Sentenced to Life Without Parole: The Need to Apply Capital Sentencing Procedures to Current LWOP Sentencing Schemes

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> *"The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration."*[1]

While the Constitution guarantees all criminal defendants the right to a jury trial and promises that no life or liberty will be taken without due process, it is silent on the role juries should play in the sentencing scheme.[2] Sentencing power lies almost entirely in the hands of individual judges, granting them broad discretion in the calculus, and thus creating a risk of disparate sentences from bench to bench.[3] The exception is for capital cases, where jurors must play an active role at the sentencing stage for a defendant to be sentenced to death.[4] By contrast, judges have almost complete and solitary discretion when imposing all non-capital sentences,[5] including life without parole ("LWOP") sentences.[6]

This Note examines the procedures used to impose LWOP sentences, especially in comparison to capital sentencing procedure, and identifies Constitutional pitfalls with LWOP sentencing. Part I gives a brief general introduction. Part II provides an overview of sentencing procedure in federal courts, its evolution in recent years, and the role that judges and jurors play in determining both capital and non-capital sentences. Part III more closely examines LWOP sentences, the current sentencing procedures in place for imposing LWOP sentences, and recent case law regarding

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1. Justice Kennedy, *Graham v. Florida*, 560 U.S. 48, 69–70 (2010).

2. *See* U.S. Const. amend. VI; *see also* U.S. Const. amend. V.

3. *See* Williams v. New York, 337 U.S. 241, 251 (1949); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER, 7 (1972) (arguing that the wide discretion given to judges at sentencing creates disparate results).

4. *See* Ring v. Arizona, 536 U.S. 584, 585 (2002); *see also* Hurst v. Florida, 577 U.S. 92, 98-99 (2016).

5. *See Williams*, 337 U.S. at 251–52 (finding that a judge was within his authority to utilize information not used at trial to make a sentencing determination without jury input).

6. *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (refusing to extend enhanced procedures similar to capital sentencing procedure to the imposition of an LWOP sentence).

juvenile LWOP sentencing that hints at the Court's acknowledgment that LWOP and capital sentences are closely tied. Finally, Part IV argues that jurors should play a similar role in deciding LWOP sentences as they do for death sentences, advocates for enhanced procedure for LWOP sentencing, and discusses the ethical issues for both criminal defense attorneys and prosecutors within the current LWOP sentencing scheme. Ultimately, this Note argues that LWOP sentences carry similar Sixth Amendment and due process implications as capital cases, and the current LWOP sentencing procedure does not provide sufficient safeguards to protect defendants' constitutional rights.

INTRODUCTION

The climactic moment in any good trial movie or television show occurs when the jury enters the courtroom to deliver their final verdict: guilty or not guilty. By contrast, a case in an actual courtroom and not on television does not end with the jury's verdict. Soon after the conviction, often with less fanfare, the judge imposes a sentence that could range from financial penalties and community service to life imprisonment without the possibility of parole or even death.[7] The United States Sentencing Commission ("USSC") provides courts with advisory sentencing guidelines, but judges are given broad discretion in determining an individual's sentence and immense latitude in what factors they can consider when imposing a sentence.[8] While fact finding is usually a juror's job, for non-capital cases the jury is dismissed after the verdict has been read, leaving the rest to the judge.[9]

Capital cases where the defendant's life is at stake are the exception to this, as death penalty cases typically require a unanimous jury vote to impose the death penalty.[10] In 2016, the Supreme Court ruled in *Hurst v. Florida* that a Florida-state law allowing a judge to give a death sentence beyond what the jury recommended violated the criminal defendant's right to a jury trial under the Sixth Amendment.[11] The Court held under the Sixth Amendment and the Due Process Clause that any law that gives the judge the power to make the factual findings necessary to impose the death sentence is unconstitutional.[12] Defendants, the Court declared, are entitled to have a jury decide the facts necessary to increase punishment to a death sentence.[13] This is consistent with general death sentencing procedure, which typically comprises bifurcated trials where jurors undergo two

7. *See* United States Department of Justice, *Sentencing* (last visited Mar. 19, 2022) https://www.justice.gov/usao/justice-101/sentencing [https://perma.cc/LL9E-GY9W].

8. *See Williams*, 337 U.S. at 241.

9. *See id.*

10. *See* Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 UNIV. MIAMI L. REV. 439, 445 (2013).

11. Hurst v. Florida, 577 U.S. 92, 97–99 (2016).

12. *Id.* at 102–103.

13. *Id.*

sets of deliberations: first, during the guilt phase they determine whether a defendant is guilty of the alleged crime, then they proceed to the sentencing phase to consider whether there are aggravating circumstances sufficient to warrant a death sentence.[14]

Not only is there a moral requirement to engage in these additional procedural safeguards when a defendant's life is on the line, but the Constitution requires it.[15] This raises the question of why the elevated procedures for capital cases are not in place for LWOP sentences. While not as egregious as a death sentence, LWOP sentences still rob individuals of the ability to ever lead a life outside the prison system, essentially serving as another type of death sentence.[16] Yet as of now, *none* of the procedural safeguards that are in place for capital sentencing apply to LWOP sentencing, and judges are granted the same latitude to impose the sentence as they are to impose a sentence of only a few months or no jailtime at all so long as they are within statutory limits.[17]

I. FEDERAL SENTENCING PROCEDURE

A. HISTORY OF FEDERAL SENTENCING PROCEDURE

Sentencing power has long rested in the hands of judges, but exactly how much information can a judge consider when determining an individual's sentence? In the seminal 1949 case *Williams v. New York*, Justice Hugo Black answered this question by declaring that judges have broad discretion in determining sentences and may consult information that was not made available during trial.[18] In *Williams*, the defendant was convicted of first-degree murder by a New York State jury, which recommended a sentence of life in person instead of the death sentence.[19] The trial judge, however, disagreed with the jury's sentencing determination citing both the brutality of the crime and Williams' continued protestations of his innocence.[20] The trial judge also analyzed a dearth of information provided by the Court's probation department that could not be admitted during trial in making his determination:

> [The trial judge] referred to the experience appellant "had had on thirty other burglaries in and about the same vicinity" where the murder had been committed. The appellant had not been convicted of these burglaries although the judge had information that he had confessed to some and had been identified

14. *See* Gregg v. Georgia, 428 U.S. 153, 190–191 (1976).

15. *See Hurst*, 577 U.S. at 102–103.

16. *See, e.g.*, Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's New Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 PRISON J. 328, 329 (2008) ("[L]ife without parole. . .is a sanction of great severity, arguably comparable to the death sentence in the suffering it entails.").

17. *See* Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform* (June 2011) at 21.

18. *See* Williams v. New York, 337 U.S. 241, 251 (1949).

19. *Id*. at 242.

20. *Id*. at 244.

> as the perpetrator of some of the others. The judge also referred to certain activities of appellant as shown by the probation report that indicated appellant possessed "a morbid sexuality" and classified him as a "menace to society." The accuracy of the statements made by the judge as to appellant's background and past practices were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise.[21]

Faced with the question of whether the trial judge abused his discretion when considering information that had not been corroborated, elicited during cross-examination, or presented to the jury, the Court ruled that he had not.[22] Citing primarily tradition that judges have wide discretion in sentencing, Justice Black ruled that "[t]he sentencing judge may consider such information even though obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross-examine."[23] Ultimately, the Court found that Williams's due process and Fourteenth Amendment rights were not violated.[24] Though the Supreme Court has since ruled that fact-finding needed to impose the death sentence requires the jury, they have not applied this rule to non-capital cases, leaving *Williams* as good law for all non-capital cases by default. The lasting consequence of *Williams* is that judges can consider almost any information presented to them when determining sentences, regardless of whether it was presented to the jury.[25] *Williams* was later codified in 1970 under 18 U.S. Code § 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[26]

Following *Williams*, the whims of individual judges decided sentences, leading to wildly disparate sentences for individuals convicted of identical crimes.[27] In his 1972 book *Criminal Sentences: Law Without Order*, Judge Marvin Frankel decries the wide discretion that *Williams* handed to judges.[28] In addition to the issue of disparate sentences, Judge Frankel notes that judges are under no requirements to give any reasoning or explanations for their sentencing decisions, creating a tyrannical process that lacks accountability and runs contrary to the rule of

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21. *Id.*
22. *Id.* at 251–52.
23. Williams v. New York, 337 U.S. 241, 245(1949).
24. *Id.* at 252.
25. A notable example of this is the 1997 case *U.S. v. Watts* in which the Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct [for which the defendant has been acquitted], so long as that conduct has been proved by a preponderance of the evidence." *See* U.S. v. Watts, 519 U.S. 148, 157 (1997).
26. 18 U.S.C. 3661.
27. *See* Frankel, *supra* note 3, at 7.
28. *Id.*

law.[29] Arguing that individualized sentences do not lead to consistent sentences, Judge Frankel advocates for more guidance in what judges should be able to consider when imposing sentences.[30] He ultimately proposes four remedies: (1) a requirement that judges put the rationale for their sentencing decisions on the record; (2) an end to the indeterminate sentencing scheme; (3) a "codified [system of] weights and measures" so that judges can appropriately consider context and criminal history during sentences; and (4) a sentencing commission to create such guidelines.[31]

Judge Frankel's proposals became a reality in 1984 when Congress passed the Sentencing Reform Act ("SRA") which created the USSC.[32] The USSC comprises "seven voting members [who] are appointed by the President and confirmed by the Senate, and serve staggered six-year terms."[33] At least three of the members must be federal judges, and no more than four members may be from the same political party.[34] The Attorney General can also designate a non-voting member to join the committee.[35] The USSC creates and annually publishes sentencing guidelines (the Guidelines Manual) to instruct judges of specific sentencing ranges for specific crimes.[36] The Guidelines Manual allows judges to consider the specific context and characteristics of the criminal and the crime at hand, while also reducing disparities in sentences.[37] Specifically, courts use the Guidelines Manual to calculate an individual's Offense Level and Criminal History Category.[38] Once it has determined both of these measurements, the court consults USSC's Sentencing Table to determine the range of months for incarceration.[39] The Guidelines Manual aims to reduce disparate sentences, but judges are still able to make "individualized consideration[s]" per *Williams* when calculating a defendant's Base Offense Level and Criminal History Category.[40] Still, because the Guidelines Manual was mandatory when it was first released and

29. *Id*. at 39.

30. *Id*. at 114.

31. *Id*. at 40, 89, 114, 119.

32. *See* Tapia v. U.S., 564 U.S. 319, 325 (2011) ("Congress accordingly enacted the Sentencing Reform Act of 1984 . . . to overhaul federal sentencing practices. The Act abandoned indeterminate sentencing and parole in favor of a system in which Sentencing Guidelines, promulgated by a new Sentencing Commission, would provide courts with a range of determinate sentences for categories of offenses and defendants.") (quoting Mistretta v. U.S., 488 U.S. 361, 368 (1989)).

33. U.S. Sent'g Comm'n, *Organization*, (last visited Jan. 3, 2022) https://www.ussc.gov/about/who-we-are/organization [https://perma.cc/H79Y-BXDL].

34. *Id.*

35. *Id.*

36. U.S. Sent'g Guidelines Manual (U.S. Sent'g Comm'n 2021), at 2, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf [https://perma.cc/59UK-5XWW] (last visited Feb. 25, 2022).

37. *Id.*

38. *Id*. at 408.

39. *Id*. at 407.

40. U.S. Sent'g Comm'n, *Simplification Draft Paper*, at 3 (last visited Feb. 25, 2022) https://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2 [https://perma.cc/GHT4-LZ26].

required judges to operate within certain sentencing ranges, it cut back on judicial flexibility and discretion.[41]

In 2005, the Supreme Court reversed course by declaring that the Guidelines Manual was only advisory and not binding on judges.[42] In *U.S. v. Booker*, the defendant Booker was convicted by a jury of drug possession with intent to distribute.[43] The statute Booker violated carried a penalty of ten years to life incarceration.[44] Under the Guidelines Manual, Booker's sentence should have been between 210 and 262 months in prison.[45] However, in a post-trial hearing, the judge found by a preponderance of the evidence that Booker possessed more drugs than he had been convicted of having and had obstructed justice.[46] Citing these findings, the judge sentenced Booker to 30 years incarceration, a vast upward departure from the Guidelines Manual.[47] The Supreme Court considered whether this upward departure violated the Sixth Amendment.[48] The Supreme Court found that the judge had violated the Sixth Amendment because the facts the judge relied on to enhance Booker's sentence were not proven by the prosecution beyond a reasonable doubt.[49] However, the Court also held that the Guidelines Manual is merely advisory and not mandatory.[50] So long as there is "a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve," judges are not bound by the Guidelines Manual.[51] Now freed from the guidelines, judges enjoy significant discretion when imposing non-capital sentences.[52]

While *Booker* has freed judges to more fully utilize the broad discretion granted to them under *Williams*, they are still bound by limits put in place by the legislature such as mandatory minimums.[53] 18 U.S. Code § 3553, which is the statutory platform that outlines how courts can impose sentences, grants courts "limited authority" to depart downward below mandatory minimums.[54] These downward departures are available under § 3553(e) only where the defendant has provided "substantial assistance in the investigation or prosecution of another

41. *See id.*
42. *See* United States v. Booker, 543 U.S. 220, 233 (2005).
43. *Id.* at 227.
44. *Id.*
45. *Id.*
46. *Id.*
47. *See* United States v. Booker, 543 U.S. 220, 233 (2005).
48. *Id.* at 226.
49. *Id.* at 245.
50. *Id.* at 246.
51. *Id.*
52. *See, e.g.*, Kimbrough v. U.S., 552 U.S. 85, 101 (2007) ("In sum, while the [federal sentencing] statute still requires a court to give respectful consideration to the Guidelines . . . *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'").
53. *See* 18 U.S.C. 3553.
54. *Id.*

person who has committed an offense."[55] In the Eighth Circuit case *U.S. v. Amanda Williams*, the sentencing judge attempted to utilize provisions in § 3553(a) to further depart downward from the mandatory minimum given the history and characteristics of the defendant.[56] The Court of Appeals held that this exceeded the authority granted by the statute, and that *Booker* only allowed judges to view the Sentencing Guidelines, not statutes or statutory mandatory minimums, as advisory:

> Nothing in the reasoning of *Booker* expands the authority of a district court to sentence below a statutory minimum. The Court's remedial holding provided that to cure the constitutional infirmity of the mandatory guidelines system, a district court is authorized to consider factors set forth in § 3553(a), and to vary from the sentence otherwise indicated by *the sentencing guidelines*. But *Booker* did not question the constitutionality of statutory minimum sentences . . . Because statutory minimum sentences remain constitutional, and it is constitutional for Congress to limit a court's authority to sentence below such minimums, the remedial holding of *Booker* does not impact the pre-existing limitations embodied in § 3553(e).[57]

While this Eighth Circuit case slightly limits judges' newly acquired discretion under *Booker*, Congress cemented their broad discretion by incorporating *Williams* into the United States Code under 18 U.S. Code § 3661.[58] However, beginning in the early 2000s, the Supreme Court handed down a line of cases—the *Apprendi* cases—that shifted some of that power and discretion for sentencing purposes to the hands of the jurors.

B. THE *APPRENDI* LINE OF CASES PUTS JURORS BACK IN THE DRIVER'S SEAT

In New Jersey in 1994, Charles Apprendi fired several gunshots into an African-American family's home soon after they had moved into the area.[59] He later stated that his crime was motivated by racial bias.[60] The grand jury returned a 23-count indictment against Apprendi, though none of those 23 counts referenced New Jersey's hate-crime statute or that Apprendi acted with racial bias.[61] Apprendi ultimately pleaded guilty to three counts: two counts of second-degree possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb.[62] At sentencing, the State requested a sentence "enhancement" for one of the counts on the grounds that the offense was committed

55. 18 U.S.C. 3553(e).
56. United States v. Amanda Williams, 474 F.3d 1130, 1130–1131 (8th Cir. 2007).
57. *Id.* at 1132.
58. 18 U.S.C. 3661.
59. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).
60. *Id.*
61. *Id.*
62. *Id.* at 469-70.

with a "biased purpose."[63] The judge held an evidentiary hearing, found by a preponderance of the evidence that "the crime was motivated by racial bias," and sentenced Apprendi to 12 years' incarceration, even though the state statute for that charge only authorized a sentence of five to ten years.[64] Apprendi appealed the decision on the grounds that that his due process rights had been violated.

In a 5-4 decision, the Court found for Apprendi, holding that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[65] In doing so, the Court invalidated the New Jersey sentencing scheme that allowed a judge to find facts the jury had not to increase a defendant's sentence:

> The New Jersey statutory scheme that Apprendi asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey finds for crime of the first degree . . . based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" [was racial bias] . . . this practice cannot stand.[66]

As Justice Antonin Scalia articulated in his concurrence, a criminal defendant's right to a jury trial "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[67] To be clear, *Apprendi* did not overturn *Williams*.[68] *Apprendi* declares that any facts that ratchet up a sentence must be found by a *jury beyond a reasonable doubt*, and not by a judge under the preponderance standard. But, when determining a sentence within a statutory range, judges maintain their broad discretion under *Williams*.

Following *Apprendi*, the Court decided a string of cases that further emphasized the importance of jurors being the fact-finders during sentencing. In *Blakely v. Washington*, the Court found that under *Apprendi*, a Washington state sentencing scheme that allowed judges to impose sentences above statutory maximums if they found "substantial and compelling reasons justifying an exceptional

63. *Id.* at 470-71.

64. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

65. *Id.* at 490.

66. *Id.* at 491.

67. *Id.* at 499 (internal quotations omitted).

68. While *Apprendi* did not overturn *Williams*, Justice Sandra O'Connor's dissenting opinion in the case foreshadowed *Booker*. She warned that the majority's opinion would turn the federal Sentencing Guidelines into a casualty in the tug-of-war between judges and juries for sentencing power. *Id.* at 544 ("[the majority's holding] would apply . . . to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determination [*e.g.*, the federal Sentencing Guidelines]. Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines."). As discussed above, in *Booker* the Court found that the guidelines were advisory and not mandatory to avoid binding courts.

sentence" invalid.[69] The Court reiterated that under *Apprendi*, fact-finding that increases the penalty for a crime can only be done by the jury.[70] Emphasizing the importance of preserving the power of the jury, Justice Scalia compared jurors to suffragists: "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[71] The Court also clarified how to define statutory maximum:

> [T]he relevant 'statutory maximum' [for *Apprendi* purposes] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' . . . and the judge exceeds his proper authority.[72]

After *Blakely* in *Alleyne v. United States*, the Court extended *Apprendi* to statutory minimums holding that "*Apprendi* applies with equal force to facts increasing the mandatory minimum" and "[any] facts that increase mandatory minimum sentences must be submitted to the jury"[73] In short, facts constitute elements of a crime and thus must be submitted to the jury if they "increase the prescribed range of penalties to which a criminal defendant is exposed," and so any fact that increases either the ceiling or the floor must go to the jury.[74]

The *Apprendi* rule was most recently re-affirmed in the 2019 case *U.S. v. Haymond*, in which the Court held that a judge's findings that a defendant violated the terms of his supervised release, therefore increasing his mandatory minimum, could only be found by the jury under *Apprendi*.[75] As Justice Neil Gorsuch noted in the majority opinion, "[e]ven when judges did enjoy discretion to adjust a sentence based on judge-found aggravating or mitigating facts, they could not 'swell the penalty above what the law ha[d] provided for the acts charged' and found by the jury."[76]

The most consequential case to this Note of the *Apprendi* line of cases is the 2002 capital case *Ring v. Arizona*. During his murder trial, the jury found Timothy Ring guilty of felony murder in the course of an armed robbery, which carried a penalty of either life imprisonment or death. [77] The jury was deadlocked on the charge of premeditated murder.[78] Under Arizona's death penalty sentencing scheme, a defendant could only be sentenced to death if the trial judge found at least one aggravating circumstance and "no mitigating circumstances sufficiently

69. Blakely v. Washington, 542 U.S. 296, 299 (2004).
70. *Id.* at 301.
71. *Id.* at 306.
72. *Id.* at 303–04.
73. Alleyne v. United States, 570 U.S. 99, 112, 116 (2013).
74. *Id.* at 111 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).
75. United States v. Haymond, 139 S. Ct. 2369, 2376 (2019).
76. *Id.* at 2376 (quoting *Apprendi*, 530 U.S. at 519.).
77. Ring v. Arizona, 536 U.S. 584, 591 (2002).
78. *Id.*

substantial to call for leniency" at a separate sentencing hearing.[79] Because he was found guilty of felony murder and not premeditated murder, the trial judge could only sentence him to death if he was the victim's actual killer or a "major participant."[80] At the sentencing hearing, the trial judge elicited testimony beyond what was presented to the jury and found that Ring was "the one who shot and killed" the victim, sentencing him to death.[81] Ring appealed, citing *Apprendi* to argue that the sentencing scheme violated his Sixth and Fourteenth Amendment rights.[82]

In its ruling, the Court extended *Apprendi* by holding that a jury must determine the existence of *any* aggravating factor that could increase the severity of punishment: "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt."[83] The Court explicitly rejected Arizona's argument that for when imposing capital sentences, further judicial authority is warranted:

> [T]he superiority of judicial factfinding in capital cases is far from evident . . . the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.[84]

The *Ring* approach to capital sentencing was recently reiterated in the 2016 case *Hurst v. Florida*. In *Hurst*, a Florida law allowed a judge to undergo factfinding and hold its own sentencing hearing to impose the death penalty even after a jury had already recommended the death sentence.[85] The Court found that this closely mirrored the facts in *Ring*, and so could not stand as it took the factfinding needed to increase a sentence out of the hands of the jury:

> Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these fact . . . Although Florida incorporates an advisory jury verdict that Arizona lacked [in *Ring*], we have previously made clear that this distinction is immaterial . . . As with Ring [sic], a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.[86]

Together, the *Apprendi* cases stand for the proposition that any fact other than a prior conviction that exposes a defendant to a greater punishment and is not authorized by the jury's guilty verdict (or is stipulated to by the defendant in a

79. *Id.* at 593.
80. *Id.* at 594.
81. *Id.*
82. Ring v. Arizona, 536 U.S. 584, 591 (2002).
83. *Id.* at 602.
84. *Id.* at 607, 609.
85. Hurst v. Florida, 577 U.S. 92, 96 ("[T]he judge based the sentence in part on her independent determination that both the heinous-murder and robbery aggravators existed.").
86. *Id.* at 99.

plea deal) is an element that must be submitted to the *jury* and proved beyond a reasonable doubt. Unlike with most sentencing procedure, this rule applies to both capital *and* non-capital cases, as *Ring* further emphasized the Sixth Amendment's requirement that the jurors must be the ones to find the aggravating factors necessary to impose the death penalty. As discussed more below, this is one of the few areas where sentencing procedure between capital and non-capital cases overlap.

C. ELEVATED PROCEDURAL SAFEGUARDS FOR CAPITAL CASES

Unsurprisingly, the Court has treated capital sentencing procedure with more scrutiny than non-capital sentencing because "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[87] In *Furman v. Georgia*, the Court held that imposition of the death penalty was unconstitutional, briefly terminating the use of the death sentence in America.[88] The *Furman* Court argued that because capital punishment was imposed in such an arbitrary manner (often on the basis of race and class), it violated the Eighth Amendment's ban against cruel and unusual punishment.[89] Justice Potter Stewart, concurring, also noted that the capriciousness with which the death penalty was imposed further violated the Eighth Amendment:

> [The] death sentence [is] cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[90]

Furman, in short, held that "the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive."[91] Following the Court's decision, the death penalty was temporarily halted as a sentencing practice across the country.[92]

States quickly responded to *Furman* with a slew of legislation intended to reinstate capital punishment within the new *Furman* boundaries.[93] To alleviate the Court's concerns about arbitrariness in imposing the death sentence, many states

87. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

88. Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

89. *Id.* at 250–51 (Douglas, J., concurring) ("Application of the death penalty is unequal: most of those executed were poor, young, and ignorant. Seventy-five of the 460 cases involved co-defendants who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.") (internal quotation marks omitted).

90. *Id.* at 309–310.

91. McCleskey v. Kemp, 481 U.S. 279, 301 (1987).

92. *See* Mark J. MacDougall & Karen D. Williams, *The Federal Death Penalty Scheme Is Not a Model for State Reform of Capital Punishment Laws*, 67 AM. UNIV. L. REV. 1647, 1656 (2018) ("In the 1972 case of *Furman v. Georgia*, the Supreme Court halted imposition of the death penalty temporarily. . .").

93. *Id.* at 1657.

imposed a mandatory death sentence for certain offenses.[94] The Court quickly rejected this approach. For instance, in *Woodson v. North Carolina*, the Court invalidated a state statute that made the death penalty mandatory for first-degree murder convictions because it did nothing to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[95] The Court emphasized that the statute could not stand because it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him a sentence of death."[96]

The Court later re-emphasized the need for juries in capital cases to consider possible mitigating factors in another post-*Furman* case, *Lockett v. Ohio*.[97] In *Lockett*, an Ohio law required judges to impose a death sentence unless one of three specific mitigating factors was present.[98] This statute effectively barred jurors from consider other relevant mitigators such as age, character, and background.[99] The Court struck down the law as unconstitutional:

> . . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest of capital cases, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis less than death . . . A statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[100]

While the mandatory death sentence approach failed to survive *Furman*, other states enacted a "guided discretion" bifurcated trial approach that did survive.[101] Under this approach, state statutes specifically enumerate which offenses have capital punishment as an available penalty.[102] Additionally, when the death sentence is imposed, it must undergo automatic appellate review.[103] The trials for these cases follow a bifurcated trial process in which the jury first deliberates on a defendants' guilt (the "guilt/innocence phase") and then deliberates separately as to whether

94. *Id.* at 1657 n. 45.
95. Woodson v. North Carolina, 428 U.S. 280, 303 (1976).
96. *Id.*
97. Lockett v. Ohio, 438 U.S. 586, 604 (1978).
98. *Id.* at 593–94.
99. *Id.*
100. *Id.* at 604–5.
101. MacDougall & Williams, *supra* note 92, at 1657.
102. *Id.*
103. *Id.*

to apply the death sentence (the "penalty phase").[104] The Court held in *Gregg v. Georgia* that this process satisfied the concerns under *Furman*, allowing the capital sentencing to begin again across the country under this new sentencing procedure.[105]

II. LIFE WITHOUT PAROLE ("LWOP")

A. LWOP BACKGROUND

While *Gregg* and similar cases paved the way for states to reinstate the death penalty, the use of capital sentencing has been in rapid decline since *Furman*.[106] In 1999, a total of ninety-eight individuals were executed nationwide, but that number dropped to forty-six in 2010 and further down to twenty-three in 2017.[107] As the use of the death sentence has dropped, the imposition of LWOP sentences has risen dramatically, especially in recent decades.[108] In 1990, thirty-two states and Washington D.C. had LWOP statutes, whereas today every state except Alaska has LWOP statutes.[109] Of the forty-nine states that have LWOP statutes today, twenty-six of them enacted those statutes from 1971–1990 and seventeen did so from 1991-2012.[110]

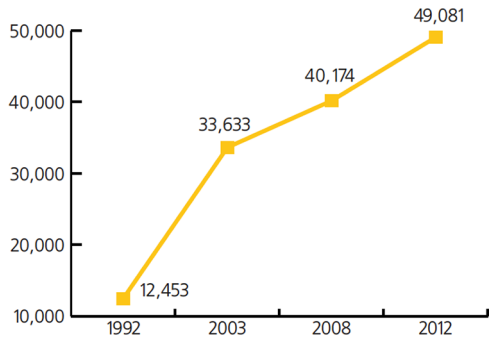

FIGURE 1. The Rise in LWOP Sentences.[111]

104. *Id.*

105. *See Gregg*, 428 U.S. at 195; *see also* MacDougall & Williams, *supra* note 92, at 1657-8 ("With this judicial 'green light' to a permissible approach, this current iteration of capital punishment in the United States allows for the return of death sentences for certain criminal offenses.")

106. MacDougall & Williams, *supra* note 92, at 1652.

107. *Id.*

108. *See* Ashley Nellis & Jean Chung, *Life Goes On: The Historic Rise in Life Sentences in America,* THE SENTENCING PROJECT 3 (Sep. 18, 2013), https://www.sentencingproject.org/publications/life-goes-on-the-historic-rise-in-life-sentences-in-america/ [https://perma.cc/PW7A-VHR9].

109. *Id.*

110. *Id.*

111. *Id.* at 13.

LWOP sentences, sometimes referred to as a "true life sentence," "death by incarceration," or the "other death penalty," sentence individuals to incarceration without any hope of release through parole.[112] The imposition of an LWOP sentence "presupposes incorrigibility in the offender."[113] And as the Court noted in 2010 in *Graham v. Florida*,[114] LWOP sentences share significant and unique similarities to death sentences:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence.[115]

The rise in LWOP sentencing is in part both a backlash to and encouragement of *Furman*'s brief moratorium of the death penalty.[116] The SRA discussed earlier abolished federal parole entirely, effectively turning all federal life sentences into LWOP sentences.[117] On the state level where parole is available, both death penalty opponents who see LWOP as a reasonable alternative to the death sentence and policymakers adopting "tough-on-crime" stances have effectively lobbied to pass LWOP statutes in state legislatures.[118]

B. LWOP SENTENCES SCHEMES COMPARED TO CAPITAL SENTENCING

Sentencing schemes for LWOP sentences follow the same procedure as non-capital sentencing, except in the case of juvenile sentencing, which this Note discusses further below.[119] As a result, LWOP sentencing receives no additional

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112. Johnson & McGunigall-Smith, *supra* note 16, at 328.

113. Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1127 (2013).

114. Graham v. Florida, 560 U.S. 48, 69–70 (2010).

115. *Id*.

116. *See* Barkow, *supra* note 17, at 23.; *see also* Nellis, *supra* note 10, at 445.

117. Fed. Bureau of Prisons, *Inmate Legal Matters*, https://www.bop.gov/inmates/ custody_and_care/ legal_matters.jsp [https://perma.cc/8DB4-5TVD] (last visited Apr. 3, 2022).

118. Brittany L. Deitch, *Life Without Parole as Death Without Dignity*, 72 ALA. L. REV. 1, 3 (2020) ("Even after the death penalty's resurrection, LWOP sentences have remained a popular solution for 'unlikely bedfellows' – death penalty abolitionists who view LWOP as a viable response to the practice of capital punishment and 'tough-on-crime' politicians who want to ensure that criminals are punished harshly, even if their juries refuse to impose capital punishment"); *see also,* Lerner, *supra* note 113, at 1116 ("Unlikely bedfellows began touting the virtues of LWOP. On the one hand were law-and-order advocates, generally on the political right, and on the other hand were death penalty abolitionists, generally on the political left"); *see also,* Note, *A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1838– 39 (2006) ("The result has been a strange pairing of death penalty abolitionists with pro-incarceration activists and legislators, joining to push life-without-parole statutes through state legislatures. Working together, they have been remarkably successful.").

119. *See* Barkow, *supra* note 17, at 21.

procedural safeguards, protections, or oversight.[120] Under *Furman* and *Gregg*, "the discretion of the sentencer must be guided by clear and objective standards" for capital cases, but this is not the case for LWOP.[121] Similarly, while cases like *Woodson* outlawed mandatory death sentences, mandatory LWOP sentences are permissible.[122] And because "LWOP is often imposed as a mandatory sentence, [there is] no room for consideration of individual circumstances," in stark contrast to the requirements under *Lockett* for capital sentences.[123] Unlike the demands of *Ring* and *Hurst* that a jury find the necessary facts to impose a death sentence, either judges or juries can impose an LWOP sentence depending on the jurisdiction.[124]

The Supreme Court explicitly refused to treat adult LWOP sentences as capital sentences in the 1991 case *Harmelin v. Michigan*.[125] In *Harmelin*, petitioner received a mandatory LWOP sentence for cocaine possession and appealed.[126] Specifically, the petitioner argued that the sentence was unconstitutional because it was mandatory, therefore depriving the sentencer of the ability to consider mitigating circumstances, which the Court had found unconstitutional for capital cases in *Woodson*.[127] Here, however, while the Court conceded that LWOP is "the second most severe penalty permitted by law,"[128] it ultimately held in a 5-4 decision that the *Woodson* doctrine "may not be extended outside the capital context because of the qualitative differences between death and all other penalties . . . [w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further."[129] However, Justice Stevens's dissent in *Harmelin*, joined by Justice Blackmun, emphasized that LWOP sentences and capital sentence share a unique similarity: "a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offended will never regain his freedom."[130] Ultimately, Justice Stevens concluded that a mandatory LWOP sentencing scheme is as arbitrary and capricious as the death penalty under *Furman*, and thus could not pass constitutional muster.[131] Still, the majority's opinion in *Harmelin* that refused to treat a mandatory LWOP sentence as a capital sentence for adults remains good law today.

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120. *See id.*

121. *Id.*

122. *Id.*; *see also* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (refusing to apply *Woodson* to a mandatory LWOP sentence scheme).

123. Barkow, *supra* note 17, at 26.

124. Nellis, *supra* note 10, at 449.

125. *Harmelin*, 501 U.S. at 996.

126. *Id.* at 961.

127. *Id.* at 961-962.

128. *Id.* at 960.

129. *Id.* at 957, 996.

130. Harmelin v. Michigan, 501 U.S. 957, 1028 (1991).

131. *Id.* at 1029 ("In my opinion the imposition of a life sentence without possibility of parole on this petitioner is equally capricious [as the death sentences at issue in *Furman*].").

C. JUVENILE LWOP CASE LAW OFFERS HOPE OF POSSIBLE CROSSOVER

Though *Harmelin* closed the door on treating adult LWOP sentences with similar procedural safeguards as capital sentences, the Supreme Court has allowed such treatment in juvenile LWOP cases.[132] This differentiation hinges on the idea that "children are constitutionally different from adults for purposes of sentencing."[133] While this Note focuses on LWOP sentencing procedure and not juvenile sentencing, the recent case law in the LWOP juvenile sentencing space gives insight as to how adult LWOP sentences could and why they should be treated more like capital cases than non-capital cases.

In *Graham v. Florida*, petitioner Graham was sixteen-years old when he committed armed burglary and later received a life sentence.[134] Because Florida had abolished parole, the sentence was by default an LWOP sentence.[135] Graham appealed, and the Court held that the Eighth Amendment prohibited a juvenile from being sentenced to LWOP for a nonhomicide offense.[136] Though the Court did not rely heavily on death penalty cases in its reasoning, in the majority opinion Justice Kennedy expanded upon the similarities between LWOP and capital sentences that Justice Stevens discussed in *Harmelin*:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence . . . As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.[137]

Though *Graham* did not explicitly cite *Woodson*, its holding "insists that youth matters in determining the appropriateness" of an LWOP sentence, invoking both the *Woodson* and *Lockett* requirements "that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him."[138] *Graham* also stated that imposing a juvenile LWOP sentence requires

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132. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 82 (2010) (finding that the Eighth Amendment prohibits a LWOP sentence for a juvenile who committed a non-homicide offense); *see also* Miller v. Alabama, 567 U.S. 460, 479 (2012) (finding that the Eighth Amendment prohibits mandatory LWOP sentencing for juvenile homicide offenses); *see also* Montgomery v. Louisiana, 577 U.S. 190, 206 (2016) (applying *Miller* retroactively).

133. *Miller*, 567 U.S. at 471.

134. *Graham*, 560 U.S. at 53, 57.

135. *Id.* at 57.

136. *Id.* at 82.

137. *Id.* at 69–70 (citing Naovarath v. State, 105 Nev. 525, 526 (1989)) (internal qu-otation marks omitted).

138. *Miller*, 567 U.S. at 470, 473 (discussing *Graham* 560 U.S. at 60-61, 68).

specific factfinding, specifically that "to justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible."[139]

Two years after *Graham* in *Miller v. Alabama*, the Court held that mandatory LWOP sentences for juveniles were unconstitutional.[140] Building off *Graham*'s requirement that the sentencer consider a defendant's age, the Court held that "the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations."[141] *Miller* directly cites *Woodson* along with *Graham* to reach its conclusion, noting that it does not overturn *Harmelin* because that case only applies to adults.[142] Still, *Miller* ultimately held that for juvenile LWOP sentencing, "a sentencer [must] follow a certain process —considering an offender's youth and attendant characteristics—before imposing a particular penalty."[143] The goal of this process was so that sentencers could distinguish "between the juvenile offender whose crime reflects unfortunate and transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[144] The Court soon after re-affirmed *Miller* in *Montgomery*, holding that the rule applied retroactively.[145]

Exactly what procedure and factfinding *Miller* mandated was contested in the 2019 case *Jones v. Mississippi*, in which the Court reversed course in its treatment of juvenile LWOP cases. The question in *Jones* was whether imposing a juvenile LWOP sentence requires a trial court to find that the juvenile is permanently incorrigible.[146] The Court held that this fact-finding was not necessary as a formal procedure, hinging its opinion on one line in *Montgomery* that "*Miller* did not impose a formal factfinding requirement" and "a finding of fact regarding a child's incorrigibility . . . is not required."[147] The Court clarified that *Miller* was a narrow holding, requiring only a "discretionary sentencing procedure–where the sentencer can consider the defendant's youth and has discretion to impose a lesser sentence," and not factfinding of a defendant's incorrigibility.[148]

But as Justice Sonia Sotomayor states in her dissent, "before imposing a sentence of LWOP, a sentencer must *actually* make that judgment [of a defendant's incorrigibility] and make it correctly."[149] Justice Sotomayor accuses the majority of "distort[ing] *Miller* and *Montgomery* beyond recognition," because "[a]s the Court quietly admits in a footnote, however, *Montgomery* went on to clarify that

139. *Graham*, 560 U.S. at 72.
140. *Miller*, 567 U.S. at 489.
141. *Id*. at 474.
142. *Id*. at 475, 481-82.
143. *Id*. at 483.
144. *Id*. at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
145. Montgomery v. Louisiana, 577 U.S. 190, 206 (2016).
146. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).
147. *Id*.
148. *Id*. at 1318.
149. *Id*. at 1329 (emphasis added).

the fact '[t]hat *Miller* did not impose a *formal* factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole.'"[150] And according to Justice Sotomayor, while "*Miller* certainly does not require sentencers to invoke any magic words," it has a "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[151] As a result, sentencers must engage in factfinding to determine if an offense is a reflection of transient immaturity, which (as Justice Sotomayor points out) the majority admits in a footnote.

The *Jones* majority does not argue that practically speaking, imposing a sentence of LWOP on a juvenile does *not* require this factfinding, only that *Miller* and *Montgomery* do not mandate a formal procedure or requirement that the sentencer explicitly do so.[152] But as discussed below, the practical need for a sentencer to find a defendant incorrigible to impose such a sentence raises issues under *Apprendi* for both juveniles and adults.[153]

III. ISSUES WITH CURRENT LWOP SENTENCING PRACTICES AND RECOMMENDATIONS FOR REFORM

A. THE NEED TO APPLY CAPITAL SENTENCING PROCEDURES TO LWOP AND RECOMMENDATIONS

As both Justice Kavanaugh in the majority opinion and Justice Sotomayor in her dissenting opinion in *Jones* indicate, sentencing a juvenile to LWOP requires a practical finding that his offense was not the result of transient immaturity. In that same vein, sentencing adults to LWOP inevitably "presupposes incorrigibility in the offender."[154] Under the current sentencing scheme, such determinations are made by the judge and not juries. Some could argue that under *Williams*, judges are free to use their discretion to determine whether a defendant has acted in a way that suggests incorrigibility and can sentence accordingly. However, under *Apprendi*, this cannot stand. Juries must be the ones to find these facts that increase a defendant's exposure to punishment.

Additionally, given the shared irrevocability between LWOP, the "other death sentence," and the actual death sentence, *Ring* and *Hurst* could also apply to LWOP sentences. While those sentenced to LWOP are not being executed by the state, they are being sentenced to die in prison. As a result, those sentenced to LWOP are losing their lives as well as their liberty to the criminal justice system. And under *Ring* and *Hurst*, any facts that grant the imposition of a death sentence on a defendant must be found by the jury.[155] As the "other death sentence," the

150. *Id*. at 1330-1331 (quoting *Montgomery*, 577 U.S. at 211) (emphasis added).
151. Jones v. Mississippi, 141 S. Ct. 1307, 1311, 1333 (2021).
152. *Id*. at 1311.
153. *See* discussion *infra* Part IV.A.
154. Lerner, *supra* note 113, at 1127.
155. *See* Ring v. Arizona, 536 U.S. 584, 602 (2002); *see also* Hurst v. Florida, 577 U.S. 92, 98 (2016).

facts necessary to instate an LWOP to apply should also be found by a jury per *Ring* and *Hurst*. This amended LWOP sentencing scheme would also invalidate any mandatory LWOP sentences under *Woodson*, because they deprive defendants of having juries determine the facts necessary to sentence them to die behind bars.

Further, due to the discussed similarities between LWOP sentences and capital sentences that the Court has explicitly acknowledged in the juvenile LWOP case law, the procedures set forth in *Gregg* should apply to both capital and LWOP cases. Specifically, *Gregg* permitted a capital sentencing scheme where "the types of crimes eligible for a death sentence are enumerated, and an automatic appellate review of any death sentence is required."[156] Applying this to LWOP, state statutes that enumerate offenses for which LWOP is available along with automatic appeal for LWOP sentences would add an important procedural safeguard. While the automatic appeal process could raise concerns about clogging the courts, defendants' right should be considered over judicial expediency.

Finally, *Gregg* approved the bifurcated trial system for capital cases where the jury first decides guilt then decides whether the defendant is deserving of the death sentence.[157] Applying this to LWOP, juries in cases where LWOP is an available sentence should first determine guilt then deliberate to determine whether the defendant is so incorrigible he is past the point of rehabilitation, and so deserving of an LWOP sentence. This procedure would alleviate the *Apprendi* and *Ring*/*Hurst* issues discussed above while also protecting defendants from being sentenced to LWOP arbitrarily as was the concern in *Furman*.

The Supreme Court in *Harmelin* explicitly refused to concede that LWOP shares enough in common with capital punishment to warrant similar procedural mechanisms.[158] However, *Harmelin* was decided in 1991—the Court has in the decades since decided *Graham*, *Miller*, *Montgomery*, and *Jones*, all of which explicitly acknowledge what the *Harmelin* dissent stated: that LWOP and capital punishment are so uniquely similar that they should be treated similarly.[159] Establishing a *Gregg*-procedural mechanism for LWOP that restores factfinding to the jury and protects from judges' unbridled discretion is essential for LWOP sentencing given those similarities.

B. ETHICAL IMPLICATIONS OF THE CURRENT LWOP SENTENCING SCHEME

The current LWOP sentencing scheme creates not just constitutional issues, but also ethical issues for practicing criminal attorneys. In its "Criminal Justice

156. MacDougall & Williams, *supra* note 92, at 1657.

157. *See* Gregg v. Georgia, 428 U.S. 153, 191-192 (1976) ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*."); *see also* MacDougall & Williams, *supra* note 92, at 1657.

158. Harmelin v. Michigan, 501 U.S. 957, 995-996 (1991).

159. *See* discussion *supra* Part III.C.

Standards," the American Bar Association has explicitly stated that criminal defense attorneys "should seek to reform and improve the administration of criminal justice."[160] Specifically, the ABA states that "when inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action."[161] This would include advocating against allowing sentencing judges to determine the facts necessary to impose LWOP beyond what the jury has found under *Apprendi*, but because *Williams* remains the applicable case law, there is no avenue for defense attorneys to do so. The ABA also creates a carveout and set of elevated guidelines for attorneys defending death penalty cases "because the death penalty differs from other criminal penalties, [so] defense counsel in a capital case should make extraordinary efforts on behalf of the accused."[162] As discussed above, LWOP sentences and death sentences share such similarities that the elevated responsibilities of death penalty defense attorneys *should* apply to attorneys whose clients face LWOP sentences.[163] But so long as our current case law insists that "death is [so] different" from LWOP that the two should procedurally be treated differently, it is unlikely that the obligations for defense attorneys will rise to the level of the obligations for death penalty defendants. As a result, defendants sentenced to "the other death penalty" suffer from a lesser standard of representation that those facing capital punishment despite the similarities between the two sentences.

The current LWOP sentencing scheme also creates ethical issues for prosecutors. Given the prevalence of plea bargaining in today's criminal justice system,[164] prosecutors who are securing plea deals with LWOP sentences should be sure that defendants are stipulating to the fact that they are permanently incorrigible in order for the deals to be valid. If the defendant does not stipulate to such and the sentencing judge approves the deal, the judge has created an *Apprendi* issue by finding facts he is not empowered to find himself. Prosecutors are required to "seek justice within the bounds of the law," but securing plea deals in such a manner that flies in the face of *Apprendi* is out of bounds of the law.[165] The ABA guidelines further specify that "prosecutor[s] should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and

160. STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-1.2(e) (Am. Bar Ass'n 4th ed. 2017).

161. *Id.*

162. *Id.* at 4-1.2(g).

163. *See* discussion *supra* Part IV.A.

164. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty*, PEW RESEARCH (Jun. 11, 2019) https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/YC7S-5VZT] (discussing how upwards of 90% of criminal convictions in the federal system are a result of plea bargaining).

165. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(b) (Am. Bar Ass'n 4th ed. 2017).

disparities."[166] As argued here, the current LWOP sentencing scheme does not assure that fair and informed sentencing judgments are made, as it hands factfinding that belongs to the jury to judges and allows sentencing judges to act with broad discretion without the procedural safeguards put in place for capital cases. By recommending LWOP sentences for defendants without the procedures recommended in this Note, prosecutors are failing to live up to the ABA guidelines.

CONCLUSION

Given the gross similarities between LWOP sentences and capital sentences—similarities that no other type of sentence shares—the former should be treated like the latter for procedural purposes. The evolving sentencing case law, starting with *Apprendi*, has continued to underscore the necessity of leaving fact-finding to the jurors when elevating a defendant's sentence. Death penalty case law has gone a step further to emphasize that when a defendant's life is on the line, procedural safeguards and further juror involvement at the sentencing stage is required. Though a sentence of LWOP does not involve execution by the state, it does forever rob a defendant of life and liberty, creating another type of death sentence. That the power to issue an LWOP sentence lies solely in the hands of an individual judge flies in the face of the discussed case law, and the failure to apply capital sentencing procedures to LWOP sentences goes against the constitutional rights of defendants and the ethical obligations of attorneys to both protect their clients and uphold the Constitution.

166. *Id*. at 3-7.2(c).