

# Sentencing Our Children to Die in Prison: Global Law and Practice

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## Introduction and Overview

THIS ARTICLE FOCUSES ON THE SENTENCING of child offenders to a term of life imprisonment without the possibility of release or parole (“LWOP”). These are children convicted of crimes when younger than eighteen years of age, as defined by the international standards contained in the U.N. Convention on the Rights of the Child.<sup>1</sup>

The LWOP sentence condemns a child to die in prison. Short of the death penalty, LWOP is the harshest of sentences that may be imposed on an adult. Imposing such a punishment on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child’s rehabilitation and redemption. It has been noted that:

This growth potential counters the instinct to sentence youthful offenders to long terms of incarceration in order to ensure public safety. Whatever the appropriateness of parole eligibility for [forty]-year-old career criminals serving several life sentences, quite different issues are raised for [fourteen]-year-olds, certainly as compared to [forty]-year-olds, [who] are almost certain to undergo dramatic personality changes as they mature from adolescence to middle age.<sup>2</sup>

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1. U.N. Convention on Rights of the Child, GA Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

2. Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, CRIM. JUST., Winter 2007, at 4, available at <http://www.abanet.org/crimjust/cjmag/21-4/LifeWithoutParole.pdf>.

Experts have documented that children cannot be expected to have achieved the same level of psychological and neurological development as an adult, even when they become teenagers.<sup>3</sup> They lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, and to understand the long-term consequences of rash actions.<sup>4</sup>

For many of the children who are sentenced to LWOP, it is effectively a death sentence carried out by the state over a long period of time. Children endure emotional hardship, hopelessness, and neglect while serving time in prison. They may also be threatened with physical abuse. The young age of those serving time in prison in the United States, for example, makes them more susceptible than adults to severe physical abuse by older inmates:

Many adolescents suffer horrific abuse for years when sentenced to die in prison. Young inmates are at particular risk of rape in prison. Children sentenced to adult prisons typically are victimized because they have "no prison experience, friends, companions or social support." Children are five times more likely to be sexually assaulted in adult prisons than in juvenile facilities.<sup>5</sup>

This experience can produce additional trauma for children who are likely to have suffered physical abuse before entering prison. One recent study of seventy-three children serving LWOP sentences in the United States for crimes committed at age thirteen and fourteen concluded: "They have been physically and sexually abused, neglected, and abandoned; their parents are prostitutes, drug addicts, alcoholics, and crack dealers; they grew up in lethally violent, extremely poor areas where health and safety were luxuries their families could not

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3. MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF 3, LESS GUILTY BY REASON OF ADOLESCENCE [hereinafter ISSUE BRIEF 3], *available at* [http://www.adjj.org/downloads/6093issue\\_brief\\_3.pdf](http://www.adjj.org/downloads/6093issue_brief_3.pdf) (discussing the decision-making capacity of adolescents); MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF 4, ASSESSING JUVENILE PSYCHOPATHY: DEVELOPMENTAL AND LEGAL IMPLICATIONS, *available at* [http://www.adjj.org/downloads/4536issue\\_brief\\_4.pdf](http://www.adjj.org/downloads/4536issue_brief_4.pdf) (discussing the applicability of adult psychopathy assessments to adolescent individuals, particularly when used to determine long-term probability of rehabilitation or recidivism).

4. ISSUE BRIEF 3, *supra* note 3; *see also* *Roper v. Simmons*, 543 U.S. 551, 569–73 (2005).

5. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR OLD CHILDREN TO DIE IN PRISON 14 (2007), *available at* <http://www.eji.org/eji/files/20071017cruelandunusual.pdf> (providing November 2007 commentary from the Equal Justice Initiative in Montgomery, Alabama, and citing 2006 reports of the National Institute of Justice and findings of the United States Congress under 42 U.S.C.A. 15601 (2003) regarding prison rape in the United States).

afford.”<sup>6</sup> Some child offenders believe death to be more humane than life with the knowledge that their death will come only after many decades spent living in these circumstances.<sup>7</sup> With no hope of release, they feel no motivation to improve their development toward maturity. This is reinforced by the fact that youths placed in the adult system “receive little or no rehabilitative programming.”<sup>8</sup>

In this context, the sentence is indeed cruel. These issues have become so well-understood at the international level that a state’s execution of this sentence raises the possibility that it not only violates juvenile justice standards but also contravenes international norms established by the United Nations Convention Against Torture.<sup>9</sup> Globally, the consensus against imposing LWOP sentences on children is virtually universal. Based on the authors’ research, there is only one country in the world today that continues to sentence child offenders to LWOP terms: the United States.<sup>10</sup> The United States has at least 2484 children serving life without parole or possibility of release sentences.<sup>11</sup> In the United States

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6. *Id.* at 15.

7. See EQUAL JUSTICE INITIATIVE, *supra* note 5, at 12, 15, 18, 28 (telling the stories of child inmates who have repeatedly attempted suicide).

8. CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME & DELINQUENCY (“NCCD”), NCCD FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 1 (2006), available at [http://www.nccd-crc.org/nccd/pubs/2006may\\_factsheet\\_youthadult.pdf](http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf).

9. U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, GA Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984). The authors made this observation in reviewing the United States’ practice of sentencing children to life without parole in 2006. See *infra* Part II.

10. Tanzania has one child offender serving a life sentence who was reported to be ineligible for parole, but the government has submitted written documentation to the authors confirming that it allows parole for all children and is in the process of undertaking reforms in the sentencing code so that the child in question, or any other child, cannot be sentenced to a term that prohibits parole review. See *infra* Part I.C.1 for a discussion on Tanzania.

11. In 2002, Human Rights Advocates reported that 2225 persons were serving this sentence. HUMAN RIGHTS ADVOCATES, WRITTEN STATEMENT SUBMITTED BY HUMAN RIGHTS ADVOCATES (RIGHTS OF THE CHILD), U.N. Doc. E/CN.4/2002/NGO/44 (2002). Human Rights Watch (“HRW”) clarified the numbers in its 2005 report and the authors recently begun clarifying these numbers in 2007: in Pennsylvania the number of child offenders receiving LWOP is now 433, up 101 since 2005. HRW’s most recent count of state cases suggests that there are at least 444 child offenders serving LWOP in Pennsylvania now and a total of 2484 child offenders serving LWOP sentences nationwide. HUMAN RIGHTS WATCH, EXECUTIVE SUMMARY: THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008, at 3 (2008) [hereinafter HRW EXECUTIVE SUMMARY], available at <http://www.hrw.org/background/2008/us1005/us1005execsum.pdf> (updating the Human Rights Watch and Amnesty International report from 2005, *infra* note 18).

from 2005 to 2007, courts sentenced 259 children to serve LWOP terms.<sup>12</sup>

A positive development is that Israel, Tanzania, and South Africa, countries reported to have had child offenders serving LWOP sentences, have now officially clarified their law to allow, or have stated publicly that they will allow, parole for juveniles in all cases.<sup>13</sup> This is a laudable departure from earlier positions and one that the authors and other human rights groups look forward to monitoring.<sup>14</sup> These countries could, however, further clarify the legal prohibition of juvenile LWOP sentences expressly in their criminal justice codes. For Israel, there remains the concern that parole review is difficult to pursue and rarely granted for child offenders convicted of violating security regulations in Israel and in the Occupied Territories. There is also concern about the Israeli Defense Forces Chief of Staff, who has the discretion and authority to determine whether parole is actually granted, conducting such review, rather than having the independent judiciary do so, though as discussed below, the government has indicated that the High Court does review all denials.

The community of nations, within which all nations are included simply by virtue of their existence, now condemns the practice of sentencing children to LWOP by any state as against modern society's shared responsibility for child protection and, more concretely, as a human right violation prohibited by treaties and expressed in customary international law. The authors wrote this Article in part to expose this human rights abuse to the global public, other governments, and the United Nations ("U.N."), and to share this information more clearly with the American public and officials.

This problem is of particular concern today for Americans because there is no evidence that the severity of this sentence provides any deterrent effect on youth, just as was the case with the juvenile death penalty.<sup>15</sup> The United States Supreme Court has found that "the absence of evidence of deterrent effect is of special concern be-

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12. HRW EXECUTIVE SUMMARY, *supra* note 11, at 2–3.

13. See *infra* Part I.C (discussing countries which have officially clarified their laws to allow, or have stated publicly that they will allow, parole for juveniles serving LWOP sentences).

14. Israel had been reported to have up to seven child offenders serving LWOP but the government has clarified its law with the authors and provided assurance that even child offenders convicted for political and security crimes are entitled to parole review. See *infra* Part I.C.4 (discussing law and practices of Israel). The last documented case in Israel of a life sentence for a juvenile occurred in 2004. See *infra* Part I.C.4.

15. *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005).

cause the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”<sup>16</sup> Americans may well ask why so many United States states continue to violate international human rights law as it is practiced by virtually every other country in the world where children also commit terrible crimes on occasion. Why does the United States continue to impose a sentence that is not humane, appropriate, or a deterrent to crime, and that fails America’s children and adults? Surveys demonstrate that Americans believe in the redemption and rehabilitation of children and do not believe that incarcerating youth in adult facilities teaches them a lesson or deters crime.<sup>17</sup> The country’s juvenile justice laws and policies should better reflect this understanding.

Part I examines the global condemnation of this practice, which has led to international law standards, as well as the actual practices of sentencing children to LWOP in the United States. This Part also highlights the countries which have abrogated the law recently and discusses those countries where the law may remain ambiguous. The discussion of the current practices in the United States demonstrates that it is the world’s only remaining practitioner of LWOP sentencing and that racial discrimination has become prevalent in these and other juvenile sentences across the country. The analysis presented in Part I is based on available information from research, review of country reports to the United Nations, meetings with officials and official statements, and reports of non-governmental organizations and other experts in the field.

Part II analyzes international human rights standards and the violation of international law by countries imposing sentences of LWOP for child offenders. Part III identifies several juvenile justice and rehabilitation models of other countries and United States states that can serve as alternatives to harsh and inappropriate sentencing for children.

Part IV presents the conclusions and recommendations of the authors to governments and policy-makers in remedying these violations, and for improving the opportunities for juvenile rehabilitation.

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16. *Id.* at 571. The United States Supreme Court stated, “As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . .” *Id.* If the death penalty has no deterrent value, it is difficult to imagine that a lesser penalty of LWOP would have more of a deterrent value.

17. BARRY KRISBERG & SUSAN MARCHIONNA, NCCD, *FOCUS: ATTITUDES OF U.S. VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM* 3–5 (2007), available at [http://www.nccd-crc.org/nccd/pubs/zogby\\_feb07.pdf](http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf) (summarizing a national poll undertaken by NCCD on the issue of juvenile crime and punishment).

The Article commends the efforts of governments, international organizations, and non-governmental organizations (“NGOs”) for their efforts in the past few years to more urgently bring non-complying governments into compliance with international law and juvenile justice standards. The authors conclude by recommending that:

- Countries should continue to denounce the practice of sentencing juveniles to LWOP as against international law, to condemn the practice among the remaining governments which allow such sentencing, and to call upon those where the law may be ambiguous to institute legal reforms confirming the prohibition of such sentencing. Countries should also work to remove barriers to the enforcement of international standards and expand their juvenile justice models to focus more extensively on rehabilitation programs, including education, counseling, employment and job training, and social or community service programs and to evaluate these models to ensure protection of the rights of juveniles.

- The United States should abolish the juvenile LWOP sentence under federal law and undertake efforts to bring the United States into compliance with its international obligations to prohibit this sentencing. This includes efforts to rectify the sentences of those juvenile offenders now serving LWOP, to evaluate the disproportionate sentencing of minorities in the country, and to work more expeditiously to eradicate the widespread discrimination in the country’s juvenile justice system. The United States government should consider more equitable and just rehabilitation models as described in this Article, as well as monitor and publish data on child offenders serving LWOP sentences in each state. The United States should also ratify the U.N. Convention on the Rights of the Child.

- Israel should expressly clarify its regulations related to political and security crimes for which LWOP sentences for juveniles are prohibited. Israel should also address concerns that parole review is difficult to pursue and rarely granted for child offenders convicted of violating security regulations in Israel and in the Occupied Territories, and ensure review by the independent judiciary rather than the Israeli Defense Forces Chief of Staff.

- Tanzania should follow through expeditiously in clarifying by law that any child currently serving or who may be given a life sentence for any crime will be subject to parole review.

- South Africa should pass, without haste, the Child Justice Bill to clarify abolition of juvenile LWOP sentencing under all circumstances.

- Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka should clarify the legal prohibition of LWOP sentences for juveniles and ensure that their provinces bring their laws into compliance with their obligations under the U.N. Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and other international law related to juvenile justice.

### I. Countries' Practices in Imposing LWOP Sentences

Very few countries have historically used life sentences for juvenile offenders. Indeed, as this Article illustrates, a single country is now responsible for 100% of all child offenders serving this sentence: the United States. Most governments have either never allowed, expressly prohibited, or will not practice such sentencing on child offenders because it violates the principles of child development and protection established through national standards and international human rights law. There are now at least 135 countries that have expressly rejected the sentence via their domestic legal commitments,<sup>18</sup> and 185 countries that have done so in the U.N. General Assembly.<sup>19</sup>

18. Only ten countries besides the United States could be said to have laws with the potential to permit the sentence today, leaving 135 countries that have rejected the potential practice expressly by law or by official pronouncements. The authors tabulate this from their own investigation and from figures reported by HRW and Amnesty International ("AI"). See AI & HRW, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 106 (2005) [hereinafter HRW/AI REPORT], available at <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>. The HRW/AI Report identifies fourteen countries out of 145 surveyed in CRC reports as having laws potentially allowing LWOP for juveniles, leaving 131 countries besides the United States having expressly rejected LWOP for juveniles. *Id.* Since that time, the authors have clarified that Argentina and Belize may also have laws allowing juvenile LWOP, but that five others do not allow juvenile LWOP: Burkina Faso, Israel, Kenya, South Africa, and Tanzania. The authors also note that the HRW/AI Report survey included 154 countries aside from the United States, but for nine, the information was inconclusive in HRW's investigation. Of the remaining 145 countries, the report found fourteen countries had laws possibly allowing LWOP sentences for children, but the authors have now clarified that five of those listed are ones that now prohibit juvenile LWOP, and two not originally listed possibly do have such laws as noted above. This would leave 135 countries expressly prohibiting the sentence and ten besides the United States that might allow the sentence.

19. In 2006, 185 countries voted for a resolution on rights of the child at the United Nations General Assembly which included the call for any government with juvenile LWOP sentences to abolish the practice. Rights of the Child, G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006) [hereinafter Rights of the Child 2006], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/503/19/PDF/N0650319.pdf?OpenElement>. A nearly identical resolution was passed by the General Assembly in 2007 by a vote of 183 to one with the United States being the only country to vote against it. Rights of the Child,

Of the remaining countries besides the United States, ten may have laws that could permit the sentencing of child offenders to life without possibility of release, but there are no known cases where this has occurred. The ten countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka.<sup>20</sup>

The United States has at least 2484 children convicted of crimes committed before the age of eighteen who are now serving the LWOP sentence in United States prisons (including 259 sentenced since 2005).<sup>21</sup>

**A. Globally, the United States is the Only Violator of the Prohibition Against LWOP Sentences for Children**

The United States is the only violator of the international human rights standard prohibiting juvenile LWOP sentences. With thousands of juveniles serving LWOP sentences, and none serving such sentences in the rest of the world, the United States is the only country now violating this standard.<sup>22</sup>

Forty-four states and the federal government allow LWOP to be imposed on juvenile offenders.<sup>23</sup> Among these states, thirteen allow

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G.A. Res. 62/141, ¶ 36(a), U.N. Doc. A/Res/62/141 (Dec. 18, 2007) [hereinafter Rights of the Child 2007].

20. HRW/AI REPORT, *supra* note 18, at 106–07 (citing their investigation of country reports to the Committee on the Rights of the Child and in-country investigations). The authors have also added Belize to this list, but deleted others as the authors' investigation has revealed clarification in law and practice since 2005 when the HRW/AI Report was issued. The authors have also now confirmed that Burkina Faso, Israel, Kenya, South Africa, and Tanzania now prohibit this practice. See *infra* Part I.C for a discussion of these countries. Kenya clarified to the Committee on the Rights of the Child ("Committee") in 2007 that those sentences were now prohibited. Burkina Faso has confirmed it applies directly the CRC prohibitions in domestic law, including sentencing. South Africa has indicated it no longer allows these sentences and has no child offenders serving. As discussed below, however, it is somewhat unclear what the law provides for in South Africa, as a Child Justice Bill, which would expressly outlaw the sentencing for youths, has been pending for five years. The authors have clarified with the Director of the President's Office of Child Rights, who herself clarified with officials in the Department of Corrections in the country, that there are no juvenile offenders serving this sentence in South Africa and this sentence will not be imposed in the future. In 1999, South Africa had reported to the Committee that four juvenile offenders were serving the sentence. HRW/AI REPORT, *supra* note 18, at 106 n.320. For Cuba, it has been suggested that it is technically possible under the law to sentence a child sixteen years of age to LWOP, but there are no known cases. *Id.* at 107. Cuban officials with whom the authors of this Article met also deny there are any child offenders serving such a sentence.

21. *Supra* notes 11–12.

22. See *supra* note 11.

23. For state-by-state LWOP information and statutory references, see *infra* Appendix.



sentencing a child of any age to LWOP, and one sets the bar at eight years or older.<sup>24</sup> There are eighteen states which could apply the sentence to a child as young as ten years,<sup>25</sup> and twenty states that could do this at age twelve.<sup>26</sup> Thirteen states set the minimum age at fourteen years.<sup>27</sup> These figures are startling considering that as of 2004, 59% of children in the United States who were convicted and sentenced to LWOP received the sentence for their first-ever criminal conviction, 16% were between the ages of thirteen and fifteen when they committed their crimes, and 26% were sentenced under a felony murder charge where they did not pull the trigger or carry the weapon.<sup>28</sup> The Appendix contains an updated summary of state practice and law.<sup>29</sup>

As noted above, the LWOP sentence was rarely imposed until the 1990s, when most states passed initiatives increasing the severity of juvenile punishments.<sup>30</sup> Such initiatives also created prosecutorial and statutory procedures to waive juveniles into the adult criminal system, where they can be prosecuted and sentenced as adults.<sup>31</sup>

The rate of judicial waiver (allowing children to be tried as adults) increased 68% from 1988 to 1992.<sup>32</sup> Since 1994, forty-three states implemented legislation facilitating transfer of juveniles to adult court.<sup>33</sup> Twenty-eight or more states limited or completely eliminated juvenile court hearings for certain crimes, and at least fourteen states

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24. See *infra* Appendix (showing thirteen states where a court can sentence a child of any age to LWOP and one state setting a minimum age of eight years). Those states are: Delaware, Florida, Idaho, Maine, Maryland, Michigan, Nebraska, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. *Id.*

25. See *infra* Appendix (describing ten states with minimum LWOP age of ten years).

26. See *infra* Appendix (describing twenty states with minimum LWOP age of twelve years).

27. See *infra* Appendix (showing thirteen states where minimum LWOP age is fourteen years).

28. HRW/AI REPORT, *supra* note 18, at 30 & n.60, 31 & n.61. Since that report, Colorado passed a law abolishing the sentencing practice in 2006. See *infra* Appendix.

29. This analysis has updated earlier statements by NGOs and advocates. See *infra* Appendix in this Article for more detail. The authors note that no national data is officially collected on juvenile LWOP sentences specifically by the United States government.

30. See PATRICK GRIFFIN ET AL., NAT'L CENTER FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS III 3-4 (1998), available at <http://www.ncjrs.org/pdffiles/172836.pdf>.

31. *Id.* at 1-11.

32. Jonathan E. Cruz, *Juvenile Waivers and the Effects of Proposition 21*, 1 LAW & SOC'Y REV. 29, 38 (2002) (Univ. of Cal., Santa Barbara), available at <http://www.lawso.ucsb.edu/projects/review/issues/2001-2002/r01-03cruz.pdf>.

33. MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT TRANSFERS IN CALIFORNIA 3 (2000), available at <http://www.buildingblocksfor youth.org/colorofjustice/coj.pdf> (noting in 2000 report how many states enacted laws for transfer from juvenile to adult court in the past six years).

gave prosecutors individual discretion to try children as adults, bypassing the traditional safeguard of judicial review.<sup>34</sup>

In violation of international law, some children are still incarcerated in adult prisons, despite undisputed research documenting that children are then subject to greater physical violence and rape, commit or attempt to commit suicide at greater rates, and suffer life-long emotional trauma.<sup>35</sup> The National Council on Crime and Delinquency found that “[o]ne in [ten] juveniles incarcerated on any given day in the U[nited] S[tates] will be sent to an adult jail or prison” to serve their time.<sup>36</sup> The number of children serving time in adult jails increased 208% between 1990 and 2004.<sup>37</sup> By transferring juveniles to the adult court system, many states neglect to honor the status of these minors as juveniles, a violation of the United States’ obligations under Article 24 of the International Covenant on Civil and Political Rights.<sup>38</sup>

Although crime rates have been steadily declining since 1994,<sup>39</sup> it is estimated that the rate at which states sentence minors to LWOP remains at least three times higher than it was fifteen years ago,<sup>40</sup> suggesting a tendency for states to punish these youths with increasing severity. For example, in 1990, there were 2234 youths convicted of murder in the United States, 2.9% of whom were sentenced to LWOP.<sup>41</sup> Ten years later, in 2000, the number of youth murderers had dropped to 1006, but 9.1% still received the LWOP sentence.<sup>42</sup>

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34. John Hubner, *Discarded Lives, Children Sentenced to Life Without Parole*, AMNESTY INT’L MAG., Spring 2006, [http://www.amnestyusa.org/Spring\\_2006/Discarded\\_Lives\\_Children\\_Sentenced\\_to\\_Life\\_Without\\_Parole/page.do?id=1105357&n1=2&n2=19&n3=392](http://www.amnestyusa.org/Spring_2006/Discarded_Lives_Children_Sentenced_to_Life_Without_Parole/page.do?id=1105357&n1=2&n2=19&n3=392).

35. See, e.g., EQUAL JUSTICE INITIATIVE, *supra* note 5, at 13–14.

36. HARTNEY, *supra* note 8, at 4.

37. *Id.* at 3.

38. Human Rights Comm., Comments on United States of America, ¶ 34.s, U.N. Doc. CCPR/C/SR.2395 (2006) [hereinafter Comments on United States]; see discussion *infra* Part II.

39. Note that crime levels reached their peak in 1994 and have declined since. See Jeffrey Fraser, *Facts vs. Perceptions: “Superpredator” Theory Belies Crime Data*, 32 CHILD., YOUTH & FAM. BACKGROUND (Univ. of Pittsburgh Office of Child Dev., Pittsburgh, Pa.), June 2000, available at <http://www.education.pitt.edu/ocd/publications/backgrounds/32.pdf>.

40. HRW/AI REPORT, *supra* note 18, at 2.

41. *Id.*

42. *Id.*

## 1. United States Children of Color Are Sentenced Disproportionately to LWOP when Compared to White Children

Also alarming is the disproportionate number of children of color sentenced to LWOP in the United States. Although significant racial disparities exist in the overall juvenile justice system, African American children are reportedly serving LWOP sentences at a rate that is ten times higher than white children.<sup>43</sup> In California, which has the greatest system-wide racial disparity in this regard, 190 of the 227 persons serving the LWOP sentence for crimes committed before the age of eighteen are persons of color. African American children in California are likely to receive a life without parole sentence at a rate that is eighteen times that of white children, while Hispanic children are five times more likely to receive the sentence than whites.<sup>44</sup> Racial disparities track in jurisdictions across the United States. Other examples are:

### ALABAMA

African American, Indian, Asian, and Hispanic children were 36% of the child population as of 2002;<sup>45</sup> African Americans are 73% of children serving LWOP sentences;<sup>46</sup> and 100% of children serving LWOP for non-homicide offenses.<sup>47</sup>

### COLORADO

African Americans are 4.4% of the child population and 26% of those serving LWOP sentences.<sup>48</sup>

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43. HRW, VOL. 20, NO. 2 (G), SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 21 (Feb. 2008) [hereinafter HRW, VOL. 20, NO. 2 (G)], *available at* <http://www.hrw.org/reports/2008/us0208/us0208web.pdf>.

44. *See* HRW, VOL. 20, NO. 1 (G), "WHEN I DIE, THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 4 (2008) [hereinafter HRW, WHEN I DIE, THEY'LL SEND ME HOME], *available at* <http://www.hrw.org/reports/2008/us0108/us0108web.pdf>.

45. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 3 (2006), *available at* <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (providing data from 2002).

46. HRW, VOL. 20, NO. 2 (G), *supra* note 43, at app. 3.

47. EQUAL JUSTICE INITIATIVE, *supra* note 5, at 24 (referencing data on thirteen- and fourteen-year old child offenders).

48. HRW, THROWN AWAY 15–24 (2005) (calling attention to children sentenced to LWOP in the state of Colorado), *available at* <http://hrw.org/reports/2005/us0205/us0205.pdf>.

## MICHIGAN

Children of color are 27% of the child population<sup>49</sup> and 71% of children serving LWOP sentences.<sup>50</sup> African American children in Michigan comprise 69% of the total.<sup>51</sup> On a county-by-county basis, the disparities are even more significant.

Children of color in Wayne County, Michigan, are 94% of the children given LWOP sentences, though they are only half of the child population; in Oakland County, they are 73% of children serving LWOP sentences but 11% of the child population; and in Kent County, children of color are 50% of children serving LWOP sentences but only 13% of the child population.<sup>52</sup>

## MISSISSIPPI

African Americans are 45% of the population<sup>53</sup> and 75% of children serving LWOP sentences (compared to 20% of white children).<sup>54</sup>

Racial disparity permeates the United States juvenile justice system. Though African Americans comprise 16% of the child population in the United States, they comprise 38% of those confined in state correctional facilities.<sup>55</sup> In analyzing the “relative rate index,” a standardized index that compares rates of racial and ethnic groups compared to whites,<sup>56</sup> the latest data identifies minority overrepresentation in detention for nearly every state in the country. For example, in South Dakota, the relative rate index for African American children compared to whites in detention is 47:1; in North Dakota it is 21:1;

49. For zero to seventeen years of age, see SNYDER & SICKMUND, *supra* note 45, at 3.

50. CHILDREN IN CONFLICT WITH THE LAW: JUVENILE JUSTICE & THE U.S. FAILURE TO COMPLY WITH OBLIGATIONS UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 25 (2008) [hereinafter CHILDREN IN CONFLICT WITH THE LAW] (printed by the Children & Family Justice Center, Northwestern University School of Law) (on file with authors).

51. HRW, VOL. 20, No. 2 (G), *supra* note 43, at app. 3.

52. CHILDREN IN CONFLICT WITH THE LAW, *supra* note 50, at 25.

53. *Id.*; see SNYDER & SICKMUND, *supra* note 45, at 3.

54. E-mail from Holly Thomas, Assistant Counsel, NAACP Legal Defense & Educ. Fund, Inc., to Michelle Leighton, Dir. of Human Rights Programs, Ctr. for Law & Global Justice, Univ. of San Francisco School of Law (Aug. 8, 2007) (on file with authors) (discussing Mississippi Department of Corrections and data released via Freedom of Information Act request that was later updated by the Office of Capital Defense Counsel in Mississippi).

55. NCCD, AND JUSTICE FOR SOME 25 (2007), available at [http://www.nccd-crc.org/nccd/pubs/2007jan\\_justice\\_for\\_some.pdf](http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf).

56. The custody rate in the index is the number of juvenile offenders in detention in 2003 per 100,000 juveniles aged ten and over to age eighteen generally. *Id.* at 8.

Wisconsin 18:1; New Jersey 15:1; Wyoming 12:1; Nebraska 11:1; and New Hampshire 10:1.<sup>57</sup>

Children of color are also held in custody and prosecuted “as adults” in criminal courts and given adult sentences more often than white children.<sup>58</sup> African American children are six times more likely to be brought into custody than white children,<sup>59</sup> even though they make up just 16% of the total United States child population, as compared to white children, who make up 78% of the child population.<sup>60</sup>

Children of color are also much more likely than white youth to do their time in adult prison. Twenty-six out of every 100,000 African American children were sentenced to and are serving time in adult prison whereas the rate for white children is only 2.2 per 100,000.<sup>61</sup> On a state-by-state basis, these disparities are magnified, as discussed above.

The United States government is aware of this disparity, as are most Americans. A recent survey indicated that 60% of Americans believe that non-white youth are more likely to be prosecuted in adult court.<sup>62</sup> This is clearly not “equal treatment before the tribunals . . . administering justice” as required by Article 5(a) of the U.N. Convention on the Elimination of Racial Discrimination (“CERD”), to which the United States is a party.<sup>63</sup>

Finally, of serious concern is the cumulative disadvantage to minorities entering the justice system via arrest through the period of incarceration. As a result, racial disparity actually increases as the youth is arrested, processed, adjudicated, sentenced, and incarcerated.<sup>64</sup>

Within the juvenile system, the trends for juvenile placements out of the home (the most severe disposition for youth adjudicated as delinquent) demonstrate that white youth are underrepresented in this category of penalty and youth of color suffer discrimination. From 1987 to 2003, the total placements increased from approximately

57. *Id.* at 24 (citing Census of Juveniles in Residential Placement 1997, 1999, 2001, and 2003).

58. *Id.* at 34.

59. HRW, VOL. 20, No. 2 (G), *supra* note 43, at 19.

60. *Id.* at 10.

61. NCCD, *supra* note 55, at 35 fig.19 (providing graphic representation of statistics as to racial disparities and youth in adult prisons).

62. See KRISBERG & MARCHIONNA, *supra* note 17, at 1.

63. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. TREATY DOC. NO. 95-18 (1994), 660 U.N.T.S. 195, *available at* <http://www2.ohchr.org/english/law/cerd.htm>.

64. NCCD, *supra* note 55, at 4.

92,000 to 97,000, yet the percentage of whites given out of home placement decreased in the same period from approximately 52% to 39%.<sup>65</sup>

While institutions in the country have documented racial disparities in growing numbers over the past decade, the United States government has done little to address the most serious discriminatory practices leading to this disparity. Even after passing the Juvenile Justice and Delinquency Prevention Act of 2002,<sup>66</sup> a law designed to address discrimination suffered by children, the government has not ensured that states take effective action to address the offending discrimination in their jurisdictions. Moreover, data on racial disparity among juveniles receiving LWOP is neither collected nor analyzed by the federal government or by states in any systemic manner. Thus, the government does not inform the public of this disparity. Without a systematic effort, the United States cannot effectively ensure the eradication of discrimination as required by CERD.

### C. Countries that Clarified or Recently Changed Their Law and Practice to Prohibit LWOP Sentences for Juveniles

The authors had reported that Tanzania and South Africa had juvenile offenders serving LWOP sentences, and that Burkina Faso and Kenya, while having no children serving LWOP sentences, had laws that appeared to allow for the punishment.<sup>67</sup> In the past year, all of these countries have clarified their practice, law, or both to prohibit LWOP sentences for juveniles, as discussed below.

#### 1. Tanzania

In Tanzania, the government asserts that no child under the age of eighteen is sentenced to LWOP.<sup>68</sup> Several children recently sen-

65. *Id.* at 19–20, 20 fig.9, 22 fig.10. Trends in residential placement evaluated from 1987–2003 were mapped by the NCCD separately and are on file with the authors.

66. Pub. L. No. 107-273, 116 Stat. 12201 (amending 42 U.S.C. § 5601 et seq. (2000), originally enacted in 1974).

67. See, e.g., HUMAN RIGHTS ADVOCATES, SPECIAL REPORT ON HUMAN RIGHTS VIOLATIONS IN SENTENCING: IMPRISONING CHILDREN FOR LIFE WITHOUT POSSIBILITY OF RELEASE (2007). This report was submitted to the 4th Session, Human Rights Council in March 2007, as part of the work completed by University of San Francisco law students Nicole Skibola, Patricia Fullinwider, and Angela Fitzsimons. HUMAN RIGHTS ADVOCATES, WRITTEN STATEMENT SUBMITTED BY HUMAN RIGHTS ADVOCATES, INC. (JUVENILE SENTENCING), U.N. Doc. A/HRC/4/NGO/3 (2007), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/4/NGO/3](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/4/NGO/3).

68. E-mail from Joyce Kafanabo, Minister Plenipotentiary, Permanent Mission of the United Republic of Tanzania to the U.N., to Michelle Leighton, Dir. of Human Rights

tenced to life terms have now been given parole.<sup>69</sup> Tanzania has confirmed that one child offender who was seventeen at the time of the crime is serving a life sentence in the country. There was concern that the Sexual Offences Special Provisions Act<sup>70</sup> (“SOSPA”), under which he was sentenced, does not provide for parole.<sup>71</sup> In meetings with the authors and written follow-up, the government has confirmed that all children, including the child in this case, are to be eligible for parole.<sup>72</sup> It committed to make the necessary changes in law to expressly prohibit such sentencing in the future, to allow for parole review of the one child offender identified above, and otherwise to come into full compliance with the Convention on the Rights of the Child. In a statement to the Center for Law and Global Justice from the Permanent Mission of the United Republic of Tanzania to the United Nations, officials stated:

The juvenile justice system in Tanzania has always been in favour of a child. No life sentence has ever been imposed on children prior to 1998. . . .

Currently there is a process to review the juvenile justice system in line with CRC. A cabinet paper has already been prepared by the Ministry of Justice and Constitutional Affairs on a comprehensive legislation on children, the same is expected to be submitted to cabinet secretariat soon.

At the same time a bill on miscellaneous amendments is expected to be tabled by Parliament before the end of 2007 . . . that gives to the High Court reversionary and discretionary powers, in this regard the court can in sua motu call a file of any case concerning a child offender and redress the harsh punishment that has been imposed on a child. It should be noted in addition to the court the social welfare officers can also move the court to make a review. Thus based on the above information on the current practice and the progress on the juvenile justice system in Tanzania, I can confidently say that the sentence of the one child serving life imprisonment will be reviewed and that his sentence has the possibility of parole . . . . It is our expectation that this information [sic] is sufficient to inform you that there are mechanisms that allow a

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Programs, Ctr. for Law & Global Justice, Univ. of San Francisco School of Law (Oct. 13, 2007) (on file with authors) [hereinafter Kafanabo E-mail, Oct. 13, 2007] (indicating that in all cases where a child is sentenced to life imprisonment, the child welfare department appeals to higher courts immediately “which in all circumstances either reduces the sentence or releases the child”); *see also* Facsimile from Joyce Kafanabo to Michelle Leighton (Oct. 15, 2007) (on file with authors) [hereinafter Kafanabo Letter, Oct. 15, 2007].

69. Two children were released recently and one is receiving a parole hearing at the time of writing. E-mail from Michelle Leighton to Joyce Kafanabo (Nov. 2, 2007) (on file with authors); Kafanabo Letter, Oct. 15, 2007, *supra* note 68.

70. Sexual Offences Special Provisions Act (“SOSPA”), Nos. 4, 7 (1998) (Tanz.).

71. Minimum Sentence Act of 1972 (Tanz.).

72. Kafanabo E-mail, Oct. 13, 2007, *supra* note 68.

review of sentence of any child who is sentenced to life, and that life imprisonment for the juvenile offenders does not mean it is without parole.<sup>73</sup>

In Tanzania, the Department of Social Welfare and a parole review board monitor children in custody and “upon being satisfied that the child has been rehabilitated will then start process for releasing the child.”<sup>74</sup> The life sentence where a child offender may not receive this review is an unusual case because the sentence has only become possible under a law enacted in 1998 to punish cases of sexual abuse, particularly in young children.<sup>75</sup>

The one law that poses an issue for sentencing of juveniles as adults is the SOSPA,<sup>76</sup> a Parliamentary Act adopted in 1998 after the country began experiencing record levels of rape, incest, and sodomy of young children, some as young as five years old.<sup>77</sup> The law sought to reduce violence against children by increasing education and punishment for such crimes.<sup>78</sup> The offender’s age is not considered in prosecuting cases under SOSPA, and children are prosecuted as adults.<sup>79</sup> The law imposes stricter sentences for second- or third-time offenders, and offenders can be sentenced to between thirty years and life.<sup>80</sup> For rape of a child under the age of ten, SOSPA mandates the automatic sentence of life imprisonment.<sup>81</sup> Under any other criminal

73. Kafanabo Letter, Oct. 15, 2007, *supra* note 68; *see also* Interview with Augustine Mahiga, Permanent Representative, United Republic of Tanzania, Ministers Plenipotentiary Joyce Kafanabo and Modest Mero, Second Secretary Tully Mwaipopo, and other Tanzanian officials, in New York, N.Y. (Sept. 28, 2007) (on file with authors) [hereinafter Mahiga, Sept. 28, 2007] (resulting from discussions initiated by Nick Imparato of the University of San Francisco School of Business and Management, who also had meetings with the Permanent Representative on the subject). The one child serving LWOP was first identified by HRW and AI in 2005. *See* HRW/AI REPORT, *supra* note 18, at 106 (citing e-mail correspondence to HRW from Erasmina Masawe, Attorney, Legal and Human Rights Centre, Dar es Salaam, Tanzania, in July 2004, regarding the high profile case of a seventeen-year-old convicted of rape).

74. Kafanabo E-mail, Oct. 13, 2007, *supra* note 68.

75. *See* Kafanabo Letter, Oct. 15, 2007, *supra* note 68.

76. SOSPA, Nos. 4, 7 (1998) (Tanz.).

77. Mahiga, Sept. 28, 2007, *supra* note 73; Kafanabo Letter, Oct. 15, 2007, *supra* note 68.

78. For example, a child convicted of murder in Tanzania is subject to ten years of imprisonment before a request for probation can be made; however, under the SOSPA, courts apply less discretionary and harsher sentences. Kafanabo Letter, Oct. 15, 2007, *supra* note 68.

79. Mahiga, Sept. 28, 2007, *supra* note 73.

80. *Id.*

81. SOSPA, § 6(3). The authors note that the source is ambiguous as to whether SOSPA applies to rape of both boys and girls, or just girls. Interpretation of the Act was provided by Tanzanian officials and lawyers. Mahiga, Sept. 28, 2007, *supra* note 73.



convictions, the President of the country personally confirms every sentence given to a child offender in Tanzania, but under SOSPA the court issues the sentence without review by the President.<sup>82</sup>

As noted above, the Tanzanian Minister of Justice is introducing a reform bill in Parliament to bring sentencing under SOSPA into compliance with the Convention on the Rights of the Child<sup>83</sup> ("CRC"). It would prohibit cruel and unusual punishments for children, including LWOP sentences for child offenders. The reform bill will provide the courts with discretion in determining all sentences under SOSPA with respect to juveniles, in compliance with the CRC.<sup>84</sup> An interim act was recently passed that allows for the offender or his family to petition the court for immediate review. In its review, the court is to ensure compliance with the CRC prohibition on LWOP sentences.<sup>85</sup> The authors will continue to monitor these developments.

## 2. South Africa

South Africa no longer allows LWOP sentences for child offenders and has no children serving this sentence. South Africa reported to the CRC in 1999 that it had four child offenders serving LWOP sentences.<sup>86</sup> The government's second report to the Committee on the Rights of the Child, the oversight body for the CRC, does not discuss or further clarify this figure.<sup>87</sup> However, the head of the President's Office on Rights of the Child has confirmed to the authors in its consultation with the Department of Corrections that there are no juvenile offenders serving an LWOP sentence in South African prisons, i.e., no persons who committed crimes before age eighteen, and that all sentenced persons qualify now to apply for parole after a de-

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82. Mahiga, Sept. 28, 2007, *supra* note 73.

83. CRC, *supra* note 1.

84. A copy of the proposed bill is on file with the authors.

85. *Id.* The Minister of Justice introduced an interim act which passed the Parliament at the time of writing this Article. E-mail correspondence between Michelle Leighton, Dir. of Human Rights Programs, Ctr. for Law & Global Justice, Univ. of San Francisco School of Law, and Joyce Kananabo, Minister Plenipotentiary, Permanent Mission of the United Republic of Tanzania (Nov. 22–26, 2007) (on file with authors).

86. *South Africa State Party Report to the Committee on the Rights of the Child*, ¶ 514, U.N. Doc. CRC/C/51/Add.2 (May 22, 1999) (reporting four child offenders serving the sentence).

87. Telephone Interviews with Official Representatives of the Office on the Rights of the Child, Government of South Africa (May–June 2007) (notes on file with the authors); *see* The Presidency of Republic of South Africa, 2nd Children's Rights Country Report submitted to the United Nations Committee on the Rights of the Child (Aug. 2006) (on file with authors).

terminate period.<sup>88</sup> Thus, child offenders cannot be sentenced to an LWOP term.

South Africa has also been considering a Child Justice Bill since 2002 that would expressly clarify the illegality of life imprisonment for child offenders.<sup>89</sup> In 2004, the South Africa Supreme Court of Appeals issued a critical decision, *Brandt v. S.*,<sup>90</sup> which gave judges sentencing discretion with regard to juveniles.<sup>91</sup> The decision emphasized the importance of children's rights and reaffirmed that CRC 37(b) principles require juvenile imprisonment to be a last resort and for the shortest time possible.<sup>92</sup>

Although the *Brandt* decision marks greater strides toward the expansion of children's rights, it appears that there is still concern by some legal groups, such as the Centre for Child Law at the University of Pretoria, that the South African government has made minimal efforts to ensure that its incarcerated youth receive special programs over its older prison population.<sup>93</sup> Section 73(b)(iv) of the Correctional Services Act 111 of 1998 specifies that a person serving life imprisonment may not be placed on parole until he or she has served at least twenty-five years or has reached sixty-five years if at that time he or she has served fifteen years.<sup>94</sup> There is no parallel clause benefiting young offenders, and it appears that the Act aids only people who were fifty years or older at the time of the commission of the offense.<sup>95</sup> The reform bill under consideration may address these deficiencies. More recently, the government announced that in an attempt to curb prison overcrowding, it would release 300 adults serving life

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88. E-mail correspondence between Mabel Rantlha, Head of South African President's Office on Rights of the Child, and Michelle Leighton (Aug. 1-2, 2007); Telephone Conferences with Officials in Dep't of Justice and Foreign Ministry (May 29, 2007-June 19, 2007) (on file with the authors).

89. See Draft Child Justice Bill, Republic of South Africa, para. 72 (2002), available at <http://www.pmg.org.za/bills/020808childjusticebill.htm> ("No sentences of life imprisonment may be imposed on a child.").

90. *S v B* 2006 (1) SACR 311 (SCA) (S. Afr.); *Brandt v State* 2005 (2) All SA 1 (SCA) (S. Afr.).

91. *Id.*

92. *Do Minimum Sentences Apply to Juveniles?*, ARTICLE 40 (Cmty. Law Centre, Univ. of the Western Cape, S. Afr.), May 2005, at 1, available at [http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article\\_40\\_2005\\_05\\_vol7\\_1.pdf](http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article_40_2005_05_vol7_1.pdf).

93. CHILD LAW MATTERS (Ctr. for Child Law, Univ. of Pretoria, Pretoria), Dec. 2006, available at [http://www.childlawsa.com/docs/Newsletter\\_Dec2006.pdf](http://www.childlawsa.com/docs/Newsletter_Dec2006.pdf).

94. Correctional Services Act 111 of 1998 s. 73(b)(iv) (S. Afr.).

95. *Id.*

sentences, some of whom were former death row inmates.<sup>96</sup> The opposition Inkatha Freedom Party, among other critics, stated that “it is petty criminals, especially juveniles, who should be considered for release, not people who are in prison serving life sentences for serious crimes.”<sup>97</sup>

### 3. Burkina Faso and Kenya

Both Burkina Faso and Kenya had been listed in earlier reports as countries where there was a possibility that a child offender could receive an LWOP sentence. However, in March 2007, during and after the U.N. Human Rights Council session, both countries clarified that they do not allow for such sentences and provided written explanation to the authors.<sup>98</sup> Both countries assert that they now apply international standards prohibiting this sentencing, particularly as now recognized by the Committee on the Rights of the Child in its General Comment on Juvenile Justice, published in February 2007.<sup>99</sup>

In Burkina Faso, there is no law providing for child offenders younger than sixteen to be given life sentences. After age sixteen, the laws could possibly be read to try the child as an adult for certain crimes, making the child potentially eligible for a life sentence.<sup>100</sup> However, this interpretation has never been confirmed by a judge in the country, and officials have stated that doing so now would contravene Burkina Faso’s treaty obligations under the CRC, which apply directly in domestic law.<sup>101</sup>

Kenya has specifically clarified its compliance with the CRC in a report submitted to the Committee on the Rights of the Child in

96. South African Press Ass’n (“SAPA”), *IFP Slams Release of Former Death-Row Inmates*, MAIL & GUARDIAN ONLINE, Jan. 4, 2007, [http://www.mg.co.za/articlePage.aspx?articleid=294936&area=/Breaking\\_news/breaking\\_news\\_\\_national](http://www.mg.co.za/articlePage.aspx?articleid=294936&area=/Breaking_news/breaking_news__national).

97. *Id.*

98. Meetings and correspondence between Philip Owade, Ambassador, Deputy Permanent Representative, Permanent Mission of Kenya to the U.N., Geneva, Switzerland, other Kenyan delegates, and official delegates of Burkina Faso, and Michelle Leighton, Dir. of Human Rights Programs, Ctr. for Law & Global Justice, Univ. of San Francisco School of Law (Mar. 2007) [hereinafter Meetings and Correspondence]; also in follow-up correspondence with Michelle Leighton (Mar. 23–28, 2007).

99. See Comm. on Rights of the Child, *Children’s Rights in Juvenile Justice*, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter *General Comment No. 10*].

100. Meetings and Correspondence, *supra* note 98.

101. Correspondence between Michelle Leighton and Myriam Poussi, Official Representative in the Mission of Burkina Faso, Geneva, Switz. (Mar. 23–28, 2007) (on file with authors) (original in French) (confirming statements of officials in meetings at the U.N. Human Rights Council session, March 2007).

2006.<sup>102</sup> It ratified a bill which outlaws LWOP sentences for all children under age eighteen.<sup>103</sup>

#### 4. Israel

Prior to 2008, Israel had been reported by human rights groups to have anywhere between one and seven child offenders serving LWOP sentences.<sup>104</sup> The authors have received official clarification and commitment from the Israeli government that its laws allow for parole review of juvenile offenders serving life terms,<sup>105</sup> even those sentenced for political or security crimes in the Occupied Territories, those children for which the authors were most concerned.<sup>106</sup> Concerns remain, however, among legal practitioners in Palestine and Israel that parole review is difficult to pursue and rarely granted.<sup>107</sup> An additional concern is that the parole review for child offenders convicted of violating security regulations in Israel and in the Occupied

102. Meeting between Michelle Leighton, other HRA delegates, and Ambassador Philip Owade during March 2007 Human Rights Council meeting (meeting notes on file with authors) (identifying its official statements to the Committee on the Rights of the Child).

103. This is found in Kenya's section 18(2) of the Children's Act. The Children's Act, (2001) Cap. 586 § 18(2) (Kenya); *see also* Gov't of Kenya, *Second Periodic Report of State Parties Under the Convention on the Rights of the Child*, ¶ 146, *delivered to the Committee*, U.N. Doc. CRC/C/KEN/2 (July 4, 2006), *available at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/189bbd47582246fdc12572590029f5a5/\\$FILE/G0545052.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/189bbd47582246fdc12572590029f5a5/$FILE/G0545052.pdf).

104. The authors also met with officials on the subject during the March 2007 session of the U.N. Human Rights Council. The report of four juvenile offenders serving life sentences was reported in *Israel State Party Report to the Committee on the Rights of the Child*, ¶ 1372, *delivered to the Committee*, U.N. Doc. CRC/C/8/Add.44 (Feb. 27, 2002), *available at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f0bbf252c0b1ca20c1256bed004c56c4/\\$FILE/G0240564.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f0bbf252c0b1ca20c1256bed004c56c4/$FILE/G0240564.pdf). But HRW identified three others: Shadi Ghawadreh, Youssef Qandil, and Anas Mussallmeh. *See* HRW/AI REPORT, *supra* note 18, at 106. E-mail correspondence between Connie de la Vega, Professor of Law, Univ. of San Francisco School of Law, and Hilary Stauffer, Legal Adviser, Human Rights & Humanitarian Affairs, Permanent Mission of Israel to the U.N., Geneva, Switz. (May 30–31, 2007) (on file with authors) [hereinafter Stauffer E-mails, May 30–31, 2007] (reporting on discussion with the Israeli Ministry of Justice and confirming the authors' prior assertions about Israel's laws and practices).

105. E-mail from Gil Limon, Legal Adviser, Permanent Mission of Israel to the U.N., to Michelle Leighton (Feb. 1, 2008) [hereinafter Limon E-mail, Feb. 1, 2008]; Letter from Daniel Carmon, Ambassador, Deputy Permanent Representative, Permanent Mission of Israel to the U.N., New York (Jan. 22, 2008) (on file with authors).

106. Letter from Daniel Carmon, Ambassador, Deputy Permanent Representative, Permanent Mission of Israel to the U.N., New York (Mar. 6, 2008) (on file with authors) (discussing concern regarding children sentenced for political or security crimes in the Occupied Territories).

107. E-mails from Khaled Quzmar, Coordinator of Legal Unit, Defence for Children International, Palestine Section, to Michelle Leighton (Jan. 10, 2008, Jan. 12, 2008, Feb. 7, 2008) (on file with authors).

Territories is not conducted by the independent judiciary but by the Israeli Defense Forces Chief of Staff, who has the discretion and authority to determine whether parole is actually granted. Officials have indicated that this determination can be subject to review by the Israeli High Court of Justice and have sent correspondence showing that two petitions for parole submitted by prisoners serving life sentences in Judea and Samaria are currently being reviewed by the High Court in Israel.<sup>108</sup>

By way of background, in its report to the Committee on the Rights of the Child in February 2002, the government identified four child offenders serving life sentences, but did not indicate whether parole was available, stating:

The Supreme Court has held, in a majority decision, that the court has the discretion to review each case on its merits; should it reach the conclusion that the appropriate punishment is life imprisonment, and should it consider that this punishment is just and necessary, it may sentence a minor to life imprisonment (Miscellaneous Criminal Applications 530/90 John Doe v. State of Israel, P.D. 46(3) 648). One Supreme Court justice, basing herself, *inter alia*, on the Convention, expressed the view that life imprisonment should only be imposed on a minor in exceptional cases; however, her opinion was deemed as “needing further study” by the justices who sat with her (Miscellaneous Criminal applications 3112/94 Abu Hassan v. State of Israel (11.2.99 not yet published)). In practice, life imprisonment is imposed on minors very rarely; to date, it has been imposed on three seventeen-year-olds who stabbed a bus passenger to death as part of the “initiation rite” of a terrorist organization; and on a youth aged seventeen and ten months who strangled his employer to death after she commented on his work and delayed payment of his salary for two days.<sup>109</sup>

Human Rights Watch identified three other juveniles sentenced to life terms in 2004.<sup>110</sup>

Israeli law provides for review of life sentences and commutation to a sentence of thirty years, unless the youth offenders are sentenced by military courts under the 1945 Emergency Regulations for political or security crimes where the commutation is not applicable—as such,

108. Limon E-mail, Feb. 1, 2008, *supra* note 105; Letter from Daniel Carmon, Ambassador, *supra* note 106.

109. *Israel's State Party Report to the Committee on the Rights of the Child*, ¶ 1372, U.N. Doc. CRC/E/8/Add.44 (Feb. 27, 2002), *available at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f0bbf252c0b1ca20c1256bed004c56c4/\\$FILE/G0240564.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f0bbf252c0b1ca20c1256bed004c56c4/$FILE/G0240564.pdf).

110. The cases in question are reported as Shadi Ghawadreh, Youssef Qandil, and Anas Mussallameh. HRW/AI REPORT, *supra* note 18, at 106; *see also supra* note 104 and accompanying text.

there was concern that for those cases a juvenile would in effect be serving the equivalent of an LWOP sentence.<sup>111</sup> The seven juveniles that could possibly qualify, discussed above, were presumably sentenced for political or security crimes.<sup>112</sup>

While the government has clarified its law, as noted above, it appears that no reform in the Emergency Regulations Act or sentencing procedure is underway to prohibit this sentence. Further express clarification of law to prohibit effective LWOP sentences is warranted, as are reforms ensuring that juvenile offenders sentenced to life terms in the Occupied Territories are not subject to harsher parole review standards than children serving the same life terms from crimes committed in Israel.

#### **D. Countries With Laws that Conceivably Allow LWOP Sentences for Juveniles but Where No Practice Exists**

The other countries with LWOP sentences available for child offenders reportedly do not have any child offenders serving this sentence. For the countries listed here, the laws provide for a life sentence to be imposed on child offenders, but it is not clear whether a life sentence means there is no possibility of parole.<sup>113</sup> Besides the United States, there remain ten countries where it is unclear but reportedly possible for a child offender to serve an LWOP sentence. These countries are: Antigua and Barbuda, Argentina, Australia, Be-

111. HRW/AI REPORT, *supra* note 18, at 106 n.322 (citation omitted) (discussing lack of parole available to those who are sentenced under the Israel 1945 Emergency Regulations Act).

112. In a 2005 report, HRW was not able to verify whether or how many of the seven youths would not be provided parole consideration because they were sentenced for political or security crimes. In the authors' meetings and correspondence with Israeli officials during 2007, officials confirmed that at that point there was no change in the general number of life and/or LWOP cases as noted in this Article. Stauffer E-mails, May 30–31, 2007, *supra* note 104. The authors have not found any additional reported cases since 2004.

113. The authors have met with officials from most countries listed in this report, including in 2007 during the U.N. Human Rights Council session and in follow-up correspondence, and have clarified state practice as presented in this Article, and added Belize to this list. Australia's circumstance is discussed in Part I.D of this Article. In addition, Argentina may become a country of concern, if it were to allow or have any children serving life sentences where it is unclear that there is the possibility of parole. The authors became aware of this suggestion only at the time of writing this Article. For an earlier list of countries which reported laws on LWOP for juveniles, see HRW/AI REPORT, *supra* note 18, at 106 n.319. For nine out of the 154 countries researched, the authors were unable to obtain the necessary sources to determine whether or not the sentence exists in law, and if it does, whether or not it is imposed.

lize, Brunei, Cuba,<sup>114</sup> Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka (which has new legislation pending that would bring it in line with the CRC prohibition on LWOP). Two countries of particular concern, Australia and Argentina, are discussed below.

According to Australia's report to the Committee on the Rights of the Child at the end of 2004, state, territory, and federal laws are now standardized as to the age of criminal responsibility, which is ten years of age.<sup>115</sup> However, there is a rebuttable presumption that "children aged between 10 and 14 are incapable, or will not be held accountable, for committing a crime, either because of the absence of criminal intent, or because they did not know that they should not have done certain acts or omissions."<sup>116</sup> There are no child offenders convicted under federal law serving LWOP sentences: Australian officials have indicated that there are currently about twenty-six federal prisoners with life sentences. Only two of those prisoners do not have a non-parole period set, but neither of these persons were sentenced when they were juveniles.<sup>117</sup>

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114. With respect to Cuba, a reform bill is pending that would create a juvenile justice system, but the present law is still unclear as to whether juvenile offenders could possibly, at some point in the future, be sentenced to LWOP.

115. Gov't of Austl., *Combined Second & Third Reports of the Government of Australia Under the Convention on the Rights of the Child, delivered to the Committee*, ¶ 72, U.N. Doc. CRC/C/129/Add. 4 (Sept. 30, 2003) [hereinafter *Australia CRC Reports*], available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9118c7351dc21240c1257007004a6026/\\$FILE/G0445319.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9118c7351dc21240c1257007004a6026/$FILE/G0445319.pdf).

116. *Id.*

117. E-mail correspondence between Michelle Leighton, Dir. of Human Rights Programs, Ctr. for Law & Global Justice, Univ. of San Francisco School of Law, and Judy Putt, Research Manager, Australian Gov't Inst. of Criminology ("AIC"), Canberra, Austl. (Sept. 18–30, 2007) (on file with authors). According to correspondence with the AIC:

[U]nder section 20C(1) of the *Crimes Act 1914* a child or young person who is charged with or convicted of a Commonwealth offense may be tried, punished or otherwise dealt with as if the offence were an offence against the law of the State or Territory in which the person is tried. This enables young federal offenders to be dealt with in accordance with the juvenile justice systems established in each State or Territory. Most State and Territory juvenile justice legislation contains maximum terms of detention that may be imposed on juveniles, i.e., the NT *Juvenile Justice Act 2005* provides that a term of detention imposed on a juvenile must not exceed 2 years (if the juvenile is over fifteen years of age) or one year (if the juvenile is less than fifteen). The NT legislation also says a non-parole period must be set if the sentence is over twelve months. In Victoria, the *Children, Youth and Families Act 2005* provides that a maximum term of one years detention can be imposed on a juvenile between the age of ten and fifteen, and a maximum of two years for juveniles over fifteen years of age. Therefore, if a juvenile federal offender is dealt with under section 20C(1) of the Crimes Act in accordance with the juvenile justice system of the State or Territory in which the offender is

State practice in Australia is more difficult to evaluate in this regard. In Queensland, children aged seventeen who are in conflict with the law may be tried as adults in particular cases, though the authors are not aware of any children serving LWOP sentences.<sup>118</sup> This was noted of concern to the Committee on the Rights of the Child in evaluating Australia's compliance with its treaty obligations.<sup>119</sup>

In New South Wales, two juveniles who were sentenced to life imprisonment challenged a law enacted after their sentencing which they argued would give legal weight to a judge's recommendation that they not be given parole and in effect cause them to be serving an LWOP sentence. Those cases are *Elliot v. the Queen*<sup>120</sup> and *Blessington v. the Queen*,<sup>121</sup> and both are before Australia's High Court.<sup>122</sup> The High Court rejected the arguments that the recommendation in question had acquired the character of a legal order and interpreted the relevant criminal sentencing acts to allow the petitioners to apply for the determination of a minimum term and additional term after they served twenty years of their sentence.<sup>123</sup>

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charged, it is unlikely that it would be possible for the juvenile to receive a sentence of life imprisonment without parole.

*Id.* However, section 20C of the Crimes Act does not preclude a juvenile who receives a sentence of life imprisonment from receiving an LWOP sentence. *Id.* Paragraph 19AB(1)(b) of the Crimes Act provides that where a court imposes a federal life sentence, or any federal sentence exceeding three years, the court must fix either a single non-parole period for that sentence or make a recognizance release order (release on a good behavior bond). *Id.* However, under subsection 19AB(3), the court may decide to not fix a non-parole period or make a recognizance release order if the court considers it inappropriate to do so under the circumstances. Under subsection 19AB(4), if the court decides not to fix a non-parole period or make a recognizance release order, then the court must give its reasons for doing so and cause these reasons to enter into the court's records. *Id.*

118. *Committee on the Rights of the Child Concluding Observations to 2d & 3rd Reports submitted by Australia to the Committee*, ¶ 73, U.N. Doc. CRC/C/15/Add. 268 (Oct. 20, 2005) [hereinafter *Concluding Remarks to 2d & 3rd Reports, Australia*]. It urged Australia to make reforms to this law before its next report due January 15, 2007. *Id.* ¶ 74.

119. *Id.* ¶¶ 9, 10; see *id.* ¶ 73.

120. *Elliot v. The Queen*, (2007) H.C.A. 51. These cases concern the New South Wales Crimes (*Sentencing Procedure*) Act of 1999. *CRC Remarks to 3rd Report, Australia*, *supra* note 118. The High Court heard oral argument in September 2007, but it is uncertain when the cases will be decided. The transcript of the High Court hearing is accessible at <http://www.austlii.edu.au/au/other/HCATrans/2007/538.html>.

121. *Blessington v. The Queen* (S218/2007).

122. *Id.* The High Court heard oral arguments in September 2007 and has now reserved the cases for decision. See High Court of Australia Bulletin 2007, No. 10, 31, Oct. 2007 (on file with authors).

123. See *supra* notes 108–09; Order of final decision H.C.A. 51 (Nov. 8, 2007). The Court found that the legislative acts did not change the authority or discretion of the province's supreme court review of applications seeking determinate sentencing, only the "determinate" time period upon which petitioners could apply (which went from eight to



No other juvenile LWOP cases are known. However, should Australian provinces allow the LWOP sentences, Australia would be in violation of its treaty obligations under the CRC. The Committee on the Rights of the Child was concerned with Australia's juvenile justice system in 2005 and with the courts' ability to implement the treaty provisions in the face of contrary domestic law. The Committee indicated that it "remains concerned that, while the Convention may be considered and taken into account in order to assist courts to resolve uncertainties or ambiguities in the law, it cannot be used by the judiciary to override inconsistent provisions of domestic law."<sup>124</sup> In response, the Committee further recommended that Australia "strengthen its efforts to bring its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies will always be available in case of violation of rights of the child."<sup>125</sup>

Argentina is now a country of concern. It passed a law in 2004 that may provide for life sentences without parole for sixteen- and seventeen-year-olds for certain crimes.<sup>126</sup> There are no known cases of persons sentenced under the 2004 law for LWOP, although there are five cases where life sentences have been given.<sup>127</sup>

The laws and practice of the majority of the countries in the world are reflective of the requirements of international treaties which prohibit LWOP for offenders under the age of eighteen at the time of the commission of the crime. The next section discusses the status of this prohibition under international law.

### III. International Law Prohibits Life Without Possibility of Release or Parole for Juveniles

Customary international law has recognized that the special characteristics of children preclude them from being treated the same as

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twenty years) and the criteria for further consideration, including recommendations of the original sentencing judge, in issuing a determinate sentence. *Id.* paras. 18–23.

124. *Concluding Remarks to 2d & 3rd Reports, Australia*, *supra* note 118, ¶ 9 (regarding Australia's compliance with the treaty); *see also id.* ¶ 73.

125. *Id.* ¶ 10.

126. Cód. Pen. [PENAL CODE] art. 13 (Arg.).

127. "La mano dura y la Corte menemista podrían costarle una condena internacional al país," *BUENOS AIRES ECONÓMICO*, Jan. 23, 2008, at 8; *see also* E-mail from Facundo Hernández, Legal and Social Studies of Uruguay, to Connie de la Vega, Professor of Law, Univ. of San Francisco School of Law (Feb. 25, 2008) (on file with authors). Translated from Spanish, the article title reads, "The hoary hand of the Menemist Court could result in an international condemnation of the country."

adults in the criminal justice system.<sup>128</sup> To sentence a child in such a severe manner contravenes society's notion of fairness and the shared legal responsibility to protect and promote child development.

Trying children in adult courts so that they can receive "adult" punishment squarely contradicts that most basic premise behind the establishment of juvenile justice systems: ensuring the well-being of youth offenders. The harsh sentences dispensed in adult courts do not take into account the lessened culpability of juvenile offenders, their ineptness at navigating the criminal justice system, or their potential for rehabilitation and reintegration into society.

Moreover, indeterminate sentences lack the element of proportionality which many believe is essential in a humane punishment.<sup>129</sup> Indeed, the LWOP sentence penalizes child offenders more than adults, because the child, by virtue of his or her young age, will likely serve a longer sentence than an adult given LWOP for the same crime.

The common law heritage of the United States and of some of the states that allow for LWOP in their laws<sup>130</sup> evolved a century ago to impose a separate punishment structure on children and to prohibit LWOP sentences.<sup>131</sup> The Children Act of 1908 in England required differentiated treatment of children and adults and "leniency in view of the age of the offender at the time of the offense."<sup>132</sup> The practice of imposing LWOP sentences on children has been a more recent phenomenon at the end of the last century, largely in the 1990s, by a

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128. *General Comment No. 10*, *supra* note 99, ¶¶ 10–11.

129. Also problematic is that many states integrate youthful violent offenders with adult state prison populations beginning at age sixteen. *See generally* KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PROFILE OF STATE PRISONERS UNDER AGE 18, 1985–1997 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pspa1897.pdf>. These youths are at increased risk for sexual assault and violent assault. *See* HRW/AI REPORT, *supra* note 18, at 73–80.

130. The United States, a number of Caribbean Islands, and Tanzania (which formerly had the possibility of the LWOP sentence), which are all referred to in this Article as having the possibility of LWOP, were all colonies inheriting the English common law tradition. It is noted in this Article that the sentence of LWOP is *not* a common law tradition, but a recent phenomenon adopted in the past decade and a half in addressing juvenile crime rates.

131. *See* Brief for the Human Rights Committee of the Bar of England and Wales, Human Rights Advocates, Human Rights Watch, and the World Organization for Human Rights USA as Amici Curiae Supporting Respondent, at 9–11, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (providing commentary by lead attorney Connie de la Vega). The Court cited the amicus brief twice in its decision.

132. *Id.* at 10 (citation omitted) (referring to Lord Steyn and Lord Hope of Craighead in a 1998 case).

small minority of countries seeking harsher sentences against juvenile offenders.<sup>133</sup>

#### A. Treaties Prohibit LWOP Sentences Because of the Special Characteristics of Children

The CRC, a treaty ratified by every country in the world except the United States and Somalia,<sup>134</sup> codifies an international customary norm of human rights that forbids the sentencing of child offenders to LWOP.<sup>135</sup> In early 2007, the Committee on the Rights of the Child, the implementation authority for the CRC, clarified this prohibition in a General Comment: “The death penalty and a life sentence without the possibility of parole are explicitly prohibited in article 37(a) of CRC.”<sup>136</sup> The General Comment’s additional paragraph 77, titled “No life imprisonment without parole,” further recommends that “parties abolish all forms of life imprisonment for offences committed by persons under the age of eighteen.”<sup>137</sup> Providing greater clarity to this norm is the Committee’s interpretation of treaty obligations around procedure for trial of juveniles, requiring nations to treat juveniles strictly under the rules of juvenile justice.<sup>138</sup> This would effectively prohibit courts from trying juveniles as adults—the primary mechanism in United States courts and elsewhere for applying the LWOP sentence.<sup>139</sup>

Other recent developments in international law have highlighted the urgent need for countries to reconsider their juvenile sentencing policies and prohibit by law LWOP sentences for child offenders. The prohibition is recognized as an obligation of the International Covenant on Civil and Political Rights<sup>140</sup> (“ICCPR”). Article 7 prohibits

133. See *supra* notes 30–34 and accompanying text (discussing the rapid evolution of LWOP sentences for children in the United States as laws emerged to allow children to be tried in courts as adults in the 1990s); *supra* notes 76–82 (noting the potential for LWOP sentences in Tanzania due to sentencing requirements for particular crimes).

134. See OHCHR, STATUS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (June 9, 2004), available at <http://www.unhcr.ch/pdf/report.pdf> (reporting the ratification status of nations for major treaties and indicating that the United States has only provided a signature for the CRC but has not ratified it).

135. CRC, *supra* note 1.

136. General Comment No. 10, *supra* note 99, ¶ 4(c).

137. *Id.* ¶ 77.

138. See *Id.* ¶ 77, 88.

139. See *infra* Appendix (providing information about the United States practice of allowing juveniles to be tried as adults).

140. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY Doc. No. 95-20 (1992), 999 U.N.T.S. 171 [hereinafter ICCPR].

cruel, unusual, and degrading treatment or punishment,<sup>141</sup> and LWOP sentences are cruel when applied to children. Juvenile LWOP sentences also violate Article 10(3), which provides, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”<sup>142</sup> In the sentencing of juvenile persons, governments should “take account of their age and the desirability of promoting their rehabilitation” as prescribed by Article 14(4) of the treaty.<sup>143</sup> This is reinforced by Article 24(1), which states that every child shall have “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”<sup>144</sup>

## **B. The United States is in Direct Violation of its Treaty Obligations**

The United States ratified the ICCPR in 1992.<sup>145</sup> The Committee on Human Rights, the oversight authority for the treaty, determined in 2006 that the United States is not in compliance with the treaty because it allows LWOP sentences for juveniles. The Committee made this determination even considering that the United States had taken a reservation to the treaty to allow the trying of juveniles in adult court in “exceptional circumstances.”<sup>146</sup> The extraordinary breadth and rapid development in the United States of sentencing child offenders to LWOP since the United States’ ratification of the ICCPR contradicts the assertion that the United States has applied this sentence only in exceptional circumstances. In fact, the total number of chil-

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141. *Id.* art. 7.

142. *Id.* art. 10(3).

143. *Id.* art. 14(4).

144. Comments on United States, *supra* note 38.

145. The United States ratified the ICCPR in June 8, 1992. ICCPR, *supra* note 140; Office of the United Nations High Comm’r for Human Rights, ICCPR, <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Apr. 23, 2008) (providing list of countries ratifying the ICCPR by country name and date). In its ratification of the ICCPR, the United States declared, “The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.” Office of the United Nations High Comm’r for Human Rights, ICCPR Declarations and Reservations, [http://www2.ohchr.org/english/bodies/ratification/4\\_1.htm](http://www2.ohchr.org/english/bodies/ratification/4_1.htm) (last visited Apr. 23, 2008).

146. Comments on United States, *supra* note 38.

dren tried as adults and sentenced to LWOP now exceeds 2484, many of whom were first-time offenders.<sup>147</sup>

In evaluating the United States' compliance with the treaty in 2006, the Committee on Human Rights found the United States to be out of compliance with its obligations. The Committee concluded that the United States' practice of sentencing child offenders to LWOP violates article 24(1), which states, "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor."<sup>148</sup>

The Committee expressed its grave concern "that the treatment of children as adults is not applied in exceptional circumstances only . . . . The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant."<sup>149</sup>

The Committee Against Torture, the official oversight body for the Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a legal party, evaluated United States' compliance in 2006. The committee commented that the life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment,"<sup>150</sup> in violation of the treaty.

Moreover, the United States has done nothing to reduce the pervasive discrimination evident in many United States states' applications of the LWOP sentence to children of color. As discussed in Part II, the rate of African American youth compared to white youth per 100,000 youths incarcerated in adult prisons is twenty-six to two. Furthermore, youth of color in some jurisdictions receive more than 90% of the LWOP sentences given and national rates for African Americans are ten times those of white youth.<sup>151</sup>

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147. See *supra* notes 11–12.

148. Comments on United States, *supra* note 38.

149. *Id.*

150. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113; Office of the High Comm'r on Human Rights, 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last visited June 15, 2008); see Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶ 35, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

151. See *supra* notes 22–42 and accompanying text (discussing United States practices); see also HRW/AI REPORT, *supra* note 18, at 2.

The Committee on the Elimination of Racial Discrimination, the official monitoring body for the Convention on the Elimination of Racial Discrimination, to which the United States is a party, determined in its Concluding Observations that juvenile LWOP sentences are incompatible with the United States' obligations under the treaty. Specifically:

The Committee notes with concern that according to information received, young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole. (Article 5 (a))

The Committee recalls the concerns expressed by the Human Rights Committee (CCPR/C/USA/CO/3/Rev.1, para. 34) and the Committee against Torture (CAT/C/USA/CO/2, para. 34) with regard to federal and state legislation allowing the use of life imprisonment without parole against young offenders, including children. In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.<sup>152</sup>

The United Nations General Assembly ("G.A.") has also acted on the issue of LWOP sentences for juveniles. By a vote of 185 to one (the United States was the only country voting against it) the G.A. passed a resolution on December 19, 2006<sup>153</sup> calling upon nations to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offense."<sup>154</sup> A similar resolution was adopted by a vote of 183 countries to one (once again, the United States was the only country voting against it) in December of 2007.<sup>155</sup>

International law, as expressed through international treaties and other agreements, is the supreme "law of the land" in the United States and should be applied in the context of juvenile sentencing. The Supremacy Clause is the common name given to Article VI, Clause 2 of the United States Constitution, which states:

152. Committee on Elimination of Racial Discrimination, Concluding Observations of the United States, ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

153. Rights of the Child 2006, *supra* note 19, ¶ 31(a).

154. *Id.*

155. Rights of the Child 2007, *supra* note 19, ¶ 36(a) (incorporating U.N. General Assembly, Third Committee, ¶ 24, U.N. Doc. A/C.3/62/L.24 (Oct. 2007)).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.<sup>156</sup>

In *Roper v. Simmons*,<sup>157</sup> which abolished the practice of juvenile executions, the United States Supreme Court considered not only the evolution of international law, but also the evolution of the practice in the community of nations. The Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."<sup>158</sup>

In considering constitutional values related to the death penalty, the most severe punishment of juveniles, the Court observed:

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. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under [eighteen] as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under [eighteen] as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.<sup>159</sup>

It has been demonstrated that a juvenile awaiting death in prison under the LWOP sentence also has no opportunity to attain a mature understanding of his or her own humanity.

### C. The Prohibition of Juvenile LWOP Is Customary International Law and a *Jus Cogens* Norm

The prohibition against sentencing child offenders to LWOP is part of customary international law and the virtually universal con-

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156. U.S. CONST. art. VI, cl. 2.

157. 543 U.S. 551 (2005).

158. *Id.* at 575–78.

159. *Id.* at 573–74 (citations omitted).

demnation of this practice can now be said to have reached the level of a *jus cogens* norm.<sup>160</sup> Once a rule of customary international law is established, that rule generally applies to all nations, including those that have not formally ratified it themselves.<sup>161</sup>

For a norm to be considered customary international law, it must be a widespread, constant, and uniform state practice compelled by legal obligation that is sufficiently long to establish the norm, notwithstanding that there may be a few uncertainties or contradictions in practice during this time.<sup>162</sup> The International Court of Justice (“ICJ”) has said that “a very widespread and representative participation in [a] convention might suffice of itself” to evidence the attainment of customary international law, provided it included participation from “States whose interests were specially affected.”<sup>163</sup> When customary law is said to be a *jus cogens* norm, no persistent objection by a particular country will suffice to prevent the norm’s applicability to all nations. According to Article 53 of the Vienna Convention on the Law of Treaties, it is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of

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160. The doctrine of *jus cogens* focuses on the supremacy of certain customary international law norms in regulating state practice: norms which have been “accepted and recognized by the international community of States as a whole as [ ] norm[s] from which no derogation is permitted and which can be modified only by [ ] subsequent norm[s] of general international law having the same character.” Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969); see also Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. REV. 735, 754 (1998); Vienna Convention on the Law of Treaties, *supra*, at 352; The Barcelona Traction, Light and Power Company, Limited Case (Belgium v. Spain), 1970 I.C.J. 4, paras. 33–34; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512–15 (4th ed. 1990); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994); de la Vega & Brown, *supra*, at 759–62.

161. The exception is a nation that has persistently objected to the rule, provided it has not already become a rule of customary international law that has reached the level of a *jus cogens* norm.

162. The Anglo-Norwegian Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 138–39; Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. U.S.), 1986 I.C.J. 14, 98, para. 186.

163. North Sea Continental Shelf Cases (FRG v. Denmark; FRG v. Netherlands) 1969 I.C.J. 3, paras. 73–74 (finding that “although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”).



general international law having the same character.”<sup>164</sup> This definition is accepted by most legal scholars in and outside of the United States.<sup>165</sup> Moreover, United States law recognizes that customary international law is part of domestic United States law and binds the government of the United States.<sup>166</sup>

The International Law Commission has included this principle among those in its Draft Articles on State Responsibility.<sup>167</sup> It commented that “the obligations arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values.”<sup>168</sup>

The current President of the ICJ, the Honorable Rosalyn Higgins, has stated that what is critical in determining the nature of the norm as a *jus cogens* norm is both the practice and *opinio juris* of the vast majority of nations.<sup>169</sup> It is important to look at the legal expectations of the international community of nations and their practice in conformity with those expectations. As such, G.A. resolutions can provide evidence of such expectations.<sup>170</sup>

The prohibition of LWOP fulfills these requisites for three reasons: (1) there is a widespread and consistent practice by countries to not impose a sentence of LWOP for child offenders as a measure that is fundamental to the basic human value of protecting the life of a child; (2) the imposition of such sentences is relatively new and now practiced by only one nation, the United States—all of the other states which had taken up the practice have joined the global community in abolishing the sentence; and (3) there is virtually universal acceptance that the norm is legally binding, as codified by the CRC and elsewhere, and requires countries to abolish this practice, as evidenced by

164. Vienna Convention on the Law of Treaties, *supra* note 160.

165. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § n102 (1986); SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 82 (2006).

166. See, for example, the United States Supreme Court opinion in *The Paquete Habana*, 175 U.S. 677, 699 (1900), discussing the place of international law in domestic United States law.

167. See Art. 40, and the Commentary, Draft Articles on Responsibility of States for Internationally Wrongful Acts, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). The International Law Commission (“ILC”) adopted the draft articles and Commentary at its 53rd session in 2001. ILC, Draft Articles on Responsibilities of States for Internationally Wrongful Acts, With Commentaries, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

168. See ILC, *supra* note 167, at 112 (providing paragraph 3 of Commentary to Article 40).

169. See HIGGINS, *supra* note 160, at 22.

170. *Id.* at 23.

the most recent U.N. General Assembly resolution 61/146 (discussed above).

First, there is only one country that is known to still practice the sentencing of juveniles to LWOP, have children serving the sentence, or both: the United States. Second, the sentence has not been consistently and historically applied to child offenders. Even in the United States, the sentence was not used on a large scale until the 1990s when crime reached record levels.<sup>171</sup> It was only between 1992 and 1995 that forty states and the District of Columbia all passed laws increasing the options for sending juveniles to adult courts.<sup>172</sup> Before this time, the sentence had been rarely imposed.<sup>173</sup> Third, there is near universal acceptance that the norm is legally binding, as codified by CRC article 37, which prohibits LWOP sentences for juveniles. All but two countries are party to the CRC (the United States and Somalia), and all countries except the United States have ended the practice of using this sentence in accordance with their treaty obligations.

The Human Rights Committee found that this sentence violates the ICCPR, in evaluating the United States' report to the Committee, as the treaty ensures that every child has the right to such measures necessary to protect his or her status as a minor.<sup>174</sup> Trying and sentencing a child as an adult violates that minor's status. Applying a serious adult sentence to a child also implicates article 7 of the ICCPR relating to cruel, inhuman, and degrading treatment, as was also suggested by the Committee Against Torture.

In addition to the legal prohibition recognized in the context of treaty law, countries have reinforced their obligation to uphold this norm in a myriad of international resolutions and declarations over the past two decades. The General Assembly resolution 61/146 of December 2006, calling for the immediate abrogation of the LWOP sentence for juveniles in any country applying the penalty, is one that grew from many other international legal pronouncements.<sup>175</sup>

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171. Note that crime levels reached their peak in 1994 and have been declining since. See Fraser, *supra* note 39.

172. *Id.*

173. From 1962 until 1981, an average of two youth offenders in the United States entered prison each year with LWOP sentences. See HRW/AI REPORT, *supra* note 18, at 31.

174. Comments on United States, *supra* note 38, ¶ 34.

175. Rights of the Child 2006, *supra* note 19, ¶ 31(a). The authors read the statement by the Committee that the juvenile LWOP sentence is out of compliance with Art. 24 to mean that "compliance" with treaty obligations would require abolition of this sentence. The authors consider that failure to comply with a substantive provision of the ICCPR, such as Art. 24, is a violation of the government's treaty obligations, particularly as country parties expect other country parties to comply with the treaty's substantive provisions.

Prior to this, the G.A. had adopted other statements on the subject which serve as evidence of nations' expectations that all members of the international community of nations should respect this norm. In 1985, the G.A. adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), reiterating that the primary aim of juvenile justice is to ensure the well-being of the juvenile and that confinement shall be imposed only after careful consideration and for the shortest period possible.<sup>176</sup> The Commentary to these rules indicates that punitive approaches are not appropriate for juveniles and that the well-being and the future of the offender always outweigh retributive sanctions.<sup>177</sup>

Similarly, in 1990 the G.A. passed two resolutions extending protections for incarcerated juveniles: the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty<sup>178</sup> and the U.N. Guidelines for the Prevention of Juvenile Delinquency<sup>179</sup> ("Riyadh Guidelines"). Both resolutions consider the negative effects of long-term incarceration on juveniles. The Riyadh Guidelines state that "no child or young person should be subjected to harsh or degrading correction or punishment."<sup>180</sup> Additionally, the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty emphasizes imprisonment as a last resort and for the shortest time possible.<sup>181</sup>

Every year for the last decade of its existence, the U.N. Commission on Human Rights emphasized the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time.<sup>182</sup> Its resolutions consistently called for this compli-

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176. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res. 40/33, U.N. Doc. A/40/53 (Nov. 29, 1985) [hereinafter Beijing Rules], available at [http://www.unhchr.ch/html/menu3/b/h\\_comp48.htm](http://www.unhchr.ch/html/menu3/b/h_comp48.htm).

177. *Id.*; see *id.* at Rule 17.1(d) (Commentary).

178. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r113.htm>.

179. United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), G.A. Res. 45/112, ¶ 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990) [hereinafter Riyadh Guidelines], available at <http://www.un.org/documents/ga/res/45/a45r112.htm>.

180. *Id.* ¶ 54.

181. United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, *supra* note 178, arts. 1–2.

182. Human Rights in the Administration of Justice, in Particular of Children and Juveniles in Detention, Comm'n on Human Rights Res. 1996/32, ¶ 13, U.N. Doc. E/CN.4/RES/1996/32 (Apr. 19, 1996); Human Rights in the Administration of Justice, in Particular of Children and Juveniles in Detention, Comm'n on Human Rights Res. 1998/

ance, and in 2005, it further called specifically for the abolition of the juvenile LWOP sentences.<sup>183</sup> The Commission's replacement body, the Human Rights Council, included the prohibition in its first substantive resolution on the rights of the child.<sup>184</sup>

A near universal consensus has coalesced over the past fifteen years and even accelerated in the last several years, as evidenced by the recently passed G.A. Resolutions 62/141 and 61/146, the 2006 Conclusions and Recommendations of the Human Rights Committee discussing the United States' practice of sentencing juveniles to LWOP, the similar observations of the Committee Against Torture, and the 2007 Committee on the Rights of the Child's General Comment on Juvenile Justice. Indeed, because only one country, the United States, now applies this sentence and holds 100% of the cases, the prohibition against the sentence can now be said to have reached the level of a *jus cogens* norm, a practice no longer tolerated by the international community of nations as a legal penalty for children. In sum, the United States alone is violating international law by allowing its courts to impose this penalty on children.

#### IV. Juvenile Justice and Rehabilitation Models

The ICCPR and the CRC provide that deprivation of liberty for child offenders be a "measure of last resort." As previously explained, the Beijing Rules and the Riyadh Guidelines consider long-term incarceration of juvenile offenders antithetical to the purpose and meaning of juvenile justice.<sup>185</sup> The Human Rights Council recognized the

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39, ¶ 15, U.N. Doc. E/CN.4/RES/1998/39 (Apr. 17, 1998); Rights of the Child, Comm'n on Human Rights Res. 1999/80, ¶ 28, U.N. Doc. E/CN.4/RES/1999/90 (Apr. 28, 1999); Rights of the Child, Comm'n on Human Rights Res. 2000/85, ¶ 36, U.N. Doc. E/CN.4/RES/2000/85 (Apr. 27, 2000); Rights of the Child, Comm'n on Human Rights Res. 2001/75, ¶ 28, U.N. Doc. E/CN.4/RES/2001/75 (Apr. 25, 2001); Rights of the Child, Comm'n on Human Rights 2002/92, ¶ 31, U.N. Doc. E/CN.4/RES/2002/92 (Apr. 26, 2002); Rights of the Child, Comm'n on Human Rights 2003/86, U.N. Doc. E/CN.4/RES/2003/86 (Apr. 25, 2003); Rights of the Child, Comm'n on Human Rights 2004/48, ¶ 35, U.N. Doc. E/CN.4/RES/2004/48 (Apr. 14, 2004). The Commission was replaced thereafter by the Human Rights Council which has only in 2007-08 begun to adopt thematic resolutions again.

183. See *supra* note 182 and accompanying text; Rights of the Child, Comm'n on Human Rights 2005/44, U.N. Doc. E/CN.4/RES/2005/44 (2005).

184. Rights of the Child, Comm'n on Human Rights ¶ 31 (2008) [hereinafter Rights of the Child 2008], <http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A-HRC-7-L11-Add1.doc>.

185. "The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance." Riyadh Guidelines, *supra* note 179, ¶ 46.

importance of alternatives to imprisonment of juveniles at its March 2008 session.<sup>186</sup> The following examples of alternative sentencing structures focusing on rehabilitation and reduction of recidivism represent only a few options of the many available to states in improving their juvenile justice practices.

#### A. The German Model of Alternative Sentencing and Juvenile Rehabilitation

The German model of juvenile rehabilitation, or restorative justice, is an example of a juvenile justice system focused on rehabilitation. In the 1970s, Germany withdrew traditional sentencing for juveniles.<sup>187</sup> The conventional model gave way to alternative measures in the 1970s enumerated in the Juvenile Justice Act ("JJA"), including suspensions, probation, community service, and a system of day-fines.<sup>188</sup> As a result, between 1982 and 1990, incarceration of juveniles in Germany decreased more than 50%.<sup>189</sup>

In 1990, the JJA was amended to include additional alternatives to incarceration.<sup>190</sup> In the case of juvenile offenders (fourteen to seventeen years of age), the German criminal justice system predominately aims to educate the juvenile and provides for special sanctions.<sup>191</sup> Initially, education and disciplinary measures are implemented.<sup>192</sup> Only if those measures are unsuccessful is youth imprisonment with the possibility of suspension and probation used.<sup>193</sup>

The current JJA emphasizes release and discharge of child offenders when the severity of the crime is balanced with "social and/or educational interventions that have taken place."<sup>194</sup> Included in Ger-

186. Rights of the Child 2008, *supra* note 184, ¶ 32.

187. Dr. Christian Pfeiffer, *Alternative Sanctions in Germany: An Overview of Germany's Sentencing Practices*, Presentation for the Nat'l Inst. of Justice Research in Progress Seminar Series, Washington, D.C., (Feb. 1996), *available at* <http://www.ncjrs.gov/pdffiles/germany.pdf>.

188. *Id.*

189. *Id.*

190. Frieder Dünkler, *Juvenile Justice in Germany: Between Welfare and Justice* § 1 (Mar. 8, 2004), *available at* [http://www.esc-eurocrim.org/files/juvjusticegermany\\_betw\\_welfar\\_justice.doc](http://www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc).

191. Lars Horst, *Rehabilitation of Juvenile Offenders in South Africa and Germany—A Comparison* 9 (2005) (unpublished Master of Law dissertation, Univ. of Cape Town, S. Afr.), *available at* <http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/52/1/HorstL+2005.pdf>.

192. *Id.*

193. *Id.*; *see also* Jugendgerichtsgesetz [Juvenile Justice Act], 1990, §§ 9, 13, 21, and 27 (F.R.G.).

194. Dünkler, *supra* note 190 (citing Juvenile Justice Act §§ 45(1)–(2)).

many's innovative system of juvenile justice and rehabilitation is the equal value given to efforts of reparation to the victim, participation in victim-offender reconciliation (mediation), and education programs.<sup>195</sup> Furthermore, the German model does not restrict rehabilitation and justice by the nature of the offense. Additionally, felony offenses can be reduced or "diverted" under certain circumstances, "e. g. a robbery, if the offender has repaired the damage or made another form of apology (restitution/reparation) to the victim."<sup>196</sup>

Prison sentences for child offenders are a sanction of last resort, *ultima ratio*, in line with international norms including CRC and the Beijing Rules.<sup>197</sup> For child offenders between fourteen and seventeen years of age, the minimum length of youth imprisonment is six months and the maximum is five years.<sup>198</sup> In cases of very serious crimes for which adults could be punished with more than ten years of imprisonment, the maximum length of youth imprisonment is ten years.<sup>199</sup> Additionally, there is no possibility of death sentences or LWOP for child offenders. The low level of juvenile recidivism is a testament to the success of this innovative system.

## **B. The New Zealand Family Group Conference Model and Juvenile Rehabilitation**

New Zealand began utilizing the approach of restorative justice as an alternative for juveniles in the criminal system in 1989 with the passage of the Children, Young Persons, and Their Families Act<sup>200</sup> ("Act"). The Act provides for a Family Group Conference ("Conference") as a first step for dealing with a juvenile offender.<sup>201</sup> These Conferences have now become the lynch-pin of the New Zealand youth justice system, both as pre-charge mechanisms to determine

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195. *Id.* § 2.

196. *Id.*

The situation is different in the general penal law for adults (> 18 or 21 years old) where diversion according to §§ 153 ff. of the Criminal Procedure Act is restricted to misdemeanours. Felony offences (i.e. [sic] crimes with a minimum prison sentence provided by law of one year) are excluded.

*Id.* § 2 n.3.

197. See Juvenile Justice Act, §§ 5(2), 17(2); see also Beijing Rules, *supra* note 176, ¶ 17.1 (restricting youth imprisonment to cases of serious violent crimes or repeated violent or other crimes if there seems to be no other appropriate solution).

198. Dünkel, *supra* note 190, § 2.

199. *Id.*

200. Children, Young Persons, and Their Families Act 1989, 1989 S.R. No. 24 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM147088.html>.

201. *Id.* § 22.

whether prosecution can be avoided, and also as post-charge mechanisms to determine how to address cases admitted or proved in the Youth Court.<sup>202</sup>

The purpose of the Conference is to establish a safe environment in which the young offender, family members and others invited by the family, the victim or a representative, a support person for the victim, the police, and a mediator or manager of the process may come together to discuss the various issues. Sometimes a social worker, a lawyer, or both are also present.<sup>203</sup>

The main goal of a Conference is to formulate a plan about how best to deal with the offending youth. It consists of three integral components. First, the participants seek to ascertain whether or not the young person admits to the offense—this is a necessary component for the process to go forward.<sup>204</sup> Next, information is shared among all the parties at the Conference about the nature of the offense, the effects of the offense on the victim or victims, the reasons for the offense, any prior offenses committed by the young person, and other information relevant to the dialogue.<sup>205</sup> Third, the participants decide on an outcome or recommendation.<sup>206</sup> The Act requires the police to comply with the recommendations/agreements adopted and findings made by the Conference.<sup>207</sup>

The New Zealand model for family group conferencing is largely inspired by traditional Maori justice practices.<sup>208</sup> Modern day family group conferencing incorporates traditional Maori beliefs “that responsibility was collective rather than individual and redress was due not just to the victim but also to the victim’s family.”<sup>209</sup> “Understanding why an individual had offended was also linked to this notion of collective responsibility. The reasons were felt to lie not in the individual but in a lack of balance in the offender’s social and family envi-

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202. New Zealand Ministry of Justice, Youth Justice Process in New Zealand—Family Group Conferencing, <http://www.justice.govt.nz/youth/fgc.html> (last visited Mar. 29, 2008).

203. Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, 1 WESTERN CRIMINOLOGY REV. 1 (1998), available at <http://wcr.sonoma.edu/v1n1/morris.html>.

204. *Id.*

205. *Id.*

206. *Id.*

207. Children, Young Persons, and Their Families Act 1989, § 35, 1989 S.R. No. 24 (N.Z.).

208. Morris & Maxwell, *supra* note 203.

209. *Id.*

ronment.”<sup>210</sup> This understanding focuses on the need to address the causes of this imbalance in a collective manner.<sup>211</sup> The emphasis is placed on restoring the harmony between the offender, the victim, and the victim’s family.<sup>212</sup>

There are now 8000 Family Group Conferences held every year in New Zealand, and as a result, 83% of youth offenders are diverted from the criminal justice system.<sup>213</sup> Imprisonment and the use of youth justice residences have dropped significantly with the use of Conferences.<sup>214</sup> This alternative to juvenile sentencing provides an excellent model for other states to follow in seeking to decrease juvenile incarceration and recidivism rates.

### C. The Georgia Justice Project’s Holistic Approach to Juvenile Rehabilitation

In the United States, the Georgia Justice Project (“GJP”) also utilizes an innovative approach to breaking the cycle of crime and poverty among children in Atlanta, Georgia.<sup>215</sup> A privately-funded nonprofit organization, GJP minimizes rates of recidivism amongst juveniles by incorporating counseling, treatment, and employment and education programs with its legal services.<sup>216</sup> Its rate of recidivism is 18.8%, as compared to the national United States average of over 60%.<sup>217</sup>

Working with underprivileged minorities in the DeKalb and Fulton counties of Georgia, GJP works with its juvenile clients to form a relationship that extends beyond legal representation.<sup>218</sup> Recognizing that juvenile offenses typically indicate deeper problems such as lack of familial support, insufficient access or motivation for educa-

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210. *Id.*

211. *Id.*

212. *Id.*

213. A.J. BECROFT, YOUTH JUSTICE FAMILY GROUP CONFERENCES: A QUICK “NIP AND TUCK” OR TRANSPLANT SURGERY—WHAT WOULD THE DOCTOR ORDER IN 2006? 8 (2006), available at [http://www.cyf.govt.nz/documents/becroft\\_paper.pdf](http://www.cyf.govt.nz/documents/becroft_paper.pdf) (presenting Judge Becroft’s views on family group conferences at an international conference in Wellington, New Zealand).

214. *Id.*

215. Georgia Justice Project, About the Georgia Justice Project, <http://www.gjp.org/about> (last visited Mar. 31, 2008) [hereinafter About the GJP].

216. *Id.*

217. Georgia Justice Project, GJP Programs, <http://www.gjp.org/programs> (last visited Feb. 19, 2000) [hereinafter GJP Programs]. The authors note, however, that the referenced statistic includes both juvenile and adult clients. *See id.*

218. Georgia Justice Project, GJP Legal Services, <http://www.gjp.org/programs/legal> (last visited Mar. 29, 2008).



tion, poverty, and lack of access to employment opportunities, GJP works on the criminal defense of the child offender as well as provides a breadth of other programs that reduce the likelihood of recidivism.<sup>219</sup> Along with an attorney, each child offender is paired with a licensed social worker.<sup>220</sup> As a team, the attorney, social worker, and juvenile work together on the case and accompany the juvenile through the entire process.<sup>221</sup> If the judicial proceedings result in incarceration, GJP maintains close contact with the juvenile both during and after incarceration.<sup>222</sup> In this context, GJP provides incentives and support as the child offender rebuilds his or her life. This support is often a critical component in breaking the cycle of crime and poverty.

#### **D. The Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative**

The Juvenile Detention Alternatives Initiative program ("JDAI"), which has eighty sites in twenty-one states and the District of Columbia, has focused its attention on eight "core strategies" to minimize juvenile delinquency and rehabilitate youth.<sup>223</sup> Notable strategies include encouraging collaboration between juvenile justice agencies and community organizations, new or enhanced alternatives to detention (such as electronic monitoring), case processing reforms to reduce length of stay in custody, and reducing racial disparities.<sup>224</sup> While children who pose a danger to the community are still detained, the program's focus is to stop deviant behavior before children fall into a life of crime.

In Santa Cruz, California, the ten-year-old JDAI program is considered a model. It offers health and drug abuse counseling, resume writing, and computer classes, as well as provides meditation classes and an adult mentor for advice and guidance. Following the JDAI program, Santa Cruz has seen the number of children in detention per day decrease from 46.7 to 15.9 on average, saving millions of dollars

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219. *Id.*

220. GJP Programs, *supra* note 217.

221. About the GJP, *supra* note 215.

222. Georgia Justice Project, GJP Social Services, <http://www.gjp.org/programs/social> (last visited June 5, 2008).

223. Annie E. Casey Found., Results from the Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/JDAIResults.aspx> (last visited Feb. 19, 2008) [hereinafter JDAI Results].

224. Annie E. Casey Found., Core Strategies, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/corestrategies.aspx> (last visited Mar. 29, 2008).

per year for the state.<sup>225</sup> Other counties have followed suit with great success. Among others, New Mexico's Bernalillo County JDAI site reduced its average daily detention population by 58% between 1999 and 2004,<sup>226</sup> and New Jersey's Essex County lowered its average daily population by 43% in just two years.<sup>227</sup> In addition, Ada County, Idaho, Pierce County, Washington, and Ventura County, California, have all decreased detention populations by at least one-third since implementing the program.<sup>228</sup>

### E. The Bridge City Center for Youth, Louisiana

After finding that the Bridge City Correctional Facility had serious problems of abuse and youth violence, the United States Department of Justice recommended immediate reform.<sup>229</sup> However, it was not until the death of a child inmate and resulting public protest that the facility began to restructure in earnest and comply with the newly enacted Juvenile Justice Reform Act.<sup>230</sup> The facility was shut and reorganized with the help of the Annie E. Casey Foundation and the MacArthur Foundation, reopening in 2005.<sup>231</sup> The reforms abolished the prior boot-camp style youth facility, in which juvenile inmates were treated like adults, and established a home-like environment focusing on therapeutic care and rehabilitation.<sup>232</sup>

In 2005, the center housed approximately seventy young men, ranging from thirteen to twenty years old, in individual dormitories for about eight to twelve persons.<sup>233</sup> The dormitories, which replaced the concrete cells, are carpeted and contain colorful quilts, pillows, curtains, and couches to create a home-like atmosphere. Each dormitory conducts a series of daily "circles" where the young men gather to discuss concerns or complaints together in order to come to nonvio-

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225. JDAI Results, *supra* note 223.

226. *Id.*

227. *Id.*

228. *Id.*

229. Letter from Deval Patrick, Assistant Attorney Gen., Civil Right Div., U.S. Dep't of Justice, to Mike Foster, Governor, State of La. (July 15, 1996), *available at* <http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm> (regarding investigation of secure correctional facilities for children in Louisiana).

230. Katy Reckdahl, *Bayou Betterment: In Louisiana, a New Juvenile Justice System Is Emerging, with the Governor's Strong Support*, AM. PROSPECT, Aug. 15, 2005, at A15, *available at* [http://www.prospect.org/cs/articles?article=bayou\\_betterment](http://www.prospect.org/cs/articles?article=bayou_betterment).

231. *Id.*

232. *Id.*

233. *Id.*

lent, group-approved solutions to problems.<sup>234</sup> The youths also have daily access to education, mental health, social services, and substance-abuse treatment.<sup>235</sup>

The success of the Bridge City Center for Youth is being replicated throughout the state at other juvenile facilities.<sup>236</sup> Though relatively new, the Annie E. Casey Foundation and the Juvenile Justice Project commended the program as a model state juvenile facility. These and other juvenile justice reforms in Louisiana contributed to a reduction in recidivism among youths from 2004 to 2006 by 23%.<sup>237</sup>

## V. Conclusions and Recommendations

The LWOP sentence condemns a child to die in prison. It is cruel and ineffective as a punishment, it has no deterrent value, and it contradicts our modern understanding that children have enormous potential for growth and maturity in passing from youth to adulthood. The sentence further prevents society from ever reconsidering a child's sentence and denies the widely held expert view that children are amenable to rehabilitation and redemption.

The international community has outlawed this sentencing practice and considers it a violation of state obligations to protect the status of a child. States are required to seek recourse in criminal punishment toward more rehabilitative models of justice. The LWOP sentence for juveniles is a direct violation of CRC, the Convention Against Torture, and ICCPR, as well as customary international law. The United States is also out of compliance with the Convention on the Elimination of Racial Discrimination in the application of this sentence disproportionately among youth of color. The fact that the United States is the only country in the world with juveniles serving these sentences alone evidences the clear consensus in the world regarding this prohibition.

Nonetheless, efforts should continue towards complete abolition in the few countries where the sentence still remains a possibility. In regard to the remaining countries of concern, the authors commend

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234. *See id.*

235. Kathleen Babineaux Blanco, Governor, State of La., Bridge City Dedication (July 14, 2005) (transcript available at <http://blancogovernor.com/index.cfm?md=newsroom&tmp=detail&articleID=857>).

236. JUVENILE JUSTICE PROJECT OF LA., ANNUAL REPORT 15 (2005 & 2006), *available at* <http://www.jjpl.org/ar06.pdf>.

237. La. Office of Youth Dev., Profile of Recidivism in Office of Youth Development (Jan. 25, 2008), *available at* <http://www.oyd.louisiana.gov/statistics-05-oyd/1f.pdf>.

Tanzania and South Africa for their recent official agreement and clarification removing the possibility of this sentence. However, the implementation of promised legal reforms should immediately begin if they are to ensure compliance with obligations under CRC and international law, in particular in South Africa where passage of the Child Justice Bill would clarify abolition of juvenile LWOP sentencing under any circumstances. The authors also welcome Israel's clarification of its laws and welcome the review of decisions of lower courts and the military commanders in the Occupied Territories by its Supreme Court.

Nine other countries still need to clarify the ambiguities in their own laws to confirm the prohibition of the LWOP sentence for juveniles: Antigua and Barbuda, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. In particular, Australia must clarify its law most urgently to prevent at least one province from moving in the opposite direction of allowing LWOP sentences for juveniles. Argentina must address the potential effects of its 2004 law and amend it to ensure that it does not result in LWOP sentences. And Israel should continue to review its lower court and military court decisions.

The authors commend the efforts of governments, international organizations, and NGOs for their efforts in the past few years to more urgently bring non-complying governments into compliance with international law and standards of juvenile justice. To solidify these changes, the authors conclude by recommending the following:

Countries should continue to denounce the practice of sentencing juveniles to LWOP as against international law, to condemn the practice of the United States government in allowing such sentencing, and to call upon those where the law may be ambiguous to institute legal reforms confirming the prohibition of such sentencing. The removal of barriers to the enforcement of international standards, expansion of juvenile justice models to focus more extensively on rehabilitation programs, including education, counseling, employment and job training, and social or community service programs, and evaluation of these models to ensure protection of the rights of juveniles should be encouraged.

The United States should abolish the LWOP sentence under federal law and undertake efforts to bring all the states into compliance with the nation's international obligations to prohibit this sentencing. This change would necessarily include rectification of the sentences of those juvenile offenders now serving LWOP. The United States should

also evaluate the disproportionate sentencing of minorities in the country and work more expeditiously to eradicate the widespread discrimination in the country's juvenile justice system, including to consider more equitable and just rehabilitation models as described in this Article. Lastly, the United States should monitor and publish data on child offenders serving LWOP sentences in each state where this occurs. It should also provide information to these states on the status of international law, particularly on the concluding observations of the treaty bodies that have reviewed United States practices in this area. The children in the United States cannot be worse in their nature or their offenses than those in all other countries. They should not be treated as if they are.

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The Center for Law and Global Justice, University of San Francisco School of Law, works university-wide in a multi-disciplinary environment, recognizing that promoting the rule of law with justice requires cooperation among all disciplines (<http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/index.html>). The work of the USF Center for Law and Global Justice and Frank C. Newman International Human Rights Law Clinic is made possible at the United Nations through the close collaboration of Human Rights Advocates ("HRA") and its Board of Directors. HRA (<http://www.humanrightsadvocates.org>) is a non-profit organization dedicated to promoting and protecting international human rights. It participates actively in the work of various United Nations human rights bodies, using its status as an accredited NGO.

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## Appendix\*

### At a Glance

43 STATES ALLOW JLWOP

12 STATES AND THE DISTRICT OF COLUMBIA EITHER DO NOT ALLOW  
OR DO NOT APPEAR TO PRACTICE JLWOP SENTENCES

7 STATES AND THE DISTRICT OF COLUMBIA PROHIBIT IT  
Alaska, Colorado, Kansas, Kentucky, Montana, New Mexico, Ore-  
gon, District of Columbia

5 STATES HAVE NO CHILDREN KNOWN TO BE SERVING THE SENTENCE  
THOUGH THEY ALLOW JLWOP BY LAW  
Maine, New Jersey, New York, Utah, Vermont

1 STATE APPLIES ONLY TO JUVENILES AT AGE 16 OR ABOVE  
Indiana

2 STATES APPLY ONLY TO JUVENILES AT AGE 15 OR ABOVE  
Louisiana and Washington

13 STATES APPLY ONLY TO JUVENILES AT AGE 14 OR ABOVE  
Alabama, Arizona, Arkansas, California, Connecticut, Iowa, Mas-  
sachusetts, Minnesota, New Jersey, North Dakota, Ohio, Utah,  
Virginia

7 STATES APPLY ONLY TO JUVENILES AT AGE 13 OR ABOVE  
Georgia, Illinois, Mississippi, New Hampshire, North Carolina,  
Oklahoma, Wyoming

1 STATE APPLIES ONLY TO JUVENILES AT AGE 12 OR ABOVE  
Missouri

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\* This state law survey was compiled by Michelle Leighton, Director Human Rights Programs, University of San Francisco School of Law, and Brian J. Foley, Visiting Associate Professor of Law, Drexel University College of Law, with assistance from Bradley Bridge, Assistant Defender, Defender Association of Philadelphia, PA, Jill Fukunaga, Law Librarian, University of San Francisco School of Law, and Jennifer Porter, Legal Intern, Center for Law and Global Justice, Graduate of the University of San Francisco School of Law. The authors updated this survey for publication with the accompanying Article. The U.S.F. Law Review updated these citations to reflect the most recent versions of the referenced code sections available.

4 STATES APPLY ONLY TO JUVENILES AT AGE 10 OR ABOVE

South Dakota, Texas, Vermont, Wisconsin

1 STATE APPLIES ONLY TO JUVENILES AT AGE 8 OR ABOVE

Nevada

14 STATES COULD APPLY LWOP AT ANY AGE

Delaware, Florida, Hawaii, Idaho, Maine, Maryland, Michigan,  
Nebraska, New York, Pennsylvania, Rhode Island, South Carolina,  
Tennessee, West Virginia



## Summary of State Law with Citations in the United States 2007

### ALABAMA

Imposes JLWOP (discretionary) Minimum age 14.

ALA. CODE § 13A-5-40 (LexisNexis 2005 & Supp. 2007) (LWOP for murder); *see also* §§ 13A-5-6, 13A-5-9 (2005) (LWOP habitual offenders).

ALA. CODE § 12-15-34 (LexisNexis 2005 & Supp. 2007) (prosecutorial discretion to transfer any child fourteen years or older to adult criminal court, with transfer hearing needed).

### ALASKA

Does not impose JLWOP.

ALASKA STAT. § 12.55.125(a), (h), (j) (2006) (providing mandatory ninety-nine-year sentences for enumerated crimes, discretionary ninety-nine-year sentences in others, but permitting a prisoner serving such sentence to apply once for modification or reduction of sentence after serving half of the sentence).

### ARIZONA

Imposes JLWOP (discretionary) Minimum age 14.

ARIZ. REV. STAT. ANN. § 13-703.01(A) (Supp. 2007) (LWOP sentences discretionary).

ARIZ. REV. STAT. ANN. § 13-501(A)–(B) (2001 & Supp. 2007) (juvenile of age fifteen, sixteen, and seventeen “shall” be prosecuted as an adult for first degree murder and enumerated felonies; juvenile at least age fourteen “may” be prosecuted as an adult for class one felonies).

### ARKANSAS

Imposes JLWOP (mandatory) Minimum age 14.

ARK. CODE ANN. § 5-4-104 (2006 & Supp. 2007) (mandatory LWOP or death for capital murder or treason).

ARK. CODE ANN. § 9-27-318 (2008) (if the juvenile is at least fourteen years of age and commits a felony, he or she can be transferred to adult court and tried as an adult).

### CALIFORNIA

Imposes JLWOP (discretionary) Minimum age 14.

CAL. PENAL CODE § 190.5(b) (West 1999 & Supp. 2008) (limiting discretionary LWOP to juveniles age sixteen or older).

CAL. PENAL CODE § 209 (West 2008) (kidnapping with or without bodily harm where death or exposure to substantial risk of death carries LWOP, age fourteen or older); §§ 218, 219 (wrecking a train or bridge); CAL. PENAL CODE § 37 (West 1999 & Supp. 2008) (treason); § 128 (perjury in capital case leading to execution), § 11418(b)(2) (West 2000 & Supp. 2008) (using weapon of mass destruction); CAL. PENAL CODE § 12310 (West 2000 & Supp. 2008) (using a bomb which kills).

#### COLORADO

Does not impose JLWOP.

COLO. REV. STAT. § 17-22.5-104(IV) (2007) (allowing juveniles sentenced to LWOP to apply for parole after serving forty years). State legislative reform passed in 2006 abolished JLWOP which has not yet been retrospectively applied.

#### CONNECTICUT

Imposes JLWOP (mandatory) Minimum age 14.

CONN. GEN. STAT. ANN. § 53a-35a (West 2007 & Supp. 2008) (mandatory sentence of LWOP or death for capital murder).

CONN. GEN. STAT. ANN. § 46b-127 (West 2004 & Supp. 2008) (mandatory transfer to adult court for children age fourteen and above for enumerated felonies).

#### DELAWARE

Imposes JLWOP (mandatory) Any age.

DEL. CODE ANN. tit. 11, § 4209 (2001 & Supp. 2005) (mandatory LWOP for “any person” convicted of first degree murder).

DEL. CODE ANN. tit. 10 §§ 1010, 1011 (1999 & Supp. 2006) (“child shall be proceeded against as an adult” for enumerated felonies; child can request hearing and court may transfer back to juvenile court at its discretion).

#### FLORIDA

Imposes JLWOP (mandatory) Any age.

FLA. STAT. ANN. § 775.082 (West 2005 & Supp. 2008) (mandatory LWOP for juveniles convicted of murder).

FLA. STAT. ANN. § 985.225 (West 2001) (“child of any age” may be indicted for crimes punishable by death or life imprisonment; once

indicted, child must be “tried and handled in every respect as an adult”; once convicted, “child shall be sentenced as an adult”).

#### GEORGIA

Imposes JLWOP (discretionary) Minimum age 13.

GA. CODE ANN. §§ 17-10-30.1, 17-10-31.1 (2004 & Supp. 2007) (LWOP or life discretionary sentence for murder), 17-10-7(b)(1&2) (authorizing mandatory LWOP for recidivist offenders).

GA. CODE ANN. § 15-11-28(b) (2005 & Supp. 2007) (concurrent juvenile and adult court jurisdiction over child of any age accused of crime where adult would be punished by death, LWOP, or life; mandatory adult court jurisdiction for such crimes if committed by child over 13 years old, no reverse transfer if child over thirteen).

GA. CODE ANN. § 15-11-28(b)(1) (2005 & Supp. 2007) (juvenile court has concurrent jurisdiction with superior court where child is alleged to have committed an act for which an adult defendant would receive the sentences of death, LWOP, life, or imprisonment).

GA. CODE ANN. § 15-11-28(b)(2)(A) (2005 & Supp. 2007) (exclusive superior court jurisdiction over any child ages thirteen to seventeen who has committed enumerated offenses).

GA. CODE ANN. § 16-3-1 (2007) (child cannot be found guilty of crime if committed it below age thirteen).

KMS v. State, 200 S.E.2d 916 (Ga. Ct. App. 1973) (distinguishing between finding of delinquency, which is permitted for children below age thirteen, with adjudication of guilt for crime, not permitted for children below age thirteen).

#### HAWAII

Imposes JLWOP (discretionary) Any age.

HAW. REV. STAT. §§ 706-656, 706-657 (1993 & Supp. 2007) (mandatory LWOP for first degree murder or attempted murder and for what would be considered “heinous” second degree murder, but, “[a]s part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment”).

HAW. REV. STAT. § 571-22 (2006 & Supp. 2007) (no age limit for discretionary transfer to adult court of juveniles for first degree murder or second degree attempted murder).

## IDAHO

Imposes JLWOP (discretionary) Any age.

IDAHO CODE ANN. § 18-4004 (2004 & Supp. 2007) (LWOP discretionary penalty for first degree murder).

IDAHO CODE ANN. § 20-508 (2004 & Supp. 2007) (mandatory transfer to adult court for juveniles ages fourteen to eighteen accused of enumerated crimes, discretionary transfer for children below age fourteen accused of enumerated crimes).

IDAHO CODE ANN. § 20-509(3)–(4) (2004 & Supp. 2007) (juvenile tried as an adult can be sentenced pursuant to adult sentencing measures, pursuant to juvenile sentencing options, or a court can commit the juvenile to custody of the department of juvenile corrections and suspend the sentence or withhold judgment).

## ILLINOIS

Imposes JLWOP (mandatory) Minimum age 13.

730 ILL. COMP. STAT. ANN. 5/5-8-1 (West 2007) (details mandatory minimum sentences for felonies; for first degree murder, if death cannot be imposed and one aggravating factor proven the mandatory sentences is LWOP, if no aggravating circumstances, the sentence is twenty to sixty years).

705 ILL. COMP. STAT. ANN. 405/5-130(4)(a) (West 2007) (mandatory adult court jurisdiction over children at least thirteen years old accused of “first degree murder committed during the course of either aggravated criminal sexual assault, criminal sexual assault, or aggravated kidnapping”).

## INDIANA

Imposes JLWOP (mandatory) Minimum age 16.

IND. CODE ANN. § 35-50-2-3 (LexisNexis 2004 & Supp. 2007) (limiting discretionary LWOP sentence to people above age sixteen for the crime of murder).

## IOWA

Imposes JLWOP (mandatory) Minimum age 14.

IOWA CODE ANN. § 902.1 (West 2003) (LWOP sentences are mandatory upon conviction for “Class A Felony”).

IOWA CODE ANN. § 232.45(6)(a) (West 2006) (juvenile court may waive jurisdiction over a child as young as fourteen).

## KANSAS

Does not impose JLWOP.

KAN. STAT. ANN. § 21-4622 (2007) (LWOP not permitted as a sentence for capital murder or first degree murder where defendant is less than eighteen years old).

## KENTUCKY

Does not impose JLWOP.

KY. REV. STAT. ANN. § 640.040 (West 2006 & Supp. 2007) (limits youthful offender convictions to life with parole after twenty-five years).

KY. REV. STAT. ANN. § 635.020 (West 2006 & Supp. 2007) (mandatory transfer to adult court of juvenile for use of a firearm and adult sentence applied); *see* Britt v. Commonwealth, 965 S.W.2d 147 (Ky. 1998) (section 640.010 applies to juveniles, including cases transferred under 635-020).

*See* Shepherd v. Commonwealth, 2006-SC-000450-MR, 2008 Ky. LEXIS 30 (Ky. Sup. Ct. Feb. 21, 2008) (error to provide jury instruction on LWOP sentence as an option for youthful offenders but not reversible as lesser sentence awarded); *see also* Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968) (juvenile LWOP as penalty for rape violative of state constitution); Edmondson v. Commonwealth, 2001-SC-0253-MR, 2002 Ky. Lexis 271 (Ky. Sup. Ct. Dec. 19, 2002) (unpublished decision concerning felony theft by an adult, citing *Workman* in dicta for general proposition that juvenile LWOP is unconstitutional).

## LOUISIANA

Imposes JLWOP (mandatory) Minimum age 15.

LA. REV. STAT. ANN. §§ 14:30, 14:30.1 (2007 & Supp. 2008) (mandatory LWOP for first- and second-degree murder).

LA. CHILD CODE ANN. art. 305 (2004 & Supp. 2008) (any juvenile fifteen years old or older charged with first-degree murder, second-degree murder, aggravated rape, or aggravated kidnapping must be tried as an adult).

## MAINE

Imposes JLWOP (discretionary) Any age.

ME. REV. STAT. ANN. tit. 17-A, § 1251 (Supp. 2006 & Supp. 2007), State v. St. Pierre, 584 A.2d 618, 621 (Me. 1990) (LWOP sentences are discretionary under § 1251).

ME. REV. STAT. ANN. tit. 15, § 3101 (2003 & West Supp. 2007) (discretionary hearing to determine whether to transfer juvenile of any age to adult court for trial for murder or enumerated felonies).

#### MARYLAND

Imposes JLWOP (discretionary) Any age.

MD. CODE ANN., CRIM. LAW §§ 2-202, 2-203, 2-304 (LexisNexis 2002 & Supp. 2007) (LWOP sentence discretionary for enumerated crimes).

MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06 (LexisNexis 2006 & Supp. 2007) (discretionary transfer to adult court of child of any age accused of murder).

#### MASSACHUSETTS

Imposes JLWOP (mandatory) Minimum age 14.

MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2002 & Supp. 2008) (LWOP mandatory for juvenile convicted of first degree murder). MASS. GEN. LAWS ANN. ch. 119, § 72B (West 2002) (treating a juvenile fourteen or older as an adult for murder in the first or second degree); § 74 (removing from juvenile court jurisdiction any juvenile fourteen or older charged with murder in first or second degree).

#### MICHIGAN

Imposes JLWOP (discretionary) Any age.

MICH. COMP. LAWS § 712A.4 (2005 & Supp. 2008) (court has discretion to try children as adult offenders, but if under fourteen years old waiver hearing required).

MICH. COMP. LAWS § 769.1 (2002 & Supp. 2008) (allows adult sentences for children convicted of certain crimes).

MICH. COMP. LAWS § 750.316 (2003 & Supp. 2008) (imprisonment for life for first-degree murder); MICH. COMP. LAWS § 791.234(6) (certain sentences of life imprisonment mean no eligibility of parole, including murder in first degree § 750.316).

MICH. COMP. LAWS § 791.244 (2005 & Supp. 2008) (Governor may grant clemency after serving ten years of an LWOP sentence).

#### MINNESOTA

Imposes JLWOP (mandatory) Minimum age 14.

MINN. STAT. ANN. § 609.106 (West 2003 & Supp. 2008) (mandatory LWOP for enumerated “heinous” crimes, including first degree murder).

MINN. STAT. ANN. § 260B.125 (West 2007 & Supp. 2008) (discretionary waiver, age fourteen).

MISSISSIPPI

Imposes JLWOP (discretionary) Minimum age 13.

MISS. CODE ANN. § 97-3-21 (West 2005 & Supp. 2007) (LWOP sentence discretionary for murder).

MISS. CODE ANN. §§ 43-21-151(a), 43-21-157(8) (West 2008) (mandatory adult court jurisdiction limited to age thirteen for any felony punishable by life; mandatory adult court jurisdiction after age thirteen for any felony punishable by life in prison or death).

MISSOURI

Imposes JLWOP (mandatory) Minimum age 12.

MO. ANN. STAT. § 565.020 (West 1999 & Supp. 2008) (mandatory LWOP for first-degree murder juveniles).

MO. ANN. STAT. § 211.071 (West 2004 & Supp. 2008) (discretionary transfer, age limit of twelve for enumerated crimes).

MONTANA

Does not impose JLWOP.

MONT. CODE ANN. § 46-18-219 (2006) (a LWOP sentence must be given if the defendant has been previously convicted of one of the following: deliberate homicide, aggravated kidnapping, sexual intercourse without consent, sexual abuse of children, or ritual abuse of a minor, otherwise LWOP is discretionary sentence for deliberate murder defined by MONT. CODE ANN. § 45-5-102).

MONT. CODE ANN. § 41-5-206 (2006) (discretionary transfer if the child is twelve years or older for enumerated offenses; when the minor is sixteen years of age, more types of offenses are added to the list; if a child is age seventeen and commits enumerated offense, county attorney “shall” file with the district court).

MONT. CODE ANN. § 46-18-222(1) (2007) (“[M]andatory minimum sentences . . . and restrictions on parole eligibility do not apply if . . . the offender was less than eighteen years of age at the time of the commission of the offense.”). A 2007 amendment to statute provides exceptions to mandatory minimum sentences and restrictions on parole eligibility for juveniles.

NEBRASKA

Imposes JLWOP (mandatory) Any age.

NEB. REV. STAT. §§ 43-247 (2004 & Supp. 2006), 43-276 (2004) (juvenile court has concurrent jurisdiction with district court for juveniles under age sixteen who commit a felony).

NEB. REV. STAT. § 43-276 (2004 & Supp. 2006) (District Attorney has discretion to file in criminal court, list of factors to be considered).

NEB. REV. STAT. § 28-105 (1995 & Supp. 2006) (Punishment for Class IA felony can be LWOP, discretionary).

NEB. REV. STAT. § 29-2522 (1995 & Supp. 2006) (murder in the first degree mandates LWOP if death penalty not unanimous).

#### NEVADA

Imposes JLWOP (discretionary) Minimum age 8.

NEV. REV. STAT. ANN. § 200.030 (LexisNexis 2006 & Supp. 2007) (Murder in first degree punishable, among other things, by death or LWOP).

NEV. REV. STAT. ANN. § 194.010 (LexisNexis 2006) (children under eight years of age not liable to punishment, but between ages eight and fourteen are liable to punishment if clear proof that they knew the act's "wrongfulness" at time of commission).

NEV. REV. STAT. ANN. § 62B.330 (LexisNexis 2006) (juveniles committing murder among other offenses not deemed "delinquent acts" and juvenile court has no jurisdiction; crimes are automatically tried in adult court).

#### NEW HAMPSHIRE

Imposes JLWOP (discretionary) Any age.

N.H. REV. STAT. ANN. § 630:1-a (LexisNexis 2007) (murder in the first degree shall be punished by LWOP).

N.H. REV. STAT. ANN. § 628:1 (LexisNexis 2007) (juvenile under age fifteen not criminally responsible, but for murder in the first or second degree, manslaughter, assault, or other specified crimes, the thirteen-year-old can be held criminally responsible if transferred to superior court).

N.H. REV. STAT. ANN. § 169-B:24 (LexisNexis 2001 & Supp. 2007) (transfer of juvenile to superior court for a trial as adult).

#### NEW JERSEY

Imposes JLWOP (mandatory) Minimum age 14.

N.J. STAT. ANN. § 2C:11-3(b), (g) (West 2005 & Supp. 2007) (specifically limiting LWOP for juveniles to mandatory LWOP for murder



of police officer, killing a child under age fourteen, or murder in the course of a sexual assault or criminal sexual contact).

N.J. STAT. ANN. § 2A:4A-26 (West 1987 & Supp. 2007) (discretionary waiver of juvenile court jurisdiction over the case if child is age fourteen or over).

#### NEW MEXICO

##### Does not Impose JLWOP

N.M. STAT. ANN. § 31-21-10 (LexisNexis 2000 & Supp. 2007) (maximum sentence in state, life imprisonment, has parole eligibility after thirty years).

#### NEW YORK

Imposes JLWOP Any age—but JLWOP applied only if crime is terrorist act.

N.Y. PENAL LAW §§ 125.25(5), 125.26, 125.27 (McKinney 2004) (element of crime of murder in the first degree (carrying LWOP under § 70.00) is being over age eighteen).

N.Y. PENAL LAW § 490.25(d) (McKinney 2008) (for the crime of terrorism, LWOP applied with no restriction on age as element of crime). *But see* N.Y. PENAL LAW §§ 30.00(1)–(2) (McKinney 2004 & Supp. 2008) (under age sixteen not held criminally responsible, including exceptions for children ages thirteen to fifteen).

#### NORTH CAROLINA

##### Imposes JLWOP (mandatory) Minimum age 13.

N.C. GEN. STAT. § 14-17 (2007) (mandatory LWOP sentence for murder in the first degree, for persons under age eighteen).

N.C. GEN. STAT. § 7B-2200 (2007) (mandatory transfer to adult court where probable cause that juvenile committed Class A felonies, age limit thirteen years).

#### NORTH DAKOTA

##### Imposes JLWOP (discretionary) Minimum age 14.

N.D. CENT. CODE § 12.1-32-01 (1997 & Supp. 2007) (LWOP discretionary for enumerated crimes).

N.D. CENT. CODE § 12.1-04-01 (1997) (juvenile under the age of seven not capable of committing a crime, and juvenile cannot be tried as adult if under fourteen years of age when he or she committed the offense).

## OHIO

Imposes JLWOP (mandatory) Minimum age 14.

OHIO REV. CODE ANN. § 2929.03(E) (LexisNexis 2006 & Supp. 2008) (LWOP or life mandatory for aggravated murder).

OHIO REV. CODE ANN. § 2971.03 (LexisNexis 2007 & Supp. 2008) (mandatory LWOP for murder, rape of victim under ten years, and other sexually violent acts).

OHIO REV. CODE ANN. § 2152.10(B) (LexisNexis 2007 & Supp. 2008) (discretionary transfer of fourteen years or older for felonies, mandatory if prior adjudicated delinquent for other offenses).

## OKLAHOMA

Imposes JLWOP (discretionary) Minimum age 13.

OKLA. STAT. ANN. tit. 21, § 701.9 (West 2002 & Supp. 2008) (discretionary LWOP for certain crimes).

OKLA. STAT. ANN. tit. 10, § 7306-1.1(B) (West 2007 & Supp. 2008) (mandatory transfer if age thirteen and above, for first-degree murder).

## OREGON

Does not Impose JLWOP.

OR. REV. STAT. § 161.620 (2007); *see also* State v. Davilla, 972 P.2d 902 (Or. Ct. App. 1998) (interpreting § 161.620 to bar juvenile LWOP).

## PENNSYLVANIA

Imposes JLWOP (mandatory) Any age.

18 PA. CONS. STAT. ANN. §§ 1102, 9711 (West 1998 & Supp. 2008) (mandatory minimum penalty for murder is life).

61 PA. CONS. STAT. ANN. § 331.21 (West 1999 & Supp. 2008) (no parole until minimum term of sentence served, i.e., life means LWOP).

42 PA. CONS. STAT. ANN. § 6302 (West 2000 & Supp. 2008) (murder not in “delinquent act” definition for juvenile court jurisdiction; certain other crimes not included for child of fifteen years or more).

42 PA. CONS. STAT. ANN. § 6322 (West 2000 & Supp. 2008) (court can transfer murders to juvenile court).

42 PA. CONS. STAT. ANN. § 6355(e) (West 2000 & Supp. 2008) (juvenile court cannot transfer case back to criminal court where criminal court has transferred it to juvenile court pursuant to section 6322).

## RHODE ISLAND

Imposes JLWOP (discretionary) Any age.

R.I. GEN. LAWS § 12-19.2-4 (2002 & Supp. 2007) (LWOP discretionary for certain crimes).

R.I. GEN. LAWS § 14-1-7 (2002 & Supp. 2007) (no age limit for transfer of juvenile for enumerated crimes; discretionary, because hearing required).

R.I. GEN. LAWS § 12-19-11 (2002) (mandatory LWOP sentence cannot be suspended or allowed parole).

R.I. GEN. LAWS § 11-23-2 (2002 & Supp. 2007) (sentence for first-degree murder is mandatory life imprisonment).

## SOUTH CAROLINA

Imposes JLWOP (mandatory) Any age.

S.C. CODE ANN. § 17-25-45 (2003 & Supp. 2007) (except in cases that impose the death penalty, when convicted of a serious offense as defined in statute, a person must be sentenced to a term of LWOP only if that person has prior convictions for enumerated crimes).

S.C. CODE ANN. § 20-7-7605(6) (Supp. 2007) (discretionary transfer and there is no age limit for murder or "criminal sexual conduct"); *see also* State v. Corey, 529 S.E.2d 20 (S.C. 2000) (construing the lack of discussion of age in § 7605(6) as requiring that there is no age limit).

## SOUTH DAKOTA

Imposes JLWOP (mandatory) Minimum age 10.

S.D. CODIFIED LAWS §§ 22-6-1 (1998 & Supp. 2003) (life imprisonment mandatory minimum for juvenile convicted of class A felony), 24-15-4 (life imprisonment means LWOP).

S.D. CODIFIED LAWS § 26-11-3.1 (1999) (mandatory transfer to adult court of juveniles sixteen or older who commit enumerated felonies, hearing at option of juvenile charged where juvenile must prove transfer back to juvenile court is in the best interests of the public; discretionary transfer for ages ten to sixteen).

## TENNESSEE

Imposes JLWOP (discretionary) Any age.

TENN. CODE ANN. §§ 39-13-202, 39-13-204 (2006 & Supp. 2007) (penalty for murder in first degree is death, LWOP or life imprisonment).

TENN. CODE ANN. § 37-1-134 (a)(1) (2005 & Supp. 2007) (mandatory transfer for enumerated crimes, no age limit for murder and other enumerated crimes).

TEXAS

Imposes JLWOP (mandatory) Minimum age 10.

TEX. FAM. CODE ANN. § 54.04(d)(3)(A) (Vernon 2005) (maximum term under juvenile court jurisdiction for enumerated felonies including murder is forty years).

TEX. FAM. CODE ANN. § 54.02(a)(2)(A) (Vernon 2002 & Supp. 2007) (juvenile can be transferred to adult court at fourteen years of age for capital felony among others).

TEX. FAM. CODE ANN. § 54.02(j)(2) (Vernon 2002 & Supp. 2007) (transfer allowed between ages ten and seventeen for capital offense per section 19.02).

TEX. FAM. CODE ANN. § 54.02(m) (Vernon 2002 & Supp. 2007) (mandatory waiver without transfer proceedings if previously transferred and convicted in criminal court).

TEX. PENAL CODE ANN. § 8.07(a) (Vernon 2003 & Supp. 2007) (other means of waiving juveniles under age fifteen to adult court jurisdiction).

TEX. PENAL CODE ANN. § 12.31 (Vernon 2003 & Supp. 2007) (mandatory death or LWOP for capital felony).

UTAH

Imposes JLWOP (discretionary) Minimum age 14.

UTAH CODE ANN. § 76-3-206 (2003 & Supp. 2006) (LWOP is a discretionary sentence).

UTAH CODE ANN. § 78-3a-502(3) (2002 & Supp. 2007) (discretionary age limit of fourteen for adult court jurisdiction).

VERMONT

Imposes JLWOP (discretionary) Minimum age 10.

VT. STAT. ANN. tit. 13, § 2303 (1998 & Supp. 2007) (LWOP discretionary for first-degree and second-degree murder).

VT. STAT. ANN. tit. 33, § 5506 (2001 & Supp. 2007) (discretionary jurisdiction for enumerated crimes, with an age limit of ten years).

VIRGINIA

Imposes JLWOP (mandatory) Minimum age 14.

VA. CODE ANN. § 18.2-10 (2005) (life imprisonment mandatory for enumerated offenses); *see* Lenz v. Warden of Sussex I State Prison, 593 S.E.2d 292 (Va. 2004) (“life” means LWOP because there is no parole for someone who receives a life sentence).

VA. CODE ANN. §§ 16.1-269.1 (2003 & Supp. 2007) (mandatory transfer of age fourteen or over if probable cause for certain felonies), 16.1-269.4 (2003) (however, the juvenile can appeal the juvenile court’s transfer decision).

VA. CODE ANN. § 53.1-151(B1) (2005 & Supp. 2007) (enumerates when a person sentenced is not eligible for parole including conviction of three felony offenses of murder, rape, robbery).

#### WASHINGTON

Imposes JLWOP (mandatory) Minimum age 15.

WASH. REV. CODE ANN. § 10.95.030 (West 2002 & Supp. 2008) (mandatory death or LWOP for aggravated murder in first degree).

WASH. REV. CODE ANN. §§ 13.04.030 (West 2004 & Supp. 2008) (exclusive adult court jurisdiction over child sixteen years or older who is accused of committing serious violent offense), 13.40.110 (West 2004 & Supp. 2008) (juvenile court to hold waiver hearing if child is aged fifteen to seventeen and accused of class A felony or attempt, solicitation, or conspiracy to commit class A felony).

#### WEST VIRGINIA

Imposes JLWOP (discretionary) Any age.

W. VA. CODE ANN. §§ 61-2-2, 62-3-15 (LexisNexis 2005) (LWOP discretionary for first-degree murder).

W. VA. CODE ANN. § 49-5-13(e) (LexisNexis 2004 & Supp. 2007) (notwithstanding any other part of code, court may sentence a child tried and convicted as adult as a juvenile).

W. VA. CODE ANN. § 49-5-10 (LexisNexis 2004 & Supp. 2007) (mandatory transfer of juvenile who is age fourteen or over for certain felonies; discretionary transfer where child below age fourteen accused of committing murder or other enumerated felon under the code).

#### WISCONSIN

Imposes JLWOP (discretionary) Minimum age 10.

WIS. STAT. ANN. § 973.014 (West 2007) (LWOP discretionary).

WIS. STAT. ANN. §§ 938.18, 938.183 (West 2000 & Supp. 2007) (exclusive adult court jurisdiction with age limit of ten years, for first-

degree intentional homicide, first-degree reckless murder, second-degree intentional homicide; age limited to fourteen for other felonies; limited exceptions also provided).

WYOMING

Imposes JLWOP (discretionary) Minimum age 13.

WYO. STAT. ANN. § 6-2-101 (2005) (LWOP discretionary for first-degree murder).

WYO. STAT. ANN. § 14-6-203(d) (2007) (juvenile court has exclusive jurisdiction in cases involving minor under age thirteen for felony or misdemeanor punishable by over six months in prison).

WYO. STAT. ANN. § 14-6-203(f)(iv) (2007) (concurrent adult and juvenile court jurisdiction, with an age limit of fourteen, for enumerated felonies).

WYO. STAT. ANN. § 14-6-237 (2007) (discretionary transfer between adult and juvenile court).

DISTRICT OF COLUMBIA

Does not Impose JLWOP

D.C. CODE § 22-2104(a) (2001 & Supp. 2008) (no LWOP for juveniles).