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Life in Prison Without Parole for Juveniles in the United States: A Violation of the Convention Against Torture

The United States is the only country in the world that actively sentences children who commit a crime under 18 years of age to life in prison without parole. Despite recent hopeful Supreme Court decisions, international treaty obligations, and successful diversion programs in certain states, juvenile offenders continue to receive the cruel and draconian sentence of life without parole. This article reviews the domestic and international legal frameworks governing juvenile life without parole (“JLWOP”) and argues that this practice violates the United States’ obligation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and other international norms.¹ It also highlights best practices for juvenile offenders in certain states and argues for the adoption of expanded diversion and rehabilitation programs in order to end the cruel and inhumane punishment of JLWOP.

I. Juvenile Life Without Parole in the United States

Although there are several other countries whose laws theoretically permit the practice of JLWOP, there are no known cases outside of the United States.² Within the United States, there

¹ There is a sizeable body of literature on whether juvenile life without parole sentences violate the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) because of the disparate impact of this practice on the youth of color. For example, a 2012 study of 1,579 juveniles serving life without parole found that 60 percent identified as Black, which is vastly disproportionate to the amount of Black youth in the United States. See ASHLEY NELLIS, PH.D., THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 2, 8 (Mar. 2012), <https://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>. Due to time and length restrictions, this article discusses only potential violations under CAT, but recognizes that the persistent racial disparities in JLWOP sentences merits a separate analysis under CERD.

² *Id.* at 1; Tera Agyepong, *Children Left Behind Bars: Sullivan, Graham, and Juvenile Life Without Parole Sentences*, 9 NW. U. J. INT’L HUM. RTS. 83, 83 (2010).

are currently around 2,100 people serving JLWOP sentences.³ Twenty-one states and the District of Columbia have banned the practice, while five other states do not currently have any inmates serving a JLWOP sentence.⁴ This means that twenty-four states still have individuals serving a JLWOP sentence. Pennsylvania has historically had the highest rate of JLWOP sentences, with over 500 juvenile offenders serving this sentence in 2017.⁵ Together, Pennsylvania, Michigan, and Louisiana alone account for about two-thirds of all JLWOP sentences.⁶

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment.⁷ In light of this amendment, a series of Supreme Court cases have limited juvenile carceral punishment.⁸ First, in *Roper v. Simmons*, the Supreme Court imposed a categorical ban on the death penalty for juvenile offenders as a form of cruel and unusual punishment.⁹ The Court found that there is an inherent difference between children and adults that makes juveniles’ “irresponsible conduct . . . not as morally reprehensible as that of an adult,” and therefore less blameworthy.¹⁰ Second, in *Graham v. Florida*, the Court held that mandatory life sentences for juvenile non-homicide offenses also violates the Eighth Amendment.¹¹ It reasoned that life without parole, the “second most severe penalty permitted by law,” should only be imposed on

³ JOSH ROVNER, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 1–2 (May 2017), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

⁴ *Id.*

⁵ David A. Love, *We’re Number One!*, PHILA. CITIZEN (Mar. 30, 2017), <http://thephiladelphiacitizen.org/juvenile-life-without-parole-jlwop-philadelphia/>; *Juvenile Lifers Information*, PA. DEP’T CORRECTIONS (Apr. 5, 2019), <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx> (as of April 5, 2019, 410 inmates serving JLWOP had been resentenced, including 184 inmates released from prison).

⁶ ROVNER, *supra* note 3, at 5.

⁷ U.S. CONST. amend. VIII.

⁸ There is also literature on whether conditions in prison for juveniles rises to the level of torture. For example, solitary confinement for juveniles can have damaging and long-lasting effects that many argue rises to the level of torture. Mikah Owen & Jeffrey Goldhagen, *Children and Solitary Confinement: A Call to Action*, 137 PEDIATRICS 1 (2016). Further, juveniles are particularly vulnerable to sexual, physical, and mental abuse in prison with adults. Jason Tashea, *Youth Courts International: Adopting the American Diversion Program Under the Convention of the Rights of the Child*, 15 OR. REV. INT’L L. 141, 142 (2013). Due to time and length restrictions, this article focuses on the sentencing practice of JLWOP and does not discuss the actual conditions in prison for juvenile offenders.

⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁰ *Id.* at 568–70.

¹¹ *Graham v. Florida*, 560 U.S. 48 (2010).

the most severe offenses, such as murder and homicide.¹² Together, these cases established that “children are constitutionally different from adults for purposes of sentencing,”¹³ and that “because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments.”¹⁴

Two years later, in *Miller v. Alabama*, the Court imposed a categorical ban on all mandatory life sentences without the possibility of parole for juvenile offenders, even in the case of homicide, because the practice violated the Eighth Amendment.¹⁵ The ruling “require[s] the sentencing authority] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”¹⁶ With this special consideration, the Court predicted that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”¹⁷ In 2016, the Court applied *Miller* retroactively to JLWOP sentences, so that all juvenile offenders may request review for the possibility of parole.¹⁸

This series of cases ensures that juvenile offenders cannot receive the death penalty, bars future mandatory life sentences, and ensures that formerly imposed mandatory life sentences may be reviewed for parole. However, *Miller* and *Montgomery* do not mean that a juvenile serving life without parole is automatically released; instead, the offender may petition for review of their sentence and seek resentencing or release based on time served. The sentencing board may still decide that the juvenile offender must serve their life sentence. By simply reviewing the case, it will avoid the designation of an unconstitutional “mandatory” sentence

¹² *Id.* at 69.

¹³ *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

¹⁴ *Id.*

¹⁵ *Id.* at 460.

¹⁶ *Id.* at 480.

¹⁷ *Id.* at 479.

¹⁸ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

because, in theory, someone has now reviewed the case individually and weighed its factors before enforcing the life sentence.¹⁹ Further, in 29 states, as mentioned above, juveniles can still receive a life sentence without parole on a case-by-case basis.²⁰ The Supreme Court specifically left open the possibility of JLWOP for homicide offenses committed by “the rare juvenile offender whose crime reflects irreparable corruption.”²¹

Mandatory and discretionary sentences that constitute the functional equivalent of life without parole also remain available. For example, a juvenile offender could receive a sentence of 90 years with possibility for parole after 70 years served.²² This is arguably the functional equivalent of life without parole: if a juvenile offender commits a crime at age 15, they would not be eligible for release until the age of 85, after having spent their entire adult life in prison. Some states allow this practice even in the case of non-homicide offenses. For example, a juvenile offender in Missouri who was convicted of seven non-homicide offenses received an aggregated sentence of over 350 years in prison.²³ The Supreme Court of Missouri upheld the sentence, finding that *Graham*’s prohibition on life sentences for non-homicide offenses only applies to a single offense, not multiple offenses.²⁴ Accordingly, it held that multiple fixed-term sentences, even if they exceed the natural life of the juvenile offender, do not constitute cruel and unusual punishment.²⁵ Thus, despite encouraging developments at the United States Supreme Court since 2005, juvenile offenders continue to receive life without parole sentences and functional equivalents.

II. International Human Rights Law Framework on Juvenile Life Without Parole

¹⁹ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

²⁰ ROVNER, *supra* note 3, at 3.

²¹ *Miller*, 567 U.S. at 479–80.

²² *See Henry v. State*, 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012).

²³ *Willbanks v. Mo. Dep’t of Corrs.*, 522 S.W.3d 238, 239 (Mo. 2017).

²⁴ *Id.*

²⁵ *Id.* at 241–46.

Torture and cruel, inhuman or degrading treatment or punishment are widely prohibited in international human rights law. While JLWOP may not rise to the level of torture, it is thought to rise to the level of cruel, inhuman or degrading treatment or punishment that is expressly prohibited by a number of different international laws, treaties and norms. Torture is inherently implicated, as prohibitions on cruel, inhuman or degrading treatment or punishment are generally found within a larger discussion on torture.

A peremptory norm of general international law, also known as a *jus cogens*, is a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”²⁶ When a norm reaches the level of a *jus cogens*, a state cannot object to or consider itself exempt from it.²⁷ The right to be free from torture is considered a *jus cogens* because it is widely accepted by almost all nations, and because the prohibition is codified into several treaties that almost all nations have signed, including the CAT, the International Covenant on Civil and Political Rights (“ICCPR”), and the Convention on the Rights of the Child.²⁸

The existence of this right as a *jus cogens* is also supported by the Universal Declaration of Human Rights (“UDHR”), now widely thought of as the “foundation of international human rights law.”²⁹ The United States was among the member states who voted in favor of adopting the UDHR. Although it is not a treaty, and therefore is not a binding source of international law on nations, it has formulated the basis for many other human rights treaties, such as the ICCPR,

²⁶ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 18232.

²⁷ Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1014 (2008).

²⁸ *Id.* at 1013–16 (explaining how the United States has not ratified the CRC but because every other nation in the world has ratified the treaty, it can be argued that the principles in the CRC are customary international law because they are so widely accepted).

²⁹ *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Aug. 13, 2017).

and it remains an important source of agreement on human rights norms among nations.³⁰ Further, because it is so widely referenced and accepted, the UDHR is frequently considered customary international law, which can be binding on states.³¹ Importantly, Article 5 of the UDHR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³²

The ICCPR, entered into force in 1976 and ratified by the United States in 1992, defines a variety of civil and political rights. To date, it has been ratified by 172 states.³³ Reiterating the UDHR, Article 7 of the ICCPR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³⁴ Further, Article 4 prohibits derogation from Article 7 in any circumstance, which means that nations can never establish a legally acceptable excuse for conducting torture.³⁵ Because the United States explicitly ratified the treaty, it is legally bound by the obligations created in the treaty. This includes protecting the rights defined in the treaty, including the right not to be tortured or treated cruelly, inhumanely, or degradingly.

The CAT entered into force in 1987 and, as of today, has been ratified by 165 states.³⁶ The United States ratified the treaty in 1994.³⁷ Article 1 of the Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on

³⁰ Lois B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT’L L.J. 129, 133 (1977).

³¹ *Id.*

³² G.A. Res. 217 (III) A, Universal Declaration of Human Rights, ¶ 5 (Dec. 10, 1948).

³³ U.N. Office of the High Commissioner of Human Rights, Status of Ratification Dashboard, International Covenant on Civil and Political Rights (last visited April 18, 2019), <http://indicators.ohchr.org/>.

³⁴ G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights, ¶ 7, (Dec. 16, 1966).

³⁵ *Id.* at ¶ 4.

³⁶ Status of Ratification Dashboard, International Covenant on Civil and Political Rights, *supra* note 33.

³⁷ *Id.*

discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³⁸

Article 2 confirms the non-derogability of the prohibition on torture and compels states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”³⁹ Article 11 requires that states maintain a “systematic review” of “rules, instructions, methods and practices” of interrogation, custody and treatment of people under arrest, detained or imprisoned.⁴⁰ Article 16 prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I” and obligates states to “undertake to prevent” these acts.⁴¹

The CAT established a Committee Against Torture to monitor and enforce the treaty.⁴² The Committee produces annual reports and reviews states’ compliance with CAT. In 2006, the Committee’s report on the United States expressed concern “at the large number of children sentenced to life imprisonment.”⁴³ It recommended that the United States “should address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment” in violation of Article 16 of CAT.⁴⁴

In 2014, CAT issued Concluding Observations in response to the United States’ periodic report, which is a self-assessment of a country submitted to CAT for review. The Concluding Observations delved deeper into JLWOP sentences than the 2006 Committee Report. It noted,

³⁸ G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 1 (Dec. 10, 1984).

³⁹ *Id.* at ¶ 2.

⁴⁰ *Id.* at ¶ 11.

⁴¹ *Id.* at ¶ 16.

⁴² *Id.* at ¶ 17.

⁴³ Comm. Against Torture, Rep. of the Thirty-Fifth and Thirty-Sixth Session, ¶ 34, U.N. Doc. A/61/44 (May 19, 2006).

⁴⁴ *Id.*

with approval, the rulings in *Graham* and *Miller*, but expressed concern that many states had not yet passed legislation in compliance with the rulings.⁴⁵ It further noted that the “rulings leave open the possibility for judges to impose life-without-parole sentences in homicide cases, even where the child played a minimal role in the crime, and courts continue to impose the sentence.”⁴⁶ The Concluding Observations stated that this practice violates Articles 11 and 16 of CAT, listed above.⁴⁷ Accordingly, the Committee recommended that the United States abolish JLWOP “irrespective of the crime committed, and enable child offenders currently serving life without parole to have their cases reviewed by a court for reassessment and resentencing, to restore parole eligibility and for a possible reduction of the sentence.”⁴⁸ In 2015, the United States issued a report in response to the Committee’s Concluding Observations. It did not address the Committee’s recommendations on JLWOP.⁴⁹

There is also an Optional Protocol to the CAT that established a “system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty.”⁵⁰ The Optional Protocol created the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to conduct these state visits.⁵¹ However, the United States did not sign the Optional Protocol, so the Subcommittee is not authorized to conduct state visits of this nature within the United States.

The United States’ Eighth Amendment standard of cruel and unusual punishment is not identical to the CAT standard of cruel, inhuman or degrading treatment or punishment. For

⁴⁵ Comm. Against Torture, Concluding Observations on the Combined Third and Fifth Periodic Reports of the United States of America, ¶ 24, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Comm. Against Torture, *Information Received from the United States of America on Follow-Up to the Concluding Observations*, U.N. Doc. CAT/C/USA/CO/3-5/Add.1 (Jan. 14, 2016).

⁵⁰ G.A. Res. 57/199, art. 1, Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 18, 2002).

⁵¹ *Id.* at art. 2.

example, the standards diverge on issues such as the death penalty, which the Committee Against Torture has argued rises to the level of torture in some cases, but is permissible under the Eighth Amendment.⁵² However, the United States has adopted the language from CAT by statute, which demonstrates that the standards are comparable and have many similarities. The statute incorporates cruel, inhuman or degrading treatment or punishment as defined by CAT into the cruel and unusual punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution.⁵³

III. JLWOP Violates CAT and International Norms Because it Constitutes Cruel, Inhuman or Degrading Treatment or Punishment

Although JLWOP may not rise to the level of “torture” as defined under Article 1 of the CAT, it still constitutes an impermissible form of punishment in violation of the Convention, the ICCPR, and the international normative prohibition on torture. Life without parole, the “second most severe penalty permitted by law,” creates “indeterminate confinement” for a crime committed before the juvenile offender has reached full maturity.⁵⁴ This constitutes cruel, inhuman or degrading treatment or punishment, as prohibited by Article 7 of the ICCPR, Article 16 of CAT, and Article 5 of the UDHR, for several reasons. First, juveniles are biologically and constitutionally different than adults.⁵⁵ Treating them as adults for purposes of sentencing is an inherently unfair practice. Second, JLWOP is a disproportionate punishment to the crime, which constitutes cruel and unusual punishment under the Eighth Amendment. Third, JLWOP deprives

⁵² The Committee has urged the United States to consider abolishing the death penalty completely, and has also stated that prolonged periods of time on death row may rise to the level of torture because of the continued threat of imminent death. Comm. Against Torture, *Concluding Observations*, *supra* note 45, at ¶ 25.

⁵³ 42 U.S.C. § 2000dd (2006) (“In this section, the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984”).

⁵⁴ *Graham v. Florida*, 560 U.S. 48, 69 (2010); Sir Nigel Rodley (Special Rapporteur of the Commission on Human Rights), *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 12, U.N. Doc A/55/290 (Aug. 11, 2000).

⁵⁵ *See Miller v. Alabama*, 567 U.S. 460, 471 (2012).

the juvenile of any hope for release and therefore limits incentives to reform. Fourth, the Supreme Court has made strong arguments for why this practice amounts to cruel and unusual punishment and should be limited as much as possible. For these reasons, JLWOP rises to the level of cruel, inhuman or degrading treatment or punishment and is therefore prohibited by international law and custom.

There are fundamental differences between juveniles and adults that should be considered in sentencing. Biologically, parts of the brain involved in behavior control are not fully matured until late adolescence, which is well past the age of 18.⁵⁶ Juveniles are more immature than adults, have an underdeveloped sense of responsibility, and are less likely to take possible punishment into account when making decisions.⁵⁷ Further, they are “more vulnerable . . . to negative influences and outside pressures” and have “limited control over their own environment.”⁵⁸ Finally, many juveniles who end up involved in crime have “frequent exposure to domestic and community-level violence, problems in school, engagement with delinquent peers, and familial incarceration.”⁵⁹ All of these factors lead to the conclusion that juveniles are generally less culpable than adults for their crimes. By completely foreclosing the ability to reform and be released back into society, the United States is imposing an extremely severe punishment on children who are biologically less culpable for their actions than adults. As such, JLWOP rises to the level of cruel, inhuman or degrading treatment or punishment, in violation of Article 16 of CAT and Article 7 of the ICCPR.⁶⁰

Second, the Supreme Court has repeatedly affirmed that in order for punishment to be

⁵⁶ *Graham*, 560 U.S. at 68 (citing Brief for American Medical Association et al. as Amici Curiae Supporting Petitioner, at 16–24 and Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, at 22–27).

⁵⁷ *Id.* at 72.

⁵⁸ *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (internal quotation marks omitted).

⁵⁹ NELLIS, *supra* note 1, at 8.

⁶⁰ Comm. Against Torture, *Concluding Observations*, *supra* note 45, at ¶ 24.

permissible under the Eighth Amendment, it must be proportional to the offense.⁶¹ It follows that punishment that is disproportionately severe when compared to the offense constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁶² As discussed above, the Eighth Amendment is analogous to the CAT's standard on cruel, inhuman or degrading treatment or punishment.⁶³ Here, JLWOP is a disproportionate punishment, primarily because juvenile offenders are less culpable for their crimes than adults due to the biological and social differences between the two. Thus, sentencing juveniles to the same sentence as adults is vastly disproportionate because of their differing levels of culpability.⁶⁴

Further, if a juvenile offender and an adult offender are convicted of the same crime, the juvenile will de facto serve a longer sentence.⁶⁵ For example, if both receive life without parole but the juvenile is 30 years younger than the adult at the time of conviction, the juvenile will serve at least 30 more years than the adult for the same crime.⁶⁶ Taken together, the fact that a juvenile will serve more years for the same crime, and that a juvenile is less mature and less culpable than an adult compounds the disproportionality of JLWOP. This makes the punishment impermissible under both the Eighth Amendment and Article 16 of the CAT, as well as other above-mentioned international treaties and norms.⁶⁷

Another factor that makes JLWOP rise to the level of cruel, inhuman or degrading treatment or punishment is that it JLWOP completely deprives the juvenile offender of any hope of release and any incentive to rehabilitate. Rather, it imposes a psychological disincentive to

⁶¹ *Graham*, 560 U.S. at 59.

⁶² *Id.* at 59–60.

⁶³ 42 U.S.C. § 2000dd-0 (2006).

⁶⁴ *Miller v. Alabama*, 567 U.S. 460, 473–74 (2012).

⁶⁵ *Id.* at 476–77.

⁶⁶ *Id.*

⁶⁷ *See Graham*, 560 U.S. at 59.

reform one's behavior because even with the best behavior, there is no possibility for release.⁶⁸ This can have irreparably damaging effects on a juvenile's psyche, and rises to the level of cruel treatment because it deprives the individual of any hope.⁶⁹ Further, in some circumstances juvenile offenders are actually deprived of programming that would facilitate their reform, such as educational opportunities, because the nature of their life sentence means the juvenile would be unable to apply these skills in the real world.⁷⁰ One study found that 61 percent of "juvenile lifers" do not participate in programming, with one third of the group banned from participation because of their life sentence, and another 28 percent having exhausted all available programming.⁷¹ Without adequate educational programming or the prospect of release, juvenile offenders are completely deprived of any incentive or ability to reflect and mature. This total deprivation of hope amounts to cruel and degrading punishment because it treats the juvenile offender as a lost cause that is not worth investing in, thus depriving them of their dignity and ability to contribute to society.⁷²

Finally, throughout the series of cases on juvenile punishment and sentencing, the Supreme Court repeatedly urged that treating juvenile offenders as adults in criminal court could violate the Eighth Amendment, which would similarly violate CAT's prohibition on cruel, inhuman or degrading treatment or punishment. For example, in *Graham*, the Court stated, "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. ... Accordingly, juvenile offenders cannot with reliability be classified

⁶⁸ *Id.* at 79.

⁶⁹ *See id.*

⁷⁰ NELLIS, *supra* note 1, at 23.

⁷¹ *Id.*

⁷² *See id.*

among the worst offenders.”⁷³ Further, the Court explained that “[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”⁷⁴ Although *Graham* only applied to non-homicide offenses, the Court later wrote in *Miller* that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific....

Graham’s reasoning implicates any life-without-parole sentence imposed on a juvenile.”⁷⁵ This demonstrates the Court’s reluctance to sentence juvenile offenders to adult punishments and its opinion that such sentencing could constitute cruel and unusual punishment under the Eighth Amendment.

The Supreme Court also noted that a “sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”⁷⁶ It then explained why JLWOP for non-homicide offenses does not advance any of the theories of punishment: retribution, deterrence, incapacitation, and rehabilitation.⁷⁷ Retribution and deterrence are not served because juvenile offenders lack the requisite maturity to fully understand the consequences of their actions and are less likely to take the possible punishment into account before committing an offense.⁷⁸ Incapacitation is arguably served because the offender is incarcerated, but by being incarcerated for life without possibility of release, the juvenile offender is kept out of society well beyond the point at which they may have reformed.⁷⁹ Finally, rehabilitation is nonexistent. Even if the juvenile undergoes extensive reform while incarcerated, there is no possibility for

⁷³ *Graham v. Florida*, 560 U.S. 48, 68 (2010) (internal quotations omitted).

⁷⁴ *Id.* at 79.

⁷⁵ *Miller v. Alabama*, 567 U.S. 460, 473 (2012).

⁷⁶ *Graham*, 560 U.S. at 71.

⁷⁷ *Id.*

⁷⁸ *See id.* at 72.

⁷⁹ *See id.* at 72–73.

them to be released into the community and demonstrate that they have been rehabilitated.⁸⁰

JLWOP condemns a juvenile offender as incorrigible and incapable of reform. Yet, juveniles demonstrate the highest rates and possibility for reform, as “incorrigibility is inconsistent with youth.”⁸¹ With no legitimate penological interest being served, JLWOP is disproportionate to the crime committed. This again elevates JLWOP to the level of cruel and unusual punishment prohibited by the Eighth Amendment, and cruel, inhumane, and degrading punishment prohibited by the CAT, the ICCPR, and the UDHR.

IV. Best Practices for Juvenile Justice

JLWOP is disproportionate, unnecessary, and in violation of the United States’ obligations under international law—and it is not without proven alternatives. Several states have implemented more positive models to assist juveniles who encounter the law and court systems. Such policies include banning JLWOP sentences, raising the criminal age of adulthood to 18, and offering diversion programs that seek to keep juveniles out of court altogether.

Despite the fact that 29 states still allow JLWOP or its functional equivalent, 21 states and the District of Columbia have banned the practice completely.⁸² This means that even when serving long sentences, juvenile offenders at least have the possibility for parole, and that they receive an individual assessment of their crime and punishment rather than mandatory life without parole sentences.⁸³ Further, 45 states have raised the age of criminal adulthood to 18, which means that juvenile courts retain at least partial jurisdiction over the offender until they reach that age.⁸⁴ By staying in juvenile court, the process is less adversarial, the punishment is

⁸⁰ *Id.* at 74.

⁸¹ *See id.* at 73.

⁸² ROVNER, *supra* note 3, at 1, 3.

⁸³ *Id.*

⁸⁴ Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 11, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>. Even in these states, some statutorily exclude certain categories of crimes

likely reduced, and the proceedings are civil rather than criminal, so the juvenile offender may avoid a permanent criminal conviction on their record. These factors favor opportunity for reform over punitive measures.

Some states also offer diversion programs that seek to keep juvenile offenders out of the court system altogether. For example, there are about 1,250 “youth courts” in the United States.⁸⁵ These courts offer civil diversion for minor offenses and certain misdemeanors, and are distinct from juvenile courts.⁸⁶ Incarceration is not an option in youth court; instead, juveniles receive alternative punishments such as community service, victim apology statements, reflective personal essays, youth court jury duty, drug and alcohol classes, restitution, or victim impact classes.⁸⁷ Further, other juveniles fill the roles of attorney, bailiff and judge, which creates a sense of trust and a feeling that due process is followed.⁸⁸ The focus is on restorative justice rather than traditional punishment.⁸⁹ Youth courts in Anchorage, Alaska have been highlighted as a model of success after juvenile recidivism rates dropped dramatically due to early diversion through this restorative model.⁹⁰

Different counties in Massachusetts also offer a variety of diversion programs for juvenile offenders. In Essex County, first-time nonviolent offenders under the age of 21 can participate in a diversion program, keeping the case out of criminal or juvenile court and

from juvenile court, such as murder and serious violent felonies. Others leave it up to the discretion of the juvenile court judge to determine whether to transfer a case to the adult court, and still others leave it up to prosecutorial discretion. All states have some form of transfer laws that allow or require a juvenile to be tried as an adult in certain, more serious cases. *Id.*

⁸⁵ Tashea, *supra* note 8, at 148.

⁸⁶ *Id.* at 148–49.

⁸⁷ *Id.* at 150.

⁸⁸ *Id.* at 148.

⁸⁹ *Id.* at 148-150.

⁹⁰ *Id.* at 151-55.

focusing instead on counseling, community service, and restitution.⁹¹ Suffolk County has similar diversion programs for first-time nonviolent offenders, and has also gone a step further by implementing a pilot diversion program for more serious offenses.⁹² The program screens juvenile offenders and connects them with “individually tailored support networks.”⁹³ Juveniles who successfully complete the program can avoid a conviction altogether.⁹⁴ This process recognizes that juveniles who commit more serious offenses still deserve the opportunity to avoid the harsh effects of the criminal system and demonstrate their ability to reform. Further, keeping juvenile offenders out of courts and prisons can decrease the likelihood of reoffending as an adult and ending up in prison for lengthy or life sentences.⁹⁵

V. Conclusion

The continued sanctioning of JLWOP in the United States directly violates its obligations under CAT to prevent cruel and inhuman punishment, especially for children, one of society’s most vulnerable populations. While some states are making efforts to divert youth out of the criminal justice system altogether, the federal government and the states that still allow JLWOP must recognize their violations under international law and take immediate steps to end the practice completely. As every other country in the world has now recognized, juvenile offenders are capable of reform and deserve a second chance.

⁹¹ Juvenile & Youthful Diversion, ESSEX DISTRICT ATTORNEY’S OFFICE, <https://www.mass.gov/service-details/juvenile-and-youthful-diversion> (last visited Apr. 17, 2019); Juvenile & Youthful Diversion, ESSEX DISTRICT ATTORNEY’S OFFICE, <http://www.mass.gov/essexda/prevention-and-intervention/school-safety/youthful-diversion.html> (last visited Aug. 13, 2017).

⁹² Early Intervention & Prevention: Juvenile Alternative Resolution, SUFFOLK COUNTY DISTRICT ATTORNEY, <https://www.suffolkdistrictattorney.com/in-the-community/early-intervention-and-prevention> (last visited Apr. 17, 2019); Jan Ransom, *Effort Launched to Aid Youthful Offenders*, THE BOSTON GLOBE (Feb. 4, 2017), <https://www.bostonglobe.com/metro/2017/02/03/new-program-seeks-help-youthful-offenders-move-out-criminal-justice-system/P6mBQYUa3aDz165zoaM5zI/story.html>.

⁹³ Early Intervention & Prevention, *supra* note 91.

⁹⁴ *Id.*

⁹⁵ Steven Patrick & Robert Marsh, *Juvenile Diversion: Results of a 3-Year Experimental Study*, 16 CRIM. JUST. POL’Y REV. 59, at 59–60 (2005).