Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper

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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. At least 2225 people in the United States currently are serving sentences of life without parole for crimes they committed before their eighteenth birthdays.

Recent research on adolescents, however, shows that there are significant psychological and neurological differences between the brains of adolescents and adults. Psychologists and juvenile rights advocates use these studies to support their position that the culpability of juveniles is reduced. 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. 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.

The Court also considered the opinions of independent associations and the practices of other countries. 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. Only about fourteen other countries permit life sentences for children, and even in those countries, it is rarely imposed. Also, a number of international human rights treaties re-

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6 Id.
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.
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.
reflect the worldwide rejection of this sentence. 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. The United States stands nearly alone in a world that identifies the sentence of juvenile life without parole as a human rights violation.

This Note explores the impact of Raper on sentencing juveniles to life without the possibility of parole. 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. By applying current psychological research and the reasoning in Raper, 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.

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. Part II surveys the state laws regarding life without the possibility of parole. Part III examines the psychological and neurological differences between children and adults. Part IV discusses the application of the Eighth Amendment to capital and non-capital sentences, particularly the Supreme Court's recent decision in Roper. Part V suggests that juvenile life without parole violates the Eighth Amendment on its face. 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. Part VII explores other reasons for the U.S. Congress and state legislatures to abolish

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.
28 See Taylor-Thompson, supra note 1, at 145.
29 Id. at 147.
30 See id. at 146.
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.
sponsible than adults and more amenable to treatment and intervention.\textsuperscript{36} Advocates believed that criminal behavior by children resulted from external forces, such as impoverished living conditions or parental neglect.\textsuperscript{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.\textsuperscript{38} The goal of creating these courts was to treat the delinquent children and enable their return to society as productive citizens.\textsuperscript{39} Illinois created the first juvenile court in 1899 and other states replicated the idea across the country.\textsuperscript{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.\textsuperscript{41} For the first half of the twentieth century, however, states almost exclusively tried children in juvenile courts.\textsuperscript{42}

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

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


\textsuperscript{38} Taylor-Thompson, supra note 1, at 147.

\textsuperscript{39} Id. at 146.

\textsuperscript{40} Id. at 147.

\textsuperscript{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. \textit{Id.} Most waiver statutes specify transfer criteria that must be met before a court may consider waiver. \textit{Id.}

\textsuperscript{42} See Human Rights Watch, supra note 5, at 14.

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

\textsuperscript{44} Scott & Grisso, supra note 35, at 145; Taylor-Thompson, supra note 1, at 147.

\textsuperscript{45} \textit{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. \textit{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. \textit{Id.} Because juvenile proceedings were civil rather than criminal, they were not subject to the due process requirements for deprivations of liberty. \textit{See id.} at 17. Such individualized treatment often led to arbitrary results. \textit{See id.} at 18–19.
dants in adult courts. 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.

An increase in juvenile crime during the 1980s and 1990s incited public outcry demanding tougher penalties for juveniles. 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. The juvenile arrest rate for robbery declined through the 1980s, but then grew rapidly to its peak in 1995.

These increases in juvenile arrests fueled a trend to "get tough" on youth crime. Supporters of this trend urged policymakers that children who committed violent offenses were inherently dangerous and destined for a life of crime. In response, all states changed their laws to make it easier to try and sentence child offenders in adult courts. 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. Today, all states allow adult criminal prosecution of children under

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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.


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 9–11. 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.\textsuperscript{55} Many states do not have a minimum age for transfer to adult court.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{61}

II. STATE LAWS REGARDING LIFE WITHOUT PAROLE

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


\textsuperscript{56} See Human Rights Watch, supra note 5, at 18.

\textsuperscript{57} See id. at 25.

\textsuperscript{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).

\textsuperscript{59} See Snyder, supra note 48, at 6.

\textsuperscript{60} See Taylor-Thompson, supra note 1, at 148-49.

\textsuperscript{61} See Human Rights Watch, supra note 5, at 116.


for all offenders, regardless of age. The other jurisdictions—Kansas, Kentucky, New York, Oregon, and the District of Columbia—prohibit the sentence for juveniles. 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.

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

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

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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.


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.


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

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.
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 97.
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." 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. 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. The law assumes that children as a class are inherently different from adults. Scientific research supports this assumption.

The literature on psychological development attributes adolescent immaturity to two types of deficiencies: cognitive and psychosocial. Cognitive development refers to the way adolescents think and make decisions. Psychosocial development refers to the values and preferences that inform adolescents' decision making. 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.

The psychosocial research shows strong differences between adolescents and adults that implicate assessments of culpability. 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.").

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84 See id. at 569.
87 See infra notes 88–108 and accompanying text.
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. In one study, adolescents on average scored significantly lower than adults on these factors and displayed less sophistication in decision making. 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.

Furthermore, psychosocial research confirms what every parent knows—that adolescents are more vulnerable to peer influence and more likely to take risks than adults. Adolescents are more focused on short-term consequences and less sensitive to future outcomes, a combination that can lead to risky behavior. 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. These attributes lead many adolescents to experiment with criminal conduct. For most children, antisocial conduct is “adolescence-limited”; in other words, they grow out of it.

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

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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).
98 See Taylor-Thompson, supra note 1, at 153-54.
logical differences between their brains and the brains of adults. Research using magnetic resonance imaging ("MRI") shows that the human brain continues to develop beyond adolescence. The brain grows in volume and becomes more organized into a person's early twenties. In particular, the frontal lobe undergoes substantial growth during adolescence. It is the area responsible for impulse control, judgment, problem solving, and behavior. Instead of using the frontal lobe to make decisions, adolescents rely more heavily on the amygdala, the emotional center of the brain. As a result, adolescents are more prone to erratic behavior than adults. 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.

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. Courts apply the Eighth Amendment to determine whether a punishment is so cruel and unusual that

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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. 309, 318 (2002).
it violates the U.S. Constitution.\textsuperscript{110} The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\textsuperscript{111} It is applicable to the states through the Fourteenth Amendment.\textsuperscript{112}

\section*{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.\textsuperscript{113} It reaffirms the government’s duty to respect the dignity of all persons, even those convicted of the most heinous crimes.\textsuperscript{114} The Eighth Amendment prohibits both disproportionate types of punishments and sentences that are disproportionate to the crime committed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{118}

Not all members of the Supreme Court agree, however, that the Eighth Amendment provides a proportionality guarantee.\textsuperscript{119} Rather, Justices Scalia and Thomas have consistently written that the Eighth Amendment prohibits the life without parole sentence for juveniles.

\footnotesize\textsuperscript{110} See U.S. CONST. amend. VIII; \textit{Roper}, 543 U.S. at 560.

\footnotesize\textsuperscript{111} U.S. CONST. amend. VIII.

\footnotesize\textsuperscript{112} See U.S. CONST. amend. XIV, § 2; \textit{Roper}, 543 U.S. at 560.

\footnotesize\textsuperscript{113} Atkins v. Virginia, 536 U.S. 304, 311 (2002); Weems v. United States, 217 U.S. 349, 367 (1910).

\footnotesize\textsuperscript{114} \textit{Roper}, 543 U.S. at 560.


\footnotesize\textsuperscript{116} See \textit{Roper}, 543 U.S. at 561 (applying the “evolving standards” test to find that the juvenile death penalty is unconstitutional on its face); \textit{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).

\footnotesize\textsuperscript{117} \textit{Roper}, 543 U.S. at 561.

\footnotesize\textsuperscript{118} Harmelin, 501 U.S. at 1001.

\footnotesize\textsuperscript{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. 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. Due to respect for stare decisis, however, Justice Scalia recognized a right to proportionality limited to cases involving the death sentence. Justice Thomas, however, recognizes no such right.

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." 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. The Court also applies its own judgment to determine whether the punishment violates the Eighth Amendment. 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.

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120 See *Ewing*, 538 U.S. at 32; *Harmelin*, 501 U.S. at 965.
121 501 U.S. at 966-98 (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 92 (Thomas, J., concurring) (stating that "the Eighth Amendment contains no proportionality principle").
125 See *id.*
126 See *id.* at 563; *Atkins*, 536 U.S. at 812.
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.\footnote{128 See\textit{ Roper}, 543 U.S. at 561.} 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.\footnote{129 See\textit{ Enmund v. Florida}, 458 U.S. 782, 788 (1982) (holding that the death penalty is unconstitutional when imposed on robbery-felony murderers); \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977) (holding that the death penalty is unconstitutional when imposed on rapists of adult women). \textit{But see Tison v. Arizona}, 481 U.S. 137, 158 (1987) (holding that the \textit{Enmund} culpability requirement is satisfied by major participation in a felony combined with reckless indifference to human life).} The Court also has held that lower courts may not impose the death penalty on juveniles or the mentally retarded for any crime.\footnote{130 See\textit{ Roper}, 543 U.S. at 574 (holding that the juvenile death penalty is unconstitutional); \textit{Atkins}, 536 U.S. at 321 (holding that the death penalty is unconstitutional when applied to mentally retarded offenders).}

The Supreme Court first recognized a categorical exemption from the death penalty in 1988 in \textit{Thompson v. Oklahoma}.\footnote{131 487 U.S. at 838.} 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.\footnote{132 Id. at 822–23.} 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.\footnote{133 Id. at 832.}

In the 2002 case of \textit{Atkins v. Virginia}, the Supreme Court applied this reasoning to create a categorical exemption from the death penalty for the mentally retarded.\footnote{134 Id. at 321.} 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.\footnote{135 Id. at 319–16.} The Court decided that mental retardation diminishes personal culpability such that the death penalty is an excessive sanction for that category of offenders.\footnote{136 Id. at 321.}

The Supreme Court's most recent decision creating a categorical exemption from the death penalty is \textit{Roper v. Simmons}.\footnote{137 543 U.S. at 568.} On March 1,
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.\textsuperscript{138} This decision overruled the 1989 case of \textit{Stanford v. Kentucky}, in which the Court held that the death penalty may be imposed on sixteen- and seventeen-year-olds.\textsuperscript{139} The Court identified a national consensus against the penalty and applied its independent judgment to confirm the consensus.\textsuperscript{140}

1. \textit{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.\textsuperscript{141} The Court noted that, at the time, thirty states proscribed the juvenile death penalty.\textsuperscript{142} The Court recognized the infrequency of the practice in the twenty states that did not formally prohibit it.\textsuperscript{143} And in the previous ten years, the Court noted, only three states executed prisoners for crimes committed as juveniles.\textsuperscript{144}

In addition, the Court examined the rate of abolition of the juvenile death penalty in the states.\textsuperscript{145} The Court compared the number of states that allowed the juvenile death penalty at the time it decided \textit{Stanford} to the number of states that allowed the practice at the time it considered \textit{Roper}.\textsuperscript{146} The \textit{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 \textit{Stanford} and \textit{Roper}.\textsuperscript{147} The Court concluded that these objective indicia demonstrated a national consensus against sentencing juveniles to death.\textsuperscript{148}

\begin{footnotes}
\textsuperscript{138} \textit{Id.}
\textsuperscript{140} \textit{Roper}, 543 U.S. at 568–71.
\textsuperscript{141} \textit{Id.} at 564–65.
\textsuperscript{142} \textit{Id.} at 564.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 565.
\textsuperscript{145} \textit{Roper}, 543 U.S. at 565–66.
\textsuperscript{146} \textit{Id.} at 566; \textit{see Stanford, 492 U.S. at 980.}
\textsuperscript{147} \textit{Roper}, 543 U.S. at 565–66.
\textsuperscript{148} \textit{Id.} at 567–68.
\end{footnotes}

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.\textsuperscript{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.\textsuperscript{162} The Court noted that every country in the world ratified this resolution except the United States and Somalia.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} The \textit{Roper} Court wrote that it does not reflect disloyalty to the U.S. Constitution to acknowledge and consider other nations' recognition of fundamental rights.\textsuperscript{166} The Court thereby created a categorical exemption from the death penalty for juveniles.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{170}

\textbf{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

\begin{itemize}
  \item \textsuperscript{161} Id. at 576.
  \item \textsuperscript{162} \textit{Roper}, 543 U.S. at 576 (citing CRC, \textit{supra} note 14, at art. 37).
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id. (citing ICCPR, \textit{supra} note 14, at art. 6(5)).
  \item \textsuperscript{166} 543 U.S. at 578.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} See id. at 561.
  \item \textsuperscript{169} See id. at 568.
  \item \textsuperscript{170} See \textit{Harmelin}, 501 U.S. at 1001 (Kennedy, J., concurring).
\end{itemize}
sentences may be tested as applied. 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. Strict proportionality between crime and sentence is not required.

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. In *Solem*, the defendant was sentenced to life in prison without the possibility of parole for writing a "no account" check for $100. 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. *Solem* was the first, and remains the only, case in which the Supreme Court invalidated a prison sentence due to its length.

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*. 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. Members of the Court disagreed, however, on the proportionality standard for non-capital offenses. Justice Scalia wrote that the individualized proportionality principle applies only to death penalty jurisprudence. He stated that the Court's decision in *Solem* was wrong because the Eighth Amendment contains no proportionality guarantee.

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171 See id. at 997.
172 See id. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{188}

To conduct the threshold comparison, a court considers the gravity of the offense and the harshness of the penalty.\textsuperscript{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.\textsuperscript{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—

\textsuperscript{183} 501 U.S. at 997 (Kennedy, J., concurring).
\textsuperscript{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).
\textsuperscript{185} Harmelin, 501 U.S. at 1027 (White, J., dissenting).
\textsuperscript{186} Id. at 1005 (Kennedy, J., concurring).
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 1004.
\textsuperscript{190} Solem, 463 U.S. at 292.
possession of more than 650 grams of cocaine—threatened to cause "grave harm" to society. Due to the seriousness of the offense, and because the offender's culpability was not reduced, the Court upheld the sentence.

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. 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." 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.

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. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, held that the sentence was not grossly disproportionate. 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. 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.

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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).

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


538 U.S. at 72.

Id. at 77.

598 U.S. at 30-31 (plurality opinion).

Id.

Id. at 30.

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. 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*. 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*.

**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. 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.

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. 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

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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.\textsuperscript{206} The court stated that age has no obvious bearing on a proportionality analysis in a non-capital case.\textsuperscript{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.\textsuperscript{208}

b. \textit{State Court Holdings}

Some state courts have held that juvenile life without the possibility of parole violates the federal and/or state constitutions.\textsuperscript{209} In \textit{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{214}

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

\textsuperscript{206} Id. at 584–85.
\textsuperscript{207} Id. at 585.
\textsuperscript{208} Id.
\textsuperscript{210} 779 P.2d at 948–49, 949 n.6.
\textsuperscript{211} Id. at 947.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 948.
\textsuperscript{214} Id.
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 508–10 (citing I.L. CONST. art. I, § 11).
223 See Roper, 543 U.S. at 561; Harmelin, 501 U.S. at 1001.
224 See infra notes 226–255 and accompanying text.
A. National Consensus

The Supreme Court is unlikely to recognize a strong national consensus against juvenile life without parole. 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. The sentence is permitted in forty-two states and required for certain crimes in twenty-seven states.

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. 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. 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.

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. 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. 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.
The Court already has decided that the psychosocial and neurological differences between adolescents and adults support a presumption of diminished culpability for adolescent offenders.\textsuperscript{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.\textsuperscript{236}

The presumption of reduced culpability also affects the Court's analysis of the social purposes of the punishment.\textsuperscript{237} In \textit{Ewing v. California} in 2003, the Supreme Court identified four standard justifications that inform a state's sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution.\textsuperscript{238} Although the Constitution does not mandate adoption of any one penological theory, a legitimate punishment must further at least one of these goals.\textsuperscript{239} In \textit{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.\textsuperscript{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.\textsuperscript{241}

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

\textsuperscript{235} See \textit{Roper}, 543 U.S. at 570; Steinberg & Scott, \textit{supra} note 7, at 1011; \textit{supra} notes 81-108 and accompanying text.
\textsuperscript{236} See \textit{Roper}, 543 U.S. at 570.
\textsuperscript{237} See \textit{id.} at 571-72.
\textsuperscript{238} Id.; \textit{Hamelin}, 501 U.S. at 999 (Kennedy, J., concurring).
\textsuperscript{239} 543 U.S. at 571.
\textsuperscript{240} See \textit{id.}; Naovarath v. State, 779 P.2d 944, 948 (Nev. 1989).
\textsuperscript{241} See \textit{Roper}, 543 U.S. at 571; \textit{Naovarath}, 779 P.2d at 948.
\textsuperscript{242} See \textit{Ewing}, 538 U.S. at 25-27 (noting that life sentences further the goals of retribution, deterrence, and incapacitation).
\textsuperscript{243} See \textit{Naovarath}, 779 P.2d at 948; Scott & Grisso, \textit{supra} note 35, at 164 (noting that adolescents place more value on short-term consequences and are less sensitive to future outcomes). Similarly, the \textit{Roper} Court noted the absence of evidence that the death penalty has a deterrent effect on juveniles. 543 U.S. at 571.
\textsuperscript{244} See \textit{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. Therefore, sentencing juveniles to life without parole does not measurably contribute to the social purposes intended by the punishment.

The Court also should consider international standards to confirm its judgment that juvenile life without parole is disproportionate punishment on its face. 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. The international community also has rejected juvenile life without parole. Only fourteen countries besides the United States permit juvenile life without parole sentences and in many countries they are rarely, if ever, imposed. 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. The United Kingdom, with whom the United States shares historic ties, abolished juvenile life without parole in 1996. 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. In light of this support, the Court should find that juvenile life without parole violates the Constitution on its face.

**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 cases.

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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.
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 *Hamelin v. Michigan* gross disproportionality test.\textsuperscript{256} Although the Supreme Court's "precedents in this area have not been a model of clarity,"\textsuperscript{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."\textsuperscript{258} The Court makes the threshold comparison by considering the gravity of the offense and the harshness of the penalty.\textsuperscript{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.\textsuperscript{260} Although successful challenges under this test are exceedingly rare, the Court should find an inference of disproportionality in certain cases.\textsuperscript{261}

\textbf{A. Gravity of the Offense}

The first factor in the threshold comparison is the gravity of the offense.\textsuperscript{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.\textsuperscript{263} In *Roper v. Simmons*, the Supreme Court decided that juveniles are less culpable than adults.\textsuperscript{264} Therefore, when reviewing a sentence, the Court should assign less weight to crimes committed by juveniles.\textsuperscript{265}

Before *Roper*, the Ninth Circuit reached a different conclusion in *Harris v. Wright* in 1996.\textsuperscript{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.\textsuperscript{267} The Ninth Circuit held that age has no obvious bearing on the proportionality analysis in non-capital cases.\textsuperscript{268} Given the strong evidence of psychosocial and neurological differences between adolescents and adults,

\textsuperscript{258} *Hamelin*, 501 U.S. at 1005 (Kennedy, J., concurring).
\textsuperscript{259} Id. at 1004.
\textsuperscript{260} Id. at 1005; *Solem v. Helm*, 463 U.S. 277, 292 (1983).
\textsuperscript{261} See *Hamelin*, 501 U.S. at 1001 (Kennedy, J., concurring).
\textsuperscript{262} See id. at 1004.
\textsuperscript{263} 463 U.S. at 292, 296–97.
\textsuperscript{264} 543 U.S. 551, 570 (2005).
\textsuperscript{265} See id.
\textsuperscript{266} *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996).
\textsuperscript{267} See id.
\textsuperscript{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* § 81.06 (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.


\(^{276}\) 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. The 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. The fact that brains of juveniles are still developing suggests a lack of coping mechanisms necessary to deal with these types of problems.

In addition to physical abuse, juvenile offenders suffer from lack of intellectual development due to sparse educational opportunities in prison. 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. Juveniles serving life without parole are disqualified because they are never within five years of release. 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. 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. 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.

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." To adjudicate a child as forever irredeemable is to impose a hopelessness that is particularly severe for a juvenile. 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.

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 Roper, 543 U.S. at 569-70.
281 See HUMAN RIGHTS WATCH, supra note 5, at 67-72.
283 See id.
284 See HUMAN RIGHTS WATCH, supra note 5, at 69.
285 See id. at 70-71.
286 See id.
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. For a first-time offender, this factor always weighs in favor of disproportionality. 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. 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.

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. 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. The Court has not conducted these analyses since *Solem* in 1983 because the Court has not found any inferences of disproportionality. The outcome of these analyses largely will depend on the current rate of sentencing in the state where the juvenile is convicted.

In certain cases, the Court should identify an inference of disproportionality and should confirm that inference through interjurisdictional 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. 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

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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.
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.\footnote{See id.}

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.\footnote{See infra notes 301–335 and accompanying text.} 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.\footnote{See supra notes 81–108, 244, 275–293 and accompanying text.} 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.\footnote{See Deborah Wilson & Gennaro Vito, \textit{Long-Term Inmates: Special Needs and Management Considerations}, 52 \textit{Fed. Probation} 21, 25 (1988).} State legislatures should proscribe the punishment also due to the high costs of aging prison populations.\footnote{See infra notes 308–319 and accompanying text.} Additionally, both Congress and state legislatures should abolish the sentence due to the racial disparities in sentencing of juvenile life without parole.\footnote{See Ingrid Brunk Wuerth, \textit{Authorizations for the Use of Force, International Law, and the Charming Betsy Canon}, 46 \textit{B.C. L. Rev.} 293, 303 (2005). Critics of the use of international law argue that it is counter-majoritarian and antidemocratic. \textit{Id.} at 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.\footnote{International human rights law explicitly prohibits sentences of life without parole for those who commit their crimes before the}
age of eighteen.\textsuperscript{506} Almost every country besides the United States adheres to this prohibition.\textsuperscript{507}

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.\textsuperscript{508} Seventy-eight members of the U.N. General Assembly, including the United States, voted to adopt the Declaration.\textsuperscript{509} Since then, the international community has protected further the rights of children and the United States has been left behind.\textsuperscript{510}

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.\textsuperscript{511} Every country in the world ratified this resolution except the United States and Somalia.\textsuperscript{512} 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.\textsuperscript{513}

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.\textsuperscript{514} 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.\textsuperscript{515} It also emphasizes the importance of rehabilitation by requiring parties to focus on education rather than punishment when sentencing children for offenses.\textsuperscript{516} 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-

\begin{footnotes}
\textsuperscript{506} HUMAN RIGHTS WATCH, \textit{supra} note 5, at 94.
\textsuperscript{507} Id.
\textsuperscript{509} See HUMAN RIGHTS WATCH, \textit{supra} note 5, at 94.
\textsuperscript{510} Id.
\textsuperscript{511} CRC, \textit{supra} note 14, at art. 37; see Roper v. Simmons, 543 U.S. 551, 576 (2005).
\textsuperscript{512} \textit{Id.}
\textsuperscript{513} See CRC, \textit{supra} note 14, at art. 37(a); HUMAN RIGHTS WATCH, \textit{supra} note 5, at 7.
\textsuperscript{514} See generally ICCPR, \textit{supra} note 14; RIGHTS REPORT, \textit{supra} note 165.
\textsuperscript{515} ICCPR, \textit{supra} note 14, at art. 10(3).
\textsuperscript{516} ICCPR, \textit{supra} note 14, at art. 14(4).
\end{footnotes}
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. 517

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. 518 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. 519

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. 520 Because offenders serving life without parole necessarily age and die in prison, this sentence increases the size of the elderly inmate population. 521 Prisoners over age sixty are now the fastest-growing age segment; this population grew nearly fifty percent between 1999 and 2004. 522 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. 523 Because elderly inmates require more medical care, it costs nearly three times as much to incarcerate them. 524 State legislatures should consider this cost when contemplating long sentences. 525

517 Rights Report, supra note 165, at 651–52.
518 See Human Rights Watch, supra note 5, at 97–98.
519 See id.
520 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.
521 See Wilson & Vito, supra note 303, at 25.
523 See Wilson & Vito, supra note 303, at 25.
524 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.
525 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

327 Id. at 2–3.
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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