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Juvenile Murderers and “National Consensus”

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The United States Supreme Court has made a number of important rulings in the past decade concerning how juveniles are punished for serious offenses. In 2005, the Court held that sentencing juvenile offenders to death is unconstitutional.¹ In 2010, it held that sentencing juveniles convicted of non-homicide offenses to life in prison without parole (LWOP) is unconstitutional.² In 2012, the Court held that *mandatory* LWOP sentences for juvenile murderers is unconstitutional,³ and just this past year it held that this latter ruling applies retroactively to previously-sentenced juveniles.⁴ Notably, the Court left open the question of whether *non-mandatory* LWOP for juvenile murderers is an acceptable punishment. This issue could be considered by the Court in the near future.

The Court determined that the use of these severe punishments with juvenile offenders violated the Eight Amendment's prohibition of cruel and unusual punishment, which, the Court stated, should be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society."⁵ In examining whether there is a "national consensus" against the use of LWOP for juveniles convicted of non-homicide offenses, the Court asserted that "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."⁶ Although 37 states and the District of Columbia did

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

² *Graham v. Florida*, 560 U.S. 48 (2010).

³ *Miller v. Alabama*, 567 U.S. __ (2012).

⁴ *Montgomery v. Louisiana*, 577 U.S. __ (2016).

⁵ *Graham* at 7.

⁶ *Id.* at 10. (quoting *Penry v. Lynaugh*, 492 U. S. 302, 331 (1989))

permit the practice,⁷ the Court noted that the international community had largely done away with LWOP for juvenile offenders,⁸ and nationwide there were “only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses.”⁹ Since sentencing juveniles to LWOP for non-homicide offenses was “exceedingly rare,”¹⁰ the Court concluded that “it is fair to say that a national consensus has developed against it,”¹¹ and was therefore prohibited by the Constitution.¹²

Some might find this approach to gauging whether a national consensus exists to be odd. After all, infrequency of use does not equate to a moral opposition to a particular punishment. For instance, California residents recently voted to retain the death penalty for adult murderers despite the fact the state has not executed anyone in over a decade.¹³ Moreover, LWOP for juvenile offenders was available in 74% of states at the time the Court banned the punishment for non-homicide offenses. If anything, one dissenting justice argued, this legislative history suggests a consensus *in favor* of keeping LWOP available for serious juvenile

⁷ *Id.* at 11.

⁸ *Id.* at 29. (“There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”)

⁹ *Graham* at 11. (citing: P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009))

¹⁰ *Id.* at 11.

¹¹ *Id.*

¹² *Id.* at 31.

¹³ California Proposition 62, Repeal of the Death Penalty (2016), was rejected by 53.15% of California voters on November, 8, 2016

([https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)))

offenders.¹⁴ Arguably, however, a better approach to examining whether a national consensus exists is by directly polling public opinion on the matter, rather than inferring it through indirect proxies.

Our research lab conducted a study querying a representative sample of six hundred US Citizens about the use of LWOP for juveniles convicted of murder, now the only eligible crime for which a juvenile may potentially receive LWOP.¹⁵ The study used two different methods to probe respondents' sentiments about LWOP for juvenile murderers. One approach was to ask respondents about the general policy of sentencing juvenile murderers to LWOP—akin to the type of question that appears on a voting ballot. The second approach presented respondents with a vignette describing a heinous murder that was committed by a juvenile,¹⁶ and asked them to determine the appropriate punishment from a list of options, including LWOP, life with the possibility of parole after 20 years, or some other term. In both approaches, the juvenile's age was either 12 or 16 years old, and the order in which respondents were presented with the questions was counterbalanced (i.e., half of the

¹⁴ Justice Thomas dissenting opinion (referring to the 74% figure as a “supermajority”). *Id.* at 12.

¹⁵ Jennifer Gongola, Daniel A. Krauss, and Nicholas Scurich, *Life without parole for juvenile offenders: Public sentiments*. 23 PSYC. PUB POLY & L. 96 (2017).

¹⁶ The facts of murder described in the vignette mirrored the facts from *Roper v. Simmons* (2005). In brief, the juvenile concocted a plan to rob his elderly neighbor with a younger accomplice, but then decided to bind and abduct the woman and throw her body off a bridge into a creek where she drowned. Not only did the accomplice testify against the juvenile at trial, the juvenile also confessed to police and bragged about the crime to numerous other individuals. Respondents were told that there was no doubt about that he factually committed the crime, that a jury had previously convicted him, and that their task was to determine what the appropriate punishment ought to be. *Id.* at 99.

participants, randomly determined, were presented with the general question first followed by the vignette and the other half received the opposite order).

The results revealed that, depending on how the question is asked, anywhere from 31-55% of respondents found the use of LWOP acceptable. For instance, 31% of respondents endorsed the use of LWOP in response to a question about the general policy of sentencing juvenile murderers to LWOP. On the other hand, after reading a brief vignette describing the facts of a heinous murder committed by a juvenile, over 55% of respondents were willing to occasion LWOP. Respondents were considerably more likely to find LWOP acceptable for juveniles age 16 than age 12, regardless of how the question is posed.

Approximately one third of all respondents endorsed the use of LWOP in response to both the general question and in response to the vignette.¹⁷ Recall that half of the respondents encountered the general question first followed by the vignette while the other half saw the reverse order. The order in which the questions were posed exerted a large impact on the degree to which respondents endorsed LWOP. Only 13.5% of respondents endorsed LWOP in response to the general question when it was posed first; in contrast, 49% of respondents endorsed LWOP in response to the general question after responding to the vignette first.¹⁸ It seems that when presented initially with a general question about juvenile murders, some respondents had difficulty imagining a scenario that justify the use of LWOP; yet, after reading about a particularly heinous murder committed by a

¹⁷ 29.4% of respondents consistently endorsed LWOP while 25.7% of respondents consistently endorsed life with the possibility of parole after 20 years. *Id.* at 101.

¹⁸ *Id.* at 100.

juvenile, respondents could imagine such a scenario and thus endorsed LWOP in response to the general question at a significantly higher rate when it followed the vignette. This finding reveals that the survey methodology – beyond simply the manner in which the question is framed – has the potential to greatly influence the results of opinion surveys.¹⁹

The Majority in *Graham* noted that “Community consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.”²⁰ Criminal sentences must also further a penological goal, such as retribution or incapacitation. The Majority in *Graham* found compelling the scientific research suggesting that because adolescents are undergoing significant psycho/social development, they are potentially less culpable, less deterrable, and more amenable to change than adult offenders.²¹ These are legitimate reasons to question whether sentencing juvenile murderers to LWOP serves a penological goal, and thus whether the practice is constitutionally valid.

However, if the Court is to categorically prohibit the non-mandatory imposition of LWOP for juvenile murderers – and hence the use of LWOP for juveniles at all – it will have to rely on a rationale other than national consensus, insofar as national consensus refers to a general agreement of opinion among the

¹⁹ See generally, Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*. 21 SOC JUST RES 119 (2008). (presenting two studies which found that participants’ attitudes towards adult criminal punishment vacillate depending on whether the question is posed in the abstract or in response to a particular case.)

²⁰ *Graham* at 16.

²¹ See BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND MENTAL HEALTH AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

US populace.²² The laity is split on whether some juvenile murderers are beyond redemption.

²² The Merriam-Webster dictionary defines “consensus” as a.) “general agreement” or b.) “the judgment arrived at by most of those concerned”