts of violence – are not destined for lives of crime.

Richard A. Mendel, Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't 15 (2000). *Id.* at 54. Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions.

While the process of physiological and psychological growth alone will lead to rehabilitiation for most adolescents, research over the last 15 years on interventions for juvenile offenders has yielded rich data on the effectiveness of programs that reduce recidivism and save money. This research further underscores that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders.

The Surgeon General has recognized the capacity of violent youth to respond to rehabilitation:

> effective treatment can divert a significant proportion of delinquent and violent youths from future violence and crime. This finding contradicts the conclusions of scientists two decades ago who declared that nothing had been shown to prevent youth violence. The second major conclusion is that there is enormous variability in the effectiveness of different types of programs for seriously delinquent youth. The most effective programs, on average, reduce the rate of subsequent offending by nearly half (46 percent), compared to controls….

Dep't of Health and Human Services, Youth Violence: A Report of the Surgeon General, ch. 5 (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/chapter5/sec5.html.

Examples of programs shown to be effective with violent and aggressive youth include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST).[1] These three programs all involve engaging families in the intervention and collaborating with them to identify problems and solutions, as well as in-depth monitoring of adherence to the intervention protocols. Peter W. Greenwood, *Changing Lives: Delinquency Prevention as Crime-Control Policy* 70 (2006). All three have been shown to significantly reduce recidivism rates even for serious violent offenders. *See Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence* 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with histories of repeat felonies); .Carol M. Schaeffer and Charles M. Borduin, *Long-term follow-up to a randomized clinical trial of multisystemic therapy with serious and violent juvenile offenders*, 73 J. Consulting & Clinical Psychol. 445, 449-451 (2005) (finding that the benefits of MST often extend into adulthood); Hinton et. al., Juvenile Justice: A System Divided, 18, *Crim. Just. Pol'y Rev.* No. 4, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders." Hinton et. al., Juvenile Justice: A System Divided, 18, *Crim. Just. Pol'y Rev.* No. 4, 475 (2007); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and*

Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial, 12 J. of Emotional & Behav. Disorders 1 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC).

Compelling anecdotal evidence also supports the notion that juveniles, even those charged with serious and violent offenses, can and do change their lives to become productive citizens. *See* Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org (last visited Jun. 12, 2009) (profiling 25 individuals, including D.C. District Court Judge Reggie Walton and former United States Senator Alan Simpson, who were adjudicated delinquent in juvenile court – many for violent offenses including attempted murder and armed robbery – and then changed the course of their lives. See Appendix A for examples of juveniles whose capacity for rehabilitation allowed them to return productively to their communities following periods of incarceration for serious criminal conduct.

B. The Supreme Court's Duty Under the Eighth Amendment to Ensure that Penalties Accord with Human Dignity Precludes the Imposition of Life Without Parole on Adolescents.

This Court has been clear that the decisive question in determining whether a penalty is

Constitutional under the Eighth Amendment is whether it comports with human dignity. As this Court has explained, "our cases… make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) *citing Trop v. Dulles,* 356 U.S. 86, 100 (1958). The *Gregg* Court further explained:

> Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.

Id. at 174 n.19. As this Court has repeatedly observed, the Court itself must determine in its "own independent judgment" whether a penalty is constitutional. *Roper,* 543 U.S. at 564. This analysis is even more vital in the case of youth; as described above, this Court has consistently recognized that youths' unique developmental status informs the constitutional protections they deserve. The Court has therefore proactively afforded protections to youth otherwise not applicable to adults. Thus, for a penalty to be constitutional, it must be appropriately calibrated to the individual's developmental status.

1. When Considering Juvenile Life Without Parole, this Court Must

Take Into Account the Diminished Culpability of Juveniles.

This Court has been clear that for those who *as a class* have diminished culpability or capacity, the relevant question under the Eighth Amendment is whether the severity of the sentence can ever be appropriate for a member of the class. Thus, an offender's youth or mental capacity can make certain penalties unconstitutional regardless of the severity of the offense.[4] In *Roper*, this Court concluded that a death sentence is categorically unconstitutional as applied to any youth under eighteen. *Id.* at 568-78. The Court explained:

---

[4] In contrast, when the defendants at issue have full culpability categorically – and are not limited by mental capacity or youth – the Court places a significant emphasis on balancing the proportionality of the offense itself to the term of years imposed. *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983); *Harmelin v. Michigan*, 501 U.S. 957, 997-1009 (In upholding an adult defendant's conviction for possession of 650 grams of cocaine, the Court proclaimed that "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt**."** *Harmelin*, 501 U.S. at 1023). While the cases involving those of a lesser culpability arise in the context of the death penalty, this Court has long been clear that categorical culpability is meaningful in other contexts as well. *See, e.g., Robinson v. California*, 370 U.S. 660, 661 (1962) (Invalidating a statute criminalizing "be[ing] addicted to the use of narcotics" and determining that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667)).

> Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.
>
> We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.

Id. at 572. Thus, regardless of the brutality of the crime, the death penalty may not be imposed. *Id.* at 572-73. This categorical exclusion protects the vast majority of juveniles whose crimes reflect "unfortunate yet transient immaturity," from receiving an irreversible punishment designed for those whose characters are irreparable. *Id.* at 573. *See also Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (highlighting that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.")

As a number of state courts have recognized, this same logic dictates holding a sentence of life without the possibility of parole unconstitutional for juveniles. As the Kentucky Supreme Court explained, "[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth." *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968). The Nevada Supreme Court has similarly recognized the incongruity of applying a sentence of LWOP as applied to juveniles, observing:

> Before proceeding we pause first to contemplate the meaning of a sentence "without possibility of parole," especially as it bears upon a seventh grader. All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences.

Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989). The court concluded that this was a "severe penalty indeed" to impose upon an adolescent and held that it could not be constitutionally applied to a thirteen-year-old. *Id.* at 944-45.[5] Similarly, the California

---

[5] Indeed, some thinkers, such as John Stuart Mill, have suggested that life in prison is indistinguishable or even worse than death:

> What comparison can there really be, in point of severity between consigning a man to the short pang of rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868), *quoted in* Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 712 (1998) [hereinafter Logan, Proportionality]. See also Id. at nn.141-47 (discussing cases and sources suggesting that LWOP may be a fate worse than the death penalty).

appellate courts have held that an adolescent's capacity to change affects the constitutionality of his or her sentence. The California Appellate Court for the Fourth District, building upon the state's longstanding recognition of the legal differences between youth and adults, recently explained:

> Age also matters….. [T]he perpetrator's age is an important factor in assessing whether a severe punishment falls within constitutional bounds. ([*People v.*] *Dillon*,… 34 Cal.3d [441,] …479, 194 Cal. Rptr. 390, 668 P.2d 697.) Youth is generally relevant to culpability (ibid.; cf. Cal. Rules of Court, rule 4.413(c)(2)(C)), and the diminished "degree of danger" ([*In re*] *Lynch*, ... 8 Cal.3d [410,]…425, 105 Cal. Rptr. 217, 503 P.2d 921) a youth may present after years of incarceration has constitutional implications (see *In re Barker* …151 Cal.App.4th 346, 375, 59 Cal.Rptr.3d 746 [(Cal.App.1 Dist., 2007)].
>
> In *Barker,* the court "agreed with the observations of the federal district court in *Rosenkrantz v. Marshall* […] 444 F.Supp.2d 1063[, 1085] [(C.D.Cal.2006)] that "the general unreliability of predicting violence is exacerbated in [a] case by ... petitioner's young age at the time of the offense [and] the passage [in that case] of nearly twenty years since that offense was committed…"

In re Nunez 173 Cal.App..4th 709, 726-27 (2009). The Court therefore held life without parole sentences unconstitutional for youth under the age of 16. *See also id.* at 736 ("Stated differently by our Supreme Court, the harshness of an LWOP is particularly evident 'if the person on whom it is inflicted is a

minor, who is condemned to live virtually his entire life in ignominious confinement, stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth.'")

Moreover, recognizing the unique developmental status of youth provides this Court with objective factors with which to analyze the cases before it. For juveniles subject to life without the possibility of parole, this Court can follow its previous decisions in acknowledging that: (1) youth are different from adults, and penalties that do not recognize their developmental status are unconstitutional; and (2) therefore, a penalty may be constitutional as long as it provides for a youth's capacity to change. Under this second prong, a sentence of life with the possibility of parole would be constitutional under the appropriate circumstances because the parole system in place would allow for a subsequent review of the culpability and dangerousness of a juvenile offender, later grown into a mature adult, and his current state of rehabilitation. As *Roper* recognized, the point where society draws the line between youth and adulthood is also the appropriate point to draw the line for criminal culpability. 543 U.S. at 1186.

2. Because Life Without the Possibility of Parole Does not Serve a Legitimate Penological Purpose, it is Unconstitutional as Applied to Adolescents

This Court has been careful not to dictate to the states the proper purposes of punishment. *See, e.g., Ewing v. California*, 538 U.S. 11, 25 ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.' [*Harmelin*] at 999, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in judgment)). A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation… Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.") A state may choose to impose a punishment for purposes of retribution, incapacitation, deterrence, rehabilitation – or any combination thereof. *Id.* A punishment that serves no legitimate penological purpose, however, inflicts needless pain and suffering in violation of the Eighth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962); *Thompson*, 487 U.S. 815; *Trop*, 356 U.S. 86; *Furman v. Georgia*, 408 U.S. 238 (1972). As this Court reasoned in *Enmund v. Florida*, 458 U.S. 782, 798 (1982), unless the imposition of a punishment "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *See also Atkins*, 536 U.S. at 319. Whether life without parole serves a legitimate purpose – and comports with the dignity of man – therefore rests at least in part on whether it serves a legitimate penological purpose.

Juvenile life without parole sentences do not appropriately serve any of the purposes of

punishment.[6] First, these sentences do not effectively deter other juveniles from committing similar crimes. In *Roper*, the Court noted that even the death penalty could not be regarded as an effective deterrent, given that juveniles generally lack the mental ability to accurately weigh the possible consequences of their actions. *Roper*, 543 U.S. at 571 (discussing psychological studies that demonstrate "the absence of evidence of deterrent effect" of the death penalty on would-be juvenile offenders); *See also Thompson* 487 U.S. at 837-38 (remarking that for children under age sixteen, "it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century"). Logic dictates that if the death penalty does not effectively deter young people, neither will a sentence of life without parole. *See, e.g., Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding that life without parole for a thirteen year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). Criminological studies also suggest that the threat of adult criminal sanctions may not have the intended

[6] The four purposes for punishment typically understood to justify the criminal justice system are: deterrence, retribution, incapacitation, and rehabilitation. See, e.g., Paul Robinson, Criminal Law: Case Studies and Controversies 82-90 (2005).

deterrent effect when the offender is a juvenile. *See* Jeffery Fagan, [102-103] *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Children 81, 102-103 (Fall, 2008); David Lee and Justin McCrary, "*Crime, Punishment, and Myopia*," Working Paper W11491 (National Bureau of Economic Research, 2005), available at http://ssrn.com/abstract=762770. *See also* Eric L. Jensen & Linda K. Metsger,.*A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime,* 40 *Crime and Delinquency* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime and Justice* 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence* (2004) (cited in Scott & Steinberg 199).

Life without parole sentences also fail to serve a retributive purpose. While retribution is served to some degree by any harsh sentence, that does not end the inquiry. As this Court observed recently, the court must consider the level of punishment in relation to the culpability of the defendant, noting that, "[i]n measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape." *Kennedy v. Louisiana,* 128 S.Ct. 2641, 2662. Indeed, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). As the *Roper* Court stated about the culpability of youth: "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose

culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Thus, the *Roper* Court found that because offenders younger than eighteen are less culpable and more amenable to rehabilitation than those who are older, it is impossible to determine with any reasonable certainty that they are beyond redemption. *Id.*, at 568-75 (noting that differences between juveniles and adults "render suspect any conclusion that a juvenile falls among the worst offenders. . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570). Relying on widely accepted psychological and sociological research,[7] the *Roper* Court underscored

[7] The Court cited the following articles and studies in its opinion: Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003); Erik H. Erikson, Identity: Youth and Crisis (1968). Other studies also confirm that conclusion. .See Elizabeth Cauffman & Laurence Steinberg, (*Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behavioral Sciences and the Law 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) Journal of Criminal Law and Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21(22) The Journal of Neuroscience 8819, 8819-8829 (2001); National Institute of Mental Health, *Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence*, NIH Publication No. 01-4929

that children should be treated differently because of their "lack of maturity," their susceptibility to outside pressures, and the still-developing nature of their personalities. *Roper*, 543 U.S. at 569 - 70.[8]

This conclusion, too, finds ample support in behavioral and neurobiological research. Adolescence has been characterized as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment." *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000). Recent scholarship confirms that "[a]s a developmental stage, adolescence is a complex

---

(2001); Kristen Gerencher, *Understand your teen's brain to be a better parent*. Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

[8] On this issue, *Roper* follows a long line of cases recognizing juveniles' distinctive susceptibility to coercion and pressure. *See, e.g., Gault*, 387 U.S. 1, 39 (1968) (juveniles need the assistance of counsel to prevent coercion in the courtroom); *Thompson v. Oklahoma,* 487 U.S. 815, 835 (1988) (holding the death penalty unconstitutional for juveniles under age 16 at the time of their crime because "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"); *Lee v. Weissman,* 505 U.S. 577, 592 (1992) (holding school prayer unconstitutional and noting that "[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

mixture of the transitional and the formative," Scott & Steinberg, Rethinking Juvenile Justice 32, and that

> Because adolescents' executive functions are not mature, their capacities for planning, for anticipating future consequences, and for impulse control are deficient—as compared with those of adults—at a time when their inclination to engage in risk-taking behavior in the company of peers is greater than it will be in a few years."

Id. at 49. Indeed, "[a]dolescents' risk perception actually declines during mid-adolescence and then gradually increases into adulthood – sixteen and seventeen year old youths perceive fewer risks than do either younger or older research subjects." Barry Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 35-36 (2008).

The reasoning of *Roper* applies with equal force here – life without parole, termed by some as a "slow death," is an extraordinarily severe punishment. Elizabeth Cepparulo, Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death? 16 Temp. Pol. & Civ. Rts. L. Rev. 225, 239 (2006). Moreover, LWOP's finality allows no room to recognize a child's development and growth. When inflicted on youth with diminished culpability and heightened capacity to change, the sentence is too disproportionate to serve its retributive aims within the bounds of the Eighth Amendment.

As for incapacitation, although LWOP sentences do serve that purpose, such incapacitation is unreasonable and disproportionate where the

offender no longer poses a danger to the community. *See United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die"). This Court, in *Roper*, recognized that this may be particularly relevant to youth: "Indeed, 'the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" 543 U.S. at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). The Court further emphasized that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id*. at 569-70 (internal citations omitted) (emphasis added). Because it is difficult even for expert psychologists to differentiate between a crime reflecting immaturity and one reflecting "irreparable corruption," a sentence that makes no allowance for a child's future rehabilitation should not stand. *See id*. at 573-74. In *Graham v. Collins,* this Court similarly emphasized the role of future dangerousness in assessing the constitutionality of a sentence, noting that: "youthfulness may also be seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future." 506 U.S. 461, 518 (1993).

Sociological and psychological research supports this conclusion. *See* Laurence Steinberg & Robert G. Schwartz, "Developmental Psychology Goes to Court," *in Youth on Trial: A Developmental Prospective on Juvenile Justice* 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("the malleability of

adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult"); John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (presenting lives of adjudicated delinquent and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and depended in many instances upon aspects of their adult lives). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

> Last, life without parole sentences do not promote rehabilitation for juveniles; they frustrate it. Like the death penalty, life without parole unconstitutionally fails to recognize a child's "potential to attain a mature understanding of his own humanity." *Roper*, 541 U.S. 551 at 554. A mandatory sentence of life imprisonment without the possibility of parole shares one important characteristic of a death sentence – the offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in

> deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." *Furman*, 408 U.S. at 307 (Stewart, J., concurring).

See also *Naovarath*, 779 P.2d at 526 (describing the devastating effects of a life without parole sentence on a youth and holding the sentence unconstitutional as applied to a thirteen-year-old).

Again, research bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *Id*. at 54. *See also*, Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 712 nn.141-47 (1998) (discussing the "psychological toll associated with LWOP, including citations to cases and sources suggesting that LWOP may be a fate worse than the death penalty).

Life without parole sentences are antithetical to the goal of rehabilitation. The "denial of hope" is antithetical to the core values of human dignity that the Eighth Amendment was enacted to protect.

II. IN LIGHT OF EVOLVING STANDARDS OF DECENCY, THIS COURT MUST HOLD THE IMPOSITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

UNCONSTITUTIONAL FOR THE PRESENT CASES

Comment [JRF1]: We are still deciding whether this section will remain in, and if yes, what else we can do to strengthen the argument.

As described above, the core question – particularly in the case of juveniles, who warrant additional protection under the constitution – is whether a penalty comports with notions of human dignity. Thus, this Court has an obligation to bring its own judgment to bear and to hold unconstitutional a penalty that is out of keeping with current scientific understandings of adolescent development. Because of this Court's duty to protect youth, as articulated by the Court's own precedent, a penalty must be found unconstitutional if out of keeping with human dignity, regardless of whether there is a national consensus on the issue.

If this Court chooses to consider national consensus as well, the consensus weighs against the imposition of juvenile life without parole. As the petitioners have argued, national consensus clearly opposes the imposition of juvenile life without parole on a child who commits an offense at age 13. Similarly, as petitioners have argued there is a clear national consensus against imposing JLWOP for armed burglary and attempted armed robbery, or for a subsequent parole violation for those offenses.

Comment [JRF2]: Confirm that they have argued this.

National consensus also weighs against the imposition of life without parole sentences on juveniles of any age and for any offense. In assessing whether there is a national consensus regarding a punishment, the Court considers not only of the number of states that explicitly prohibit a penalty, but also engages in a careful assessment of a set of more nuanced factors, such as the express intent of

the legislature and frequency with which the penalty is applied.

The sentence of juvenile life without parole in any circumstance is largely a legislative accident and fails to reflect any broad national intent to imprison juveniles for life. In assessing the constitutionality of a sentence applied to juveniles, this Court has looked to the *express* intent of state legislatures. *Thompson v. Oklahoma,* 487 U.S. 815, 817 (1998). In assessing a minimum age at which the death penalty would be constitutional, the *Thompson* Court confined its focus to those statutes expressly establishing a minimum age for the death penalty. As Justice O'Connor further explained in her concurrence,

> There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders. Such reasons would suggest nothing about the appropriateness of capital punishment for 15-year-olds.

Id. at 850. This same reasoning applies to juvenile life without parole.

In nine states and the district of Columbia, juvenile life without parole sentences are prohibited in all

circumstances.[9] In 24 of the remaining 41 states that permit juvenile life without parole in at least some instances, the sentence is a statutory accident, resulting from the convergence of transfer and sentencing statutes.[10] Prior to the 1980s and 1990s,

Comment [JMS3]: Need to figure out if NJ transfer laws bar JLWOP, because N.J. Stat. Ann. § 2C:11-3 (West 2005) specifically limits LWOP for juveniles to mandatory LWOP for murder of a police officer, child under 14, or murder in the course of a sexual assault or criminal sexual contact, but the NJ transfer/waiver statute (N.J.S.A. 2A:4A-20) lays out maximum sentences for crimes of various levels of severity and the maximum sentence is 20 years. If not (for example because of direct file laws) - note somewhere that zero kids are currently serving JLWOP in NJ and see how many of the kids in the adult system are there because of transfer laws.

---

[9] A total of five states and the District of Columbia legislatively prohibit juvenile LWOP. District of Columbia, Colorado, Kansas, New York, Oregon and Texas. See D.C. Code. § 22-2104 (a) (2007) (no person who was less than 18 years of age at the time of committing a murder can be sentenced to LWOP); C.R.S.A. § 17-22.5-104 (2)(d)(iv)(2008) (juveniles charged as adults eligible for parole after 40 years); Kan. Stat. Ann. §§ 21-4622, 21-4635 (2007) (No sentence of life without parole for capital murder where defendant is less than 18 years old); N.Y. Penal Law § 70.00(5) (McKinney 2007) (LWOP available only for first-degree murder), N.Y. Penal Law 70.05 (McKinney 2007) (limiting indeterminate sentencing for youthful offenders), N.Y. Penal Law 125.27(1)(b) (McKinney 2007) (required element of first-degree murder is that the defendant is over 18 years old); Or. Rev. Stat. §161.620 (prohibiting LWOP for juveniles tried as adults) (2005), State v. Davilla, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting §161.620 to bar juvenile LWOP). Texas SB 839 (signed into law by the Governor on June 19, 2009, to be effective on September 1, 2009, text available at: http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB00839I.htm. In addition, the transfer statutes in New Jersey bar the imposition of LWOP on a juvenile by designating maximum sentences for youth transferred to adult court. Two more states legislatively prohibit LWOP for both juveniles and adults. See Alaska Stat. § 12.55.125(a), (h), & (j) (LexisNexis 2007) (providing mandatory 99 year sentences for enumerated crimes, discretionary 99 year sentence in others, but permitting prisoner serving such sentence to apply once for modification or reduction of sentence after serving half of the sentence; N.M. Stat. Ann. § 31-21-10 (Supp. 2007) (maximum sentence in state has parole eligibility after 30 years). Additionally, one state Supreme Court has held broadly that life without parole is unconstitutional as applied to juveniles. Workman v. Kentucky, 429 S.W.2d 374 (KY 1968).

[10] For a list of these statutes, see Appendix B.

most juveniles charged with crimes in the United States were prosecuted in juvenile courts – specialized courts that were established to provide services designed to assist in the rehabilitation of youth who were found delinquent by juvenile court judges and which aimed explicitly to spare juveniles the harsh consequences of a criminal conviction or adult sentence. Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (2005) 14; Patrick Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, with Recommendations for Reform*, National Center for Juvenile Justice (Nov. 2008) 5; Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, at 14.

In the 1980s and 1990s, in the wake of fears of escalating youth crime, states nationwide began passing statutes providing for the transfer of juveniles into adult court.[11] Griffin, *Different from Adults* at 5; *The Rest of Their Lives* at 14. This expansion drastically widened the scope of transfer laws over a short period of time by increasing the types of offenses for which youth could be transferred to adult court and lowering the age at which youth could be eligible for transfer. Griffin, *Different from Adults* at 5; *The Rest of Their Lives* at 14. Notably, however, none of these laws explicitly contemplated the appropriateness or constitutionality of either the

Comment [JRF4]: Need to double check Louisiana - whether the statute did explicitly contemplate JLWOP

[11] Ironically, the "wave" of juvenile crime began to taper off after the mid 1990s. *The Rest of Their Lives* at 15 (citing James Alan Fox, "Homicide Trends in the United States: 2000 Update" (U.S. Department of Justice, Bureau of Justice Statistics, January 2003) and Franklin E. Zimring, *American Youth Violence* (New York: Oxford University Press, 1999).

death penalty or the sentence of life without the possibility of parole. Nonetheless, the changes in transfer legislation between 1992 and 1999 were dramatic, and drastically increased the number of youth eligible for both sentences: 1) 27 states extended their judicial waiver laws (where the juvenile judge waives jurisdiction over the minor after a hearing) by broadening the number of children eligible for transfer by this mechanism, either by lowering the age at which children were eligible for transfer or broadening the categories of offenses for which they could be transferred; 2) 13 states enacted new laws providing for "presumptive waiver," such that there is a rebuttable presumption of transfer in certain categories of cases; 3) 35 states created or expanded automatic transfer; and 4) 11 states expanded the role of prosecutorial discretion in transfer decisions. Griffin, *Different from Adults* at 5; *see also*, Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 133 (1999) (available at http://www.ncjrs.gov/html/ojjdp/nationalreport99/).[12]

[12] The states which changed or expanded transfer provisions from 1992 to 1999 were Alabama (ALA. CODE §§ 12-15-34, 12-1534.1 (West 1996)), Alaska (AS. ST. ANN. §§ 47.12.100 (West 1996), 47.12.030 (West 1996)), Arizona (ARIZ. REV. STAT. §§ 8-239, 13-501 (West 1997)) , Arkansas (A.C.A. § 9-27-318 (West 1993, 1994, 1995, 1997), California (WEST'S ANN. CAL. WELF. & INST.CODE 707 (West 1993, 1994, 1998)), Colorado (COLO. REV. STAT. ANN. §§ 19-2-517, 19-2-518 (West 1997)), Connecticut (CONN. GEN. STAT. ANN. § 46b-127 (West 1995)), Delaware (10 DEL. C. §§ 921, 1010, 1011 (West 1995)), Florida (FL. ST. ANN. §§ 985.226, 985.227 (West 1997)), Georgia (GA CODE ANN. §§ 15-11-39, 15-11-62 (West 1996)), Hawaii (HAW. REV. STAT. §§ 571-22, (West 1997)), Idaho, Illinois (705 ILCS 405/1-1, *et seq*. (West 1992)), 405/5-805, 5-810 (West 1999)), Indiana (IC 31-30-3-1 (West 1997)), Iowa (IOWA CODE ANN. §§ 232.45 (West 1997), 232.8 (West

As a result, juveniles were suddenly eligible for sentences of both death and life without the possibility of parole – sentences which were previously only applicable to adults in most states.[13]

1995)), Kansas (K.S.A. § 38-1636 (West 1993, 1996, 1997)),, Kentucky (K.R.S. §§ 635.020, 640.010 (West 1994)), Louisiana (L.S.A. Ch. C. §§ 305, 857 (West 1992)), Maryland (MD CTS & JUD PRO § 3-804 (1994)), Massachusetts (M.G.L.A. 119 §§ 54, 61, 74 (West 1996)), Minnesota (M.N. ST. § 260.125 (West 1995)), Mississippi (MISS. CODE. ANN. §§ 43-21-151, 43-21-157 (West 1994)), Missouri (MO. ANN. STAT. § 211.071 (West 1995)), Montana (MONT. CODE. ANN. §§ 41-5-206 (West 1993, 1997), 41-5-203 (West 1997)), Nevada (NV ST 62.080, (1993, 1995, 1997) (1993, 293; 1995, 1343;1997, 833); NV ST 62.020 (1993, 1995) (changing the definition of adult)), New Hampshire (N.H. Rev. Stat. § 169-B:24 (1998)), (N.H. REV. STAT. ANN. § 169-B:24) (West 1998)), New Mexico (N.M.S.A. 1978 § 32A-2-3 (West 1993)), North Carolina (N.C. ST. § 7A-608 (West 1994)), North Dakota (N.D. ST. § 27-20-34 (West 1997)), Ohio (OH. ST. § 2151.26 (West 1995)), Oklahoma 10 OK. ST.ANN. § 7306-1.1 (West 1989, 1992, 1993, 1994, 1995)); Oregon (O.R.S. § 419C.349 (West 1999), O.R.S. § 419C.352 (West 1993, 1995), O.R.S. § 419C.364 (West 1993), O.R.S. § 419C.370 (West 1993)), Pennsylvania (42 Pa.C.S.A. § 6322 (West 1995)), 42 Pa.C.S.A. § 6302 (West 1995, 1998)), Rhode Island (R.I. GEN. LAWS § 14-1-7 (West 1990)), South Carolina (S.C. ST. § 20-7-7605 (West 1996)), South Dakota (S.D. CODIFIED LAWS § 26-11-3.1 (West 1997, 2006)), Tennessee (TENN. CODE ANN. § 37-1-134 (a)(1) (FILL IN YEARS)), Texas (V.T.C.A. §§ 8.07, 54.02 (West1995) Utah, Virginia (VA. CODE. ANN. § 16.1-269.1 (West 1994, 1996, 1997)), Washington (WASH. REV. CODE ANN. §§ 13.04.030 (West 1994), 13.40.110 (West 1997)), West Virginia (WV ST § 49-5-10 (1995, 1996)), Wisconsin (WI ST 48.18 (1993)), Wyoming (WYO. STAT. ANN. § 14-6-203 (West 1994)) and the District of Columbia (D.C. STAT. § 16-2307 (West 1993, 1994)); Howard Snyder and Melissa Sickmund, *Juvenile Offenders and Victims* at 89.

[13] After this Court's decision in *Roper*, forbidding the imposition of the death penalty on youth under the age of 18, juveniles who have been transferred to the adult criminal courts and who were previously eligible for the death penalty are now eligible only for a sentence of life without the possibility of parole. *Id.*; *see also*, Human Rights Watch, *State Distribution of Estimated 2,574 Juvenile Offenders Serving Juvenile Life Without Parole* (2009) (available at

In a general sense, of course, adult sentencing was one of the goals of transfer legislation. As this Court recognized in *Thompson*, however, contemplation of the broad goals of adult sentencing does not imply that the legislatures considered the specific – and irrevocable – penalty at issue here. *See, e.g., People v. Miller*, 202 Ill. 2d 328, 340, 781 N.E.2d 300 (2002) (noting that the convergence of Illinois's automatic transfer statute, multiple-murder sentencing statute and accountability statute resulted in an unconstitutional application of JLWOP under the facts of that case).

Indeed, only a small handful of states account for the bulk of the children sentenced to life without the possibility of parole in the United States.[14] Additionally, the sentence has been imposed less and less frequently over the past 13 years. Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 31 (2005). Recent opinion polls have shown that the "public opposes adult prison for most juveniles and favors rehabilitative interventions even for serious first time juvenile offenders so long as they are held accountable for their crimes." Scott and Steinberg, Rethinking Justice at 11. At the same time, there is a growing movement toward age-appropriate

---

http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf).

[14] According to data collected by the Campaign for the Fair Sentencing of Youth, only four states -- Pennsylvania, Michigan Louisiana and Florida -- supply more than half of the youth incarcerated for life without the possibility of parole. http://www.endjlwop.org/stats-by-state/ (accessed June 30, 2009).

sentencing for juveniles.[15] The American Bar Association, for example, has recently issued a resolution asserting that sentences for youthful offenders should be less punitive than those imposed on adults for the same offenses, that sentences should recognize mitigating factors, and that "youthful offenders should generally be eligible for parole or other early release." ABA, Report with Recommendations No. 105 (February 11, 2008).

Of the remaining states that allow for JLWOP, seven permit juvenile life without parole only in limited circumstances (for example, only for narrowly specified offenses, or only for older juveniles).[16] In two of these states, courts have struck down the sentence, calling into question the continued validity

---

[15] In evaluating state law, trends are instructive in addition to tallies. *Roper* at 565-67 (giving particular weight to the trend toward prohibition evidenced by recently-passed state laws to prohibit the death penalty for juveniles).

[16] California, Indiana, Massachusetts, Kentucky, Montana, New York. *See* Cal. Penal Code § 190.5(b) (2006) (LWOP or at the discretion of the court 25 years to life for first degree murder committed by a juvenile 16 or older at the time of the commission of the crime); Ind. Code Ann. § 35-50-2-3 (West Supp. 2005) (LWOP sentences are discretionary juveniles age 16 or older convicted of murder and impermissible for defendants below age 16); M.G.L.A. 265 § 2; see also M.G.L.A. 119 § 72B (LWOP is mandatory upon murder conviction of juvenile age 14 or older who committed a murder in the first degree); (New Jersey); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968); Mont. Code Ann. § 46-18-219; N.Y. Penal Law §490.25(d); Connie De La Vega & Michelle Leighton, Ctr. For Law & Global Justice, Univ. S.F. Law Sch., *Sentencing Our Children to Die in Prison: Global Law and Practice* 1029-44 (2007) (available at http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_30_Web.pdf, last accessed July 10, 2009) (listing state-by-state JLWOP statutes generally).

of the statute. *See Trowbridge v. State*, 717 N.E.2d 138 (Ind., 1999) (holding that the sentence could not be applied to a child under the age of sixteen convicted of murder); *In re Nunez* 173 Cal.App.4th 709, 726-27 (2009) (invalidating LWOP as violating the Eighth Amendment's ban on cruel and unusual punishment when applied to a juvenile kidnapper under age 16 when no one was injured during the commission of his crime). This leaves only ten states expressly permitting the imposition of life without parole sentences on juveniles on the same terms as they can be imposed on adults.[17]

In the majority of states that allow juvenile life without the possibility of parole, the sentence does not reflect a conscious and considered decision by the state legislatures. Instead, it is largely the incidental product of the swift and relatively sudden expansion of transfer legislation in the latter part of the last century. To the extent that states have specifically and explicitly considered the implications of sentencing children to this harsh sentence, they are not representative of any national consensus with regard to the sentence. Instead, the opposite is true – the majority of states that theoretically permit the sentence have not expressly determined that life without the possibility for parole is appropriate for any juvenile. Of those addressing the question, the majority either prohibit it or restrict its use. Given a

[17] Ohio, Florida, Georgia, Maryland, Missouri, Nebraska, North Carolina, Wyoming, Nevada, Virginia. *See* Ohio Rev. Code Ann. §2929.03(E); F.S.A. §985.56; Ga. Code Ann., §§ 17-10-6.1, 17-10-31.1; Md. Code Ann., Crim. Law §§2-202, 2-203, 2-304, MD LEGIS 186 (2009); V.A.M.S. 565.020(2); Neb. Rev. Stat. §28-105; N.C. Gen. Stat. §14-17; Wyo. Stat. Ann. §6-2-101; Nev. Rev. Stat. Ann. §§200.030, 193.130; Va. Code Ann. §18.2-10.

sentence of such finality – every juvenile sentenced to life without parole will die in prison – the lack of express intent cannot be ignored. Thus, the national trend with respect to these statutes strongly suggests that a life without parole sentence for juveniles contravenes evolving standards of decency in this country.

APPENDIX A

Juveniles whose capacity for rehabilitation allowed them to return productively to their communities following periods of incarceration for serious criminal conduct.

*Peter**[18]

Peter's life spun out of control after his mother died when he was 12. With his father largely absent from his life, Peter turned to drugs and alcohol to cope with his loss and began to rob houses to pay for his growing habit. Two years later, at the age of 14, Peter was charged with aggravated assault for beating up a homeless man with some of his friends. "We beat the guy up pretty bad," Peter recalls. Though he was released pending the outcome of the case, repeated violations stemming from his alcohol and drug abuse and continued robbery attempts raised the possibility of his being transferred to adult criminal court.

Peter wanted to turn his life around and knew that he needed to stay away from the drugs and alcohol. He told his social worker and probation officer that he didn't have any support and knew that he couldn't get better unless he got away from negative influences. Largely through the efforts of his social worker, Peter was placed in a juvenile

[18] Names with asterisks have been changed to protect the privacy of the individuals. The stories of Peter, Crystal and Ariel were provided by the Campaign for Youth Justice.

residential program where he could get the treatment and therapy he needed in a new environment.

At the residential program Peter participated in one-on-one therapy and group sessions where he got to talk about his feelings and his substance abuse. These programs as well as the education and work opportunities he received challenged Peter in many ways. In this setting, Peter says, "I was away from everyone that I knew and it was totally different. There was structure, there were rules and before I didn't have any…. I learned a lot about myself and about how to deal with things and how to think about things…. I learned how to be a member of society."

Just over a year later, Peter was released into a foster home. He graduated from high school and began working at a local coffee shop. He is now married to his high school sweetheart. They have two children.

In addition to working at the coffee shop, Peter is taking classes at the local college. He credits his probation officer and the juvenile justice system with giving him a second chance at life: "If I had been in the adult system I wouldn't have gotten that. It would have been much harsher. I don't think I would have been able to get any of the therapy that I received…If I had gone into the adult system, I definitely wouldn't be here. There is no way…I would have stayed where I was, doing drugs and getting into trouble…possibly gone to jail and just learned more tricks. I definitely would not have been a productive member of society and possibly not even alive."

Starcia Ague[19]

At the age of 15 Starcia Ague came before a juvenile judge on six Class A felonies including kidnapping and robbery. She and her friends were accused of tying up a man with a telephone cord and threatening him with a kitchen knife. She spent 214 days in detention, awaiting a determination of whether she would be tried as an adult or a juvenile. The judge denied the request to transfer Starcia to the adult system.

On the advice of the judge, Starcia took a plea to 3 Class A felonies and was committed until her twenty-first birthday. Starcia spent the next five and a half years in the system, going from one juvenile facility to another, and was released to a group home for her final year of commitment. During her time at the juvenile facility, Starcia began to gain perspective on her life and began to take advantage of the programs being offered to her. She says, "I was given the chance to transform from being a product of my environment to an individual who had to overcome many obstacles, but realized change is possible." Through the juvenile justice agency, Starcia was matched with a mentor through the department who encouraged her to follow her dreams. She worked two jobs in order to gain valuable job skills. She also threw herself into her studies and in convincing the authorities to allow her to take college classes when she completed high school.

By the time she transitioned out of the detention facility to a group home, she had completed 54 credits online toward her associates degree. Once

[19] Information about Starcia Ague is based on an interview and subsequent conversations between her and NJDC in July, 2009.

in the community, Starcia immediately enrolled in the local community college and got a part-time job. She has since transferred to Washington State University and has been awarded several scholarships. A criminal justice major, she will enter her senior year this fall and is one year away from reaching her goal of a college degree. Starcia now interns at the local public defender's office. In the future, she has stated that she would like to work with kids who grew up in hard circumstances like she did so that they don't have to become another statistic and learn the lessons of the life the hard way, like she did.

*Ariel**

Ariel grew up in California. Molested by her step-brother and two neighbors beginning when she was only five years old, Ariel learned to suppress the memories of the abuse and sought control of her life in drugs and in bullying other students at school. She would steal marijuana and sell it at school. She started smoking crack and began robbing people to pay for the drugs. Throughout middle school and high school, she was in and out of juvenile detention facilities for her drug use and fighting with teachers and students.

When Ariel was 17 years old, she was arrested for robbing a person at gunpoint. Though her case could have been transferred to adult court, Ariel's case stayed in the juvenile system and she was sentenced to 2 ½ years at the California Youth Authority (CYA). At first, she acted out against authority, resulting in an additional 2 ½ years being added to her original sentence. It was only at that

point that Ariel realized that this was not the life she wanted for herself. She began to go to counseling and treatment groups. "For the first time in years," she recalls, "I was forced to deal with my emotional trauma sober, and that was a very hard thing." During her time at CYA, Ariel earned her high school diploma and enrolled in college classes. She also worked for the California Department of Forestry. This experience taught her valuable lessons of self-discipline.

Ariel reflects that "going to CYA was the best thing that ever happened to me…." Ariel has been out of CYA for over five years. Since then, she completed her parole successfully and had her records sealed. Now married and the mother of a young child, Ariel recognizes that she is now a "law abiding citizen thanks to the juvenile justice system."

*Crystal**

A student of political science at the University of California, Berkeley, Crystal has come a long way from her childhood in East Los Angeles. Raised by a single mother who worked around the clock to support her three children, Crystal's contacts with the juvenile justice system began at the very young age of 11, when she ran away from home. By 14, her juvenile record included grand theft auto, entering a campus with a weapon, and attempted murder. Crystal spent most of her teenage years in and out of youth detention centers. Finally she was sent to a rehabilitation camp instead of the youth prison because the judge said that he thought there was still hope that she would benefit from the counseling she could get at the residential program.

Her counselor at the residential program changed Crystal's life. At first she had trouble opening up about her experiences but her counselor helped her to talk to others about her life. Crystal says, "He understood that my reason for being there was ultimately based on poverty and the relationship with my mother and the multiplicity of factors that led me down the path I was on. I really felt like he understood that and he really cared about making that better…he even gave [my mother] tools to help her better parent me."

After she completed the program, Crystal moved out of her old neighborhood in Los Angeles, earned her high school diploma, got married and enrolled in college. Crystal plans to pursue human rights law or public policy work after getting a law or other graduate degree. Crystal credits the juvenile justice system for her success. Crystal's counselor at the residential program is still a big part of her life. "He really had a positive impact on my life," she says. "He held me accountable and really cared. We are still friends to this day…. He was there at my high school graduation, my community college graduation…and my kids call him 'grandpa'."

Naziyr

Naziyr grew up in South Philadelphia, the youngest of six children. The memories of his childhood are painful. His father routinely beat him and then left the family when Naziyr was just six years old. As a young teenager, Naziyr began running the city streets with his older brothers who were members of a gang. He remembers that time as when he "got into a world of trouble. [I] thought I

was going to be dead or in prison by the time I was 16."

At the age of 16, Naziyr did find himself in prison for aggravated assault. The experience of being incarcerated in an adult facility was a shock to him. Naziyr remained at the Philadelphia County Prison for a year while he awaited trial. He suffered many difficulties during this period and had to go through some major psychological issues. With no family support and no one to talk to, he tried to do everything he could to survive. That one year was worse than anything he ever saw on the streets.

At the end of that year, Naziyr was granted a decertification hearing; he entered into a plea agreement so that he could be sentenced in the juvenile justice system. Naziyr was initially sent to a secure residential treatment placement in Colorado for a term of 24 months. During his time there, Naziyr wanted to prove that he should never have been in prison in the first place. He was so successful in his treatment that he was discharged in 15 months. At the staff's recommendation that he be stepped down to a less restrictive environment, Naziyr was transferred to ARC (Alternative Rehabilitation Community Inc.) in Lancaster, Pennsylvania where he remained for 12 months. As in Colorado, Naziyr was a model resident, participating in all the programs available to him. Upon his release, Naziyr received a boxing scholarship for the Olympic Education Center in Marquette, Michigan.

Naziyr is now 28 years old and lives in Lancaster, PA with his wife and three children. He is a USA elite Amateur boxer and a five-time state champion headed to Salt Lake for Golden Gloves

nationals. Naziyr is a junior at Elizabethtown College, studying criminal justice and works as a counselor at ARC, the same residential juvenile treatment facility he attended as a teen.

*Donald**

David grew up in a neighborhood in the south side of Chicago where gangs were a fixture and the lack of resources made participation in neighborhood programs virtually impossible. David was a good student and stayed away from gang involvement. But he couldn't escape them entirely – his friends were members of the gangs and when David was 15 years old, several neighborhood gang members informed David that they planned to assault him on the first day of the school year. David had been subject to much bullying in the past and was terrified of what he might face at school. Though he pleaded with his mother to allow him to stay home, she was determined that he not miss school. Not knowing what else to do, David bought a handgun, hoping that just showing his attackers the gun would scare them off and stave off any future attacks or harassment.

After school that day, over a dozen boys attacked David in gym class. In the struggle, David pulled out the gun. The crowd dispersed and David also ran away. But as he ran, his gun accidentally went off, striking one of the boys in the foot. When David later found out that he had wounded one of the boys, he surrendered to authorities and was placed under arrest for attempted first degree murder and aggravated battery with a firearm. Because the offense involved the possession of a firearm at school, David's case was automatically transferred to adult court without a hearing. Fortunately, he was able to

make bond and get permission to move to Georgia during the pendency of his case. In Georgia, David flourished both academically and personally. He became an active member of the Future Business Leaders of America, was named to his school's Dean's List, and achieved consistently high marks. In recognition of David's potential for rehabilitation, the prosecutor agreed not to pursue the adult firearm charges and offered David a plea to one count of aggravated battery. David took the plea and spent six weeks in a youth facility for his juvenile offense.

After his time in the juvenile detention facility, David moved permanently to Georgia where he has lived up to the court's expectations of rehabilitation. He had no other disciplinary problems and excelled in school. He received a full scholarship to a well-regarded school and was voted President of his class. David is working this summer for the Children and Family Justice Center at Northwestern Law School. David says, "I want to become a community organizer and hopefully gain enough experience working with people in promoting economic efficiency to run for city and national elected positions."

APPENDIX B

States where juvenile life without parole sentences are imposed through transfer or waiver laws without express statutory language on the applicability of the sentences to juveniles.

Alabama: Ala. Code § 13A-5-39 (2007) (capital offenses are punishable by sentence of death or life imprisonment) Ala. Code §13A-5-40 (2007) (defining elements of a capital offense) Ala. Code §§ 13A-5-46 13A-5-48 (2007) (explaining that aggravating and mitigating factors only affect whether the sentence is death or life imprisonment without parole; imposition of either the death penalty or LWOP is mandatory for a defendant convicted of a capital offense) Ala. Code §§ 13A-5-6 13A-5-9 (West 2005) (LWOP available for various serious habitual offenders).

Arizona: Ariz. Rev. Stat. Ann. § 13-703.01(A) (Westlaw 2006) (LWOP ("natural life") or life sentence for specified time for defendants convicted of first degree murder).

Arkansas: Ark. Code Ann. § 5-4-104 (2006) (mandatory LWOP or death for capital murder or treason).

Connecticut: Conn. Gen. Stat. § 53a-35a (West 2001) (mandatory sentence of LWOP or death for capital murder).

Comment [JMS5]: We are in the process of updating the Appendix; some statutes may not match up to those in text.

Delaware: Del. Code Ann. tit. 11 § 4209 (2005) (mandatory LWOP for "any person" convicted of first degree murder).

Hawaii HRS § 706-656 (LWOP imposed on juveniles only in cases of murder or attempted murder).

Idaho: Idaho Code Ann. § 20-509(3)-(4) (Michie 2004) (juvenile tried as an adult can be sentenced pursuant to adult sentencing measures pursuant to juvenile sentencing options or a court can commit the juvenile to the custody of the department of juvenile corrections and suspend the sentence or withhold judgment).

Illinois: 730 Ill. Comp. Stat. 5/5-8-1 (West Supp. 2005) (details mandatory minimum sentences for felonies; for first degree murder if death cannot be imposed and one aggravating factor is proven the mandatory sentence is LWOP if no aggravating circumstances the sentence is 20-60 years).

Iowa: Iowa Code § 902.1 (West 2003) (LWOP sentences are mandatory upon conviction for "Class A Felony") Iowa Code § 902.2 (West 2003) (LWOP prisoner allowed to apply for commutation at least every 10 years and director of Iowa department of corrections may make a request for commutation to governor at any time).

Kentucky: Ky. Rev. Stat. Ann. § 532.025 (Michie Supp. 2002) Ky. Rev. Stat. Ann. § 532.030 (Michie 1999) (LWOP discretionary for capital offense; age a mitigating factor in sentencing).

Louisiana: La. Child. Code Ann. art. 305 (West 2004) (any juvenile 15 years old or older charged with first-degree murder second-degree murder aggravated rape or aggravated kidnapping must be tried as an adult) La. Crim. Code. Ann. art. 14:30 (mandatory LWOP for first degree murder) La. Crim. Code. Ann. art. 14:30.1 (mandatory LWOP for second degree murder).

Maine - ??????

Michigan: Mich. Comp. Laws Ann § 750.316 (West 2004) (mandatory LWOP for first degree murder) and People v. Snider 239 Mich.App. 393 608 N.W.2d 502 (Mich. Ct. App. 1999) (life sentence means LWOP).

Minnesota: Minn. Stat. § 609.106 (West Supp. 2005) (mandatory LWOP for enumerated "heinous" crimes including first degree murder).

Mississippi: Miss. Code Ann. § 97-3-21 (2005) (discretionary LWOP life for capital murder).

Montana: Mont. Code Ann. § 46-18-219 (2005) (a sentence of life without parole must be given if the defendant has been *previously convicted* of one of the following: deliberate homicide aggravated kidnapping sexual intercourse without consent sexual abuse of children or ritual abuse of a minor) Mont. Code Ann. § 45-5-102 (2005) (life term of years discretionary sentence for deliberate homicide).

Nevada: Nev. Rev. Stat. Ann. § 200.030 (LexisNexis 2001 & Supp. 2003) (discretionary LWOP sentence for murder).

North Dakota: N.D. Cent. Code § 12.1-32-01 (Michie 1997) (LWOP not mandatory but is maximum for Class AA felonies).

Oklahoma??

Pennsylvania: 18 Pa.C.S.A. § 1102 (West 1998 & Supp. 2005) (mandatory minimum punishment for murder is life imprisonment) 61 Pa.C.S.A. § 331.21 (West 1999 & Supp. 2005) (no parole until minimum term of sentence served i.e. life means LWOP).

Rhode Island: R.I. Gen. Laws § 12-19.2-4 (LexisNexis 2002) (LWOP sentence discretionary).

South Carolina: S.C. Code Ann. § 17-25-45 (2005) (except in cases that impose the death penalty when convicted of a serious offense as defined in statute a person must be sentenced to a term of imprisonment for life without the possibility of parole only if person has *prior convictions* for enumerated crimes; otherwise there is discretion between LWOP and life with possibility of parole).

South Dakota: S.D. Codified Laws § 22-6-1 (West 2004) (life imprisonment is mandatory minimum for juvenile convicted of class A felony) S.D. Codified Laws § 24-15-4 (West 2004) (life imprisonment means LWOP).

Tennessee: Tenn. Code Ann. §§ 39-13-202 204 (2003) (sentence for first degree murder discretionary as to death imprisonment for life without possibility of parole).

Texas: Tex. Penal Code §8.07 (Vernon 2005 & Supp. 2007) (capital felony is exception to the age limit of 15 for being tried as an adult) Tex. Penal Code § 12.31 (sentence of life imprisonment without parole is mandatory when state does not seek the death penalty in capital felony cases).

Utah: Utah Code Ann. §76-3-206 (LexisNexis 2003) (LWOP discretionary).

Vermont: Vt. Stat. Ann. tit. 13 § 2303 (2003) (life imprisonment discretionary for first degree murder) (section 2303 was held unconstitutional on other grounds - however the Vermont House retained discretionary LWOP see H. B. 874 2005 Leg. Adjourned Sess. 2005-2006 (Vt. 2006)) see also State v. White 172 Vt. 493 787 A.2d 1187 (Vt. 2001) (court has discretion to impose LWOP).

Washington: Wash. Rev. Code Ann. § 10.95.030 (West 2005) (mandatory death or LWOP for aggravated murder in first degree).

West Virginia: W. Va. Code § 49-5-13(e) (Michie Supp. 2005) (notwithstanding any other part of code court may sentence a child tried and convicted as adult as a juvenile) W. Va. Code § 61-2-2 (Michie

Supp. 2005) (mandatory LWOP for first degree murder).

Wisconsin: Wis. Stat. Ann. § 973.014 (West 1998) (LWOP discretionary not minimum for first degree murder).