

DISPOSING OF CHILDREN: THE EIGHTH AMENDMENT AND JUVENILE LIFE WITHOUT PAROLE AFTER *ROPER*

Abstract: In most states, juveniles may receive the sentence of life without the possibility of parole when convicted in adult court. Scientific research has shown, however, that the brains of juveniles are different from those of adults. Citing this research, the U.S. Supreme Court held in the 2005 case of *Roper v. Simmons* that sentencing juveniles to the death penalty violates the Eighth Amendment due to their reduced culpability. Applying the reasoning of *Roper*, this Note argues that sentencing juveniles to life without parole violates the Eighth Amendment on its face. In the alternative, it argues that the sentence violates the Eighth Amendment as applied in certain cases. In addition, this Note presents policy arguments for the abolition of the sentence by state and federal legislatures.

INTRODUCTION

In the last decade, the general public has devoted significant attention to the issue of youth violence because of tragedies such as the in-school murders committed by two teenagers in Littleton, Colorado.¹ Public outcry has resulted in changes that have dismantled the juvenile justice system, a system founded on the idea that childhood is a distinct phase of life, and that juveniles are less culpable for crimes than adults and more amenable to rehabilitation.² The changes implemented by states have made it easier for these states to prosecute juveniles as adults, and thereby reflect the growing notion that children are indistinguishable from adults.³ States implemented these changes to emphasize punishment and deterrence, rather than focusing on rehabilitation.⁴ Today, children are not only transferred to and

¹ Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 143, 144 & n.10 (2003). Throughout this Note, all references to youths, children, adolescents, and juveniles refer to persons under the age of eighteen. The phrase "life without parole" refers to sentences of life without the possibility of parole. The phrase "juvenile life without parole" refers to sentences of life without parole imposed on persons younger than eighteen.

² *Id.* at 146-49.

³ *Id.*

⁴ *Id.* at 148-49.

prosecuted in the adult system more readily than before the 1990s, but also are sentenced to its penultimate penalty—life without the possibility of parole.⁵ At least 2225 people in the United States currently are serving sentences of life without parole for crimes they committed before their eighteenth birthdays.⁶

Recent research on adolescents, however, shows that there are significant psychological and neurological differences between the brains of adolescents and adults.⁷ Psychologists and juvenile rights advocates use these studies to support their position that the culpability of juveniles is reduced.⁸ In 2005, the U.S. Supreme Court recognized this reduced culpability when it held in *Roper v. Simmons* that imposing the death penalty on juveniles violates the U.S. Constitution.⁹ The Court examined the evolving standards of decency in the United States and held that the juvenile death penalty violates the Eighth Amendment on its face.¹⁰

The Court also considered the opinions of independent associations and the practices of other countries.¹¹ Although sentencing juveniles to life without parole has become more common in the United States since the 1990s, the international community overwhelmingly has rejected the practice.¹² Only about fourteen other countries permit life sentences for children, and even in those countries, it is rarely imposed.¹³ Also, a number of international human rights treaties re-

⁵ See HUMAN RIGHTS WATCH, AMNESTY INT'L, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1* (2005), available at <http://www.amnestyusa.org/countries/usa/clwop/report.pdf>.

⁶ *Id.*

⁷ See, e.g., Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742–43 (2000); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21(22) J. NEUROSCIENCE 8819, 8819 (2001) [hereinafter Sowell et al., *Mapping Continued*]; Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003).

⁸ See Cauffman & Steinberg, *supra* note 7, at 742–43; Sowell et al., *Mapping Continued*, *supra* note 7, at 8819; Steinberg & Scott, *supra* note 7, at 1013.

⁹ 543 U.S. 551, 578 (2005).

¹⁰ *Id.*

¹¹ *Id.* at 575–78.

¹² HUMAN RIGHTS WATCH, *supra* note 5, at 104–07.

¹³ *Id.* at 106. It is not clear whether any of these countries permits the possibility of parole. *Id.* Of the fourteen other countries that permit the sentence, only three currently have people serving life without parole for crimes committed as children—South Africa, Tanzania, and Israel. *Id.*

flect the worldwide rejection of this sentence.¹⁴ The United States, however, either has refused to ratify these treaties, or has ratified them only with a reservation that preserves its right to incarcerate juveniles for life without parole.¹⁵ The United States stands nearly alone in a world that identifies the sentence of juvenile life without parole as a human rights violation.¹⁶

This Note explores the impact of *Roper* on sentencing juveniles to life without the possibility of parole.¹⁷ Given the ambiguity of the Supreme Court's Eighth Amendment analysis, it is difficult to predict how the Court would rule on the constitutionality of juvenile life without parole.¹⁸ By applying current psychological research and the reasoning in *Roper*, however, this Note concludes that the Court should find that juvenile life without parole violates the Constitution on its face or at least in certain cases where the harshness of the penalty outweighs the gravity of the offense.¹⁹

Part I of this Note provides a history of the juvenile justice system and discusses the process by which adult court jurisdiction subjects children to life without the possibility of parole.²⁰ Part II surveys the state laws regarding life without the possibility of parole.²¹ Part III examines the psychological and neurological differences between children and adults.²² Part IV discusses the application of the Eighth Amendment to capital and non-capital sentences, particularly the Supreme Court's recent decision in *Roper*.²³ Part V suggests that juvenile life without parole violates the Eighth Amendment on its face.²⁴ Even if the Court finds that the sentence does not violate the Constitution on its face, Part VI argues that juvenile life without parole violates the Eighth Amendment as applied in certain cases.²⁵ Part VII explores other reasons for the U.S. Congress and state legislatures to abolish

¹⁴ See United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; United Nations International Covenant on Civil and Political Rights arts. 10(3), 14(4), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁵ HUMAN RIGHTS WATCH, *supra* note 5, at 97–99.

¹⁶ *Id.* at 94.

¹⁷ See *infra* notes 222–299 and accompanying text.

¹⁸ See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (noting “[o]ur precedents in this area have not been a model of clarity”).

¹⁹ See *infra* notes 222–299 and accompanying text.

²⁰ See *infra* notes 27–61 and accompanying text.

²¹ See *infra* notes 62–80 and accompanying text.

²² See *infra* notes 81–108 and accompanying text.

²³ See *infra* notes 109–221 and accompanying text.

²⁴ See *infra* notes 222–255 and accompanying text.

²⁵ See *infra* notes 256–299 and accompanying text.

the sentence of juvenile life without parole, including the United States's stature in international human rights law, the costs of lifetime imprisonment, and the racial disparities in sentencing.²⁶

I. CHILDREN IN ADULT COURT

Throughout U.S. history, the juvenile justice system has changed with societal attitudes about adolescent capabilities.²⁷ At the formation and in the early days of the American justice system, children were tried as adults and could be put to death.²⁸ The advent of juvenile courts in the early twentieth century ushered in an era during which rehabilitation was the primary goal for juvenile sentencing.²⁹ In the past fifteen years, however, states have changed their laws to allow again adult sentencing of juveniles in certain cases, focusing on the goals of retribution and deterrence rather than rehabilitation.³⁰ Today, children are more vulnerable to life without parole sentences than at any time since the nineteenth century.³¹

Children always have been subject to prosecution in the U.S. justice system.³² In the late eighteenth and early nineteenth centuries, children as young as seven were tried in adult courts and could be convicted if the government showed the child possessed the capacity to form a *mens rea*.³³ If convicted, children faced the full range of penalties, including the death penalty.³⁴

In the early twentieth century, however, child welfare advocates convinced states that children's immaturity and potential for rehabilitation should influence the response to their criminal behavior.³⁵ This social reform movement argued that children were less criminally re-

²⁶ See *infra* notes 300-335 and accompanying text.

²⁷ See SAMUEL M. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* 1-8 (Thomson West 2005) (1974).

²⁸ See Taylor-Thompson, *supra* note 1, at 145.

²⁹ *Id.* at 147.

³⁰ See *id.* at 148.

³¹ See *id.*

³² *Id.* at 145.

³³ See Taylor-Thompson, *supra* note 1, at 145. The government had this burden when a child criminal defendant advanced an infancy defense, in which the child asked the court to dismiss the charges because she lacked the capacity to distinguish between right and wrong. *Id.*

³⁴ See *id.* Although the practice was rare, some children between the ages of ten and twelve were executed. See *id.* at 145-46.

³⁵ See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997); Taylor-Thompson, *supra* note 1, at 145-46.

sponsible than adults and more amenable to treatment and intervention.³⁶ Advocates believed that criminal behavior by children resulted from external forces, such as impoverished living conditions or parental neglect.³⁷ In response, states created juvenile courts that relied on a "best interest of the child" approach to tailor treatment plans to the offenders' needs.³⁸ The goal of creating these courts was to treat the delinquent children and enable their return to society as productive citizens.³⁹ Illinois created the first juvenile court in 1899 and other states replicated the idea across the country.⁴⁰ After the creation of juvenile courts, judges in most states retained the discretion to waive jurisdiction and allow prosecution of children in adult criminal court.⁴¹ For the first half of the twentieth century, however, states almost exclusively tried children in juvenile courts.⁴²

Early juvenile court proceedings were more informal than adult court proceedings and provided few adult-like due process protections.⁴³ This procedural informality raised questions about protections for juveniles and consistency in sentencing.⁴⁴ Because juvenile courts in the early twentieth century did not recognize constitutional due process protections for children, their decisions often were arbitrary.⁴⁵ To impose more order in juvenile delinquency hearings, in 1967 the U.S. Supreme Court in *In re Gault* extended to juveniles many of the procedural due process rights enjoyed by criminal defen-

³⁶ See Scott & Grisso, *supra* note 35, at 141–43; Taylor-Thompson, *supra* note 1, at 146.

³⁷ See Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. Rev. 401, 405 (1999).

³⁸ Taylor-Thompson, *supra* note 1, at 147.

³⁹ *Id.* at 146.

⁴⁰ *Id.* at 147.

⁴¹ See PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3 (1998), available at <http://www.ncjrs.gov/pdffiles/172836.pdf>. All states that authorize discretionary waivers require a waiver hearing. *Id.* Most waiver statutes specify transfer criteria that must be met before a court may consider waiver. *Id.*

⁴² See HUMAN RIGHTS WATCH, *supra* note 5, at 14.

⁴³ See Taylor-Thompson, *supra* note 1, at 147. For example, juveniles did not have the right to an attorney in juvenile court. *Id.*

⁴⁴ Scott & Grisso, *supra* note 35, at 145; Taylor-Thompson, *supra* note 1, at 147.

⁴⁵ *In re Gault*, 387 U.S. 1, 18–20 (1967). Under the rationale of the state as *parens patriae*, children had a right to custody rather than to liberty. *Id.* at 16–17. Therefore, when the state intervened for the parents of a delinquent child, it merely substituted the custody to which the child was entitled. *Id.* Because juvenile proceedings were civil rather than criminal, they were not subject to the due process requirements for deprivations of liberty. See *id.* at 17. Such individualized treatment often led to arbitrary results. See *id.* at 18–19.

dants in adult courts.⁴⁶ These included the right to notice of charges, the right to counsel, the privilege against self-incrimination, and the right to cross-examination of witnesses.⁴⁷

An increase in juvenile crime during the 1980s and 1990s incited public outcry demanding tougher penalties for juveniles.⁴⁸ The rate of juvenile arrests for violent crime grew substantially beginning in the mid-1980s and peaking in the mid-1990s, including the juvenile arrest rates for murder, aggravated assault, and forcible rape.⁴⁹ The juvenile arrest rate for robbery declined through the 1980s, but then grew rapidly to its peak in 1995.⁵⁰

These increases in juvenile arrests fueled a trend to "get tough" on youth crime.⁵¹ Supporters of this trend urged policymakers that children who committed violent offenses were inherently dangerous and destined for a life of crime.⁵² In response, all states changed their laws to make it easier to try and sentence child offenders in adult courts.⁵³ States restricted the jurisdiction of juvenile courts by lowering the age for adult court jurisdiction, expanding criteria for transfer, enacting automatic transfer statutes, and granting prosecutors the discretion to file charges against children directly in adult court.⁵⁴ Today, all states allow adult criminal prosecution of children under

⁴⁶ *Id.* at 33, 36–37, 55–56. The Court based its decision partly on concerns that juveniles were getting neither the promised rehabilitation nor the procedural rights guaranteed to adults. *Id.* at 18 n.23. The Court noted that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.

⁴⁷ *Id.* at 33, 36–37, 55–56. The Court did not extend to juveniles the right to trial by jury, nor did it adopt a punitive approach. See Taylor-Thompson, *supra* note 1, at 147.

⁴⁸ See HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 2003, at 4 (2005), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/209735.pdf> (presenting trends in juvenile arrests); Taylor-Thompson, *supra* note 1, at 148 (describing public outcry in response to increased youth delinquency).

⁴⁹ See SNYDER, *supra* note 48, at 6.

⁵⁰ See *id.*

⁵¹ See Scott & Grisso, *supra* note 35, at 148; Taylor-Thompson, *supra* note 1, at 148. The emphasis in this modern system is on protecting society from the harms caused by youthful offenders. Scott & Grisso, *supra* note 35, at 148.

⁵² See Scott & Grisso, *supra* note 35, at 149; Taylor-Thompson, *supra* note 1, at 148–49.

⁵³ See Scott & Grisso, *supra* note 35, at 149–50; Taylor-Thompson, *supra* note 1, at 149.

⁵⁴ See GRIFFIN ET AL., *supra* note 41, at 3–11. Twenty-eight states have statutes that remove certain offenses from the juvenile court's jurisdiction. *Id.* at 8. Fourteen states require mandatory waiver of juvenile court jurisdiction in cases that meet certain criteria. *Id.* at 4. Fifteen states have direct file statutes that define a category of cases in which the prosecutor determines whether to proceed initially in juvenile or criminal court. *Id.* at 7.

certain circumstances.⁵⁵ Many states do not have a minimum age for transfer to adult court.⁵⁶ Unless statutorily exempt, once children are prosecuted as adults, they become subject to the same penalties as adults, including life without the possibility of parole.⁵⁷

It is now apparent that the dramatic increases in violent crime in the 1980s and 1990s were short-lived and not indicative of a generation of "super-predators" as analysts had warned in the mid-1990s.⁵⁸ In 2003, the juvenile arrest rates for murder, forcible rape, and robbery reached their lowest levels since 1980, and the rate for aggravated assault also declined.⁵⁹ Nevertheless, the 1990s' "get tough" trends encouraged the average person to view juvenile offenders as dangerous threats rather than wayward children in need of rehabilitation.⁶⁰ Critics contend that the legacy of those fear-filled years is a justice system that, rather than holding juveniles accountable, holds the nation's youngest offenders disposable.⁶¹

II. STATE LAWS REGARDING LIFE WITHOUT PAROLE

Though state sentencing laws vary, most states permit juvenile life without the possibility of parole.⁶² Only eight states and the District of Columbia prohibit the sentence.⁶³ Four of those states—Alaska, Maine, New Mexico, and West Virginia—proscribe life without parole

⁵⁵ See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 139 (2005); PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, *NATIONAL OVERVIEWS* (2005), <http://www.ncjj.org/stateprofiles/overviews/transfer1.asp>.

⁵⁶ See HUMAN RIGHTS WATCH, *supra* note 5, at 18.

⁵⁷ See *id.* at 25.

⁵⁸ See ZIMRING, *supra* note 55, at 105–06 (quoting analysts including John Dilulio of Princeton University, who coined the term "super-predators," James Fox of Northeastern University, and the Council on Crime in America, all of whom warned of an impending crime wave in the first ten years of the twenty-first century due to population growth of teenagers).

⁵⁹ See SNYDER, *supra* note 48, at 6.

⁶⁰ See Taylor-Thompson, *supra* note 1, at 148–49.

⁶¹ See HUMAN RIGHTS WATCH, *supra* note 5, at 116.

⁶² See Adam Liptak, *No Way Out: The Youngest Lifers Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1.

⁶³ See *id.* The eight states are Alaska, Kansas, Kentucky, Maine, New Mexico, New York, Oregon, and West Virginia. See ALASKA STAT. § 12.55.125 (2004); D.C. CODE § 22-2104 (2001 & Supp. 2006); KAN. STAT. ANN. § 21-4622 (2000 & Supp. 2005); KY. REV. STAT. ANN. § 640.040 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 17A, § 1251 (2005); N.M. STAT. § 31-21-10 (2000); N.Y. PENAL LAW § 10.00 (1998 & Supp. 2004) (defining juvenile offender as fifteen or younger); *id.* § 70.05 (providing for indeterminate sentencing for juveniles who commit felonies including second degree murder); *id.* § 125.27 (removing juveniles from jurisdiction for first degree murder); OR. REV. STAT. § 161.620 (2005); W. VA. CODE § 62-12-13 (2005 & Supp. 2006).

for all offenders, regardless of age.⁶⁴ The other jurisdictions—Kansas, Kentucky, New York, Oregon, and the District of Columbia—prohibit the sentence for juveniles.⁶⁵ In twenty-seven of the forty-two states that permit sentencing of juveniles to life without parole, the sentence is mandatory for anyone, child or adult, found guilty of certain enumerated crimes.⁶⁶

The crimes for which offenders receive sentences of life without parole vary by state.⁶⁷ Children can be sentenced to life without parole for homicide offenses, robbery, aggravated assault, and rape.⁶⁸ In most states, juvenile offenders may receive this sentence for felony murder or aiding and abetting a murder.⁶⁹

Recently, some states have considered or passed changes to their sentencing laws.⁷⁰ In 2004–2005, Colorado and Florida considered, but did not pass, bills that would ban juvenile life without the possibility of parole.⁷¹ Texas did pass a new law in 2005.⁷² Although Texas previously proscribed the sentence of life without parole for all offenders, the state changed its laws effective September 1, 2005 to

⁶⁴ ALASKA STAT. § 12.55.125; ME. REV. STAT. ANN. tit. 17A, § 1251; N.M. STAT. ANN. § 31-21-10; W. VA. CODE § 62-12-13.

⁶⁵ D.C. CODE § 22-2104; KAN. STAT. ANN. § 21-4622; KY. REV. STAT. ANN. § 640.040; N.Y. PENAL LAW § 10.00; *id.* § 70.05; *id.* § 125.27; OR. REV. STAT. § 161.620.

⁶⁶ See HUMAN RIGHTS WATCH, *supra* note 5, at 25 n.44 (listing Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, Washington, and Wisconsin).

⁶⁷ See DEBORAH LABELLE ET AL., AM. CIVIL LIBERTIES UNION OF MICH., SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 3 (2004), <http://www.aclumich.org/pubs/juvenilelifers.pdf>.

⁶⁸ See *id.* Although ninety-three percent of youths are sentenced to life without parole for homicide offenses, the punishment is not reserved only for the most brutal murderers. See HUMAN RIGHTS WATCH, *supra* note 5, at 27. Rather, the Amnesty International self-report study of 172 youth offenders found that twenty-six percent were sentenced to life without parole for felony murder. *Id.* In a survey of 146 juvenile lifers in Michigan, nearly half reported that they were convicted of aiding and abetting or that they did not personally commit the murder. See LABELLE ET AL., *supra* note 67, at 4.

⁶⁹ See LABELLE ET AL., *supra* note 67, at 4; see also, e.g., LA. REV. STAT. ANN. § 14:30.1 (1997 & Supp. 2006); MASS. GEN. LAWS ch. 265, § 1 (2000 & Supp. 2006); MICH. COMP. LAWS § 750.316 (2004).

⁷⁰ See Jim Hughes, *Parole Fight for Juveniles Changes Course*, DENVER POST, Mar. 4, 2005, at B2; Beth Reinhard, *Parole Denied for Kids Who Get Life*, MIAMI HERALD, Apr. 1, 2004, at 1A.

⁷¹ See Hughes, *supra* note 70, at B2; Reinhard, *supra* note 70, at 1A.

⁷² 2005 Tex. Sess. Law Serv. ch. 787 (West).

permit this sentence for all offenders found guilty of a capital felony without regard to age.⁷³

In the forty-two states that permit juvenile life without parole, there is wide variation in the number of offenders serving the sentence.⁷⁴ For instance, three states—New Jersey, Utah, and Vermont—permit the sentence for all offenders, but had no child offenders serving life without parole as of 2005.⁷⁵ In each of several other states, including Florida, Louisiana, Michigan, and Pennsylvania, there are currently more than 300 youths serving life without parole.⁷⁶ In total, there are currently at least 2225 child offenders serving life without parole in the United States.⁷⁷

Criminal justice policy choices influence each state's sentencing rate for life without parole.⁷⁸ The sentencing rates are higher in states that (1) make life without parole mandatory for certain crimes and (2) do not set a minimum age for adult court jurisdiction.⁷⁹ Advocates for children contend that legislators adopting such laws should consider evidence—discussed in Part III of this Note—that demonstrates significant psychological and neurological differences between children and adults.⁸⁰

III. DIFFERENCES BETWEEN CHILDREN AND ADULTS

Scientists have identified psychological and neurological differences between children and adults.⁸¹ These differences undermine the legitimacy of imposing equal measures of retribution on the two groups.⁸² In 2005, the U.S. Supreme Court found these differences

⁷³ *Id.*

⁷⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at 35.

⁷⁵ See N.J. STAT. ANN. § 2C:11-3 (West 2005); UTAH CODE ANN. § 76-3-206 (2000 & Supp. 2005); VT. STAT. ANN. tit. 13, § 2303 (1998 & Supp. 2005); HUMAN RIGHTS WATCH, *supra* note 5, at 35 (presenting a table of total number of youths serving life without parole by state).

⁷⁶ See HUMAN RIGHTS WATCH, *supra* note 5, at 35; LABELLE ET AL., *supra* note 67, at 4.

⁷⁷ See HUMAN RIGHTS WATCH, *supra* note 5, at 1.

⁷⁸ See *id.* at 37.

⁷⁹ See *id.* at 18 (presenting a table of minimum age for adult prosecution by state); *id.* at 35 (presenting a table of total number of youths serving life without parole by state); *id.* at 37 (discussing differences between states with mandatory sentences and those with discretionary sentences).

⁸⁰ See *id.* at 45.

⁸¹ See, e.g., Cauffman & Steinberg, *supra* note 7, at 742–43; Sowell et al., *Mapping Continued*, *supra* note 7, at 8819; Steinberg & Scott, *supra* note 7, at 1013.

⁸² See Steinberg & Scott, *supra* note 7, at 1011 (stating “adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences”). But see Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an*

significant when it held in *Roper v. Simmons* that the juvenile death penalty violates the Eighth Amendment; the Court stated: "These differences render suspect any conclusion that a juvenile falls among the worst offenders."⁸³ The Court noted that almost every state prohibits children younger than eighteen from voting, serving on juries, or marrying without parental consent, in recognition of the immaturity and irresponsibility of juveniles.⁸⁴ American law, acknowledging that children are unable to make rational decisions, adopts a paternalistic approach that finds legal rights of children meaningful only as exercised by adult agents acting with the children's best interests in mind.⁸⁵ The law assumes that children as a class are inherently different from adults.⁸⁶ Scientific research supports this assumption.⁸⁷

The literature on psychological development attributes adolescent immaturity to two types of deficiencies: cognitive and psychosocial.⁸⁸ Cognitive development refers to the way adolescents think and make decisions.⁸⁹ Psychosocial development refers to the values and preferences that inform adolescents' decision making.⁹⁰ Although researchers disagree on the extent to which adolescents and adults differ in cognitive reasoning, studies have identified strong psychosocial differences that may affect determinations of culpability.⁹¹

The psychosocial research shows strong differences between adolescents and adults that implicate assessments of culpability.⁹² Researchers have identified four psychosocial factors that affect the way adolescents make decisions, including whether to commit a crime or

Overhaul, 34 POL'Y REV. 65, 65 (1985) ("These are criminals who happen to be young, not children who happen to commit crimes.").

⁸³ 543 U.S. 551, 570 (2005).

⁸⁴ See *id.* at 569.

⁸⁵ See John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1778-79 (1981).

⁸⁶ See *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.25 (1988).

⁸⁷ See *infra* notes 88-108 and accompanying text.

⁸⁸ See Cauffman & Steinberg, *supra* note 7, at 742-43; Scott & Grisso, *supra* note 35, at 161; Steinberg & Scott, *supra* note 7, at 1011-12.

⁸⁹ See Scott & Grisso, *supra* note 35, at 157.

⁹⁰ See Steinberg & Scott, *supra* note 7, at 1012.

⁹¹ See Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265, 275 (1989). One study found that adolescents are aware of the risks they take and that little growth in logical abilities related to decision making occurs past age sixteen. See Cauffman & Steinberg, *supra* note 7, at 743-44 (stating that research shows few significant differences). In contrast, one study indicated there may be significant differences in the extent to which those logical abilities are employed. See Scott & Grisso, *supra* note 35, at 160.

⁹² See Cauffman & Steinberg, *supra* note 7, at 744.

an antisocial act: peer influence, attitude toward risk, future orientation, and capacity for self-management.⁹³ In one study, adolescents on average scored significantly lower than adults on these factors and displayed less sophistication in decision making.⁹⁴ Although individual levels of these factors are more predictive of antisocial decision making than chronological age alone, researchers found that the period between ages sixteen and nineteen is an important transition point in psychosocial development.⁹⁵

Furthermore, psychosocial research confirms what every parent knows—that adolescents are more vulnerable to peer influence and more likely to take risks than adults.⁹⁶ Adolescents are more focused on short-term consequences and less sensitive to future outcomes, a combination that can lead to risky behavior.⁹⁷ When faced with a stressful situation, adolescents fail to see more than one option due to their lack of experiences and ineffective information-processing abilities.⁹⁸ These attributes lead many adolescents to experiment with criminal conduct.⁹⁹ For most children, antisocial conduct is “adolescence-limited”; in other words, they grow out of it.¹⁰⁰

In addition to psychological research showing differences in the way adolescents think and react, neurological studies reveal physio-

⁹³ See Steinberg & Scott, *supra* note 7, at 1012; see also Cauffman & Steinberg, *supra* note 7, at 745 (identifying three psychosocial factors—responsibility, perspective, and temperance).

⁹⁴ See Cauffman & Steinberg, *supra* note 7, at 756.

⁹⁵ See *id.* at 756–57.

⁹⁶ See Scott & Grisso, *supra* note 35, at 162–63 (noting that adolescents are more likely to commit crimes with peers than are adults, and citing studies showing that adolescents differ from adults in their attitude toward, and perception of, risk); Claudia Wallis, *What Makes Teens Tick*, TIME, May 10, 2004, at 56–58 (noting that hormones released during adolescence attach to receptors in the brain that regulate mood and excitability and thereby create an appetite in adolescents for thrill-seeking and risk-taking behavior).

⁹⁷ See Scott & Grisso, *supra* note 35, at 164 (citing William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, in *ADOLESCENTS IN THE AIDS EPIDEMIC* 17, 25–26 (William Gardner et al. eds., 1990)).

⁹⁸ See Taylor-Thompson, *supra* note 1, at 153–54.

⁹⁹ See Scott & Grisso, *supra* note 35, at 154.

¹⁰⁰ See *id.* at 154–55; Taylor-Thompson, *supra* note 1, at 156. Many children adjudicated delinquent and subsequently rehabilitated go on to lead productive lives rather than continuing a life of crime. See LABELLE ET AL., *supra* note 67, at 23; OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *SECOND CHANCES: GIVING KIDS A CHANCE TO MAKE A BETTER CHOICE* 1–27 (2000), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/181680.pdf> (profiling twelve former delinquents who contributed to society in a positive manner). Only a small portion of offenders will persist in a life of crime. See Scott & Grisso, *supra* note 35, at 154.

logical differences between their brains and the brains of adults.¹⁰¹ Research using magnetic resonance imaging ("MRI") shows that the human brain continues to develop beyond adolescence.¹⁰² The brain grows in volume and becomes more organized into a person's early twenties.¹⁰³ In particular, the frontal lobe undergoes substantial growth during adolescence.¹⁰⁴ It is the area responsible for impulse control, judgment, problem solving, and behavior.¹⁰⁵ Instead of using the frontal lobe to make decisions, adolescents rely more heavily on the amygdala, the emotional center of the brain.¹⁰⁶ As a result, adolescents are more prone to erratic behavior than adults.¹⁰⁷ As the Supreme Court recognized in *Roper*, this evidence of neurological differences between adolescents and adults, combined with the evidence of psychosocial differences, supports a presumption of diminished culpability for adolescent offenders.¹⁰⁸

IV. INTERPRETATION OF THE EIGHTH AMENDMENT

The reduced culpability of juveniles is important when courts determine whether a punishment is appropriate for a juvenile who has been found guilty of a crime.¹⁰⁹ Courts apply the Eighth Amendment to determine whether a punishment is so cruel and unusual that

¹⁰¹ See Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 861 (1999) [hereinafter Sowell et al., *In Vivo*]; Sowell et al., *Mapping Continued*, *supra* note 7, at 8819.

¹⁰² See Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999) (concluding that the volume of brain matter continues to increase and reorganize through age twenty); Sowell et al., *In Vivo*, *supra* note 101, at 861. These studies refute the conclusions of previous generations of psychologists who believed that human brain development finishes before age twelve. See Giedd et al., *supra* note 102, at 861; Sowell et al., *In Vivo*, *supra* note 101, at 861.

¹⁰³ See Mary Beckman, *Neuroscience: Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596, 596 (2004); Giedd et al., *supra* note 102, at 861; Sowell et al., *In Vivo*, *supra* note 101, at 861.

¹⁰⁴ See Sowell et al., *Mapping Continued*, *supra* note 7, at 8821; Wallis, *supra* note 96, at 59–60 (attributing behavioral problems in adolescents to hormonal changes as well as the immaturity of the frontal lobe).

¹⁰⁵ See Wallis, *supra* note 96, at 59–60.

¹⁰⁶ See Beckman, *supra* note 103, at 599; Wallis, *supra* note 96, at 62 (noting that using the amygdala may explain why adolescents have difficulty reading emotional signals).

¹⁰⁷ See Beckman, *supra* note 103, at 599; Wallis, *supra* note 96, at 62.

¹⁰⁸ See 543 U.S. at 570; Steinberg & Scott, *supra* note 7, at 1011. Similarly, the Supreme Court held in *Atkins v. Virginia* in 2002 that differences between mentally retarded and average adults diminish the personal culpability of mentally retarded criminal defendants. 536 U.S. 304, 318 (2002).

¹⁰⁹ See *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

it violates the U.S. Constitution.¹¹⁰ The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹¹¹ It is applicable to the states through the Fourteenth Amendment.¹¹²

A. Proportionality Principle

The Eighth Amendment's guarantee of a right not to be subjected to excessive sanctions flows from the basic principle that a punishment should fit a crime.¹¹³ It reaffirms the government's duty to respect the dignity of all persons, even those convicted of the most heinous crimes.¹¹⁴ The Eighth Amendment prohibits both disproportionate types of punishments and sentences that are disproportionate to the crime committed.¹¹⁵

Although the U.S. Supreme Court's Eighth Amendment decision making is not a model of clarity, there seem to be two tests the Court uses to determine whether a sentence violates the cruel and unusual clause of the Eighth Amendment.¹¹⁶ First, the Court evaluates the sentence on its face by determining whether, when applied to a specific class of offenders, it is so disproportionate according to "evolving standards of decency" that it violates the Constitution and, therefore, the class of offenders deserves a categorical exemption from the punishment.¹¹⁷ Alternatively, the Court applies a gross disproportionality test to determine whether the sentence as applied to the particular offender for the particular offense violates the Constitution.¹¹⁸

Not all members of the Supreme Court agree, however, that the Eighth Amendment provides a proportionality guarantee.¹¹⁹ Rather, Justices Scalia and Thomas have consistently written that the Eighth

¹¹⁰ See U.S. CONST. amend. VIII; *Roper*, 543 U.S. at 560.

¹¹¹ U.S. CONST. amend. VIII.

¹¹² See U.S. CONST. amend. XIV, § 2; *Roper*, 543 U.S. at 560.

¹¹³ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Weems v. United States*, 217 U.S. 349, 367 (1910).

¹¹⁴ *Roper*, 543 U.S. at 560.

¹¹⁵ *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 284 (1983).

¹¹⁶ See *Roper*, 543 U.S. at 561 (applying the "evolving standards" test to find that the juvenile death penalty is unconstitutional on its face); *Harmelin*, 501 U.S. at 1001 (applying the "gross disproportionality" test to find that life without parole as applied to the offender did not violate the Constitution).

¹¹⁷ *Roper*, 543 U.S. at 561.

¹¹⁸ *Harmelin*, 501 U.S. at 1001.

¹¹⁹ See *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring); *Harmelin*, 501 U.S. at 965 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).

Amendment prohibits only those cruel methods of punishment not typically employed in the Anglo-American tradition, to be determined without reference to an individual offense.¹²⁰ In 1991 in *Harmelin v. Michigan*, Justice Scalia, in a Part joined only by Chief Justice Rehnquist, wrote that the lack of a proportionality guarantee is demonstrated by the text of the Eighth Amendment, its history, the framers' intent, the early commentary, the early judicial constructions, and the subjective nature of such analysis.¹²¹ Due to respect for stare decisis, however, Justice Scalia recognized a right to proportionality limited to cases involving the death sentence.¹²² Justice Thomas, however, recognizes no such right.¹²³

B. *Testing a Sentence on Its Face: "Evolving Standards of Decency"*

To determine whether the application of a punishment to a specific class of offenders is so disproportionate as to be cruel and unusual under the Eighth Amendment, the Court refers to "evolving standards of decency that mark the progress of a maturing society."¹²⁴ To determine "evolving standards of decency," the Court reviews objective indicia, including legislative enactments and jury behavior with respect to the mode of punishment, to identify a national consensus against a particular mode of punishment.¹²⁵ The Court also applies its own judgment to determine whether the punishment violates the Eighth Amendment.¹²⁶ In making that judgment, the Court examines the culpability of the specific class of offenders and considers whether the application of the particular punishment to the class of offenders measurably contributes to the social purposes intended by the punishment, taking into consideration the opinions of independent associations and the practices of other countries.¹²⁷

¹²⁰ See *Ewing*, 538 U.S. at 32; *Harmelin*, 501 U.S. at 965.

¹²¹ 501 U.S. at 966-93 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).

¹²² See *id.* at 996 (Scalia, J., plurality opinion).

¹²³ See *Ewing*, 538 U.S. at 32 (Thomas, J., concurring) (stating that "the Eighth Amendment contains no proportionality principle").

¹²⁴ *Roper*, 543 U.S. at 561-62 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹²⁵ See *id.*

¹²⁶ See *id.* at 563; *Atkins*, 536 U.S. at 312.

¹²⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988). In *Ewing v. California*, decided in 2003, the Supreme Court identified four standard justifications that inform a state's sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution. 538 U.S. at 25. Although the Constitution does not mandate adoption of any one penological theory, a legitimate punishment must further at least one of these goals. See *id.*; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

The only punishment for which the Supreme Court has recognized categorical exemptions for certain classes of offenders is the death penalty.¹²⁸ The Court has held that it violates the Constitution on its face to impose the death penalty for the crimes of rape of an adult woman and felony murder based on robbery where the defendant did not kill, attempt to kill, or intend to kill.¹²⁹ The Court also has held that lower courts may not impose the death penalty on juveniles or the mentally retarded for any crime.¹³⁰

The Supreme Court first recognized a categorical exemption from the death penalty in 1988 in *Thompson v. Oklahoma*.¹³¹ There, the plurality set aside the death sentence imposed on a fifteen-year-old offender and determined that the nation's standards of decency did not permit the execution of any offender who was under the age of sixteen at the time of the crime.¹³² It noted that the last execution for a crime committed by an offender under the age of sixteen was carried out in 1948, forty years prior.¹³³

In the 2002 case of *Atkins v. Virginia*, the Supreme Court applied this reasoning to create a categorical exemption from the death penalty for the mentally retarded.¹³⁴ The Court identified a national consensus against the death penalty for the mentally retarded because at least thirty-three states prohibited the punishment and there was a consistent direction of change away from imposing the punishment.¹³⁵ The Court decided that mental retardation diminishes personal culpability such that the death penalty is an excessive sanction for that category of offenders.¹³⁶

The Supreme Court's most recent decision creating a categorical exemption from the death penalty is *Roper v. Simmons*.¹³⁷ On March 1,

¹²⁸ See *Roper*, 543 U.S. at 561.

¹²⁹ See *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding that the death penalty is unconstitutional when imposed on robbery-felony murderers); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is unconstitutional when imposed on rapists of adult women). But see *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that the *Enmund* culpability requirement is satisfied by major participation in a felony combined with reckless indifference to human life).

¹³⁰ See *Roper*, 543 U.S. at 574 (holding that the juvenile death penalty is unconstitutional); *Atkins*, 536 U.S. at 321 (holding that the death penalty is unconstitutional when applied to mentally retarded offenders).

¹³¹ 487 U.S. at 838.

¹³² *Id.* at 822–23.

¹³³ *Id.* at 832.

¹³⁴ 536 U.S. at 321.

¹³⁵ *Id.* at 314–16.

¹³⁶ *Id.* at 321.

¹³⁷ 543 U.S. at 568.

2005, the Court held that execution of individuals who were under eighteen years of age at the time of their crimes is prohibited by the Eighth Amendment.¹³⁸ This decision overruled the 1989 case of *Stanford v. Kentucky*, in which the Court held that the death penalty may be imposed on sixteen- and seventeen-year-olds.¹³⁹ The Court identified a national consensus against the penalty and applied its independent judgment to confirm the consensus.¹⁴⁰

1. *Roper v. Simmons*: National Consensus Against Juvenile Death Penalty

To identify a national consensus against the juvenile death penalty, the Court looked to the rejection of the practice in the majority of states, the infrequency of its use where it remained on the books, and the consistency in the trend toward abolition of the practice.¹⁴¹ The Court noted that, at the time, thirty states proscribed the juvenile death penalty.¹⁴² The Court recognized the infrequency of the practice in the twenty states that did not formally prohibit it.¹⁴³ And in the previous ten years, the Court noted, only three states executed prisoners for crimes committed as juveniles.¹⁴⁴

In addition, the Court examined the rate of abolition of the juvenile death penalty in the states.¹⁴⁵ The Court compared the number of states that allowed the juvenile death penalty at the time it decided *Stanford* to the number of states that allowed the practice at the time it considered *Roper*.¹⁴⁶ The *Roper* Court recognized a significant, consistent direction of change demonstrated by the abandonment of the juvenile death penalty in five states during the fifteen years between *Stanford* and *Roper*.¹⁴⁷ The Court concluded that these objective indicia demonstrated a national consensus against sentencing juveniles to death.¹⁴⁸

¹³⁸ *Id.*

¹³⁹ See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), overruled by *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁴⁰ *Roper*, 543 U.S. at 568–71.

¹⁴¹ *Id.* at 564–65.

¹⁴² *Id.* at 564.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 565.

¹⁴⁵ *Roper*, 543 U.S. at 565–66.

¹⁴⁶ *Id.* at 566; see *Stanford*, 492 U.S. at 380.

¹⁴⁷ *Roper*, 543 U.S. at 565–66.

¹⁴⁸ *Id.* at 567–68.

2. *Roper v. Simmons*: Court's Independent Judgment; Culpability of Offender, Social Purposes of Punishment, Opinions of Independent Associations, and International Standards

The Court in *Roper* also exercised its independent judgment to determine that the death penalty is disproportionate punishment when applied to juveniles.¹⁴⁹ It noted three general differences between juveniles and adults that diminish the culpability of juveniles, citing psychology publications.¹⁵⁰ First, juveniles' lack of maturity and responsibility often preclude them from making rational decisions and cause them to take risks and seek thrills.¹⁵¹ Second, juveniles are more susceptible to negative influences and outside pressures, including peer pressure.¹⁵² Third, the character of juveniles is not as well-formed as that of adults.¹⁵³ Because juveniles are less culpable than adults, the Court concluded that the penological justifications for the death penalty—retribution and deterrence—apply to juveniles with lesser force than adults.¹⁵⁴ The Court concluded that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juveniles.¹⁵⁵ Therefore, the Court applied its independent judgment to confirm a national consensus against the practice.¹⁵⁶

The Court also cited the overwhelming weight of international opinion against the juvenile death penalty.¹⁵⁷ The Court wrote, "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."¹⁵⁸ When the Court decided *Roper*, the United States was the only country in the world that gave official sanction to the juvenile death penalty.¹⁵⁹ The Court noted that the United Kingdom, whose experience bears particular relevance in light of the historic ties between it and the United States, eliminated the practice fifty-six years ago.¹⁶⁰

¹⁴⁹ *Id.* at 568–72.

¹⁵⁰ *Id.* at 569.

¹⁵¹ *Id.* (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

¹⁵² *Roper*, 543 U.S. at 569.

¹⁵³ *Id.* at 570.

¹⁵⁴ *Id.* at 571–72.

¹⁵⁵ *Id.* The Court concluded that retribution fails as a justification because imposing the law's most severe penalty on one whose culpability is diminished is inherently disproportional. *Id.* The Court rejected deterrence as a justification because it is unclear whether the death penalty has a significant deterrent effect on juveniles. *Id.*

¹⁵⁶ *Id.* at 574.

¹⁵⁷ *Roper*, 543 U.S. at 575.

¹⁵⁸ *Id.* at 578.

¹⁵⁹ *Id.* at 575.

¹⁶⁰ *Id.* at 577–78.

The Court also pointed to international resolutions to confirm its holding.¹⁶¹ In particular, the Court mentioned Article 37 of the United Nations Convention on the Rights of the Child (the "CRC"), which proscribes juvenile life without parole.¹⁶² The Court noted that every country in the world ratified this resolution except the United States and Somalia.¹⁶³ The Court cited parallel provisions in other significant international covenants such as the International Covenant on Civil and Political Rights (the "ICCPR"), adopted by the United Nations (the "U.N.") General Assembly in 1966 and signed and ratified by the United States subject to a reservation in 1992.¹⁶⁴ In reservation number two, the United States reserved the right to impose capital punishment on any person other than a pregnant woman, including those persons below eighteen years of age.¹⁶⁵ The *Roper* Court wrote that it does not reflect disloyalty to the U.S. Constitution to acknowledge and consider other nations' recognition of fundamental rights.¹⁶⁶ The Court thereby created a categorical exemption from the death penalty for juveniles.¹⁶⁷

This "evolving standards of decency" test, which examines a certain punishment on its face to exempt a class of offenders, is the first test for violations of the Eighth Amendment.¹⁶⁸ The Supreme Court never has determined whether juveniles as a class are exempt from the punishment of life without the possibility of parole due to their reduced culpability.¹⁶⁹ Even if a class does not qualify for a categorical exemption, however, courts still must examine the sentence as applied to a particular offender to determine if it violates the Constitution.¹⁷⁰

C. *Testing a Non-Capital Sentence as Applied*

The Supreme Court has stated that the Eighth Amendment's proportionality principle applies to non-capital sentences such that those

¹⁶¹ *Id.* at 576.

¹⁶² *Roper*, 543 U.S. at 576 (citing CRC, *supra* note 14, at art. 37).

¹⁶³ *Id.*

¹⁶⁴ *Id.* (citing ICCPR, *supra* note 14, at art. 6(5)).

¹⁶⁵ SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1992), reprinted in 31 I.L.M. 645, 651 (1992) [hereinafter RIGHTS REPORT].

¹⁶⁶ 543 U.S. at 578.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 561.

¹⁶⁹ *See id.* at 568.

¹⁷⁰ *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

sentences may be tested as applied.¹⁷¹ The Court also has stated, however, that successful challenges are rare outside of the capital punishment context because the Eighth Amendment prohibits only grossly disproportionate sentences.¹⁷² Strict proportionality between crime and sentence is not required.¹⁷³

In 1983 in *Solem v. Helm*, the Supreme Court held that a sentence of life without the possibility of parole violates the Eighth Amendment as applied when imposed for a seventh nonviolent felony.¹⁷⁴ In *Solem*, the defendant was sentenced to life in prison without the possibility of parole for writing a "no account" check for \$100.¹⁷⁵ The Court identified three factors relevant to disproportionality: (1) the gravity of the offense and the harshness of the penalty, (2) the sentences that could be imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions.¹⁷⁶ *Solem* was the first, and remains the only, case in which the Supreme Court invalidated a prison sentence due to its length.¹⁷⁷

1. Creation of the Gross Disproportionality Test: *Harmelin v. Michigan*

Eight years after *Solem* in 1991, the Supreme Court again addressed proportionality for a non-capital offense in *Harmelin v. Michigan*.¹⁷⁸ There, a majority of the Court concluded that life without the possibility of parole for a first-time offender convicted of possession of 672 grams of cocaine did not violate the Eighth Amendment.¹⁷⁹ Members of the Court disagreed, however, on the proportionality standard for non-capital offenses.¹⁸⁰ Justice Scalia wrote that the individualized proportionality principle applies only to death penalty jurisprudence.¹⁸¹ He stated that the Court's decision in *Solem* was wrong because the Eighth Amendment contains no proportionality guarantee.¹⁸²

¹⁷¹ See *id.* at 997.

¹⁷² See *id.* at 1001; *Solem*, 463 U.S. at 288.

¹⁷³ *Harmelin*, 501 U.S. at 1001; *Solem*, 463 U.S. at 288.

¹⁷⁴ 463 U.S. at 303.

¹⁷⁵ *Id.* at 281.

¹⁷⁶ *Id.* at 292. The gravity of the offense is determined in light of the harm inflicted by the offender on the victim and society, as well as the culpability of the offender. See *id.*

¹⁷⁷ See *id.* at 303.

¹⁷⁸ See *Harmelin*, 501 U.S. at 961-62 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).

¹⁷⁹ *Id.* at 1009 (Kennedy, J., concurring).

¹⁸⁰ See *id.* at 996-97.

¹⁸¹ *Id.* at 996. (Scalia, J., plurality opinion).

¹⁸² *Id.* at 965 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist).

In contrast, Justice Kennedy, joined by Justices O'Connor and Souter, concurring in part and in the judgment, recognized that a non-capital sentence could violate the Eighth Amendment as applied if it was grossly disproportionate to the crime, but maintained that the facts of *Harmelin* did not meet this standard.¹⁸³ At least three circuit courts regard Justice Kennedy's test as the rule of *Harmelin* because it is the position taken by those members who concurred in the judgment on the narrowest grounds.¹⁸⁴ The other members of the *Harmelin* Court agreed with Justice Kennedy that the Eighth Amendment includes a proportionality guarantee for non-capital offenses, but they dissented from the judgment because they found the sentence grossly disproportionate to the crime and therefore unconstitutional.¹⁸⁵

In the test for gross disproportionality established by Kennedy, the reviewing court first determines whether a threshold comparison of the crime and the sentence leads to an inference of gross disproportionality.¹⁸⁶ If so, the court undertakes the intrajurisdictional and interjurisdictional analyses set forth in *Solem*—by comparing the sentences imposed on other criminals in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions—to validate the court's initial inference that a sentence is grossly disproportional to a crime.¹⁸⁷ Justice Kennedy rejected the idea that *Solem* announced a rigid three-part test, and instead concluded that consideration of the second and third *Solem* factors is appropriate only when the threshold comparison leads to an inference of gross disproportionality.¹⁸⁸

To conduct the threshold comparison, a court considers the gravity of the offense and the harshness of the penalty.¹⁸⁹ When determining the gravity of the offense, the court considers the culpability of the offender, the harm inflicted on society by the offender, and the criminal record of the offender.¹⁹⁰ In *Harmelin*, Justice Kennedy maintained that a sentence of life without the possibility of parole did not raise an inference of gross disproportionality because the offense—

¹⁸³ 501 U.S. at 997 (Kennedy, J., concurring).

¹⁸⁴ See *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 754 (9th Cir. 2001); *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); *United States v. Bland*, 961 F.2d 123, 128–29 (9th Cir. 1992).

¹⁸⁵ *Harmelin*, 501 U.S. at 1027 (White, J., dissenting).

¹⁸⁶ *Id.* at 1005 (Kennedy, J., concurring).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1004.

¹⁹⁰ *Solem*, 463 U.S. at 292.

possession of more than 650 grams of cocaine—threatened to cause “grave harm” to society.¹⁹¹ Due to the seriousness of the offense, and because the offender’s culpability was not reduced, the Court upheld the sentence.¹⁹²

2. Recent Applications of the Gross Disproportionality Test

The Supreme Court decided two cases regarding the proportionality principle for non-capital punishment on March 5, 2003.¹⁹³ In *Lockyer v. Andrade*, Justice O’Connor, writing for a majority of the Court, admitted that the Court’s precedents in this area have not established “a clear or consistent path for courts to follow.”¹⁹⁴ The Court held that a decision by the California Court of Appeal to affirm the petitioner’s two consecutive terms of twenty-five years to life in prison for a “third strike” conviction was not contrary to, and did not involve an unreasonable application of, any clearly established gross disproportionality principle and thus did not warrant habeas relief.¹⁹⁵

In *Ewing v. California*, also decided on March 5, 2003, the plurality held that a prison term of twenty-five years to life does not violate the Eighth Amendment when imposed for felony grand theft on a repeat felon under California’s three strikes law.¹⁹⁶ Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, held that the sentence was not grossly disproportionate.¹⁹⁷ The plurality applied the test from Justice Kennedy’s concurrence in *Harmelin* and held that the threshold comparison of the crime and sentence does not lead to an inference of gross disproportionality.¹⁹⁸ The plurality concluded that the sentence of twenty-five years to life was justified by the state’s public safety interest in incapacitating and deterring recidivist felons and by the offender’s long and serious criminal record.¹⁹⁹

¹⁹¹ 501 U.S. at 1002 (Kennedy, J., concurring). In *Harmelin*, the Court also held that mandatory sentences are not unconstitutional because the Constitution does not mandate any particular penological theory and because the Court is deferential to legislative policy. *Id.* at 995 (Scalia, J., plurality opinion). For another opinion upholding mandatory sentences, see *Chapman v. United States*, 500 U.S. 453, 467 (1991) (holding that a mandatory sentencing scheme for drug distribution offenses does not violate the Eighth Amendment).

¹⁹² See *Harmelin*, 501 U.S. at 1002–04 (Kennedy, J., concurring).

¹⁹³ See generally *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing*, 538 U.S. 11.

¹⁹⁴ 538 U.S. at 72.

¹⁹⁵ *Id.* at 77.

¹⁹⁶ 538 U.S. at 30–31 (plurality opinion).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 30.

¹⁹⁹ *Id.* at 29–30.

3. Juvenile Life Without Parole Under the Gross Disproportionality Test Prior to *Roper*

The Supreme Court never has considered the effect of juvenile status on proportionality within the context of non-capital sentencing, such as on life without parole.²⁰⁰ Given the recent confirmations of Chief Justice Roberts and Justice Alito, it is unclear whether the Court will continue to apply the gross disproportionality test articulated in *Harmelin*.²⁰¹ Although a few federal courts of appeals and state courts considered sentences of juvenile life without parole prior to *Roper*, none of these courts has considered the constitutionality of the sentence since *Roper*.²⁰²

a. *Holdings of the Federal Courts of Appeals*

Prior to *Roper*, two circuit courts held that juvenile life without parole does not violate the Eighth Amendment.²⁰³ In 1998 in *Rice v. Cooper*, the U.S. Court of Appeals for the Seventh Circuit held that a sentence of life without the possibility of parole imposed on a sixteen-year-old for the first degree murder of four people did not lead to an inference of gross disproportionality, even though the court recognized that the sentence is exceptionally severe for a minor.²⁰⁴

In 1996, the Ninth Circuit held in *Harris v. Wright* that it was not cruel and unusual within the meaning of the Eighth Amendment to sentence a fifteen-year-old first-time offender convicted of felony murder to life without the possibility of parole, even though his co-defendant fired the gun.²⁰⁵ The Ninth Circuit held that the juvenile failed to show that evolving standards of decency reject the sentence of life without the possibility of parole on its face, or that the sentence

²⁰⁰ See HUMAN RIGHTS WATCH, *supra* note 5, at 86.

²⁰¹ See 501 U.S. at 1005 (Kennedy, J., concurring). In *Harmelin*, Chief Justice Rehnquist joined Justice Scalia in an opinion refusing to extend the proportionality principle to non-capital sentences. See *id.* at 994 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist). Justice O'Connor, on the other hand, joined the Justice Kennedy concurrence that established the gross disproportionality test. See *id.* at 996-97 (Kennedy, J., concurring). Therefore, the loss of these two Justices results in one fewer vote in favor and one fewer vote against a proportionality principle for non-capital cases. See *id.* at 994 (Scalia, J., writing in a Part joined only by Chief Justice Rehnquist); *id.* at 996-97 (Kennedy, J., concurring).

²⁰² See *Roper*, 543 U.S. at 551.

²⁰³ See *Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998); *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996).

²⁰⁴ 148 F.3d at 752.

²⁰⁵ 93 F.3d at 585.

was grossly disproportionate as applied to the crime.²⁰⁶ The court stated that age has no obvious bearing on a proportionality analysis in a non-capital case.²⁰⁷ The court also wrote that the sentence of life without the possibility of parole raises no inference of disproportionality when imposed on a murderer, regardless of age.²⁰⁸

b. State Court Holdings

Some state courts have held that juvenile life without the possibility of parole violates the federal and/or state constitutions.²⁰⁹ In *Naovarath v. State* in 1989, the Nevada Supreme Court held that life without the possibility of parole was cruel and unusual punishment under the state and federal constitutions for a thirteen-year-old convicted of murdering a man who molested him.²¹⁰ The judge stated, "To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder."²¹¹ The judge questioned whether sentencing children to life imprisonment without parole measurably contributes to the intended objectives of retribution, deterrence, and segregation from society.²¹² As to retribution, the judge found that children do not deserve the degree of retribution represented by life without the possibility of parole given their lesser culpability and greater capacity for growth, and given society's special obligation to children.²¹³ The judge also concluded that the objective of deterrence fails given the inability of children to consider ramifications for their actions, and that segregation is not justified.²¹⁴

Other state supreme courts have overturned life without parole punishments or excessively long prison sentences under their state constitutions.²¹⁵ In 1968, the Supreme Court of Kentucky held in *Workman v. Kentucky* that a sentence of life without the possibility of parole im-

²⁰⁶ *Id.* at 584–85.

²⁰⁷ *Id.* at 585.

²⁰⁸ *Id.*

²⁰⁹ See *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968); *Naovarath v. State*, 779 P.2d 944, 948–49 (Nev. 1989).

²¹⁰ 779 P.2d at 948–49, 949 n.6.

²¹¹ *Id.* at 947.

²¹² *Id.*

²¹³ *Id.* at 948.

²¹⁴ *Id.*

²¹⁵ See *People v. Miller*, 781 N.E.2d 300, 310 (Ill. 2002); *Trowbridge v. State*, 717 N.E.2d 138, 150 (Ind. 1999); *Workman*, 429 S.W.2d at 378.

posed on a fourteen-year-old convicted of rape violates the Kentucky Constitution.²¹⁶ In 1999, in *Trowbridge v. State*, the Indiana Supreme Court reduced a sentence imposed on a fifteen-year-old convicted of murder, rape, robbery, and auto theft, among other crimes, from 199 years to ninety-seven years.²¹⁷ It held that age is an element to consider in constitutional proportionality analysis.²¹⁸ The Supreme Court of Illinois reduced a mandatory sentence of life without parole imposed on a child offender.²¹⁹ In 2002, in *People v. Miller*, the court affirmed a decision to reduce a mandatory sentence of life without the possibility of parole imposed on a fifteen-year-old who acted as a lookout in the murder of two rival gang members.²²⁰ The court held that imposing life without the possibility of parole on a child who had one minute to contemplate his involvement violates the state constitution.²²¹

V. JUVENILE LIFE WITHOUT PAROLE AS A FACIAL CONSTITUTIONAL VIOLATION

If the U.S. Supreme Court hears a case in which a juvenile sentenced to life without parole claims a violation of the Eighth Amendment, there are two ways the Court could overturn the sentence.²²² It could decide that the sentence is so disproportionate on its face that it always violates the Constitution, or the Court could conclude that the sentence is grossly disproportionate as applied to the particular juvenile for the particular offense.²²³ This Part applies the first test to the sentence of life without parole and concludes that the Court should create a categorical exemption for juveniles, even though there may not be a strong national consensus against the practice.²²⁴ Although the Court has recognized categorical exemptions only for the death penalty, the same reasoning it used there should apply to other sentences, such as life without the possibility of parole.²²⁵

²¹⁶ 429 S.W.2d at 378.

²¹⁷ 717 N.E.2d at 150–51.

²¹⁸ *Id.*

²¹⁹ *Miller*, 781 N.E.2d at 310.

²²⁰ *Id.*

²²¹ *Id.* at 308–10 (citing ILL. CONST. art. I, § 11).

²²² See *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

²²³ See *Roper*, 543 U.S. at 561; *Harmelin*, 501 U.S. at 1001.

²²⁴ See *infra* notes 226–255 and accompanying text.

²²⁵ See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1168 (2004) (applying the “evolving standards” test to argue that felon disenfranchisement violates the Eighth Amendment).

A. National Consensus

The Supreme Court is unlikely to recognize a strong national consensus against juvenile life without parole.²²⁶ Unlike the arguable consensus in *Roper v. Simmons*, where thirty states prohibited the juvenile death penalty and the twenty others rarely imposed it, many states continue to sentence juveniles to life without parole.²²⁷ The sentence is permitted in forty-two states and required for certain crimes in twenty-seven states.²²⁸

It is possible, however, for the Court to recognize a national consensus if it emphasizes the direction of change in sentencing rates in the past decade.²²⁹ Although there is no strong trend toward state statutory abolition of the sentence, there is a trend toward reduced imposition of the sentence: the total number of youths sentenced to life without parole per year decreased from 152 in 1996 to fifty-four in 2004.²³⁰ If the Supreme Court hears a juvenile life without parole case in the next few years, however, before there is time for many states to change their laws, it likely will not find a strong national consensus against the practice.²³¹

B. Independent Judgment of the Court

Although the Court is not likely to find a strong national consensus against juvenile life without parole, it still must apply its own judgment to determine whether the sentence is unconstitutional on its face.²³² In the past, the Court has not employed this step of the analysis to find unconstitutional a punishment that is still embraced by the states, but there is no precedent precluding it from doing so.²³³ In making its independent judgment, the Court considers the culpability of the class of offenders, the social purposes intended by the punishment, the opinions of independent associations, and the practices of other countries.²³⁴

²²⁶ See *Roper*, 543 U.S. at 564.

²²⁷ See HUMAN RIGHTS WATCH, *supra* note 5, at 36.

²²⁸ See *id.* at 25.

²²⁹ See *Roper*, 543 U.S. at 565–66.

²³⁰ See HUMAN RIGHTS WATCH, *supra* note 5, at 31. This decrease in rate of sentencing might be explained partly, however, by the decrease in juvenile arrests since the 1990s. See SNYDER, *supra* note 48, at 6.

²³¹ See *Roper*, 543 U.S. at 564–67.

²³² See *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

²³³ See *id.*

²³⁴ See *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988).

The Court already has decided that the psychosocial and neurological differences between adolescents and adults support a presumption of diminished culpability for adolescent offenders.²³⁵ This presumption should influence the Court's independent judgment against the punishment of juvenile life without parole because it undermines the legitimacy of imposing equal measures on adults and children.²³⁶

The presumption of reduced culpability also affects the Court's analysis of the social purposes of the punishment.²³⁷ In *Ewing v. California* in 2003, the Supreme Court identified four standard justifications that inform a state's sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution.²³⁸ Although the Constitution does not mandate adoption of any one penological theory, a legitimate punishment must further at least one of these goals.²³⁹ In *Roper*, the Court held that the juvenile death penalty is unconstitutional because neither retribution nor deterrence—the two purposes served by the death penalty—provide adequate justification for the punishment.²⁴⁰ Regarding the sentence of juvenile life without parole, the Court should find that each of these justifications also fails due to the unique nature of adolescence.²⁴¹

The justifications for sentencing a juvenile to life without parole fail due to the differences between adolescents and adults.²⁴² First, rehabilitation by definition is not an intended purpose of life without parole.²⁴³ Second, deterrence fails as a justification given the inability of children to consider ramifications for their actions.²⁴⁴ Third, incapacitation by definition obtains its goal, but the decreased culpability of juveniles does not justify life in prison.²⁴⁵ Fourth, retribution fails as

²³⁵ See *Roper*, 543 U.S. at 570; Steinberg & Scott, *supra* note 7, at 1011; *supra* notes 81–108 and accompanying text.

²³⁶ See *Roper*, 543 U.S. at 570.

²³⁷ See *id.* at 571–72.

²³⁸ 538 U.S. 11, 25 (2003).

²³⁹ *Id.*; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

²⁴⁰ 543 U.S. at 571.

²⁴¹ See *id.*; *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989).

²⁴² See *Roper*, 543 U.S. at 571; *Naovarath*, 779 P.2d at 948.

²⁴³ See *Ewing*, 538 U.S. at 25–27 (noting that life sentences further the goals of retribution, deterrence, and incapacitation).

²⁴⁴ See *Naovarath*, 779 P.2d at 948; Scott & Grisso, *supra* note 35, at 164 (noting that adolescents place more value on short-term consequences and are less sensitive to future outcomes). Similarly, the *Roper* Court noted the absence of evidence that the death penalty has a deterrent effect on juveniles. 543 U.S. at 571.

²⁴⁵ See *Naovarath*, 779 P.2d at 948.

a justification because children do not deserve the degree of retribution represented by life without the possibility of parole given their lesser culpability, their capacity for growth, and society's special obligation to children.²⁴⁶ Therefore, sentencing juveniles to life without parole does not measurably contribute to the social purposes intended by the punishment.²⁴⁷

The Court also should consider international standards to confirm its judgment that juvenile life without parole is disproportionate punishment on its face.²⁴⁸ In *Roper*, the Court confirmed its determination that the death penalty is always disproportionate punishment for juveniles by citing the overwhelming weight of international opinion against the practice.²⁴⁹ The international community also has rejected juvenile life without parole.²⁵⁰ Only fourteen countries besides the United States permit juvenile life without parole sentences and in many countries they are rarely, if ever, imposed.²⁵¹ Out of 145 countries examined by Human Rights Watch for its 2005 report, only four countries currently have child offenders serving life sentences—Israel, South Africa, Tanzania, and the United States.²⁵² The United Kingdom, with whom the United States shares historic ties, abolished juvenile life without parole in 1996.²⁵³ The numbers speak for themselves: there are currently at least 2225 child offenders serving life without parole in the United States, but in the rest of the world there are only about twelve.²⁵⁴ In light of this support, the Court should find that juvenile life without parole violates the Constitution on its face.²⁵⁵

VI. JUVENILE LIFE WITHOUT PAROLE AS A CONSTITUTIONAL VIOLATION IN CERTAIN CASES

Even if the U.S. Supreme Court does not create a categorical exemption for juveniles from life without parole, it should hold that the punishment violates the Eighth Amendment as applied in certain

²⁴⁶ See *id.*

²⁴⁷ See *Thompson*, 487 U.S. at 833.

²⁴⁸ See *Roper*, 543 U.S. at 578.

²⁴⁹ *Id.* at 575.

²⁵⁰ HUMAN RIGHTS WATCH, *supra* note 5, at 106.

²⁵¹ *Id.*

²⁵² *Id.* at 105–06.

²⁵³ See *Roper*, 543 U.S. at 577 (noting the particular relevance of the United Kingdom to the United States); *Hussain v. United Kingdom*, 22 Eur. Ct. H.R. 1, 27 (1996) (abolishing life without parole for juveniles in the United Kingdom).

²⁵⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at 1, 106.

²⁵⁵ See *Roper*, 543 U.S. at 561; *Thompson*, 487 U.S. at 833.

cases under the *Harmelin v. Michigan* gross disproportionality test.²⁵⁶ Although the Supreme Court's "precedents in this area have not been a model of clarity,"²⁵⁷ it seems as though the Court first determines whether a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."²⁵⁸ The Court makes the threshold comparison by considering the gravity of the offense and the harshness of the penalty.²⁵⁹ If the comparison creates an inference of gross disproportionality, the Court undertakes the jurisdictional analyses set forth in *Solem v. Helm* to validate its initial judgment that a sentence is grossly disproportionate to a crime.²⁶⁰ Although successful challenges under this test are exceedingly rare, the Court should find an inference of disproportionality in certain cases.²⁶¹

A. Gravity of the Offense

The first factor in the threshold comparison is the gravity of the offense.²⁶² The Supreme Court held in *Solem* in 1983 that courts must weigh the gravity of an offense in light of the culpability of the offender and the harm caused to the victim or society.²⁶³ In *Roper v. Simmons*, the Supreme Court decided that juveniles are less culpable than adults.²⁶⁴ Therefore, when reviewing a sentence, the Court should assign less weight to crimes committed by juveniles.²⁶⁵

Before *Roper*, the Ninth Circuit reached a different conclusion in *Harris v. Wright* in 1996.²⁶⁶ There, the court held that it does not violate the Eighth Amendment to sentence a fifteen-year-old first-time offender convicted of felony murder to life without the possibility of parole, even though his co-defendant fired the gun.²⁶⁷ The Ninth Circuit held that age has no obvious bearing on the proportionality analysis in non-capital cases.²⁶⁸ Given the strong evidence of psychosocial and neurological differences between adolescents and adults

²⁵⁶ See 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

²⁵⁷ See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

²⁵⁸ *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

²⁵⁹ *Id.* at 1004.

²⁶⁰ *Id.* at 1005; *Solem v. Helm*, 463 U.S. 277, 292 (1983).

²⁶¹ See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

²⁶² See *id.* at 1004.

²⁶³ 463 U.S. at 292, 296-97.

²⁶⁴ 543 U.S. 551, 570 (2005).

²⁶⁵ See *id.*

²⁶⁶ *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996).

²⁶⁷ See *id.*

²⁶⁸ See *id.*

published since the Ninth Circuit decided *Harris* in 1996, and given the holding in *Roper*, however, the Supreme Court should find that age does have a bearing on proportionality analysis in non-capital cases.²⁶⁹ Therefore, the Court should consider the age of the offender in its threshold comparison when it weighs the gravity of the offense.²⁷⁰

The Court should be particularly influenced by this reduced gravity when it considers sentences imposed on juveniles for felony murder.²⁷¹ The precise definition of felony murder varies from state to state, but generally all persons engaged in a felony are liable for murder if one of them kills a person during the felony, even if the others did not participate in the murder or intend for the murder to occur.²⁷² Given the reduced culpability of juveniles in general and the lack of intent or participation on the part of felony-murderers, the Court should find that these crimes are less grave when committed by juveniles.²⁷³ Certainly, offenses less serious than felony murder are also reduced in gravity when committed by juveniles.²⁷⁴

B. Harshness of the Penalty

When the Court evaluates the second factor, the harshness of the penalty, it should recognize that a sentence of life without parole has particularly severe consequences for juveniles.²⁷⁵ Life sentences imposed on juveniles necessarily are longer than life sentences for adults.²⁷⁶ The years child offenders spend in prison are the most formative ones, in which typical adolescents finish their education, form relationships, start families, and gain employment.²⁷⁷

In addition, research shows that juveniles in adult facilities are

²⁶⁹ See *Roper*, 543 U.S. at 569–70; Steinberg & Scott, *supra* note 7, at 1014; *supra* notes 81–108 and accompanying text.

²⁷⁰ See *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring).

²⁷¹ See HUMAN RIGHTS WATCH, *supra* note 5, at 27–28.

²⁷² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06 (3d ed. 2001).

²⁷³ See HUMAN RIGHTS WATCH, *supra* note 5, at 27–28; LABELLE ET AL., *supra* note 67, at 4.

²⁷⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at 27–28; LABELLE ET AL., *supra* note 67, at 4.

²⁷⁵ See BUREAU OF JUVENILE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 7 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>; LABELLE ET AL., *supra* note 67, at 18.

²⁷⁶ See LABELLE ET AL., *supra* note 67, at 18.

²⁷⁷ See *id.* (quoting one child offender serving life without parole who said, "I don't even know what I'm missing, only that I'm missing everything . . . I recognize that I'm not mentally capable to endure this for another 50+ years").

more likely to be victimized than those in juvenile facilities.²⁷⁸ One study found they are five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than are children in juvenile facilities.²⁷⁹ The fact that brains of juveniles are still developing suggests a lack of coping mechanisms necessary to deal with these types of problems.²⁸⁰

In addition to physical abuse, juvenile offenders suffer from lack of intellectual development due to sparse educational opportunities in prison.²⁸¹ Prisons are not required to provide educational programming for inmates older than eighteen, and federal funding for post-secondary education is available only for incarcerated youths under the age of twenty-five and within five years of release.²⁸² Juveniles serving life without parole are disqualified because they are never within five years of release.²⁸³ Therefore, post-secondary education is available for youth offenders serving life without parole only if they or their families can afford to pay for it.²⁸⁴ Although many prisons offer educational and vocational programs, they often determine eligibility by weighing a number of factors including length of time remaining on an inmate's sentence.²⁸⁵ Because offenders sentenced to life without parole have the greatest amount of time remaining on their sentences, prisons often exclude them from programs to reserve resources for inmates returning to society.²⁸⁶

As stated by the Supreme Court of Nevada in *Naovarath v. State*, "Denial of [opportunity for parole] means denial of hope; it means that good behavior and character improvement are immaterial."²⁸⁷ To adjudicate a child as forever irredeemable is to impose a hopelessness that is particularly severe for a juvenile.²⁸⁸ When the Court weighs the harshness of the penalty as part of the threshold comparison, it should consider the special status of juveniles and find that the harshness factor weighs in favor of disproportionality.²⁸⁹

²⁷⁸ See *id.*; see also Martin Forst et al., *Youth in Prisons and State Training Schools*, 40 JUV. & FAM. CT. J. 1, 9 (1989).

²⁷⁹ See Forst, *supra* note 278, at 9.

²⁸⁰ See *Roper*, 543 U.S. at 569-70.

²⁸¹ See HUMAN RIGHTS WATCH, *supra* note 5, at 67-72.

²⁸² See 20 U.S.C. § 1151 (2000).

²⁸³ See *id.*

²⁸⁴ See HUMAN RIGHTS WATCH, *supra* note 5, at 69.

²⁸⁵ See *id.* at 70-71.

²⁸⁶ See *id.*

²⁸⁷ 779 P.2d 944, 944 (Nev. 1989).

²⁸⁸ See *id.* at 947.

²⁸⁹ See *Roper*, 543 U.S. at 570.

Another factor in the analysis of harshness of the penalty is the criminal record of the offender.²⁹⁰ For a first-time offender, this factor always weighs in favor of disproportionality.²⁹¹ Even for a juvenile with a prior record of juvenile adjudications, the Court should give less weight to these adjudications than it would assign to an adult with a prior criminal record.²⁹² Ultimately, the Court should find that the threshold comparison of the offense and the punishment of life without parole creates an inference of gross disproportionality when the offender is a juvenile and a first-time offender, especially when the juvenile did not participate in a murder or intend for a murder to occur.²⁹³

C. Jurisdictional Analyses

When a Court finds an inference of gross disproportionality, it conducts the jurisdictional analyses described in *Solem* to validate its initial judgment that a sentence is grossly disproportionate to a crime.²⁹⁴ Specifically, the Court compares the challenged sentence to those imposed on other criminals in the same jurisdiction and those imposed for commission of the same crime in other jurisdictions.²⁹⁵ The Court has not conducted these analyses since *Solem* in 1983 because the Court has not found any inferences of disproportionality.²⁹⁶ The outcome of these analyses largely will depend on the current rate of sentencing in the state where the juvenile is convicted.²⁹⁷

In certain cases, the Court should identify an inference of disproportionality and should confirm that inference through inter-jurisdictional and intrajurisdictional comparisons to find that juvenile life without parole fails the gross disproportionality test and violates the Constitution as applied to the specific offender.²⁹⁸ The Court should do so when it reviews a sentence of life without parole imposed on a first-time juvenile offender who did not participate in a

²⁹⁰ See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

²⁹¹ See *id.* The Amnesty International report surveyed 281 youth offenders and found that fifty-nine percent received a life without parole sentence for their first offense. See HUMAN RIGHTS WATCH, *supra* note 5, at 28.

²⁹² See *Roper*, 543 U.S. at 570.

²⁹³ See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

²⁹⁴ See *id.*

²⁹⁵ *Solem*, 463 U.S. at 292.

²⁹⁶ See *Ewing v. California*, 538 U.S. 11, 25–27 (2003).

²⁹⁷ See *Solem*, 463 U.S. at 292.

²⁹⁸ See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

murder or intend for a murder to occur in a jurisdiction that does not frequently impose the penalty.²⁹⁹

VII. POLICY ARGUMENTS FOR ABOLITION OF JUVENILE LIFE WITHOUT PAROLE BY CONGRESS AND STATE LEGISLATURES

Even if the U.S. Supreme Court does not find juvenile life without parole to violate the Eighth Amendment, the U.S. Congress and state legislatures should pass laws to proscribe this punishment for federal and state crimes and to allow current child offenders serving this sentence to obtain review by courts for re-sentencing to include the possibility of parole.³⁰⁰ Both Congress and state legislatures should abolish this sentence due to the psychological research demonstrating the reduced culpability of juveniles, the absence of a deterrent effect, and the increased harshness of the penalty.³⁰¹ Congress should abolish juvenile life without parole for federal crimes also to improve the standing of the United States in the international human rights community.³⁰² State legislatures should proscribe the punishment also due to the high costs of aging prison populations.³⁰³ Additionally, both Congress and state legislatures should abolish the sentence due to the racial disparities in sentencing of juvenile life without parole.³⁰⁴

A. *International Law*

The interpretive use of international law promotes a broad range of normative values, including enhancing the international stature of the United States, promoting its ability to influence the development of these norms, enhancing its ability to protect its interests abroad, and advancing the development of a well-functioning international judicial system.³⁰⁵ International human rights law explicitly prohibits sentences of life without parole for those who commit their crimes before the

²⁹⁹ See *id.*

³⁰⁰ See *infra* notes 301-335 and accompanying text.

³⁰¹ See *supra* notes 81-108, 244, 275-293 and accompanying text.

³⁰² See *infra* notes 308-319 and accompanying text.

³⁰³ See Deborah Wilson & Gennaro Vito, *Long-Term Inmates: Special Needs and Management Considerations*, 52 FED. PROBATION 21, 25 (1988).

³⁰⁴ See *infra* notes 326-335 and accompanying text.

³⁰⁵ Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 303 (2005). Critics of the use of international law argue that it is counter-majoritarian and antidemocratic. *Id.* at 304.

age of eighteen.³⁰⁶ Almost every country besides the United States adheres to this prohibition.³⁰⁷

In 1959, the U.N. General Assembly adopted the Declaration of the Rights of the Child, which recognized that children need special legal protections due to their immaturity.³⁰⁸ Seventy-eight members of the U.N. General Assembly, including the United States, voted to adopt the Declaration.³⁰⁹ Since then, the international community has protected further the rights of children and the United States has been left behind.³¹⁰

For example, the United States has failed to ratify the United Nations Convention on the Rights of the Child (the "CRC"), which went into force in 1990 and explicitly proscribes sentencing juveniles to life without parole.³¹¹ Every country in the world ratified this resolution except the United States and Somalia.³¹² If Congress expects and intends the United States to be a world leader on the issue of human rights, the Senate should consent to ratification of the CRC without reservation.³¹³

In 1992, the United States became a party to the International Covenant on Civil and Political Rights (the "ICCPR"), which was adopted by the U.N. General Assembly in 1966.³¹⁴ The ICCPR acknowledges the special needs of children in the criminal justice system by requiring the separation of child offenders from adults and the provision of treatment appropriate to the child's age.³¹⁵ It also emphasizes the importance of rehabilitation by requiring parties to focus on education rather than punishment when sentencing children for offenses.³¹⁶ When the United States ratified the ICCPR, however, it attached this limiting reservation:

That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provi-

³⁰⁶ HUMAN RIGHTS WATCH, *supra* note 5, at 94.

³⁰⁷ *Id.*

³⁰⁸ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. Doc. A/4354 (Nov. 20, 1959), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0142/09/IMG/NR014209.pdf?OpenElement>.

³⁰⁹ See HUMAN RIGHTS WATCH, *supra* note 5, at 94.

³¹⁰ *Id.*

³¹¹ CRC, *supra* note 14, at art. 37; see *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

³¹² *Roper*, 543 U.S. at 576; LABELLE ET AL., *supra* note 67, at 21.

³¹³ See CRC, *supra* note 14, at art. 37(a); HUMAN RIGHTS WATCH, *supra* note 5, at 7.

³¹⁴ See generally ICCPR, *supra* note 14; RIGHTS REPORT, *supra* note 165.

³¹⁵ ICCPR, *supra* note 14, at art. 10(3).

³¹⁶ ICCPR, *supra* note 14, at art. 14(4).

sions regarding treatment of juveniles in the criminal justice system. Nevertheless, 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 14.³¹⁷

Given the frequency with which the United States prosecutes juveniles as adults and incarcerates them in adult prisons, it is failing to adhere to the terms of its reservation.³¹⁸ If the United States wants to continue to influence the development of international human rights norms, it should remove its reservation to the ICCPR and proscribe the sentence of juvenile life without parole for federal crimes.³¹⁹

B. *Costs of Lifetime Imprisonment*

Even if juvenile life without parole is not found to violate the Eighth Amendment, state legislatures should proscribe the punishment for one practical reason—it is expensive.³²⁰ Because offenders serving life without parole necessarily age and die in prison, this sentence increases the size of the elderly inmate population.³²¹ Prisoners over age sixty are now the fastest-growing age segment; this population grew nearly fifty percent between 1999 and 2004.³²² The needs of elderly inmates are much greater than those of younger inmates: they have more chronic health problems, need expensive medication, and often require handicap-accessible housing.³²³ Because elderly inmates require more medical care, it costs nearly three times as much to incarcerate them.³²⁴ State legislatures should consider this cost when contemplating long sentences.³²⁵

³¹⁷ RIGHTS REPORT, *supra* note 165, at 651–52.

³¹⁸ See HUMAN RIGHTS WATCH, *supra* note 5, at 97–98.

³¹⁹ See *id.*

³²⁰ See LABELLE ET AL., *supra* note 67, at 22 (estimating that it costs the state of Michigan more than one million dollars to incarcerate a juvenile lifer for fifty years); Wilson & Vito, *supra* note 303, at 25.

³²¹ See Wilson & Vito, *supra* note 303, at 25.

³²² See Vanessa Blum, *Gray Area*, LEGAL TIMES, Mar. 29, 2004, at 1.

³²³ See Wilson & Vito, *supra* note 303, at 25.

³²⁴ See Blum, *supra* note 322, at 1; Tammerlin Drummond, *Cellblock Seniors: They Have Grown Old and Frail in Prison. Must They Still Be Locked Up?*, TIME, June 21, 1999, at 60.

³²⁵ See HUMAN RIGHTS WATCH, *supra* note 5, at 7–9.

C. Racial Disparities in Sentencing

Finally, Congress and the states should consider research studies showing that minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system.³²⁶ Minority youths are more likely than white youths to be detained, formally charged, waived to adult court, and incarcerated.³²⁷ In 1997, the most recent year for which data are available, minority youths made up about one-third of the juvenile population nationwide but two-thirds of the detained and committed population in secure juvenile facilities.³²⁸ African-American youths are overrepresented more than any other minority group.³²⁹

The overrepresentation of minority youths also exists in sentencing.³³⁰ In 2005, Amnesty International found that black youth offenders constituted sixty percent of all youth offenders serving life without parole in the United States, whereas whites constituted only twenty-nine percent.³³¹ Data from individual states also show disparities in sentencing.³³² In Michigan, the American Civil Liberties Union (the "ACLU") reported that of 307 people serving life without parole in 2004, the majority (221) consists of minority youths and 211 of those are African Americans.³³³ A Florida study found that, among like offenders, minority youths had a higher probability than white youths of receiving the harshest disposition available at each stage of processing.³³⁴ This racial disparity in sentencing, combined with the other arguments against juvenile life without parole, should convince Congress and state legislatures to prohibit the sentence for juveniles.³³⁵

³²⁶ See generally EILEEN POE-YAMAGATA & MICHAEL A. JONES, BLDG. BLOCKS FOR YOUTH INITIATIVE FOR THE NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME (2000), available at <http://www.buildingblocksforyouth.org/justiceforsome/jfs.html>.

³²⁷ *Id.* at 2-3.

³²⁸ H.N. SNYDER & M. SICKMUND, U.S. DEP'T OF JUSTICE, MINORITIES IN THE JUVENILE JUSTICE SYSTEM 4 (1999), available at <http://www.ncjrs.gov/pdffiles1/ojdp/179007.pdf>.

³²⁹ CARL E. POPE ET AL., U.S. DEP'T OF JUSTICE, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001, at 2-3 (2002), available at http://www.ojdp.ncjrs.org/dmc/pdf/dmc89_01.pdf.

³³⁰ See LABELLE ET AL., *supra* note 67, at 6.

³³¹ HUMAN RIGHTS WATCH, *supra* note 5, at 39. A shortcoming of this study is that it fails to control for type of conviction and extent of criminal history. *Id.* Therefore, it cannot be used to determine whether minority children are sentenced to higher rates than white children from similar backgrounds. *Id.*

³³² *Id.*

³³³ LABELLE ET AL., *supra* note 67, at 6.

³³⁴ HUMAN RIGHTS WATCH, *supra* note 5, at 40.

³³⁵ See *id.* at 39-40.

CONCLUSION

Sentencing juveniles to life without the possibility of parole is cruel and unusual punishment and violates the Eighth Amendment of the U.S. Constitution because adolescents are less culpable than adults due to their psychological and neurological deficiencies. The U.S. Supreme Court should create a categorical exemption for juveniles from life without parole by applying its independent judgment in the "evolving standards of decency" test. Juvenile life without parole violates the Eighth Amendment on its face because of the reduced culpability of children and because the sentence does not contribute to the purposes of lifelong imprisonment for adults. Even if application of this test does not result in abolition of the sentence, the Court should find that juvenile life without parole is grossly disproportionate as applied in certain cases, such as for a first-time offender for a crime of felony murder. Furthermore, even if the Court finds that sentencing juveniles to life without parole does not violate the Constitution, the U.S. Congress and state legislatures should pass laws to exempt juveniles from this type of punishment. Although children should be held accountable for their crimes, the U.S. criminal justice system should never make them disposable.

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