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From Death to Near-Death: The Fate of Serious Youthful Offenders after *Roper v. Simmons*

Christopher A. Mallett*

INTRODUCTION

The United States juvenile death penalty was abolished in 2005 when the Supreme Court, in *Roper v. Simmons*, found this punishment to be cruel and unusual and in violation of the Constitution's Eighth Amendment.¹ This decision was the final step in ending the death sentence for those under the age of eighteen. While this sentence is no longer an option for retributively-inclined states, many serious youthful offenders continue to meet similar, and in some ways, comparably difficult fates. These fates include the wholesale transfer of serious youthful offenders to the criminal courts² and the subsequent incarceration of tens of thousands of troubled adolescents;³ and

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¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

² See Patrick Griffin, Nat'l. Center for Juvenile Justice, National Overviews, State Juvenile Justice Profiles (2003); Christopher A. Mallett, Death is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts, 43 *Crim. L. Bull.* 523 (2007); Edward P. Mulvey & Carol A. Schubert, Transfer of Juveniles to Adult Court: Effects of a Broad Policy on One Court, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dept. of Justice, Wash., D.C. (2007).

³ See Richard A. Mendel, No Place for Kids: The Case for Reducing Juvenile Incarceration (2012); Office of Juvenile Justice and Delinquency Prevention, OJJDP Statistical Briefing Book (2011), available at <http://www.ojjdp.gov/ojstatbb/corrections/qa08201.asp?qaDate=2010>; Melissa Sickmund, Juveniles in Residential Placement: 1997 to 2008, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dept. of Justice, Wash., D.C. (2010).

for a smaller subset of this group, their imprisonment for life without the possibility of parole (LWOP).⁴

This review of the juvenile death penalty - its history, impact, and extinction – does not end with the 2005 *Roper* decision. While the abolishment of life-ending sentences for adolescent offenders is no longer an option for judicial officers, its punitive paradigm has been far-reaching, and its alternative – life without the possibility of parole – much more common. This Article is in two-parts: 1) the analysis of the recent juvenile death penalty era (1976 to 2005) and federal and Supreme Court doctrine that eventually ended executions; and 2) post-*Roper*, the continued dismal state for serious youthful offenders, most who suffer from significant disabilities, trauma, and education deficits, with thousands sentenced to life imprisonment without the possibility of parole. This country has shifted from the juvenile death penalty era to the juvenile near-death penalty era.

JUVENILE DEATH PENALTY: 1976 TO 2005

The death penalty has been used to execute adolescents in this country for over 300 years across varying offenses, though during the recent juvenile death penalty era (1976 to 2005) the offense had to have been first-degree or aggravated murder.⁵ There had been, on average, one execution of an adolescent annually since the founding of this country, with twenty-two (of a total 226 who were sentenced to death) occurring since 1973.⁶

The death-sentencing of adolescents declined during the most recent three-decade era, beginning with a four-year moratorium declared in 1972 by the Supreme Court finding this sentence unconstitutional. The Court held the death penalty (for

⁴ See Ashley Nellis, *The Lives of Juvenile Lifers: Findings From a National Survey*, The Sentencing Project, Wash., D.C. (2012).

⁵ Mallett, *supra* note 2; Mirah A. Horowitz, *Kids Who Kill: A Critique of How the American Legal System Deals with Juveniles Who Commit Homicide*, 63 *Law & Contemp. Probs.* 135 (2000).

⁶ See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes* (2005).

juveniles and adults) to be unconstitutional due to arbitrary and capricious state sentencing standards.⁷ When the Court reestablished the death penalty as constitutional in 1976, it directed the sentencing authority to consider relevant mitigating circumstances to the offense and a range of factors about the individual defendant.⁸ In striking down mandatory capital sentencing statutes that existed prior to 1972, the Court found the flaw to be a failure to permit the presentation of mitigating circumstances: “[T]he Eighth Amendment,” explained the Court, “requires consideration of the character and record of the individual . . . as a constitutionally indispensable part of the process of inflicting the penalty of death.”⁹ As will be seen, this mitigating circumstance evidentiary standard was often not met for juvenile death (and, later, near-death) sentenced individuals.

Mitigating Evidence

From the 1976 *Furman* decision to the turn of the twenty-first century, the Court continued to reinforce and expand mitigating evidence requirements in capital cases. The Court recognized that in order to support individualized sentencing requirements in capital cases the sentencing authority must be permitted to consider any aspect of a defendant’s character or record and any of the offense circumstances,¹⁰ and that troubled childhood histories must be considered a mitigating factor.¹¹ Subsequently, the Court found that jury instructions may not limit jury consideration of these mitigating circumstances, a significant step in having all parties be aware of the defendant’s background.¹²

⁷ *Furman v. Georgia*, 408, U.S. 238 (1972).

⁸ *Gregg v. Georgia*, 428, U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

⁹ *Woodson v. California*, 428 U.S. 280, 303 (1976). The Court continued that “without this consideration, the possibility of compassionate or mitigating factors could not be reviewed in light of the frailties of humankind. Fixed death penalty sentencing guidelines treat human beings as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”

¹⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹¹ *Eddings v. Oklahoma*, 436 U.S. 921 (1978).

¹² *Hitchcock v. Dugger*, 381 U.S. 393 (1987).

The Court further found that the defendant's character and background are relevant because of society's belief that a disadvantaged upbringing, emotional difficulties, or mental problems may diminish offenders' moral culpability.¹³ Indeed, the Court has posited that "[t]he sentence imposed at the death penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime"¹⁴ and must consider both the tangibles and intangibles of the defendant.¹⁵ In some cases, evidence of drug abuse, brain damage, and poverty must be reviewed by the sentencing authority.¹⁶ And more recently, it was held unequivocal that evidence from childhood difficulties must be presented to the sentencing authority.¹⁷ The Court determined that the following evidence should be considered at sentencing of defendants: child borderline mental retardation, child physical abuse, parent imprisonment for child neglect, and reunification of the child with the abusive parent after prison release. In addition, the Court faulted the absence of jury instructions informing the jury that it could consider and give effect to the defendant's mental retardation and history of abuse.¹⁸

It became clear doctrine that for a death sentence to be appropriately determined, the youthful offenders' histories and difficulties must have been identified and presented to the sentencing authority. Unfortunately, the failure to identify and review such childhood background, difficulties, traumas, and disabilities was common in capital cases. Of the fifty-three juvenile offenders on death row in 2002, only twenty-six of the offenders' background or mitigating histories were presented at trial, with five of the juries hearing only that the offender was an adolescent.¹⁹ Of these juvenile offender backgrounds not presented at trial, a majority had histories of traumatic abuse,

¹³ *California v. Brown*, 429 U.S. 538 (1987).

¹⁴ *Woodson*, 428 U.S. at 304.

¹⁵ *Caldwell v. Mississippi*, 427 U.S. 320 (1985).

¹⁶ *Hitchcock*, 381 U.S. 393.

¹⁷ *Williams v. Taylor*, 529 U.S. 362 (2000).

¹⁸ *Williams*, 529 U.S. at 370-71.

¹⁹ Mallett, *supra* note 2.

mental health problems, school failure, and poverty.²⁰ In a second review of twenty executed juveniles, similar outcomes were found in that nine had medically documented brain damage; however, only two of these adolescents' jury trials were presented with this mitigating evidence (as seen in Table 1).²¹

Table 1 – Juveniles Sentenced to Death

Juveniles Sentenced to Death ²²	%
Minority (African-American or Hispanic)	56
Mitigating Histories	
Maltreatment victimization	68
Poverty experienced	55
Serious mental health disorders	37
Developmentally delayed (mental retardation)	31
Substance abuse disorders	30
School failure	28
Brain damage	17

Sentencing

In two decisions, the Court narrowed the use of the death penalty and ultimately abolished its application to those less than eighteen years of age. In *Atkins v. Virginia*, it was found that youthful offenders with low intellectual functioning could not be sentenced to death because their disabilities limited impulse control and judgment abilities, “[t]hey do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”²³ The Court further reasoned that the use of this severe punishment neither afforded retribution for the offender’s act nor deterrence.²⁴ This decision was important in providing serious youthful (and adult) offenders with

²⁰ Mallett, *supra* note 2.

²¹ See American Bar Association, *Juvenile Death Penalty Report* (2003).

²² Mallett, *supra* note 2; American Bar Association, *Juvenile Justice Death Penalty Report* (2000).

²³ *Atkins v. Virginia*, 536 U.S. 304, 305 (2002).

²⁴ *Atkins*, 536 U.S. at 311.

significant developmental disabilities respite from the death penalty.

And ultimately, in *Roper*, the Court found youthful offenders less culpable for similar impulse control reasons, among others, but went further to find adolescence itself a mitigating factor.²⁵ This was not the first Court holding or commentary on juvenile offender culpability; early, the Court in *Johnson v. Texas* wrote, “the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”²⁶ Yet in *Roper*, the Court found relevant differences between those under eighteen years of age and adults so consequential as to not classify adolescents among the worst offenders.²⁷ These differences included an underdeveloped sense of responsibility leading to impetuous actions as well as a lack of maturity,²⁸ lessened character development,²⁹ and vulnerability to negative influences and outside peer pressure.³⁰ For these reasons

²⁵ *Roper*, 543 U.S. 551 (“The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”). This was not the first Court holding or commentary on juvenile offender culpability, for in *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988), it was acknowledged that “teenagers capacity for growth” and in *Johnson v. Texas*, 509 U.S. 350, 368 (1993), the Court stated “the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”

²⁶ *Johnson*, 509 U.S. at 368.

²⁷ *Roper*, 543 U.S. at 556 (“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.”).

²⁸ *Roper*, 543 U.S. at 557 (“[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”).

²⁹ *Roper*, 543 U.S. at 557 (“[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”).

³⁰ *Roper*, 543 U.S. at 557 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.”).

“almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.”³¹ The juvenile death penalty was thus abolished; these individuals were resentenced to juvenile life without the possibility of parole.

This is not the end of the story. Though executions of juvenile offenders are barred, the long-term and life-time incarceration of these similarly-situated serious youthful offenders is today’s quagmire.

JUVENILE NEAR-DEATH PENALTY: 2005 TO PRESENT

A harsh, punitive paradigm continues to dominate the criminal justice system for serious youthful offenders, particularly those who have committed some of the more tragic offenses (murder, sexual assault, robbery, or aggravated assault); LWOP sentences are allowed for only aggravated murder or homicide in the states that utilize this punishment. Though reform efforts, state budgetary difficulties, and litigation concerning unconstitutional care and dangerous facilities have reduced the number of youthful offender incarcerations over the past decade, little has changed for the subset of juveniles who have committed these serious personal crimes. These youthful offenders are often incarcerated in juvenile and adult prisons, and for those who have committed murder, receive long incarceration sentences, and, for some, a life-time prison term.³²

Incarceration

More than 60,000 youthful offenders are confined each day in the United States by order of a juvenile court.³³ The most common placement for these committed adolescents is a locked, long-term state facility that typically hold hundreds of youthful offenders at one time, in prison-like environments with locked

³¹ *Roper*, 543 U.S. at 557.

³² *Supra* note 3.

³³ *Supra* note 3.

cell blocks, and provide minimal rehabilitative services.³⁴ These incarcerations in juvenile justice facilities do not include youthful offenders transferred to the adult criminal courts, a controversial procedure that bifurcates the youthful offender population often without sufficient safeguards for the adolescent.³⁵ While estimates vary, 2,500 to 10,000 youthful offenders are held in adult jails and prisons each day, in addition to the 60,000 in juvenile facilities.³⁶ A majority of this incarcerated population is older (sixteen- and seventeen-year olds), male (87%), and minority (68%) adolescents. Of the minority group, approximately 60% are African-American, 33% are Hispanic, and, depending on the jurisdiction, between 1-4% are American Indian or Asian,³⁷ a phenomenon known as disproportionate minority confinement (DMC) and found in nearly all states (those formerly on death row were also disproportionately minority)³⁸ Almost all youthful offenders sentenced to LWOP have detention, recidivism, and incarceration histories.

Sentencing and Mitigating Evidence

³⁴ Supra note 3.

³⁵ See Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 *Future of Children* 81 (2008); Simon Singer, *Recriminalizing Delinquency: Violent Juvenile Crime and Juvenile Justice Reform* (1996).

³⁶ See Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, Wash., D.C. (2011); *State Trends: Legislative Victories from 2005 to 2010: Removing Youth from the Adult Criminal Justice System*, Campaign for Youth Justice, Wash., D.C. (2011); Todd D. Minton, *Prison and Jail Inmates at Midyear*, Office of Justice Programs, Bureau of Justice Statistics, U.S., Department of Justice, Wash., D.C. (2010).

³⁷ Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book* (2011), available at <http://www.ojjdp.gov/ojstatbb/corrections/qa08201.asp?qaDate=2010>; Paul Tracy et al., *Gender Differences in Delinquency and Juvenile Justice Processing: Evidence from National Data*, 55 *Crime & Delinq.* 171 (2009).

³⁸ See Alex R. Piquero, *Disproportionate Minority Contact*, 18 *Future of Children* 59 (2008); National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, National Council on Crime and Delinquency, Oakland, Cal. (2007).

After *Roper*, the Constitution's Eighth Amendment requires punishment to be proportioned to the youthful offender offense.³⁹ A key factor in this proportionality determination is the culpability of the offender.⁴⁰ Since 2005, two Court decisions have narrowed the available use of the most severe criminal punishments for serious youthful offenders, finding certain sentences violated the Amendment's Cruel and Unusual Punishment Clause.

In *Graham v. Florida*, the Court found that sentencing non-homicide offending youthful offenders to life without the possibility of parole was unconstitutional. In so holding, the Court reinforced and relied upon their *Roper* decision in reiterating that youthful offenders are different from adults and that these characteristics mean that "[i]t 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."⁴¹ The Court further found that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."⁴² The Court decision, however, did not extend this Constitutional protection to youthful offenders sentenced to life without the possibility of parole for homicide crimes.⁴³

This constitutional protection from certain LWOP sentences for youthful offenders convicted of homicide was extended in *Miller v. Alabama*. The Court furthered the reasoning from *Roper* and, more significantly from *Graham*, in finding that a youthful offender convicted of homicide and sentenced by a mandatory state statute to LWOP was unconstitutional.⁴⁴ The

³⁹ *Roper*, 543 U.S. at 560.

⁴⁰ *Roper*, 543 at 559-70; *Atkins*, 536 U.S. at 319; *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982).

⁴¹ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

⁴² *Graham*, 130 S. Ct. at 2026.

⁴³ *Graham*, 130 S. Ct. at 2029.

⁴⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

Court determined that these mandatory laws “run[] afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.”⁴⁵ The Court went further in addressing mitigating evidence in finding, “[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional.”⁴⁶

The law today allows the sentencing of youthful offenders convicted of homicide to LWOP, but only after the sentencing court has investigated and reviewed the adolescent’s mitigating evidence, involvement in the offense, and related matters. Specifically, a sentencing authority must consider the adolescent’s age and impact on maturity and appreciation of consequences, the family and home environment, the offense circumstances including involvement level and influence of peers, the adolescent’s level of sophistication in dealing with the adult criminal justice system, and the possibility for rehabilitation. This mitigation investigation should be thorough and identify important developmental, family, maltreatment, mental health, and other related disability circumstances that the adolescent suffers or has suffered from, and in particular, those that impacted the commission of the crime.⁴⁷

Near-Death Sentenced Mitigating Histories

The Supreme Court’s decision in *Miller* was a step forward in eliminating mandatory state LWOP sentences, yet this still allows the LWOP sentence after a review of mitigating and offense specific evidence. The constitutional right granted in *Miller* may still not be guaranteed if important mitigating

⁴⁵ *Miller*, 132 S. Ct. at 2460.

⁴⁶ *Miller*, 132 S. Ct. at 2464.

⁴⁷ *Miller*, 132 S. Ct. at 24644.

evidence is not uncovered and presented to the sentencing authority.

This may be problematic because those in the population serving a LWOP sentence often have very difficult and traumatic mitigating histories, something not always readily identified. In a review of 1,579 individuals serving these sentences in 2012, the following was found (though not all was presented to the earlier sentencing authority): 32% had been raised in public housing; and almost 20% were homeless, living with a friend, in a detention center, or a group home prior to incarceration; nearly half (47%) experienced physical abuse, including almost 80% of females; 21% were victims of sexual abuse, including 77% of females; 40% had been enrolled in special education classes; 84% had been suspended or expelled from school, including 53% that were not enrolled in school at the time of the crime.⁴⁸

The incarcerated serious youthful offender population (most not serving life sentences, and in either long-term juvenile or adult facilities) have similar mitigating histories and difficulties. In fact, most suffer disproportionately from educational deficits and related learning problems, mental health/substance abuse disorders, and/or maltreatment victimizations.⁴⁹ The prevalence rates of these mitigating difficulties in the incarcerated serious youthful offending population can be quite astounding. Reviews of this population over the past two decades have found significantly higher incidences of these disorders and maltreatment victimizations – from two (for some mental health disorders) to as many as sixty

⁴⁸ Nellis, *supra* note 4.

⁴⁹ See John H. Lemmon, *How Child Maltreatment Affects Dimensions of Juvenile Delinquency in a Cohort of Low-Income Urban Males* 16 *Just. Q.* 357 (2009); Ilhong Yun et al., *Disentangling the Relationship Between Child Maltreatment and Violent Delinquency: Using a Nationally Representative Sample*, 26 *J. Interpersonal Violence* 88 (2011); Christopher A. Mallett, *Seven Things Juvenile Courts Should Know About Learning Disabilities*, National Council of Juvenile and Family Court Judges, Reno, Nev. (2011); Christopher A. Mallett et al., *Predicting Juvenile Delinquency: The Nexus of Child Maltreatment, Depression, and Bipolar Disorder*, 19 *Crim. Behav. & Mental Health* 235 (2009).

times (for maltreatment victimization) the rates found in the general adolescent population (see Table 2).⁵⁰

Table 2 – Incarcerated and Non-Incarcerated Adolescent Comparisons

	Incarcerated Youthful Offender Population (%)	Adolescent Population (%)
Minority (African-American or Hispanic)	68	36
Life Histories		
Maltreatment victimization	34-60	1
Special education disabilities	28-45	4-9
Mental health disorders	35-80	9-18
Substance abuse	30-70	4-5

These difficulties are often linked to the offending behaviors. Maltreatment victimization and related trauma experiences are not only harmful to adolescents, but for many lead to serious offending behavior risks – including school difficulties, mental health disorders, and substance abuse problems.⁵¹ Adolescents with maltreatment histories who do

⁵⁰ See Laurie Chassin, *Juvenile Justice and Substance Abuse*, 18 *Future of Children* 165 (2008); Daniel P. Mears & Laudan Y. Aron, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current State of Knowledge*, Urban Institute, Justice Policy Center, Wash., D.C. (2003); Linda Teplin et al., *Psychiatric Disorders of Youth in Detention*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, Wash., D.C. (2006); Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965 (2008).

⁵¹ See J. David Hawkins et al., *Predictors of Youth Violence*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, Wash., D.C. (2000); Heather A. Turner et al., *The Effect of Lifetime Victimization on the Mental Health of Children and Adolescents*, 62 *Soc. Sci. & Med.* 13 (2006); Jeffrey Leiter, *School Performance Trajectories After the Advent of Reported Maltreatment*, 29 *Children & Youth Services Rev.* 363 (2007).

not complete high school, those in foster care who are truant or change schools often, and those aging out of the child welfare system are at high risk for incarceration.⁵²

Mental health problems are often severe within the incarcerated youthful offender population: psychotic, mood, and post-traumatic stress disorders are common.⁵³ Of particular concern is a subset of these troubled adolescents (between 5-10% of those with a mental health diagnosis) who develop serious emotional disturbances that substantially impact functioning.⁵⁴ Those in this group have long histories of multiple mental health disorders and related problems (often substance abuse and trauma) that continue into young adulthood, and constitute 20% of incarcerated youthful offenders in most states.⁵⁵ Experiencing these traumas and difficulties – in particular, poor parenting, abuse and neglect, and severe mental health problems (including psychopathic traits) – are predictors of adolescent violence and, for some, homicide.⁵⁶

⁵² See Joseph P. Ryan et al., *Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 *Children & Youth Services Rev.* 1035 (2007).

⁵³ See Robert Kinscherff, *A Primer for Mental Health Practitioners Working with Youth Involved in the Juvenile Justice System*, Technical Assistance Partnership for Child and Family Mental Health, Wash., D.C. (2012); Jennifer Wareham & Denise Paquette Boots, *The Link Between Mental Health Problems and Youth Violence in Adolescence*, 39 *Crim. Just. & Behav.* 1002 (2012).

⁵⁴ Substance Abuse and Mental Health Services Administration, *Mental Health, United States, 2008*, Center for Mental Health Services, U.S. Department of Health and Human Services, Wash., D.C. (2008).

⁵⁵ See John D. & Catherine T. MacArthur Foundation, *Juvenile Justice and Mental Health: A Collaborative Approach*, *Models for Change: Systems Reform in Juvenile Justice*, Chicago, Ill. (2012); Joseph J. Cocozza & Kathleen Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 *Juvenile Just. J.* 3 (2000).

⁵⁶ See Kathleen Heide, *Young Killers: The Challenge of Juvenile Homicide* (1999); Matt DeLisi & Glen Walters, *Multiple Homicide as a Function of Prisonization and Concurrent Instrumental Violence: Testing an Interaction Model – Research Note*, 47 *Crime & Delinq.* 147 (2011); Alex Piquero, John MacDonald et al., *Self-Control, Violent Offending, and Homicide Victimization: Assessing the General Theory of Crime*, 21 *J. Quantitative Criminology* 55 (2005).

ROPER AND ABOLISHMENT: DEATH PROBLEM REDEFINED

LWOP's Disproportionate Impact

The LWOP sentence is much more widely available than the former juvenile death penalty sentence. There are between 1,755 and 2,574 serious youthful offenders currently serving a LWOP sentence in thirty-four states,⁵⁷ representing a majority of states that allow this sentence.⁵⁸ By comparison, in 2005, only seventy-one serious youthful offenders were on death row. In addition, from 1973 to 2005, only twenty-five states allowed this death sentencing, while most states did not ever sentence a juvenile to death row (see Table 3).⁵⁹

Table 3 – Death Penalty and LWOP Sentencing Comparison

Juvenile Death Penalty Sentencing (1973-2005)	Juvenile LWOP Sentencing
22 Executions (226 ever sentenced) ⁶⁰	2,524 Serving LWOP in 2012 ⁶¹

⁵⁷ See Christopher A. Mallett, Juvenile Life Without the Possibility of Parole, 35 Children & Youth Services Rev. 743 (2013).

⁵⁸ See Ashley Nellis & Ryan S. King, No Exit: The Expanding Use of Life Sentences in America, The Sentencing Project (2009). There is some controversy in identifying the exact number of LWOP-sentenced youthful offenders because of different definitions utilized: some researchers use an expanded “juvenile” definition of all offenders under the age of eighteen, not just those based on state law definitions (whereby some sixteen-and seventeen-year-olds when transferred to adult criminal court are no longer counted as juveniles), and find the higher prevalence rates. See Human Rights Watch, State Distribution of Estimated 2,574 Juvenile Offenders Serving Juvenile Life without Parole (Rest of their Lives 2009 Update), available at <http://www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole>; Paulo G. Annino et al., Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation, Public Interest Law Center, Fla. St. U. (2009).

⁵⁹ Streib, *supra* note 6.

⁶⁰ Streib, *supra* note 6.

⁶¹ The most recent data on the number of youthful offenders serving a LWOP sentence (as of November 2012) is from the University of San Francisco’s School of Law’s State by State Legal Resource Guide, available at http://www.usfca.edu/law/jlwop/resource_guide/.

Texas (13)	Texas (4)
Florida	Florida (266)
Alabama	Alabama (62)
Louisiana (1)	Louisiana (355)
Mississippi	Mississippi (24)
Georgia (1)	Washington (28)
North Carolina	North Carolina (44)
Arizona	Arizona (32)
Oklahoma (2)	Oklahoma (49)
South Carolina (1)	South Carolina (26)
Pennsylvania	Pennsylvania (444)
Ohio	Ohio (2)
Virginia (3)	Virginia (56)
Missouri (1)	Missouri (116)
Indiana	Delaware (7)
Kentucky	Arizona (32)
Maryland	Maryland (13)
Nevada	Nevada (21)
Arizona	<i>Total = 1,582</i>
Delaware	
New Jersey	<i>Juvenile Death Penalty was not Available; LWOP is Available</i>
Washington	Illinois (103)
Arkansas	Massachusetts (57)
Idaho	Nebraska (24)
Utah	South Dakota (9)
	California (250)
	Hawaii (4)
	Idaho (4)
	New Hampshire (3)
	North Dakota (1)
	Tennessee (4)
	Arkansas (73)
	Iowa (44)
	Michigan (346)
	Minnesota (2)
	Rhode Island (2)
	Connecticut (9)

	Delaware (7)
	<i>Total = 942</i>

It is worth reinforcing that there are ten times as many youthful offenders serving a LWOP sentence today than were ever sentenced to death between 1976 and 2005. In eighteen states that allow a LWOP sentence, and that also allowed past juvenile death penalty sentences, there are 1,582 youthful offenders imprisoned for life. Additionally, in the seventeen states that did not allow a past juvenile death penalty sentence there are 942 youthful offenders currently imprisoned for life. While these numbers may decrease with the impact of the *Miller* decision, the LWOP sentence continues to be utilized across a majority of states, with a disproportionate impact in a few states (Florida, Louisiana, Pennsylvania, California, and Michigan), similar to the juvenile death penalty sentencing era and its disproportionate usage in a few states (Texas, Virginia, and Louisiana). However, it is also quite possible that these LWOP sentencing levels may continue indefinitely for there is no current Supreme Court case scheduled to review or further the *Miller* decision, though a number of advocates may pursue this in certain federal district courts.⁶²

Not only are LWOP sentences more widely available and utilized than the former juvenile death penalty sentence, its outcome equally hopeless. When an adolescent is sentenced without even the possibility of a parole hearing in future decades, this is a near-death experience: no options, no rehabilitation, and nothing will change this future. Unfortunately, the incarceration experience itself, beyond this lack of hope for redemption, harms the youthful offender. Time spent in these facilities gravely impacts adolescent development and decreases cognitive and social functioning. A majority of the LWOP sentenced population is sixteen or seventeen years old, and adolescents of this age have deficiencies in decision-

⁶² In particular, the Equal Justice Initiative in Montgomery, Alabama, the group responsible for shepherding the *Miller* case through the federal courts to the Supreme Court.

making ability, greater vulnerability to external coercion, and an underdeveloped character.⁶³ Incarceration also significantly lessens adolescents' abilities to function independently because of the rigid expectations of the facility, and social and coping skills are diminished for similar reasons.⁶⁴ Incarceration facilities lack necessary rehabilitation services, separate the adolescents from their families, and are often dangerous and violent environments.⁶⁵

Social Quagmire

One of the most disturbing realities of youthful offenders who were formerly sentenced to death and today are imprisoned for life is that most had such traumatized and difficult backgrounds. Most did not make it unscathed into young adulthood because of gravely harmful experiences, including poverty, highly dysfunctional families, school and learning failures, severe mental health problems, and for most, a comorbid impact of multiple difficulties. Delinquency, detention, and incarceration are often the outcomes for these adolescent difficulties.

However, there is more to this unhappy ending: social and political factors also impact the pathway to incarceration and, for some, a life prison term. As discussed earlier, a disproportionate number of the LWOP-sentenced youthful offenders are minority (African-American, Hispanic, and depending on the jurisdiction, American Indian or Asian), with a concentration of these sentences occurring in a fairly small number of states (Florida, Alabama, Louisiana, North Carolina, Illinois, California, Pennsylvania, Virginia, Oklahoma, and

⁶³ See Elizabeth Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *Future of Children* 16 (2008); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence*, 58 *Am. Psychologist* 1009 (2003).

⁶⁴ See Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 *Dev. & Psychopathology* 1073 (2012).

⁶⁵ *Supra* note 3.

Massachusetts).⁶⁶ In a recent study of LWOP sentences across all states, it was found that race and the election of judges had significant impacts on outcomes. States that have the most African-Americans and have judges that are elected (and not appointed) sentence the most youthful offenders to life terms in prison; in other words, more politically conservative states disproportionately sentence minorities to LWOP sentences.

Abolish LWOP

LWOP sentences are near-death experiences for the youthful offender, similar to the abolished juvenile death penalty. These sentences impact a far greater number of adolescents across most states and are influenced by racial politics and other nefarious factors. A majority of those who are LWOP-sentenced are poor, minority, and troubled young people. For these and other related reasons, the Supreme Court should determine that a juvenile LWOP sentence is cruel and unusual punishment and hold it to be unconstitutional. A society is not judged by the success of its most able-bodied but by how it treats its most disadvantaged.

⁶⁶ In late 2012 a federal court in Michigan ordered the review of all LWOP-sentenced youthful offenders based on the *Miller* decision. In addition, in nearly a dozen states, their respective Supreme Courts are revisiting the sentences of many currently LWOP-sentenced youthful offenders, based on the *Miller* decision; however, it is not clear whether *Miller* can be applied retroactively. Moving forward, though, there is some positive news for youthful offenders and these severe sentences: California, Delaware, and Wyoming eliminated LWOP sentences; and Arkansas, Louisiana, Nebraska, North Carolina, Pennsylvania, South Dakota, and Utah have placed greater restrictions on the use of LWOP. However, mandatory minimum legislation was defeated in Alabama, Florida, Illinois, Missouri, and Washington.