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Juvenile Life Without Parole

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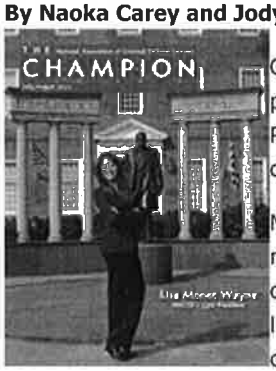

Of the 2,500 people in the United States who have been sentenced to life in prison without the possibility of parole for crimes committed before they were 18, two-thirds of them are concentrated in just five states — Pennsylvania, Michigan, Louisiana, California, and Florida. There are thousands more children across the country sentenced to "virtual life" sentences of 60, 70, 80, or 100 or more years.

Most of the people serving juvenile life without parole (JLWOP) sentences are not repeat offenders, nor were many found guilty of pre-meditated crimes: nearly 60 percent of people serving JLWOP are first-time offenders, and more than one-fourth of them were convicted on the basis of "felony murder" or accomplice liability theories. Not surprisingly, research on the use of the sentence around the country has found evidence of systemic racial disparities, gross failures in legal representation, and numerous examples of youth being sentenced more harshly than adults convicted of the same types of crimes or even involved in the same offense as their younger co-defendants.[1] Nationally, Black children are 10 times more likely to receive JLWOP than White children charged with the same crimes;[2] and in some states, such as California, disproportionate rates of sentencing are significantly higher.

Not only does sentencing youth to irrevocable sentences such as life without the possibility of parole raise significant questions about fairness and excessive sentencing, it also flies in the face of research on **adolescent** development and the best ways to address and prevent youth crime. The juvenile justice system was founded because youth have unique characteristics — requiring special protections and services — that reflect a greater capacity to change than adults. Unfortunately, "tough on crime" legislation in the 1990s stripped many youth of the ability to have their cases heard in juvenile courts, and often resulted, inadvertently, in them being subjected to mandatory adult sentences, including life without parole.

Fortunately, recent developments in the U.S. Supreme Court and in state legislatures around the country suggest that the tide may be turning on excessive and short-sighted criminal justice policies for youth, including JLWOP. One year ago, the Supreme Court held in Graham v. Florida[3] that it is unconstitutional to sentence youth to life in prison without the possibility of parole for "non-homicide"[4] offenses committed before they turned 18. In doing so, the Court reaffirmed the reasoning underlying its earlier ruling in Roper v. Simmons (holding the death penalty unconstitutional for youth under 18): youth are fundamentally different from adults and therefore fundamentally less culpable than adults convicted of the same crimes. This recognition — that youth are distinct from adults and must be treated accordingly by the criminal justice system — is also reflected in several recent legislative trends around the country, in which states have increasingly retreated from the now discredited "adult time for adult crime" approach to dealing with youthful offenders.

In the context of these promising developments, this article is intended to provide criminal defense attorneys with a basic foundation in the policy arguments against JLWOP sentences, and to highlight opportunities for contributions and collaboration by defense attorneys and other advocates seeking reform. Defense counsel can play an important role in bringing about change, whether by bringing the lessons of developmental psychology to bear in their practice with young offenders, or by collaborating with partners to bring about broader change. Working in partnership, advocates can shift criminal justice policies to hold youth accountable for their crimes and simultaneously focus on their potential for rehabilitation and reintegration into society.

Why the Time for Change Is Now

As most people are aware, many of the current "tough on crime" policies were enacted in the 1990s. These policies were based in large part on irrational fear and exacerbated by the theory, which was subsequently disproven, that a new generation of "Superpredator" youth were coming and, with them, an unprecedented crime wave. The predicted youth crime wave never materialized. Instead, juvenile arrest rates have continued to fall in recent years. Between 1999 and 2008, for example, juvenile arrest rates for violent crimes decreased by 8.6 percent and total juvenile arrest rates have fallen by 15.7 percent in the past decade.[5]
In the wake of the continuing decrease in youth crime, and propelled by extensive new evidence about what works for kids involved in both minor and more serious crimes, the pendulum has begun to swing away from adult treatment of youth. A recent report, for example, highlights four recent trends in which harsh sentencing policies imposed on youth have been scaled back.

Four states (Colorado, Maine, Virginia, and Pennsylvania) passed laws limiting the ability to house youth in adult jails and prisons.
Three states (Connecticut, Illinois, and Mississippi) expanded their juvenile court jurisdiction so that older youth who previously would be automatically tried as adults are not prosecuted in adult criminal court.
Ten states (Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Nevada, Utah, Virginia, and Washington) changed their transfer laws, making it more likely that youth will stay in the juvenile justice system.
Four states (Colorado, Georgia, Texas, and Washington) changed their mandatory minimum sentencing laws to take into account the developmental differences between youth and adults.[6]
As states re-examine their policies, advocates for youth have increasingly found bipartisan support for sensible reforms, as lawmakers and advocates on both sides of the political spectrum recognize that sentencing youth to die in prison is not age-appropriate, cost-effective, or humane. For example, Pat Nolan, a former Republican Leader of the California Assembly, has spoken out against the practice of sentencing youth to life in prison without hope of ever being released. He explained:

Why would a tough "law and order" Republican support giving a second chance for people who have committed awful crimes? I support giving people a second chance because every one of us has made stupid mistakes when we were young, sometimes with terrible consequences. Fortunately, the boneheaded things I did as a teenager didn't end up harming anyone, but they sure could have.

In addition to individuals like Nolan, a new national initiative called "Right on Crime," launched by the Texas Public Policy Foundation, is leading a campaign among conservatives to promote sound, cost-effective criminal justice policy reforms. "Right on Crime" spokespeople include Newt Gingrich, Ed Meese, David Keene, and other staunch conservatives. This group recently added to its juvenile justice policy recommendations a call to require review of all sentences given to individuals under 18 at the time of their offense.[7]

Youthfulness and Its Role in Criminal Procedure and Sentencing

In addition to the legislative advances noted above, the last decade has brought with it a growing recognition by the U.S. Supreme Court of the necessity of considering youthfulness in criminal sentencing. Most recently, on May 17, 2010, the Supreme Court ruled in Graham v. Florida that sentencing youth who did not commit murder to life without parole is unconstitutional. In a 5-4 decision authored by Justice Kennedy (Chief Justice Roberts concurred in the judgment), the Court held that the Eighth Amendment's prohibition against cruel and unusual punishment categorically barred the imposition of life without the possibility of parole sentences for youth convicted of "non-homicide offenses" who were under the age of 18 at the time of their offenses. Notably, the Court was not presented with, nor did it expressly rule on, the appropriateness of life without parole as a sentence for a homicide crime.

For any attorney who represents youth, whether in adult or juvenile court, the Graham decision, like the decision in Roper v. Simmons before it, contains a wealth of useful language and potential support for arguments addressing the unique needs of adolescents who are involved in the criminal justice system. Unlike the Roper decision, which was, potentially at least, circumscribed by its death penalty context, the reasoning of the Graham decision could arguably apply to other sentencing or criminal procedure issues as they relate to youth. Here are a few of many highlights from the decision:

The Court's ruling that it is a violation of the Eighth Amendment to sentence a juvenile to life in prison without the possibility of parole if he or she did not kill or intend to kill;[8]
Reaffirmation by the Court that age is a relevant factor in determining what is cruel and unusual punishment, in particular the statement that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed";[9]
Reliance on the research of neurologists and behavioral scientists in support of its finding that kids are fundamentally different than adults;[10]
Acknowledgment that any judgment, at least at the time of sentencing or earlier, "that the juvenile is incorrigible ... [is] questionable" and that the lack of reliability in making such determinations weighs directly against the imposition of a final, irrevocable sentence on any

juvenile;[11] and
Recognition of the unique disadvantages faced by youth in criminal proceedings, including the difficulties they face in effectively aiding their attorneys in their defense.[12]
As is apparent from the foregoing, one of the most critical lessons of Graham for defense counsel is the necessity of raising the relevance of youthfulness at all stages of representation, from contested suppression issues to trial and sentencing, and again on appeal. This is especially critical when representing young people in adult court, where procedures, as well as judges and jurors, often seem to encourage ignorance of this basic fact about a client's life and context. In addition to Graham, extensive case law exists addressing the differences between children and adults, not to mention the research cited in the decision itself, all of which can be used to ensure that a child's age is never forgotten or ignored during the proceedings. Unfortunately, for far too many of the individuals who were sentenced to life without parole for offenses committed as children, no reference or even mention of their age was ever made at trial or during subsequent proceedings.

Beyond the courtroom, Graham has also become a useful tool for policy advocates, providing additional justification for treating children involved in the justice system in a way that is consistent with their age and capacity to change. Most state laws already recognize the differences between children and adults — the fact that children are more impulsive, susceptible to peer pressure, and do not have adult levels of judgment or risk assessment. That is why, in most states, youth are not allowed to vote, serve on juries, buy alcohol, or join the armed services. Graham makes clear that the same factors that cause us to limit teens' activities or rights in most other contexts should also be applicable in the world of criminal law.

Unfortunately, while Graham has had a mostly positive influence on the broader discussion around youthful offenders, some have used it to call for similarly punitive sentences as alternatives to JLWOP for non-homicide crimes: 60- or 70-year sentences, for example, with no opportunity for sentence review. These potentially harmful efforts have increased the need for broad-based coalitions and collaboration among advocates and lawyers seeking better alternatives to JLWOP or other extreme sentences.

Defense Attorneys as Critical Partners in Reform

Collaboration between policy advocates and defense attorneys in efforts to abolish extreme sentencing practices is not only mutually beneficial, but is also a critical ingredient of successful sentencing reform. In addition to using cases like Graham to directly advocate for youth facing extreme sentences, including JLWOP, defense counsel have been instrumental in informing and guiding legislative and other policy reform efforts in many states. Defense attorneys educate policy advocates about how specific sentencing or transfer statutes work in practice, and help explain the implications of judicial discretion in sentencing and what factors (such as age) are or could be considered. Defense counsel may also offer key insights about broader sentencing practices and schemes in a particular state, giving legislative advocates a better sense of what is feasible and workable in a particular jurisdiction. Similarly, defense counsel can provide an important critical eye for proposed legislation, identifying potential pitfalls with proposed "reforms" that may have unintended and undesired consequences.

In addition to providing concrete legal context to policymakers, defense counsel can also play a crucial role in identifying and clarifying broader, systemic issues. Defense attorneys may, where appropriate and consistent with the interests of clients, share important information about the lives and backgrounds of clients who are facing or serving JLWOP sentences, as well as examples of egregious injustices or inadequacies in the system. Real-life examples help policy advocates put a human face on the youth who are sentenced and shape the messages that are used in public education efforts. Defense counsel may also be involved in potentially significant litigation efforts (including challenges to sentencing schemes or other strategies) that could alter the strategic landscape in a particular state — in these cases, communication and coordination between counsel and legislative advocates are key elements.

Defense counsel can also receive numerous benefits by virtue of their participation in broader reform efforts. Advocates involved in the movement to end JLWOP, for example, have access to relevant research, networks of experts, and policy briefs that may strengthen legal arguments made by defense attorneys in individual cases. They also bring information about proposed legislation that may impact individual clients whose cases are pending. As Bryan Gowdy, the attorney for Terrance Graham, noted, partnerships with advocates were enormously helpful when the U.S. Supreme Court decided to hear the case: "Advocates can be invaluable in organizing amici who can support the defense attorney's legal arguments. They are also a useful resource for learning about the latest supporting empirical research, legislative bills, and cases, especially from outside of one's home jurisdiction." Perhaps most importantly, defense counsel and their clients benefit directly from more sensible, fair laws, which hold youth accountable while recognizing their unique capacity for growth and change.

This is a critical time for organizers, advocates, and defense attorneys to create forums to communicate and work together to implement

strategies to ensure that youth convicted of crimes are never sentenced to die in prison. With the momentum generated by the increasingly bipartisan understanding of effective juvenile justice practice, as well as the unequivocal recognition of youth's unique status by the Supreme Court, the time has come to move toward a rational, fair approach to holding youth accountable.

Notes

1. HUMAN RIGHTS WATCH, EXECUTIVE SUMMARY: THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008 (May 2008), available at http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf (last viewed May 10, 2011).
2. Id. at 5.
3. Graham v. Florida, 130 S. Ct. 2011 (2010).
4. "The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 2027.
5. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2008: TEN YEAR ARREST TRENDS, Table 32, available at http://www2.fbi.gov/ucr/cius2008/data/table_32.html (last viewed May 10, 2011).
6. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2011), available at http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf (last viewed May 10, 2011).
7. RIGHT ON CRIME, PRIORITY ISSUES: JUVENILE JUSTICE, available at http://www.rightoncrime.com/priority-issues/juvenile-justice (last viewed May 10, 2011).
8. 130 S. Ct. at 2029, 2034.
9. Id. at 2036.
10. Id. at 2028.
11. Id. at 2033.
12. Id. at 2038.

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