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END NATURAL LIFE SENTENCES FOR JUVENILES*

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In 2005, the U.S. Supreme Court in *Roper v. Simmons* (125 S. Ct. 1183) banned executions of persons who commit capital murder before they reach age 18. *Roper* overturned death sentences for 72 people in 18 states (Streib, 2005). Most (but not all) were resentenced to natural life or life in prison without the possibility of parole (or JLWOP).¹ Juvenile justice advocates now want to extend *Roper's* maturity heuristic, proportionality analysis, aversion to errors, and deference to international laws and norms to argue for a constitutional ban on natural life sentences for adolescent offenders. This move could have a far greater reach than did *Roper*, potentially affecting more than 2,250 inmates in 42 states.² But extending *Roper* raises difficult normative, constitutional and policy questions. Does the *Roper* logic fit when the crime is other than murder? When the sentence is less than death? A retreat from natural life sentences requires a confrontation in state legislatures with three decades of increasingly harsh punishment legislation aimed at juvenile offenders, and with its underlying fear-driven instinct to remove serious youthful offenders categorically and permanently from our midst. The policy options and mobilization strategies to counter this trend emerge not only from *Roper's* jurisprudence but also from the coupling and alignment of natural life sentences with a broader discourse on the principles of juvenile justice and youth policies.

DIVERSITY AMONG STATES IN JLWOP ELIGIBILITY

Currently, 42 states permit juvenile life without parole (JLWOP) sentences (Human Rights Watch-Amnesty International, 2005, hereafter HRW-AI). Colorado banned JLWOP sentences in 2006, and five other

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1. Information regarding individuals resentenced after *Roper v. Simmons* was compiled by searching respective states' department of corrections websites for offenders listed by Streib (2005). In some states, the department of corrections websites did not provide inmate search capabilities or did not have information on a particular offender.

2. A complete list of states and their JLWOP sentencing statutes appears in a detailed report by Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005). Available online: http://hrw.org/reports/2005/us1005/5.htm#_Toc114638402. The list of statutes also is available from the author.

states have abolition legislation pending.³ Among the nine states that prohibit JLWOP sentences, four prohibit LWOP sentences at any age.

No consensus exists among the states for the minimum age of a natural life sentence: Fourteen states allow a minor to be tried as an adult at any age and sentenced to JLWOP. In seven states, all life sentences deny the possibility of parole, regardless of age. Some states, such as California, limit JLWOP sentences to persons convicted of capital crimes or “special circumstances” crimes that include felony murder, capital murder, or terrorism. Most JLWOP sentences require a conviction for capital homicide and felony murder. But many states have much broader statutory horizons that extend to crimes other than homicide, including lesser degrees of homicide or manslaughter, robbery, aggravated assault, rape, and nonviolent felonies such as burglary and drug selling (Massey, 2006). Other states (e.g., Louisiana, South Carolina) permit or mandate natural life sentences for minors as a second or third *strike*.

Although they are widely authorized across the states, the use of JLWOP sentences has varied over time. JLWOP sentences were extremely rare before 1980 (HRW-AI, 2005). The number rose steadily throughout the 1980s, reaching 50 in 1989, and peaking at 152 in 1996; since then, JLWOP sentences have declined sharply to 54 in 2003 (HRW-AI, 2005). This downward trend mirrors the sharp decline in juvenile death sentences over the same period, a decline that exceeded the decline in the rate of juvenile homicide arrests and the overall decline in the homicide and violent crime rates (Fagan and West, 2005).⁴

3. Michigan, Florida, California, Mississippi, and Illinois. For example, four bills in the Michigan Senate would eliminate LWOP for minors sentenced before their 18th birthday. SB 0006 would change the “Code of Criminal Procedures” to prohibit the court from sentencing youth 17 years and under with imprisonment for life without parole eligibility. SB 0009 would change “Corrections Code of 1953” to require that individuals 17 years or younger when they committed a crime be eligible for parole after having served a minimum of 10 years. SB 0028 would change the “Probate Code of 1939” to allow the court to impose any sentence on a juvenile that could be imposed on an adult convicted of the offense for which the juvenile was convicted, except imprisonment for life without parole eligibility. SB 0040 would amend Michigan Penal Code 1931 PA 328 to include a statement prohibiting individuals 17 years and younger from being sentenced to life imprisonment without parole eligibility. In California, SB 999 would eliminate JLWOP sentences for first-degree murder and replace them with indeterminate sentences of 25 years to life.

4. However, JLWOP sentencing practices for all degrees of murder seemed to harden during this time (HRW-AI, 2005). The increase in the rate of JLWOP sentences per juvenile homicide arrest indicates that the decline is certainly not a sign of evolving norms or a dissolving of the national consensus. According to the thorough HRW-AI study, the proportion of homicide defendants below age 18 years who received LWOP sentences rose sharply: The share of adolescents convicted of murder who received sentences of natural life rose from 2.86% in 1990 to 9.05% in 2000.

CRIMINOLOGY & PUBLIC POLICY

737

Not only is there heterogeneity in the statutory architecture of JLWOP sentences, but there also is wide variability in the willingness of states to use it. The HRW-AI report (2005) shows enormous variation across states in their use of JLWOP sentences. JLWOP rates in Delaware, Illinois, and Maryland are low despite high juvenile arrest rates for violent crimes, but Pennsylvania and Michigan have high JLWOP rates but low youth violence arrest rates. Juvenile arrests for violence are comparable in Michigan and New Jersey; yet Michigan has sentenced 306 youth to LWOP compared with none in New Jersey. Missouri has high juvenile arrest rates and high rates of youths serving natural life sentences.

The architecture of JLWOP statutes seems to shape this variation. The eight states where natural life sentences are mandatory for specific crimes have the highest JLWOP rates (per youth population). The lowest rates are in five states where the sentence is discretionary—that is, statutes that assign sentencing judges discretion based on individualized assessments. In this statutory design, JLWOP has the deepest and widest reach when legislatures in effect delegate sentencing authority to prosecutors whose charging decisions have the power to foreclose any latitude in sentencing once the case reaches the criminal court.

INTERNATIONAL NORMS AND COVENANTS

The *Roper* Court nodded to international norms, noting “. . .the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” Here, abolitionists are on firm ground: international norms strongly oppose natural life sentences for minors (HRW-AI, 2005). The norms and practices of other nations reveal the jurisprudential isolation and outlier status of American law and policy on this question. Only three countries authorize and use natural life sentences for minors: the United States, South Africa, and Israel (HRW-AI, 2005). None use it as often or as broadly as U.S. courts. HRW-AI (2005) reports that only four juvenile offenders were serving natural life sentences in South Africa in 1999 and four in Israel as of 2002. Several countries explicitly ban JLWOP sentences: Austria, Ireland, Japan, Switzerland, Sweden, and the United Kingdom. In Canada, a sentence of LWOP is prohibited for juvenile offenders, and the harshest penalty a juvenile can receive is life with the possibility of parole in five to 10 years.

JLWOP sentences violate several international covenants (Goliath, 2003; HRW-AI, 2005), including Articles VII (right to special protection), XXV (right to due process), and XXVI (right to protection against cruel, infamous, or unusual punishment) of the American Declaration of the Rights and Duties of Man. Article 37 of the Convention of Rights of the Child, which has been signed and ratified by every country but the United

States and Somalia, explicitly prohibits LWOP sentences for juvenile offenders under the age of 18 years. In the United Nations, JLWOP sentences also violate the U.N. *Standard Minimum Rules for the Administration of Juvenile Justice* (i.e., the *Beijing Rules*), which hold that detention of children should only occur as a last resort and for the shortest length of time possible.

THE PROPORTIONALITY OF NATURAL LIFE SENTENCES FOR CHILDREN AND ADOLESCENTS

The jurisprudential bar is both different and higher for those hoping to extend *Roper's* calculus to the case of natural life sentences for adolescents. The problem is not the design of blanket rules that instantiate the rationality of an age-based classification as a proxy for human development and various aspects of behavior (Emens, 2005). Law is good at that when it comes to adolescence (Scott and Steinberg, 2003). The *Roper* Court's proportionality analysis, and its resulting bright line on age, was simplified by its longstanding "death is different" jurisprudence that treats execution as a separate category with its own precedents and rules [e.g., *Woodson v. North Carolina* U.S. 280 (1976)], and whose culpability bar is highest. Because of the low culpability bar and weak track record of proportionality analyses in LWOP case law, JLWOP sentences — whether authorized or mandated legislatively — can run afoul of the jurisprudence of the juvenile death penalty. Accordingly, the constitutionality of JLWOP sentences may turn on how legislatures form their views of the severity of natural life sentences for adolescents.

DEATH IS DIFFERENT, BUT IS JLWOP DIFFERENT?

The U.S. Supreme Court, as well as federal and state appellate courts, has generally adopted narrow Eighth Amendment proportionality principles in noncapital cases, thereby affirming natural life sentences for nonviolent crimes such as drug selling or "Three-Strikes" violations.⁵ In juvenile LWOP cases, differing views of the proportionality of JLWOP sentences have led some courts to invalidate these sentences and others to affirm

5. Decisions such as *Ewing v. California* (2003) (upholding a life sentence under California's Three Strikes Law for the theft of three golf clubs worth \$399 each), *Rummel v. Estelle* (1980) (affirming a LWOP sentence for the theft of \$120.75 worth of goods via credit card fraud), and *Harmelin v. Michigan* (1991) (upholding a LWOP sentence in a drug distribution case for a first-time offender) are typical, standing in contrast to *Solem v. Helm* (1983), where the Court reversed a LWOP sentence for a chronic property offender.

CRIMINOLOGY & PUBLIC POLICY

739

them.⁶ This admixture of proportionality standards for juveniles in these cases is hardly surprising. Courts are conflicted over whether age is a fiction in proportionality analyses, and the conflict is heightened when sentencing goals move from retributive to instrumental. If the legislatures are inchoate on proportionality principles, it is not surprising that appellate judges also disagree on exactly what proportionality means, how it might

6. In *Harris v. Wright* (1995), the Ninth Circuit rejected the notion that a sentence of natural life for an adolescent is fungible with execution: "Youth has no obvious bearing on this problem. . . . Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer." But in *People v. Miller* (2002), the court overturned an LWOP sentence for a first-time, 15-year-old Illinois offender, after finding the LWOP sentence so disproportionate to the defendant's role as a passive lookout that it "shocks the moral sense of the community." The Court was critical of the Illinois felony murder law whose wide net and diluted notions of culpability would offend *Roper's* logic.

State courts are inconsistent in their views of age as a factor in assessing the proportionality of natural life sentences. In *State v. Massey* (1990), the Washington State Court of Appeals rejected age as a factor in the proportionality analysis of a life sentence for a 13-year-old convicted of murder, narrowly defining proportionality as "only a balance between the crime and the sentence imposed." But in *Workman v. Kentucky* (1968), the Kentucky Supreme Court held that JLWOP sentences for two 15-year-old males convicted of rape "under all circumstances shocks the general conscience of society today and is intolerable to fundamental fairness." And in *Naovarath v. State* (1989), the Nevada Supreme Court overturned a natural life sentence of a 13-year-old convicted of first-degree murder for shooting a man who had been sexually molesting him. The Court, pointing to the "undeniably lesser culpability of children for their bad actions, their capacity for growth, and society's special obligation to [them]," held that JLWOP sentence constituted severe cruel and unusual punishment: "To adjudicate a thirteen year old to be forever irredeemable and to subject a child of this age to hopeless, life-long punishment. . . is not a usual or acceptable response to childhood criminality."

Even when courts consider age, structured sentencing may preclude its relevance in sentencing. In *State v. Mitchell* (1998), a Minnesota court rejected a proportionality challenge brought by a 15-year-old who had been sentenced to natural life (albeit with parole review after 30 years). Although age was obviously a mitigating factor, the trial judge could not impose a lesser sentence since JLWOP was mandatory once the case was transferred to the criminal court, where any sentencing discount for diminished culpability was forfeited. In *State v. Standard* (2003), the South Carolina Supreme Court discounted age altogether and invoked an instrumentalist definition of proportionality in affirming a natural life sentence under the state's "Two-Strikes Law" for a 15-year-old with a prior armed robbery conviction who was later convicted of first-degree burglary and grand larceny and sentenced to LWOP. The Court ruled that *Standard's* sentence was within the bounds of society's current and evolving standards, citing the minority of states that authorize the sentence on very young juvenile offenders (see, also, *State v. Mitchell*, 1998).

be defined operationally in law and policy, what its limits are when punishment serves nonretributive purposes, and whether states can have different proportionality standards and principles that operate simultaneously (Frase, 2005).

THE THINNEST OF LINES BETWEEN NATURAL LIFE AND DEATH

The *Roper* Court casually entered this debate, perhaps unintentionally. Justice Kennedy's opinion toyed with the notion that for adolescents, a natural life sentence is on the same proportionality plane as a death sentence. First, he noted in passing that ". . .the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." Then, he invoked the incomplete development of adolescents as a discount on proportionality, stating that ". . .[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life *and his potential to attain a mature understanding of his own humanity*" (emphasis added) (*Roper v. Simmons*, 2005, at 1197). The Court seemed to reject *any* punishment that would permanently mortgage or foreclose the possibility of the realization of full human development. Finally, the majority opinion concluded that minors might well imagine life without parole to be the same, if not worse, than death because most of their lives lie ahead. "To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person" (*Roper v. Simmons*, 2005, at 1196). By these proportionality standards, both the juvenile death penalty and the JLWOP sentence fail a constitutional or commonsense test of the retributive and deterrence goals of punishment. It is only when the sentencing goals drift toward the instrumental that the *Roper* logic and its extension to JLWOP become moot.

The idea that LWOP is the equivalent of death for an adolescent is not only enduring, but it is also a challenge to the *Harris* Court's dismissal of proportionality analyses in non-capital cases. John Stuart Mill (1868) characterized a natural life sentence as a "living tomb." Logan (1998) cites both historical and contemporary evidence that modern courts have characterized JLWOP as a "slow death sentence" that is "equally severe" to a death sentence. Anticipating *Roper*, the Nevada Supreme Court in *Naovarath v. Nevada* (1989) characterized JLWOP as "virtually hopeless lifetime incarceration" that is ". . .a denial of hope" that renders "good behavior and character improvement" immaterial and, worse, is cancerous to human development: "To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopelessness or near

CRIMINOLOGY & PUBLIC POLICY

741

hopelessness is the hallmark of [this] punishment” ([*Naovarath v. Nevada*, (1989, at 948)]. The *Naovarath* Court also raised doubts about the deterrent effects of JLWOP for younger offenders: “It is questionable as to whether a 13-year-old can even imagine or comprehend what it means to be imprisoned for 60 years or more.”

The severity of punishment of a natural life sentence is also an empirical question, but the available facts let us estimate its boundaries. Most of this evidence, such as the recent newspaper series by Liptak (2005) and Florio et al. (2005), is descriptive. One of the very few systematic empirical studies on prisoners serving LWOP sentences confirms the protracted deterioration of humanity that occurs when one is imprisoned for life. In the 1920s, Sir Alexander Patterson studied the effects of long-term imprisonment on both young and older offenders as part of a parliamentary review of capital punishment in the United Kingdom (Patterson, 1951 [1930]). As part of his report for the British Parliament’s *Select Committee on Capital Punishment*, he visited men serving life sentences in English prisons at 6-week intervals for nearly a year. He recorded a deterioration that “will permanently impair something more precious than the life of the physical body,” and he equated life sentences with “a death sentence where the inevitable end is reached by the imperceptible stages of institutional decay instead of by one full stroke” (p. 485). The Select Committee recommended that life sentences include review and the possibility of release after 20 years. Patterson also recommended that “inasmuch as 21 is the age when full civil responsibility is assumed, it should also be the age below which no one should be sentenced to death” (p. 487).⁷

Patterson’s description of the emotional and spiritual decay of long prison terms comports with Streib’s (1995) characterization of early incarceration as a lifetime sentence to psychological and physical (often sexual) abuse in prison. The facts side with this view. For example, Forst et al. (1989) show the elevated risks of physical and sexual abuse when minors are transferred to the criminal court and sentenced as adults to prison, which is a consequence of transfer and waiver laws that are essential moving parts of the JLWOP process (Logan, 1998). Thus, natural life sentences for juveniles are in yet another way a disfiguring punishment, certainly a dimension of “cruel” but, again, not all that unusual. The link between violent subjugation of youths in prison and their long-term spiritual and emotional decay suggests that “. . . life in prison is as severe, if not more severe . . . for a juvenile than is the death penalty” (Streib, 1995:776).

7. The recommendations of the Select Committee were hardly unanimous. Six Conservative members withdrew from the committee in an effort to discredit the report. See Calvert (1931:v–xii).

MISTAKES

The recent newspaper series (Florio et al., 2005; Liptak, 2005) and television documentaries (Frontline, 2007) illustrate how the spacious net of JLWOP statutes can permanently incarcerate young offenders whose culpability—whether convicted of felony murder or a second drug offense—may be attenuated. These cases illustrate one of *Roper's* central concerns: the inability of judges and juries to accurately render individualized assessments about whether a teenager's immaturity and developmental deficits attenuates his or her culpability. It also shows how mandatory JLWOP sentences can result when culpability is low. The number of mistakes—whether errors in determining guilt or in divining culpability—is a difficult empirical question. Errors are all too common in death penalty cases (Forst, 2003; Liebman et al., 2000), including juvenile death penalty cases (Gross et al., 2005), but we discover many of these errors because of strong due process footprints (Garrett, 2008) and the close attention of skilled death penalty lawyers. No such footprints exist in most JLWOP cases, and certainly, fewer legal resources are available when death is not at stake. Accordingly, the same risks of error that cautioned the courts in *Roper* and 4 years earlier in *Atkins v. Virginia* (2002) (banning the execution of mentally retarded persons)—inflated culpability assessments, false confessions, ineffective assistance to counsel, all leading to wrongful conviction—are present equally for JLWOP but with significantly less appellate recourse.

Errors in capital cases, as Justice Kennedy reminds us in *Roper*, are not correctable. Unless natural life sentences become reviewable as to the matter of (im)maturity or guilt, and until defense resources routinely provide lawyers who are sufficiently skilled and trained specifically for the punishment at hand, similar mistakes are likely given the wide statutory net and the absence of (super) due process to protect against mistakes such as those that occur in capital cases even after remedies are exhausted (Garrett, 2008). Indeed, the *Roper* opinion reflects the fear that mistakes will happen, at least in part, because of the irrationality of judgments among prosecutors, judges, and juries about the culpability and danger of youths (Emens, 2005). In *State v. Mitchell* (1998), the appellate opinion notes how this fear of youth crime has metastasized in state legislatures into two-strike and three-strike laws aimed at youths and that promote mandatory JLWOP sentences. The *Mitchell* court notes that whether or not natural life sentences for minors are cruel, they certainly are no longer unusual.

CRIMINOLOGY & PUBLIC POLICY

743

STRATEGY AND TACTICS

Opponents of natural life sentences for minors have three avenues to proceed within states; local contexts guide the choice of strategies. First, many of the waiver and transfer statutes that make possible JLWOP sentences delegate—de facto—transfer decisions to prosecutors and legislators through the coupling of unreviewable charging decisions with mandatory JWLOP provisions. These expansive waiver laws deregulate punishment and remove judges from any role other than procedural traffic cop and evidentiary gatekeeper. Narrowing or reversing these laws can reduce the reach of JLWOP statutes. Some states have reduced the scope of these laws, whereas others—such as Connecticut—have simply reversed the statutory trends of the past 30 years to criminalize delinquency by raising the age of majority to 18 years and by restricting waiver eligibility. Robust empirical evidence shows that these laws offer no crime-control benefits and instead expose high numbers of minors to the iatrogenic effects of criminal court sentences (McGowan, 2006). The same may also be true of the felony murder rule, where little evidence exists of marginal deterrence, and where there may be unanticipated and perverse effects resulting in victim substitution (Klick and Garoupa, 2006). These facts can offset the demand for retribution that seems to fuel spacious JLWOP and transfer laws.

Second, narrowing JLWOP eligibility to capital crimes would reduce the reach of these statutes drastically and mitigate some of their errors. Evidence of fractured proportionality could be persuasive to state legislators when the actual human faces of excessive punishment are visible so that parents and legislators can forge a sense of linked fate to animate advocacy for legislative change. These laws are used wantonly and promiscuously, and personalized proportionality analyses can reveal the moral hazard in the expansion of natural life sentences for persons of compromised culpability.

Third, of course, is the pursuit of abolition within states. The success of the efforts in Colorado, and the story of state efforts that aggregated to the *Atkins* decision (Ellis, 2003), charts a path and a strategy for building a persuasive consensus of states. The *Atkins* decision was the result of time-consuming work by local coalitions of mental health advocates, voluntary organizations in the disability community, and mental health professionals, who worked with death penalty opponents within both the legal and the advocacy communities (Ellis, 2003). Their work uniquely juxtaposed legislative action with constitutional analysis. The legitimacy of their constitutional argument with both legislatures and the Court was enhanced by the

intersection of advocacy interests with the professional judgments of clinicians and scientists. The same work was done in the interval between *Stanford v. Kentucky* (1989) and *Roper*, although with more limited success, to produce abolition of juvenile death sentences in five states. Here, the argument and the penal calculus are simpler: What extra benefits to crime control or to retributive justice do we gain from a sentence of life without parole for an immature juvenile than we now gain from sentences of 40 or 50 years? The answer, given the reality and severity of prison, is nothing at all.

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CRIMINOLOGY & PUBLIC POLICY

745

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