

Adult Time for Adult Crimes

Life Without Parole for Juvenile Killers
and Violent Teens

By Charles D. Stimson and
Andrew M. Grossman

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Executive Summary

Life without parole for the very worst juvenile offenders is reasonable, constitutional, and (appropriately) rare. In response to the Western world's worst juvenile crime problem, U.S. legislators have enacted commonsense measures to protect their citizens and hold these dangerous criminals accountable. Forty-three states, the District of Columbia, and the federal government have set the maximum punishment for juvenile offenders at life without the possibility of parole. By the numbers, support for its use is overwhelming.

Nonetheless, its continued viability is at risk from misleading lobbying efforts in many states and court cases that seek to substitute international law for legislative judgments and constitutional text.

Emboldened by the Supreme Court's *Roper v. Simmons* decision, which relied on the Eighth Amendment's "cruel and unusual punishments" language to prohibit capital sentences for juveniles, anti-incarceration activists have set about extending the result of *Roper* to life without parole. If they succeed, an important tool of criminal punishment will be eliminated, and all criminal sentences could be subjected to second-guessing by judges, just as they are in capital punishment cases today.

The most visible aspects of this campaign are a number of self-published reports and "studies" featuring photographs of young children and litigation attacking the constitutionality of life without parole for juvenile offenders—including two cases that the U.S. Supreme Court has agreed to hear in its 2009 term.

Forty-three states, the District of Columbia, and the federal government have set the maximum punishment for juvenile offenders at life without the possibility of parole. By the numbers, support for its use is overwhelming.

Because the activists have monopolized the debate over life without parole, legislatures, courts, the media, and the public have been misled on crucial points. For example, dozens of newspaper articles, television reports, and court briefs have echoed the activists' assertion that 2,225 juvenile offenders are serving LWOP sentences in the United

States, despite that this figure is nothing more than a manufactured statistic. This report is an effort to set the record straight. It provides reliable facts and analysis, as well as detailed case studies, with full citations to primary sources.

Activists argue that the United States does not need life-without-parole sentences for juvenile offenders because other Western nations, particularly in Europe, do not use it. In fact, the need is real.

In one recent year, juveniles committed as many violent crimes in the United States as in the next seven highest countries combined. The U.S. ranks third in murders committed by youths and 14th in murders per capita committed by youths, putting it in the same league as Panama, the Philippines, Kazakhstan, Paraguay, Cuba, and Belarus.

Legislatures, courts, the media, and the public have been misled on crucial points. This report is an effort to set the record straight. It provides reliable facts and analysis, as well as detailed case studies, with full citations to primary sources.

Also contrary to activists' arguments, the Constitution does not forbid use of the sentence. The Eighth Amendment's prohibition on "cruel and unusual punishments" was intended to bar only the most "inhuman and barbarous" punishments, like torture. Though the Supreme Court has departed from this original meaning, it has honored the principle that courts should defer to lawmakers in setting sentences in almost every instance.

One exception applies to punishments that are "grossly disproportionate to the crime," something that the Court has found only in a handful of cases. Otherwise, the Court has approved harsh punishments for a variety of offenses so long as legislatures have a "reasonable basis" for believing that the punishment advances the criminal-justice system's goals. Because no state imposes life without parole for minor crimes, the punishment will never be constitutionally disproportionate. The other exception applies only in death-penalty cases like *Roper*, and the Court has long refused to subject non-death punishments to the deep scrutiny that it uses in capital cases.

Even ignoring that distinction, the argument that *Roper* could be extended to life-without-parole sentences comes up short. Indeed, the *Roper* Court actually relied on the availability of the sentence to justify prohibiting the juvenile death penalty.

Finally, the activists turn to international law to challenge life-without-parole sentences for juvenile offenders, relying on the aspirational language that is often present in treaties to advance their domestic political agendas. They assert that international law prohibits the use of the sentence and is directly applicable in U.S. court cases.

In this, they ignore almost every rule about the relationship between international agreements and U.S. law. Most treaties are not "self-executing," which means that they can be enforced in domestic courts only to the extent that they have been implemented by statutes.

This variety of treaty, which includes almost every human rights agreement, simply cannot preempt federal or state law acting on its own.

Treaties do not reach even that point until they have been ratified, as required by the Constitution. Yet activists cite the Convention on the Rights of the Child, which the United States has not ratified. To get around this, they claim that the CRC has become customary international law. But, like treaties, customary law cannot be enforced in domestic courts until it has been implemented by legislation.

They also give short shrift to reservations that the United States entered when it ratified two other treaties, the International Covenant on Civil and Political Rights and the Convention Against Torture. In both cases, the United States acted to preserve its sovereignty with respect to criminal punishment, limiting the treaties' reach to punishments already forbidden by the Eighth Amendment.

Used sparingly, as it is, life without parole is an effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.

Most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system. Every state has a juvenile justice system, and those courts handle the majority of crimes committed by juveniles.

But some crimes evince characteristics that push them beyond the leniency otherwise afforded to juveniles: cruelty, wantonness, a complete disregard for the lives of others. Some of these offenders are tried as adults, and a small proportion of them are sentenced to life without parole—the strongest sentence available to express society's disapproval, incapacitate the criminal, and deter the most serious offenses.

A fair look at the Constitution provides no basis for overruling the democratic processes of 43 states, the District of Columbia, and the U.S. Congress. Neither do international law or the misleading and sometimes just wrong statistics and stories marshaled in activists' studies. Used sparingly, as it is, life without parole is an effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.

The United States leads the Western world in juvenile crime and has done so for decades. Juveniles commit murder, rape, robbery, aggravated assault, and other serious crimes—particularly violent crimes—in numbers that dwarf those of America’s international peers.

The plain statistics are shocking. Between 1980 and 2005, 43,621 juveniles were arrested for murder in the United States.¹ The picture is just as bleak with respect to arrests for rape (109,563), robbery (818,278), and aggravated assault (1,240,199).²

In response to this flood of juvenile offenders,³ state legislatures have enacted commonsense measures to protect their citizens and hold these dangerous criminals accountable. The states spend billions of dollars each year on their juvenile justice systems, which handle the vast majority of juvenile offenders. Most states have also enacted laws that allow particularly violent and mature juveniles to be tried as adults. And for the very worst juvenile offenders, 43 state legislatures and the federal government have set the maximum punishment at life without the possibility of parole.⁴

There is an overwhelming national consensus that life without parole is, for certain types of juvenile offenders, an effective, appropriate, and lawful punishment.

This represents an overwhelming national consensus that life without parole (LWOP) is, for certain types of juvenile offenders, an effective, appropriate, and lawful punishment. Moreover, no state court that has addressed the constitutionality of sentencing juvenile offenders to life without parole has struck the sentence down as unconstitutional.⁵ Federal courts have consistently reached the same conclusion.⁶

Nonetheless, the right of the people, acting through their representatives, to impose this punishment is under attack.

Emboldened by the outcome in *Roper v. Simmons*, a 2005 decision of the United States Supreme Court that banned capital punishment for juvenile offenders,⁷ a small group of human rights organizations and liberal academics who oppose the sentence of life without parole for juvenile offenders have launched a major campaign to achieve a constitutional end run around the dozens of legislatures that have authorized the sentence. This movement, though representing a narrow constituency, has had an outsized presence owing to its tight coordination, ample funding, and multifaceted approach.⁸

The two most visible aspects of this campaign are the proliferation of self-published reports and “studies” featuring photographs of young children⁹ and appellate advocacy attacking the constitutionality of life without parole for juvenile offenders—including two cases that the U.S. Supreme Court has agreed to hear in its October 2009 term.¹⁰

To date, these groups’ efforts have gone largely unchallenged outside of the courts. The result has been a one-sided discussion of the issue and a skewed presentation of the relevant facts and legal principles. In this, policymakers and the public have been poorly served. How a society prevents and punishes violent crimes committed by juvenile offenders is a matter of immense public interest and importance, and any debate that seeks to advance public understanding of criminal punishment must be based on facts and reasonable interpretations of the law.

This report is an attempt to correct the false or misleading factual claims and legal explanations propounded by activist groups. It provides reliable facts and analysis, as well as detailed case studies, all with full citations to primary sources. It is our hope that judges and legislators will approach the issue of life without parole for juvenile offenders with both an open mind and skepticism about much of what has been written on the topic, probing and challenging the facts and propositions put to them to ensure that they are relying on the most accurate facts and strongest arguments.

This report was undertaken in response to litigation and legislation against the use of life-without-parole sentences for juvenile offenders. Following several challenges in state supreme courts, interest in the issue has only grown since the U.S. Supreme Court agreed to hear two cases challenging life-without-parole-sentences for juvenile offenders on Eighth Amendment grounds. Recent years have also witnessed the introduction, in several states, of legislation prohibiting the practice. California’s experience with such legislation is typical.

California Misled

In 2007, State Senator Leland Yee introduced a bill to radically alter the sentence of life without parole for juvenile offenders in California. Specifically, Senate Bill No. 999 would have ended the use of these sentences prospectively. Under the legislation, any juvenile offender convicted of first-degree murder, with any number of aggravating circumstances (such as multiple murders, murder for hire, murder of a police officer or firefighter, and torture of the victim¹¹), would be punishable by, at most, a life sentence with the possibility of parole after 25 years.¹²

Claims that “[t]he U.S. is the only country in the world that sentences kids to life without parole” are simply false.

The debate over the measure was conducted largely by national special-interest groups. On one side were a variety of activist groups that have engaged on this issue in a number of states, including the American Civil Liberties Union (ACLU), Human Rights Watch (HRW), Amnesty International (AI), Equal Justice Initiative, and NAACP Legal Defense and Educational Fund. On the other side, opposing the legislation, were local groups representing prosecutors, police, and victims.¹³ These opponents ultimately proved successful, and the bill died at the conclusion of the legislative session.¹⁴

1 Case Study

In February 2009, with the support of the same activist groups, Senator Yee introduced an even more radical proposal than Senate Bill No. 999.¹⁵ Without banning life-without-parole sentences for juveniles, Senate Bill No. 399 would allow any prisoner who has served 10 to 15 years of a life-without-parole sentence for an offense committed when he or she was less than 18 years old to petition the sentencing court for “recall” (i.e., cancellation) of the existing sentence, a rehearing, and a new reduced sentence. The court would then choose whether to accept the petition.

The court would have no such choice, however, if the prisoner satisfies three of eight criteria, including whether the prisoner had an adult codefendant; has “maintained family ties” while in prison; has not maintained ties with criminals outside of prison;

Defendant: Andre Contreras

Victims: Anthony Castro
Alejandro Salazar
Pedro Flores

Crimes: Murder
Drive-by special circumstances
Street gang special circumstances
Two counts, attempted murder
Shooting from a motor vehicle
Allowing someone to shoot from a motor vehicle
Shooting at an inhabited dwelling
Five counts, street terrorism special allegation
Gun enhancements special allegation

Age: 16

Where: Richgrove, California (Tulare County)
Earlimart, California (Tulare County)

Crime date: March 27, 2005

Summary

During a two-day crime spree in 2005, Andre Contreras, a gang member, stole a car, attempted to murder one man in Earlimart, murdered another, and severely wounded a third man in Richgrove. He confessed to his crimes, and a jury found him guilty on all charges.

Facts

Andre Contreras was an admitted member of the Southern Gang (Mifa) of McFarland, California, in Kern County. The Southern Gang is known for crossing over the county line to attack rival gang members in Tulare County.

On March 26, 2005, Contreras stole a white Honda Accord in McFarland and used it to commit a drive-by shooting in Kern County that night. The next morning was Easter, and Contreras met with his fellow gang member, Ezekiel Perez. Around 9:00 a.m., they went to a K Mart located in Delano. They purchased .22 caliber ammunition for Contreras’s rifle. Then they drove from Delano to Earlimart, where they saw Pedro Flores standing outside of this apartment, talking on his cell phone. Contreras and Perez stared at Flores while he was on the phone and flashed a gang sign at him; Flores responded with his middle finger.

NO PHOTOS FOR THIS CASE STUDY AVAILABLE

suffered from “cognitive limitations” at the time of the offense (perhaps even being a juvenile); has taken a class while in prison; used self-study while in prison; and has taken some “action that demonstrates the presence of remorse.” Notably, whether the prisoner would present a danger to the community is not among the criteria.

With these easily satisfied criteria, practically every prisoner sentenced to life without parole for an offense committed while a juvenile would be entitled to recall and a resentencing hearing.¹⁶ Under this system, individuals sentenced to life without parole could actually be released from prison before those sentenced to lesser terms for less serious or less heinous offenses.

Contreras and Perez drove around the block and again passed Flores’s house and flashed a gang sign at him. While Contreras was driving, Perez pulled out the rifle and shot multiple rounds at Flores. None hit Flores. Flores dashed inside and made for an upstairs bedroom at the front of the house, and moved his sister from that bedroom to the rear of the house. Perez fired shots into the bedroom before the Accord sped away from the scene.

Contreras and Perez drove to Richgrove. Shortly after 10:00 a.m., they noticed a brown Honda at a gas station and decided to stop there. They flashed gang signs at Anthony Castro, 15, and his little brother, Victor, who were filling up their mother’s car. Contreras and Perez followed the Honda as it left the gas station. Anthony picked up his friend Alejandro Salazar, who lived nearby, and then drove home to drop off Victor. Castro and Salazar parked the car and left the residence on foot.

According to Contreras, when he and Perez saw Castro and Salazar walking, Perez stated, “Yeah, I’m going to shoot them.” Contreras drove slowly by the two victims as Perez, in the backseat, fired several shots. According to witness statements, however, Contreras was actually the shooter, and Perez was the driver. Castro was shot in the chest and died. Salazar suffered three gunshot wounds:

one to the head, one to the leg, and one to the buttocks. He survived but has not yet fully recovered.

That evening, deputies from the Kern County Sheriff’s Office investigated a report that the stolen Honda was at a residence in McFarland. They found Contreras, along with a .22 caliber rifle and a shotgun, in the backseat of the car.

Contreras confessed to his participation in both shootings and further admitted to stealing the white Honda, buying the ammunition before the shooting, and wearing gloves before handling the gun. Officers executed a search warrant at Contreras’s home and found a shirt with the number “13” on it, a symbol of the Southern Gang. Witnesses described the shooter as wearing a shirt with “13” on it, and Contreras admitted he was wearing the shirt when the crimes were committed. He claimed that Perez, who was several years older and more senior in the gang, had coerced him to commit the crimes.

Sources

Letter from Don Gallian, Assistant District Attorney, Tulare, CA, to Charles Stimson (Aug. 26, 2008) (on file with author); *California v. Conteras*, 2007 WL 4532804 (Cal.App. 5 Dist. 2007); *Conteras v. California Dept. of Corrections*, 2009 WL 981204 (E.D. Cal. 2009). ■

After quick initial progress, the 2009 legislation met the same fate as its predecessor. The bill cleared the California Senate in early June, having passed through two committees with little opposition, before going down to a quick and unexpected defeat at the end of the month in the Assembly's Committee on Public Safety.

News coverage of the 2007 and 2009 measures has generally been one-sided, with reporters quoting the sponsor of the bills and activist supporters. More troubling are the unsupported assertions made by supporters, including that “children” should never face severe adult sentences, that *Roper* cast doubt on the constitutionality of life without parole for juvenile offenders,¹⁷ that ending such sentences would significantly reduce prison overcrowding, and that many who were serving such sentences were mere accomplices to or observers of the crimes with which they were charged.¹⁸

This important public policy debate has been shaped by a carefully crafted campaign of misinformation.

Further, the sponsor's statement in the bills' official analyses contained highly questionable assertions of fact. For example, the statement for the current version of the bill claims that “59% of youth sentenced to LWOP are first-time offenders” and that “45% of the youth sentenced to life in prison did not perform the murder they were convicted of.”¹⁹ It provides no sources for or explanation of these claims. It also states that “70% of the youth acted under the influence of adults” and that, “in 56% of these cases, the youth received a higher sentence than the adults.”²⁰

The bill further claims that “[t]he U.S. is the only country in the world that sentences kids to life without parole.”²¹ This is simply false. As even Amnesty International and Human Rights First acknowledge, at least 11 other countries allow life without parole for juvenile offenders, and the true number is likely greater, as explained below.²² The bill's sponsor and supporters have made many other claims that do not stand up to even light scrutiny.²³

Our skepticism in the face of these assertions led us to research these claims. The leading sources on life without parole for juvenile offenders, and frequently the only sources consulted by those with an interest in the issue, were one-sided reports by many

of the same activist groups that had supported the California legislation.²⁴ This was, we learned, no accident.

A Small but Coordinated Movement

Opponents of tough sentences for serious juvenile offenders have been working for years to abolish the sentence of life without the possibility of parole. Though representing relatively few, these groups are highly organized, well-funded, and passionate about their cause. Emboldened by the Supreme Court’s decision in *Roper*, which relied on the “cruel and unusual punishments” language of the Eighth Amendment to the Constitution to prohibit capital sentences for juveniles, they have set about to extend the result of *Roper* to life without parole.

These groups wrap their reports and other products in the language of *Roper* and employ sympathetic terms like “child” and “children” and *Roper*-like language such as “death sentence” instead of the actual sentence of life without parole. Their reports are adorned with pictures of children, most of whom appear to be five to eight years old, despite the fact that the youngest person serving life without parole in the United States is 14 years old and most are 17 or 18 years old.

A careful reading of these groups’ reports, articles, and press releases reveals that their messages and themes have been tightly coordinated. There is a very unsubtle similarity in terminology among organizations in characterizing the sentence of life without parole for juvenile offenders.

For example, they consistently decline to label teenage offenders “juveniles” despite the fact that the term is used by the states, lawyers, prosecutors, state statutes, judges, parole officers, and everyone else in the juvenile justice system. Instead, they use “child.”

There is nothing wrong, of course, with advocacy groups coordinating their language and message. The problem is that this important public policy debate has been shaped by a carefully crafted campaign of misinformation.

The issue of juvenile offenders and the proper sentence they are due is much too important to be driven by manufactured statistics, a misreading of a Supreme Court

Many of the studies feature pictures of children who are far younger than any person actually serving life without parole in the United States.

case, and fallacious assertions that the United States is in violation of international law. Instead, the debate should be based on real facts and statistics, a proper reading of precedent, an intelligent understanding of federal and state sovereignty, and a proper understanding of our actual international obligations.

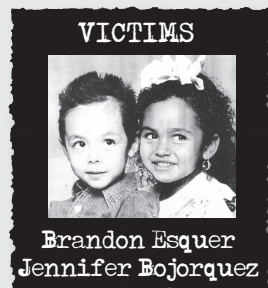
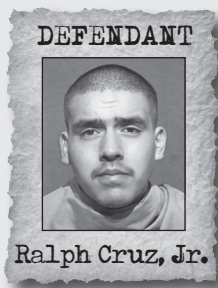
The Public Is Disserved by a One-Sided Debate

Regrettably, that has not been the case, as opponents of life without parole for juvenile offenders have monopolized the debate. As a result, legislatures, courts, the media, and the public have been misled on crucial points.

One prominent example is a frequently cited statistic on the number of juvenile offenders currently serving life-without-parole sentences. Nearly all reports published on

Case Study 2

Defendant: Ralph David Cruz, Jr.
Victims: Lucila Bojorquez
Brandon Esquer
Jenny Bojorquez
Crimes: Three counts, first degree murder
Armed robbery
Age: 16
Where: Tucson, Arizona
Crime date: August 4, 2001



Summary

Ralph Cruz, Jr., shot and killed a mother and her two young children after the mother refused to give him her car. He then dumped the children's bodies in the desert.

NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

Facts

Lucila Bojorquez was the single mother of two children: six-year-old Brandon Esquer and his seven-year-old sister Jenny Bojorquez. On August 4, 2001, all three were in their car in a Tucson apartment complex parking lot, preparing to drive home.

Cruz, armed with a Glock .40-caliber semi-automatic handgun, approached them, pointed the gun at Bojorquez, and demanded that she give him the car. She refused. Cruz shot her once in the head and twice in the chest. Cruz then pulled her lifeless body out of the car, got in, and drove off, running over her bloodied body.

Witnesses notified the police immediately. Police learned that the children had likely been in the car.

Approximately 30 minutes later, citizens discovered the bodies of two young children at an overlook at West Gate's Pass in the Tucson Mountains, west of Tucson. The bodies were those of Brandon and Jenny. Both had been shot in the head. There was also a hole in Jenny's hand, indicating that she had tried to hide her face before Cruz shot her. Several days later, Bojorquez's vehicle was

the subject and dozens of newscasts and articles based on those reports state that there are at least 2,225 juveniles sentenced to life without parole.²⁵ That number first appeared in a 2005 report by Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*.²⁶

But a careful look at the data and consultation with primary sources—that is, state criminal-justice officials—reveals that this statistic is seriously flawed. As described below, officials in some states reject as incorrect the figures assigned to their states. Others admit that they have no way of knowing how many juvenile offenders in their states have been sentenced to life without parole—and that, by extension, neither could activist groups.

found in the desert, missing its tires and rims. Blood, bullet casings, and Cruz's palm print were found in the vehicle.

The police circulated recent photos of the car before it had been stripped, with its fancy rims and tires intact.

Three days after the murders, Cruz's mother called 911, and explained to the dispatcher that her son had recently acquired rims that matched Bojorquez's, which she had seen on the news. A search of the Cruz home turned up the tires and rims. Detectives found the gun buried a foot deep in the backyard, beneath a 100-pound slab of concrete. They also found Cruz's bloodied clothes, which had also been buried.

Prosecutors sought the death penalty, but after the second day of trial, Cruz agreed to plead guilty to all charges if they would relent.

On January 7, 2002, Cruz received two sentences of life without parole for murdering Brandon and Jenny, a sentence of life with the possibility of parole after 25 years for murdering Bojorquez, and a sentence of 10-and-a-half years for taking Bojorquez's car, with the sentences

to run consecutively. He also received 10 year sentence (to run concurrently with the other sentences) for a home invasion and shooting that had occurred before the murders.

Cruz's attorney, Richard Parrish, later called the sentence "a victory," because his client had escaped the death penalty.

Sources

Letter from Amelia Cramer, Chief Deputy Pima County (AZ) Attorney, to Charles Stimson (Mar. 26, 2009) (on file with author); David Cieslak, *Teen Killer of 3 Gets Life*, Tucson Citizen, Jan. 8, 2002, at 1C; Joseph Barrios, \$3M bond is set for boy in killing of mom, two kids, ARIZONA DAILY STAR, Aug. 9, 2000, at 1; Joseph Barrios, *Transcript of mom's 911 call in triple slaying case released*, ARIZONA DAILY STAR, Oct. 11, 2000, at 4; Enric Volante, *Gun yields DNA clue to 3 killings Weapon found in teen's yard had victim's blood, tests show*, ARIZONA DAILY STAR, Nov. 4, 2000, at 1; Joseph Barrios, *Behind bars till he dies*, ARIZONA DAILY STAR, Jan. 8, 2002, at 1; Tom Beal, *Profile: Richard Parrish*, ARIZONA DAILY STAR, May 23, 2003, at 1. ■

Nonetheless, this statistic has gone unchallenged even as it has been cited in appellate briefs²⁷ and oral arguments²⁸ before state supreme courts and even in a petition to the United States Supreme Court.²⁹ All of these courts have been asked to make public policy based on factual representations that even cursory research would demonstrate are questionable.

Another example is the unrealistic portrait of the juvenile offenders who are sentenced to life without parole that activist groups have painted. Nearly every report contains sympathetic summaries of juvenile offenders' cases that gloss over the real facts of the crimes, deploying lawyerly language and euphemism to disguise brutality and violence.

For example, consider the case of Ashley Jones. The Equal Justice Initiative's 2007 report describes Ms. Jones's offense as follows: "At 14, Ashley tried to escape the violence and abuse by running away with an older boyfriend who shot and killed her grandfather and aunt. Her grandmother and sister, who were injured during the offense, want Ashley to come home."³⁰

The judge's account of the facts, however, presents a somewhat different picture. An excerpt:

““ When Ashley realized her aunt was still breathing, she hit her in the head with a heater, stabbed her in the chest and attempted to set her room on fire....

As ten-year old Mary Jones [Ashley's sister] attempted to run, Ashley grabbed her and began hitting her. [Ashley's boyfriend] put the gun in young Mary's face and told her that that was how she would die. Ashley intervened and said, "No, let me do it," and proceeded to stab her little sister fourteen times.³¹

In a similar vein, many of the studies feature pictures of children who are far younger than any person actually serving life without parole in the United States.³² When these reports do include an actual picture of a juvenile offender, the picture is often one taken years before the crime was committed.³³ The public could be forgiven for believing incorrectly that children under 14 are regularly sentenced to life behind bars without the possibility of release.

A final example is the legality of life-without-parole sentences for juvenile offenders. Opponents make the claim, among many others, that these sentences violate the United States' obligations under international law. Yet they usually fail to mention that no court has endorsed this view, and rarely do they explain the implications of the fact that the United States has not ratified the treaty that they most often cite, the Convention on the Rights of the Child, and has carved out legal exceptions (called "reservations") to others.³⁴

Further, they often abuse judicial precedent by improperly extending the death penalty–specific logic and language of *Roper* into the non–death penalty arena,³⁵ an approach that the Supreme Court has repeatedly rejected.³⁶ Again, the public could be forgiven for believing incorrectly that the Supreme Court, particularly in *Roper*, has all but declared the imposition of life sentences without parole for juvenile offenders to be unconstitutional. A more honest reading of the precedent, however, compels the opposite conclusion: that the sentence is not constitutionally suspect.³⁷

Public policy should be based on facts, not false statistics and misleading legal claims.

The Whole Story

Public policy should be based on facts, not false statistics and misleading legal claims. For that reason, we undertook the research to identify those states that have authorized life without parole for juvenile offenders and wrote to every major district attorney's office³⁸ across those 43 states. To understand how prosecutors are using life-without-parole sentences and the types of crimes and criminals for which such sentences are imposed, we asked each office for case digests of juvenile offenders who were prosecuted by their offices and received the specific sentence of life without parole.

The response from prosecutors around the country was overwhelming. Prosecutors from across the United States sent us case digests, including official court documents, police reports, judges' findings, photos of the defendants and victims, motions, newspaper articles, and more. From that collection of case digests, we selected 16 typical cases, all concerning juvenile offenders, and assembled a complete record for each. Those cases are presented as studies in this report. In sharp contrast to the practices of

other reports, these case studies recount all of the relevant facts of the crimes, as found by a jury or judge and recorded in official records (which are cited), in neutral language.

The text of the report itself includes a neutral analysis of the relevant case law and Supreme Court precedents, as well as an analysis of how international law affects domestic practice in this area. It also includes a rough analysis (which is all the present data will allow) of the statistics often used in activist groups' reports and a comparison of U.S. and international juvenile crime statistics.

Based on this research, we conclude that the sentence of life without parole for juvenile offenders is reasonable, constitutional, and (appropriately) rare. Our survey of the cases shows that some juveniles commit horrific crimes with full knowledge of their actions and intent to bring about the results. In constitutional terms, the Supreme Court's own jurisprudence, including *Roper*, draws a clear line between the sentence of death and all others, including life without parole; further, to reach its result, *Roper* actually depends on the availability of life without parole for juvenile offenders. We also find that while most states allow life-without-parole sentences for juvenile offenders,

judges generally have broad discretion in sentencing, and most juvenile offenders do not receive that sentence.

Our survey of the cases shows that some juveniles commit horrific crimes with full knowledge of their actions and intent to bring about the results.

We conclude, then, that reports by activist groups on life without parole for juvenile offenders are at best misleading and in some instances simply wrong in their facts, analyses, conclusions, and

recommendations. Regrettably, the claims made by these groups have been repeated so frequently that lawmakers, judges, the media, and the public risk losing sight of their significant bias.

To foster informed debate, more facts—particularly, good state-level statistics—are needed about the use of life-without-parole sentences for juvenile offenders. But even on the basis of current data, as insufficient as they are, legislators should take note of how these sentences are actually applied and reject any attempts to repeal life-without-parole sentences for juvenile offenders.

2 Manufacturing Statistics: 19-Year-Old “Juveniles”

Nearly every report, newspaper article, editorial, and court brief on this topic states that there are 2,225 juvenile offenders serving life-without-parole sentences in the United States. Both the origin of that number and the way it has been used raise great concerns about the veracity of the facts supplied by activists seeking to put an end to the sentence.

Most sources cite the number to a 2005 Amnesty International/Human Rights Watch report.³⁹ (One exception is the University of San Francisco Law School’s 2007 report, which states categorically that there are 2,381 juveniles serving life without parole.⁴⁰) An investigation into the source of the AI/HRW number reveals serious flaws.

The beginning of an answer to the question of where this number originated can be found in Appendix B to the 2005 AI/HRW report. The report explains accurately that the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and DOJ’s Office of Juvenile Justice and Delinquency Prevention (JJ) do not collect data on the number of juvenile offenders in the adult criminal justice system.⁴¹

The report goes on to explain that most states tend to “lose” the fact that “an offender was a child at the time of his or her crime once he or she is admitted to adult prison.”⁴² As a result, many state reports on incarcerated populations give the impression “that there are no youth offenders in adult prison and do not offer information about a particular inmate’s age at the time of his or her offense.”⁴³

An investigation into the source of the Amnesty International/Human Rights Watch number reveals serious flaws.

Because there were no good federal government data on the incidence of life-without-parole sentences for juvenile offenders, AI/HRW set about drawing data from other sources and, when that proved fruitless, gathering data itself. Initially, AI/HRW turned to the National Corrections Reporting Program (NCRP) within the U.S. Department of Justice.⁴⁴ A division of the United States Bureau of Justice Statistics within DOJ's Office of Justice Programs, NCRP was the logical place to turn to, since the Bureau of Justice Statistics' mission is to collect, analyze, and publish data relating to crime in the United States.

However, AI/HRW quickly found that the NCRP was "not a comprehensive source for the data we sought."⁴⁵ First, the NCRP data included only juvenile offenders serving LWOPs in 23 states,⁴⁶ despite the fact that the sentence is available and used in many other states. But rather than use the NCRP data as a starting point, AI/HRW rejected them entirely even as it concluded that it had "no basis for believing that the data available in the NCRP is skewed in any particular way that would cause such analyses to be inaccurate."⁴⁷

3 Case Study

Defendant: David Garcia

Victims: Fernando Barrera (murdered)
Rigoberto Martinez
(attempted murder)
Isidrio Martinez
(attempted murder)
Manuel Chavez
(attempted murder)

Crimes: Murder with special circumstances
Three counts, attempted murder
with special circumstances
Shooting an inhabited dwelling

Age: 17

Where: Poplar, California (Tulare County)

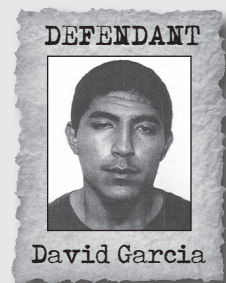
Crime date: May 19, 2006

Summary

Attempting to murder members of a rival gang, David Garcia shot and killed a member of his own.

Facts

David Garcia, 17, was an active member of the Northern Gang. On May 19, 2006, he and several fellow gang members drove past a residence that they suspected housed members of the rival Southern gang. Their suspicion was confirmed when they spotted Southern gang members and exchanged gang slurs with them. The Southern gang members, fearing an ambush, threw bottles at the vehicle. Garcia and his friends drove down the street, exited the car, and picked up some rocks. They then drove back toward the house and threw rocks at the Southern gang members.



NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

In late 2003, Human Rights Watch began to assemble its own data set by writing letters to the departments of corrections in the 41 states that had sentenced juvenile offenders to life without parole at the time of their research.⁴⁸ The group also sent letters to all 50 states asking for data on juveniles who committed crimes that resulted in life-without-parole sentences or very long sentences, which it defined as “life plus years.”⁴⁹ Discovering that “life plus years” varies in meaning from state to state (and in practice could mean a relatively short sentence), the group eliminated most of those sentences from its analysis, though some may still remain from states that conflated the requests.⁵⁰

That is not the only quirk in the AI/HRW methodology. As the AI/HRW report explains, many state departments of corrections do not keep records on an inmate’s age “at the time he or she committed an offense but only record an individual’s age at the time of admission to the prison.”⁵¹ Rather than collect the data on prisoners’ ages at the time of their offenses—an arduous practice—AI/HRW instead chose an arbitrary cutoff, including within its sample prisoners younger than age 20 and serving life without

Then they drove to a nearby alley to meet with another Northern gang member, Vincent Cardenas. Garcia informed Cardenas that the rival gang was causing problems. Cardenas handed Garcia a 12-gauge shotgun loaded with lethal buckshot rounds.

Armed with the shotgun, Garcia got back into the car, and they drove back to the Southern gang members’ residence. Vincent Cardenas and his girlfriend followed in a second vehicle. At their destination, they jumped out and rushed the rival gang members, who retreated into the garage. Their rivals closed the garage door and were standing inside holding the door down. Garcia’s fellow gang member Fernando Barrera, 16, approached the garage door and attempted to pull it open to allow Garcia a clear shot.

Garcia fired one shot at the door. The rounds pierced the garage door and penetrated the interior walls, nearly hitting a sleeping infant. Garcia and his gang vandalized

the vehicles parked in the driveway. They then walked toward their own cars.

When Garcia reached the sidewalk, he turned to fire one more shot at the garage and his rivals inside of it. Just as Garcia pulled the trigger, Barrera stepped into the path of the shot. He died instantly, and Garcia fled.

Apprehended shortly after the murder, Garcia admitted to fighting with the rival gang but denied that anyone had a weapon. At trial, however, members of Garcia’s own gang testified against him. He took the stand in his own defense, but the jury did not believe him. He was convicted and sentenced to life without the possibility of parole.

Sources

Letter from Don Gallian, Assistant District Attorney, Tulare, CA, to Charles Stimson (Aug. 26, 2008) (on file with author); *News Briefs*, FRESNO BEE, May 24, 2006, at B2. ■

parole.⁵² It described this “as a way to capture all inmates that likely committed crimes before the age of eighteen,” based on two stated assumptions.⁵³

1. The report assumes “that a person would spend as little as 13 months in the arrest-to-sentencing stage before entering prison.”⁵⁴
2. It assumes that there is “between one and two years between a seventeen-year-old’s commission of a crime and his or her arrest, trial, possible subsequent trial (as a result of a hung jury or a mistrial), sentencing, and ultimate admission to prison.”⁵⁵

Those assumptions, however, are problematic. First, the time between arrest and sentencing is often far shorter than 13 months. The vast majority of criminal charges result in a plea bargain, avoiding the delay of a trial, and even trials can be accomplished in less time, particularly when the facts of the crime are relatively straightforward. This is especially true since *Roper* eliminated the death penalty as a possible punishment for juvenile killers. The second assumption, focusing on the time between the commission of a crime and arrest, is also suspect for the same reasons. Most of the offenders whose cases are recounted in this study were arrested shortly after the commission of their offenses, frequently the same day or the following day.

Taken together, these assumptions inflate the count considerably, given that, among juveniles, the number sentenced to life without parole increases significantly with age. Thus, including those who are 18 and 19—and adults in the eyes of the law—is likely to have a disproportionate impact, pushing the final count significantly upwards.

AI/HRW’s count of juveniles serving life-without-parole sentences shrinks considerably when it does not rely on these unrealistic assumptions. Counting only the offenders that AI/HRW was able to determine were younger than 18 at the time of their offenses, the top-line number shrinks from 2,225 to just 1,291.⁵⁶ That number may include the bulk of juveniles serving life-without-parole sentences, since it is based on data from 35 states (out of the 45 that allowed the sentence at the time) and the federal government.⁵⁷

Much of the state data used throughout the AI/HRW report appear to be unreliable. With respect to data from the states of Alabama (15), Idaho (data missing), and Virginia (48), the report notes that the states were not able to gather the statistics “because of staffing limitations and prohibitive costs.”⁵⁸ Rather than accept NCRP data (including numbers for Alabama and Virginia), AI/HRW opted to obtain the data “through other measures.”⁵⁹

With respect to Virginia, AI/HRW used a “statistical extract from the reports made by the state of Virginia to the National Corrections Reporting Program between the years 1993 and 2000 to gather a *rough number* of individuals serving the sentence in the state.”⁶⁰ The report does not explain its methodology for Alabama or any attempt to gather information from Idaho.

The states of Michigan (306) and Illinois (103) did not respond to the AI/HRW letters requesting information.⁶¹ After calls and letters to officials in those states yielded nothing, AI/HRW used data from the ACLU Juvenile Life Without Parole Initiative in Michigan, which had previously requested and received such data from the states.⁶² These requests, according to the AI/HRW report, employed “criteria very similar to those used by Human Rights Watch,”⁶³ but any differences in methodologies (e.g., counting 19-year-olds or those serving “life-plus” sentences) are not noted.

Some states flat-out reject Amnesty International/Human Rights Watch’s tally of the number of juveniles in their prisons who are serving life without parole.

Finally, some states flat-out reject AI/HRW’s tally of the number of juveniles in their prisons who are serving life without parole. The Department of the Attorney General of the State of Rhode Island, for example, maintains that “there have not been any cases within the last twenty-six years that we are aware of where a sentence of life without parole was imposed” on juveniles.⁶⁴ Further, the records-keeper for the state’s Adult Correctional Institution “confirmed that there were not any juveniles [currently] serving life without the possibility of parole.”⁶⁵ Nonetheless, AI/HRW claims that Rhode Island has two juveniles behind bars serving life-without-parole sentences.⁶⁶

These deficiencies cast serious doubt on AI/HRW's methodology, data, and estimates. They also point to the conclusion that, based on existing data, calculating the number of juvenile offenders currently serving life without parole is highly speculative. Any nationwide statistic is at best a very rough estimate, and a more precise figure, based on the data, can be no more than a guess. The 2,225 number is certainly not—as it has been presented to courts,⁶⁷ legislators, and the public—a fact.

The great confusion and false certainty over the most basic factual component of this debate demonstrate how little serious study and research the issue had received.

3

The U.S. Has a Juvenile Crime Problem

Underlying nearly every argument made by opponents of life without parole for juvenile offenders is the premise that, because many other countries have not authorized or have repealed the sentence, the United States should do the same so that it can be in conformance with the international “consensus” on the matter.

In fact, this premise is the cornerstone of the litigation strategy to extend the Eighth Amendment’s prohibition on “cruel and unusual punishments” to reach life-without-parole sentences for juveniles. This application of foreign sources of law to determine domestic law, in addition to being legally problematic, too often overlooks the qualitative differences between the United States and other countries.⁶⁸

This has certainly been the case in the debate over life without parole for juvenile offenders. The leading reports on the issue do not grapple seriously with the facts concerning juvenile crime and how those facts differ between nations. Instead, they play a crude counting game, tallying up nations while ignoring the realities of their circumstances and juvenile justice systems.

Despite a high incarceration rate, convicted persons in the United States actually served less time in prison, on average, than the world average and the European average.

The Facts on Worldwide Crime and Sentencing

The fact is that the United States faces higher rates of crimes, particularly violent crimes and homicides, than nearly any other country. Adults and juveniles commit crimes in huge numbers, from misdemeanor thefts to premeditated murders. The root

causes of this epidemic have been debated, studied, tested, and analyzed for decades, but the fact of its existence is neither controversial nor in doubt.

After a decade of gains in deterring juvenile crime, the trend has turned the other way in recent years. According to the U.S. Department of Justice, there was “substantial

4 Case Study

Defendant:	Eric Hancock
Victims:	Jamal Muzafar
Crimes:	Criminal homicide Robbery Carrying a firearm without a license Possession of a firearm by a minor
Age:	15
Where:	Pittsburgh, Pennsylvania
Crime date:	August 26, 2007

Summary

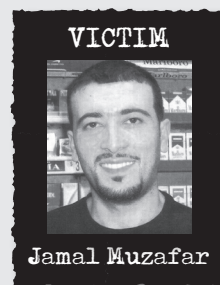
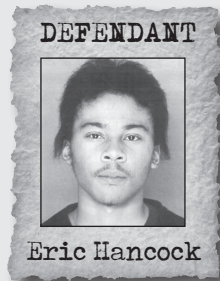
Eric Hancock shot and killed a clerk while robbing a local convenience store.

Facts

Jamal Muzafar was born and lived in Syria. After an accident, one of his legs was amputated, and he came to the United States for medical treatment and for adjustments to his prosthetic leg. He lived with his uncle, the owner of the A&E Deli Food Mart, where he worked as a clerk and cashier.

Eric Hancock patronized the delicatessen frequently, and Muzafar and his uncle had even offered Hancock a job.

In the summer of 2007, Hancock and his cousin Jeremy decided to rob a store. Hancock suggested that they rob the A&E Deli because it was nearby.



About a week later, on August 26, 2007, Hancock entered the deli alone, armed with a handgun. Muzafar was behind the counter. Hancock jumped on the counter and ordered Muzafar to put his hands in the air. Muzafar complied. Hancock demanded access to the store safe, but Muzafar could not understand what Hancock was saying. Frustrated, Hancock pointed the gun at him.

“Don’t shoot, don’t shoot. Please, don’t shoot,” the clerk begged. Hancock shot Muzafar three times in the chest. Hancock would later testify that the shooting was accidental.

As Muzafar lay dying on the floor, Hancock ransacked the store. He managed to steal about \$400. He searched Muzafar’s clothing, finding little, and then took the lottery money box and several packs of cigarettes.

Later, Hancock burned his clothes and buried the lottery box.

The entire incident had been captured by a surveillance camera. After he was arrested, Hancock confessed.

Sources

Letter from Allegheny County Prosecutor’s Office to author (Sept. 2008) (on file with author); Jason Cato, Police: *Mt. Oliver clerk begged teen not to shoot*, PITTSBURGH TRIBUNE REVIEW, Sept. 8, 2007; Gabrielle Banks, *Video Shows Robber Gunning Down Store Clerk*, PITTSBURGH POST-GAZETTE, July 2, 2008, at B1; Gabrielle Banks, *Teen Says He Killed Clerk in Mt. Oliver*, PITTSBURGH POST-GAZETTE, July 3, 2008, at B1; Gabrielle Banks, *M.C. Teen Gets Life Sentence for Killing Clerk in Mt. Oliver*, PITTSBURGH POST-GAZETTE, July 4, 2008, at B1. ■

growth in juvenile violent crime arrests...in the late 1980s [which] peaked in 1994.”⁶⁹ Between 1994 and 2004, the arrest rate for juveniles for violent crimes fell 49 percent, only to see a 2 percent uptick in 2005 and then a 4 percent gain in 2006.⁷⁰ In 2005 and 2006, arrests of juveniles for murder and robbery also increased.⁷¹

Despite the progress made through 2004, juvenile violent crime remains much higher in the United States than in other Western nations. Some statistics:

- In 1998 alone, 24,537,600 recorded crimes were committed in the United States.⁷²
- Of the 72 countries that reported recorded crimes to the United Nations Seventh Survey of Crime Trends, the United States ranked first in total recorded crimes.⁷³
- Worse still, the United States reported more crimes than the next six countries (Germany, England/Wales, France, South Africa, Russia, and Canada) combined. Their total was 23,111,318.⁷⁴
- Even more tellingly, the U.S. had a higher crime rate than all of those countries, except for England, which experienced disproportionate rates of property crimes but much lower rates of violent crimes.⁷⁵

In terms of violent crime rates, the U.S. ranks highly in every category, and the same is true in the realm of juvenile crime. For example:

- In 1998, teenagers in the United States were suspects in 1,609,303 crimes,⁷⁶ and 1,000,279 juveniles were prosecuted.⁷⁷
- That is as many juvenile prosecutions as the next seven highest countries combined.⁷⁸ Those countries are England/Wales, Thailand, Germany, China, Canada, Turkey, and South Korea.⁷⁹

-
- According to 2002 World Health Organization statistics, the United States ranks third in murders committed by youths⁸⁰ and 14th in murders per capita committed by youths.⁸¹
 - In terms of rates, the United States is the only non-developing Western nation on the list until number 38 (New Zealand).⁸² Countries with similar youth murder rates include Panama, the Philippines, Kazakhstan, Paraguay, Cuba, and Belarus.⁸³ In terms of juvenile killers per capita, the United States is more like Colombia or Mexico than the United Kingdom, which ranks 52 on the list.⁸⁴

Given this domestic crime problem, it should come as no great surprise that the United States tops the lists of total prisoners and prisoners per capita.⁸⁵ The U.S. incarceration rate bests that of the runner-up, Russia, by more than 20 percent.⁸⁶

Despite this high incarceration rate, convicted persons in the United States actually served less time in prison, on average, than the world average and the European average. Among the 35 countries surveyed on this question in 1998, the average time actually served in prison was 32.62 months.⁸⁷ Europeans sentenced to prison served an average of 30.89 months.⁸⁸ Those in the United States served an average of only 28 months.⁸⁹

These crucial statistics are not mentioned by those who urge abolition of life-without-parole sentences for juvenile offenders. The reason may be that it undercuts their arguments: If the juvenile crime problem in the United States is not comparable to the juvenile crime problems of other Western nations, then combating it may justifiably require different, and stronger, techniques. The fact that some other nations no longer sentence juvenile offenders to life without parole loses a significant degree of its relevance. In addition, the data on sentence length demonstrate that the use of life-without-parole sentences is not a function of excessive sentence lengths in the United States, but rather an anomaly in a criminal justice system that generally imposes shorter sentences than those of other developed nations.

In 2005, the Supreme Court held in *Roper v. Simmons* that the Eighth and Fourteenth Amendments to the U.S. Constitution bar the application of the death penalty to offenders who were under the age of 18 when their crimes were committed.⁹⁰ Since then, the decision’s reasoning has become the cornerstone of the efforts of those who oppose life without parole for juvenile offenders and has reinvigorated their legal crusade to put an end to the practice.

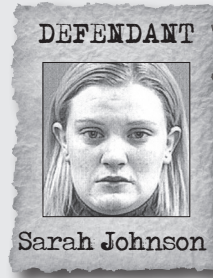
The text and history of the Eighth Amendment, however, provide little support for the idea that life without parole for juvenile offenders constitutes prohibited “cruel and unusual” punishment. Even departing from the text and employing a *Roper*-style analysis is unavailing; the factors that the Court considered in that case all mitigate in favor of life without parole’s constitutionality, even as applied to juvenile offenders.

The Original Meaning of the Eighth Amendment

The meaning of the Eighth Amendment’s prohibition on “cruel and unusual punishments,” as incorporated against the states through the Fourteenth Amendment, has been the subject of much disagreement in the literature and in the courts. Its text derives from the English Bill of Rights of 1689, which was well known to legislatures in the American colonies, and later those of the states, and to the Framers of the Constitution.⁹¹

Under the English Bill of Rights, the text merely banned punishments that had not been authorized by Parliament or legal precedent.⁹² In the colonies, however, it took on a broader meaning, encompassing as well “cruel methods of punishment that are not regularly or customarily employed”⁹³ and are “design[ed] to inflict pain for pain’s sake,” as had previously been prevalent in Britain and were contemporaneously employed in “less enlightened countries.”⁹⁴ The absence of such a prohibition from the Constitution as

Defendant: Sarah Johnson
Victims: Alan Johnson
 Diane Johnson
Crimes: Two counts, first degree felony murder
 Use of a firearm
Age: 16
Where: Bellevue, Idaho
Crime date: September 2, 2003



Magnum rifle. Her father was in the shower, and her mother was still asleep. Johnson placed the end of the rifle on her mother’s head and pulled the trigger. She then walked toward the master bathroom and saw her father coming out of the shower. She shot him once through the chest at a distance of about three feet.

Summary

Using a hunting rifle, Sarah Johnson killed her parents after they grounded her for attempting to spend the night with her older boyfriend. She shot her sleeping mother in the head and her father as he stepped out of the shower.

Facts

Alan and Diana Johnson lived in the small town of Bellevue, Idaho. Alan was a co-owner of a successful landscaping company, and Diana worked for a financial firm. They had a son, a daughter, and a nice house on a spacious two-acre parcel of land.

Their daughter Sarah Johnson attended Wood River High School. She fell in love with 19-year-old Bruno Santos, a former high school classmate and illegal alien who had had brushes with the law and was rumored to be involved with illegal drugs.

One Friday, Johnson told her parents that she was going to spend the night at a friend’s house. Her mother called the friend’s house and discovered that Sarah was not there. The parents guessed that their daughter was most likely with Santos.

Alan Johnson drove over to Santos’s house and found his daughter there. He spoke with Santos’s mother and then drove his daughter home. He grounded her for the weekend.

Just after 6 a.m. on September 2, 2003, a few days after she had been grounded, Sarah Johnson entered her parents’ bedroom armed with a Winchester .264

Alan fell to the floor and then stood and walked toward the side of the bed where his wife usually slept. He felt for her and then collapsed. Neighbors who heard the gunshots called 911. Sarah Johnson exited the house and ran down the street, screaming that someone had shot her parents.

While Sarah Johnson told police a number of different stories about what she witnessed the morning of the murders, the evidence against her was overwhelming. There had been no forced entry to the home. Crime scene officers found a pink robe in the trash, inside of which they found a leather glove and a latex glove. Tests of the robe revealed biological material from the defendant and her parents. Testing of the leather glove revealed gunshot residue, and Sarah Johnson’s DNA was found inside the latex glove. The matching leather glove was found in Sarah’s bedroom, and the rifle was found in the master bedroom. The Winchester rifle was usually stored in the family’s guest house, where Sarah had spent the weekend after being grounded.

According to prosecutors, Johnson committed the murders because she was fearful that her parents were going to turn in Santos for statutory rape and have him deported. There was additional evidence that the defendant murdered her parents to get their money so that she and Santos could go away together.

Sources

Interview with Prosecutor’s Office, Bellevue, Idaho (March 25, 2009); Andres Martinez, *Trial Set to Start for Idaho Girl Accused of Murdering her Parents*, Court TV News, Feb. 15, 2005, available at http://www.courtTV.com/trials/johnson/020405_backgrounder_ctv.html; Idaho v. Johnson, 188 P.3d 912 (2008). ■

NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

drafted in 1787 was a point of contention at several ratifying conventions, and the Eighth Amendment’s inclusion in the Bill of Rights was a direct response to these concerns.⁹⁵

Understood in this light, the Eighth Amendment’s prohibition extends to torturous *methods* of punishment like “pillorying, disemboweling, decapitation, and drawing and quartering.”⁹⁶ The Supreme Court’s earliest jurisprudence applying the amendment adopted this view. Thus, the Court upheld execution by firing squad and by electrocution, ruling that neither embodied the “something inhuman and barbarous” that the Amendment forbids.⁹⁷ In the death penalty context, “cruel and unusual” was long seen as encompassing “only such modes of execution as compound the simple infliction of death with added cruelties or indignities.”⁹⁸

Applying that basic formulation to life without parole demonstrates the Eighth Amendment’s impotence in the instant policy debate. It is wholly inapplicable. Imprisonment of juveniles has a long historical pedigree, well predating this nation’s founding and extending to the present time. Yet there is no suggestion that the *duration* of incarceration, as opposed to the *conditions* in which it is carried out, could be “inhuman and barbarous.”

The Supreme Court has held that there is no constitutional right, outside of capital cases, for any mitigating factors to be considered in sentencing.

Further, life without parole, unlike a “cruel and unusual” punishment, is not designed to inflict torture as a means of enhancing the punishment; it simply lacks “the evil that the Eighth Amendment targets...intentional infliction of gratuitous pain.”⁹⁹ Without any aspect of “unnecessary cruelty,”¹⁰⁰ the Eighth Amendment is simply unavailing.

While the reasoning of courts in the present era may not track this understanding, the effect remains the same: The courts simply refuse to second-guess the punishments that legislatures prescribe, at least not on Eighth Amendment grounds. Only very rarely is that appropriate deference upset.

Life Without Parole is a Proportionate Punishment for Serious Crimes

Yet a majority of the Supreme Court has declined to limit its interpretation to the Eighth Amendment’s original meaning. In these cases, the Court has held that the Eighth Amendment also prohibits punishments that it has declared to be disproportionate or

6 Case Study

Defendant: Ashley Jones

Victims: Deroy Nalls (grandfather; murdered)
Millie Nalls (aunt; murdered)
Mary Elizabeth Nalls (grandmother; attempted murder)
Mary Elizabeth Jones (sister; attempted murder)

Crimes: Two counts, first degree capital murder
Two counts, attempted first degree murder
First degree robbery

Age: 14

Where: Birmingham, Alabama

Crime date: August 30, 1999

Summary

In a span of minutes, Ashley Jones and her boyfriend shot her grandfather twice in the face and then stabbed him until he died; shot her sleeping aunt three times; shot her grandmother in the shoulder and then stabbed her, poured lighter fluid on her, set her on fire, and watched her burn; and stabbed her 10-year old sister 14 times. Jones then took \$300 from her grandfather's wallet and the keys to his Cadillac, which she drove away from the crime scene.

Facts

After Ashley Jones stabbed her father and pregnant mother in 1998, killing neither, she and her younger sister were sent to live with her grandparents and maternal aunt. Deroy Nalls, her 78-year-old grandfather, was a retired steelworker and deacon at his church. His wife, Mary Nalls, 73, was a homemaker.

By late August of 1999, the Nallses were growing tired of Jones's bad behavior and grounded her for staying out all night at a party. The Nallses did not approve of Jones's boyfriend, Geramie Hart, and told him not to visit their house. This angered Jones.

NO PHOTOS FOR THIS CASE STUDY AVAILABLE

Jones and Hart decided to kill everyone in the house, set it on fire, and take their money. To prepare, Jones stole two of her grandfather's guns and smuggled them out of the house to Hart. She mixed together rubbing alcohol, nail polish remover, and charcoal fire starter in anticipation of setting the house ablaze.

It took the couple two days to put their plan into action. On the evening of August 30, 1999, Jones kept an eye on her relatives until they had settled in for the evening. Then she called Hart. He arrived around 11:15 p.m., and Jones led him into the house. He was carrying the .38 revolver taken from Jones's grandfather.

Jones and Hart sneaked into the den, where her grandfather was watching television. Hart shot him twice in the face; still alive, Deroy stumbled toward the kitchen. Next, they visited the bedroom of Millie Nalls, 30, Ashley's aunt, and shot her three times. Seeing that her aunt was still breathing, Jones hit her in the head with a portable heater, stabbed her in the chest, and attempted to set the room on fire.

The gunshots awakened Jones's grandmother, and she got out of bed. That was when Jones and Hart entered her bedroom and shot her once in the shoulder. It was their last bullet.

Jones and Hart returned to the den to discover that her grandfather was still alive. With knives from the kitchen, they stabbed him over and over again and left one knife embedded in his back. Jones poured charcoal lighter fluid on her grandfather, set him ablaze, and listened to him groan as he burned alive.

The noise attracted Jones's 10-year-old sister, Mary Elizabeth Jones, to the kitchen. From there, she could see her grandfather on the den floor, ablaze. Soon after, the wounded Mary Nalls entered the kitchen and called out to her dying husband. Jones stabbed her grandmother in the face with an ice pick. Jones then poured lighter fluid on her, set her on fire, and watched her burn.

Mary Elizabeth attempted to leave, but Jones grabbed her and began punching. Hart shoved the pistol in Mary's face

and said that he was going to shoot her. Jones intervened: “No, let me do it.” She stabbed her sister 14 times and stopped only after Mary curled up in a ball on the floor and pretended to be dead. Jones and Hart piled sheets, towels, and paper on the floor and set the pile on fire.

Jones and Hart removed about \$300 from her grandparents’ mattress and took the keys to their Cadillac, which they drove to a local hotel. Jones spent the night partying at the hotel, with her grandfather’s blood on her socks and grandmother’s blood on her shirt.

Miraculously, Mary Elizabeth and her grandmother Mary had survived. Mary Elizabeth helped her grandmother out of the house and walked to a neighbor’s home for help. They called the police, who quickly responded to the scene. Police officers found Deroy Nalls dead on the living room floor, Millie Nalls dead in her bed, and Mary Nalls heavily wounded. Firefighters were able to extinguish the fire lit by Jones and Hart.

The following morning, news outlets reported the murders, as well as the fact that Jones’s sister had survived. The news angered her. “I thought I killed that bitch,” she later explained.

Mary Elizabeth received stitches for her numerous stab wounds and was hospitalized with a collapsed lung. Mary was treated for gunshot and stab wounds and the burns that covered a third of her body. She spent a month in the burn unit of a local hospital, undergoing multiple skin grafts, before undergoing treatment at a rehabilitation facility to relearn how to use her arms after the burns.

Hart and Jones were arrested the next morning after police identified the Nallses’ vehicle in the parking lot.

Speaking to police, Jones admitted that “we both” stabbed her grandfather. She explained further: “I mean we shot Millie second. . . me and Geramie just started shooting her. And then. . . and then I went back in there and she was still breathing, so. . . I hit her on the head with the heater and stabbed her in her heart. And she just started coughing up blood.”

According to the prosecutor, Laura Poston, Ashley Jones displayed no emotion throughout the trial:

Sociopaths can however be in the form of a 14, now 15 year old petite girl with a pretty face who can sit all week in a courtroom, look at pictures of her dead grandfather and aunt, listen to her sister cry as she recounts the horrors of that night, and not shed a tear. The first time Ashley showed any emotion about what happened that night was when the jury read the verdicts finding her guilty of two counts of capital murder and two counts of attempted murder—she cried her first tears.

Judge Gloria Bahakel noted in her sentencing decision that Jones “did not express genuine remorse of her actions.” The judge continued: “Although she apologized, at the prompting of the Court, her words were hollow and insincere. Furthermore, it was brought to the attention of the Court that while awaiting her sentencing, the defendant had threatened older female inmates in the Jefferson County Jail by telling them she would do the same thing to them that she had done to her family.”

Sources

Letter from Laura Poston, Deputy District Attorney, Birmingham, AL, to Charles Stimson (Aug. 15, 2008) (on file with author); Letter from Laura Poston, Deputy District Attorney, Birmingham, AL, to Charles Stimson (Mar. 30, 2009) (on file with author); Carol Robinson, *Two Teens Accused of Bloody Rampage*, BIRMINGHAM NEWS, Aug. 31, 1999, at 1A; Steve Joynt, *Arrest of Teenager Revives Question of What Can Turn People into Killers*, BIRMINGHAM POST-HERALD, Sept. 18, 1999, at E1; Carol Robinson, *Young Victim of Massacre Received 13 Stab Wounds*, BIRMINGHAM NEWS, Sept. 1, 1999, at 1C; Carol Robinson, *Girl Accused in Family Attack Still in Detention*, BIRMINGHAM NEWS, Sept. 2, 1999, at 4B; Carol Robinson, *Teen Guilty of Stabbing Family*, BIRMINGHAM NEWS, Mar. 3, 2001, at 1A; Alabama v. Jones, No. CC-2000-0151 (Cir. Ct. of Jefferson County, AL. May 25) (finding of fact from guilt phase of trial). ■

excessive.¹⁰¹ Though initially this inquiry was grounded, at least rhetorically, on the comparison of punishments for different statutory offenses—for example, that it was cruel and unusual that punishment for a misrepresentation on a form exceed that available for treason, rebellion, and most homicides¹⁰²—greater theoretical complexity quickly emerged.

The Supreme Court’s present formulation of the standard takes two forms. One is a “narrow proportionality principle,” applicable in non-capital cases, designed to further judicial economy and deference to the political branches, and buttressed by a more searching but still “objective” analysis of comparative proportionality. The other, so far applicable only to capital punishment, was developed in *Atkins*¹⁰³ and *Roper* and employs three factors, each one a wide-ranging inquiry.

The “narrow” principle is derived from the Court’s fractured holding in *Harmelin v. Michigan*.¹⁰⁴ The Eighth Amendment, wrote Justice Anthony Kennedy in a concurrence that the lower courts have taken as controlling,¹⁰⁵ “does not require strict propor-

7 Case Study

Defendant: Eduardo Lopez
Victims: Roscoe Powers
Robbie Goyette
Officer Tom MacLeod
Crimes: Two counts, first degree murder
First degree assault
Attempted first degree murder
Robbery
Age: 17
Where: Nashua, New Hampshire
Crime date: March 23, 1991

Summary

In just two hours, Eduardo Lopez shot a man who refused to give him money, tried to rob and then shot and killed another man, and assaulted a police officer with a hand

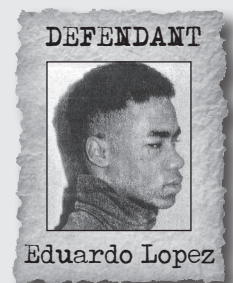
rail when the officer attempted to question him.

Facts

At about 9 p.m. on March 23, 1991, Eduardo Lopez approached Roscoe Powers on Main Street in Nashua, New Hampshire. Lopez aimed his gun at Powers and demanded money. Powers turned and ran, and Lopez gave chase. When Powers slipped on ice, Lopez was able to catch up with him. Lopez then shot Powers in the chest, but Powers managed to stand up and run. Lopez resumed his chase.

Powers pulled out a knife and turned to confront Lopez, and this time Lopez fled. Though seriously injured, Powers survived the assault.

Less than an hour later, Lopez approached Robbie Goyette and a friend as they sat in a car. Lopez stuck



tionality between crime and sentence,” but rather “forbids only extreme sentences that are grossly disproportionate to the crime.”¹⁰⁶ This threshold inquiry, a simple comparison of the crime (not the criminal) and the punishment, is as far as most courts need go; a more searching proportionality analysis is “appropriate only in the rare case” in which comparison “leads to an inference of gross disproportionality.”¹⁰⁷

In *Harmelin*, the Court upheld a sentence of life without parole for the crime of possession of a large amount of cocaine.¹⁰⁸ Because this crime “threatened to cause grave harm to society,” the state legislature “could with reason conclude” that it was “momentous enough to warrant the deterrence and retribution of a life sentence without parole”—a conclusion buttressed by the laws of other states and prior guidance by the Court on proportionality.¹⁰⁹

This appropriately deferential inquiry, focused on the relationship between the crime and the punishment and explicitly rejecting the contention that the Eighth Amendment “mandate[s] adoption of any one penological theory” (such as rehabilita-

his gun inside the car and demanded money. Goyette refused and attempted to drive away. Lopez ran along side the car and shot Goyette in the neck, killing him.

Later that night, Nashua police officer Tom MacLeod was searching for the shooter. At around 10 p.m., he came upon Lopez, who was walking out of his house bearing a four-foot-long wooden handrail. Officer MacLeod attempted to stop and question Lopez, but Lopez ignored him. Suspecting that Lopez was the shooter, MacLeod drew his gun and ordered Lopez to stop and drop the handrail. MacLeod holstered his gun and took several steps toward Lopez. Lopez hit him with the handrail. The two struggled for some time, and ultimately, the officer was able to subdue Lopez and arrest him.

Eduardo Lopez was convicted after a jury trial and sentenced to life without the possibility of parole for the murder of Robert Goyette. When he heard the verdict, Lopez overturned the defense table, swore, and made

obscene gestures at the judge, jury, and reporters in the courtroom. Bailiffs had to forcibly remove him from the courtroom.

In addition to life without parole, Lopez also received 4 to 8 years for attacking Officer MacLeod, 7 to 15-and-a-half years for robbery, and 10 to 20 years for first-degree assault.

Sources

Letter from Ann Rice, Associate Attorney General, Criminal Justice Bureau, New Hampshire, to Charles Stimson (Aug. 27, 2008) (on file with author); Beth Marchese, *Nashua Teen Serving Life Received Additional Time*, UNION LEADER (Manchester, N.H.), Sept. 1, 1993, at A4; Tammy Annis, *Murder Conviction Sends Defendant, 19, Into Courtroom Rage*, UNION LEADER (Manchester, N.H.), June 24, 1993, at A1; *New Hampshire v. Lopez*, 652 A.2d 696 (N.H. 1994). ■

tion),¹¹⁰ affords no room for consideration of the offender’s age or maturity. Indeed, a majority of the Court held that there is no constitutional right, outside of capital cases, for *any* mitigating factors to be considered in sentencing.¹¹¹

Only in the rare cases where an inference of disproportionality arises should courts look beyond that relationship, considering three “objective factors”: again, the “gravity of the offense and the harshness of the penalty”; sentences imposed on other criminals within the same jurisdiction; and “sentences imposed for commission of the same crime in other jurisdictions.”¹¹² Once again, this analysis, focused on “the harm

Opponents of life without parole for juvenile offenders attempt to extend the Supreme Court’s capital jurisprudence, particularly Roper v. Simmons, to non-capital cases; but the Court in Roper actually relies on the existence of the sentence of life without parole for juvenile offenders to reach its result.

caused or threatened to the victim or society” in assessing the proportionality of the sentence, allows no room for consideration of mitigating factors, such as age, except as may be inherent in assessing the offender’s *mens rea*, or criminal intent.¹¹³

The Court reaffirmed the *Harmelin* approach in *Ewing v. California*, a challenge to California’s three-strikes law by a repeat offender imprisoned for 25 years to life after shoplifting

three golf clubs.¹¹⁴ Nothing in the Eight Amendment, the plurality opinion explained, prohibits the California legislature from “mak[ing] a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime.”¹¹⁵ It was enough that the state “had a reasonable basis for believing that [the law] advances the goals of its criminal justice system in any substantial way”—in other words, that its justification was not a pretext.¹¹⁶

Proportionality analysis as it exists today is no barrier to the imposition of life-without-parole sentences on juvenile offenders so long as the sentence is not enacted for pretextual reasons and is not grossly disproportionate to the crime. There is no evidence or even accusation of pretext, and because the sentence is employed sparingly, in response to only the most grievous conduct, no serious claim can be made that its application is so disproportionate as to preclude its use altogether. Under current law, which

enforces a strict separation between capital and non-capital Eighth Amendment law, this would be the end of the analysis.

“Evolving Standards of Decency” Require Life Without Parole for the Worst Juvenile Offenders

Faced with the insusceptibility of non-capital proportionality analysis to direct consideration of an offender’s age, opponents of life without parole for juvenile offenders attempt to extend the Court’s capital jurisprudence, particularly *Roper*,¹¹⁷ to non-capital cases; but even this more giving standard (which the Court, in any case, seems ill disposed to apply outside of capital cases¹¹⁸) would be unavailing. The Court in *Roper* actually relies on the existence of the sentence of life without parole for juvenile offenders to reach its result.

8 Case Study

Defendant: Jesus Mandujano
Victims: J. Sacramento Benitez-Hernandez
Unknown female
Crimes: Felony murder
Three counts, robbery
Attempted robbery
Assault with intent to commit rape
Burglary
Age: 17
Where: San Jose, California
Crime date: January 3, 1992, and April 2, 1992

migrated northwards and, in 1992, began his career in the United States as a burglar.

On January 3, 1992, Mandujano and some fellow gang members entered the home of J. Sacramento Benitez-Hernandez. Benitez-Hernandez’s sister sold jewelry from the home, and Mandujano and his fellow gang members intended to get some money. Mandujano, armed with a handgun, confronted Benitez-Hernandez, who fled to his bedroom and closed the door. Mandujano shot him through the bedroom door, killing him.

On April 2, 1992, Mandujano participated in another home robbery in San Jose. During the robbery, he pistol-whipped several men in the house and forced two women to undress, threatening to cut off their breasts if they did not comply. He then sexually assaulted one of the females in a bedroom.

Sources

Letter from Marc T. Buller, Chief Assistant District Attorney, Santa Clara, CA, to Charles Stimson (Oct. 29, 2009) (on file with author). ■

Summary

Three months after robbing and murdering a man in his own home, Jesus Mandujano invaded another home, assaulting the men there and sexually assaulting one of two women whom he forced to undress.

Facts

A Mexican native, Jesus Mandujano was from the town of Nuevo Italia in the State of Michoacan, Mexico. He

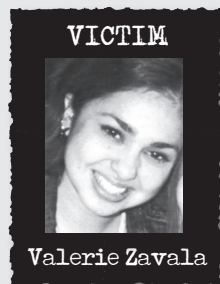
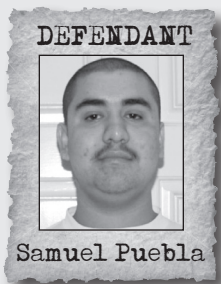
NO PHOTOS FOR THIS CASE STUDY AVAILABLE

Roper employs a three-factor test to determine whether a punishment is constitutionally proportional. The first factor is “objective indicia” of “evolving standards of decency,” particularly evidence of a national consensus against the challenged punishment.¹¹⁹ This is primarily a numerical inquiry, though the relevant types of numbers have varied from case to case.

Roper, similar to *Atkins* before it, focused on three sets of numbers: the number of states allowing or prohibiting the practice; the frequency of the practice in each state (to knock out some states that allow it but use it infrequently); and the recent trend among states that had changed their practices.¹²⁰ Thus, in *Roper*, though 20 states, including some of the most populous, allowed the juvenile death penalty and 12 of the remaining 30 had banned the death penalty altogether, the Court put greater weight on the fact that only three had used it in the previous decade.¹²¹ The Court also found significant a “consistency of direction” in states banning the juvenile death penalty; that is, several had abolished it in recent years, and none that previously prohibited it had reversed course.¹²² These numbers—and primarily the “consistency of direction”—demonstrated a “national

9 Case Study

Defendant: Samuel Puebla
Victims: Valerie Zavala
Crimes: First degree murder
Attempted rape
Felony murder
Age: 17
Where: Fillmore, California
Crime date: January 1, 2003



Summary

Samuel Puebla attempted to rape a college student whom he met at a party and, when she resisted, beat her head and chest before strangling her to death with his bare hands.

Facts

Valerie Zavala was an attractive 19-year-old student attending college in San Jose, California. She had graduated from Fillmore High School and was returning home to visit her family during the Christmas and New Year’s break.

On December 31, 2002, Zavala attended a New Year’s Eve party at the home of a friend in Fillmore. There she ran into Puebla, a senior at Fillmore High School. After midnight, Zavala’s friend Anna Hinojosa became sick and asked Zavala for a ride home. Zavala agreed. Puebla also asked Zavala for a ride home, and Zavala said she would drop

consensus” that “today our society views juveniles...as categorically less culpable than the average criminal,” at least as regards the death penalty.¹²³

The second factor—and one that is especially resistant to quantitative or logical analysis—is the “exercise of our own independent judgment” with respect to the proportionality of the challenged punishment.¹²⁴ In this inquiry, death is different. As the Court put it, “the Eighth Amendment applies to it [the death penalty] with special force.”¹²⁵ Death was to be reserved for the worst of the worst, a group that cannot include juvenile offenders because they lack maturity and responsibility, are more vulnerable or susceptible to negative influences and outside pressures, and, in terms of character, are both more transitory than and “not as well formed” as adults.¹²⁶ Thus, a juvenile’s “irresponsible conduct is not as morally reprehensible as that of an adult.”¹²⁷

From this, the Court concludes that subjecting juvenile offenders to the death penalty does not proportionally further the state’s penological justifications: retribution and deterrence. Retribution is undermined because juveniles’ ultimate moral culpabil-

him off after Hinojosa. After dropping off Hinojosa, and helping her into the house, Zavala set off for Puebla’s home.

As Zavala was driving, Puebla attempted to sexually assault her. When Zavala resisted, Puebla choked her until she fell unconscious for a short period of time.

At some point, Puebla took the driver’s seat and drove to Fillmore’s St. Francis of Assisi Church, where he parked. Zavala came to, managed to escape Puebla, and ran.

Puebla caught her near a trash dumpster on the church’s property. He struck her head with such force that it ruptured her left eardrum and knocked her earring to the ground. Zavala fell to the ground. Puebla ripped off her clothing, pulled out her tampon, and attempted to rape her, without success. Zavala struggled to defend herself, but Puebla struck her repeatedly on the head, sat on her chest, and ultimately strangled her with his hands.

After abandoning the car near a local market, Puebla returned to the church in his own car to dispose of Zavala’s body. He dumped it in a drainage culvert, where a jogger found it the next morning.

A search of the crime scene produced Zavala’s earring, tampon, and underwear. Trace, circumstantial, and biological evidence, including DNA, connected Puebla to the crimes, and he was convicted and sentenced to life without parole.

Sources

Letter from Maeve Fox, Senior Deputy District Attorney, County of Ventura, CA, to Mike Frawley, Chief Deputy District Attorney, County of Ventura, CA (on file with author); Holly Wolcott, *Slaying Suspect Changes Story*, L.A. TIMES, May 18, 2004, at B1; *California v. Puebla*, 2006 WL 2724026 (Cal.App. 2 Dist. 2006). ■

ity is diminished, making the exercise of society’s greatest punishment a disproportionate response,¹²⁸ and deterrence is uncertain “because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”¹²⁹ Further, the marginal deterrent effect would be no more than “residual,” given the availability of “life imprisonment without the possibility of parole,” which the Court described as “itself a severe sanction, in particular for a young person.”¹³⁰

It is worth emphasizing, then, that the *Roper* court relies on the practice of life without parole for juvenile offenders to conclude that the death penalty may be a poor deterrent and so is disproportionate.

Third, the Court puts great weight on international law and the practices of foreign countries, an approach sometimes called “transnationalism.” These sources are “instructive for its interpretation” of the Eighth Amendment, though not “controlling.”¹³¹ In *Roper*, the Court specifically considered “the overwhelming weight of international opinion against the juvenile death penalty,” as well as the trend among foreign countries.¹³² Seemingly most persuasive to the Court was the fact “that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”¹³³

The Roper court relies on the practice of life without parole for juvenile offenders to conclude that the death penalty may be a poor deterrent and so is disproportionate.

On the basis of these three amorphous inquiries, the Court set aside the death sentence in the case before it, as well as the application of all state laws allowing similar punishment.¹³⁴

Since that decision, “human rights” organizations and juvenile-criminal advocates have turned their sights to life without parole for

juvenile offenders, arguing that, based on *Roper*’s reasoning, it should be next on the Court’s Eighth Amendment chopping block. In their speeches, reports, and briefs, they claim that this is the next logical step in the evolution of the law and that the death penalty and life without parole, which they frequently refer to as a “death sentence,” are perfectly analogous.¹³⁵

Nothing in *Roper*, however, supports those pat conclusions. Quite the opposite: *Roper* undercuts their case. Rhetorical comparisons aside, all three of the factors

10 Case Study

Defendant: Rudolfo Sandoval
Victims: Ryan Briner
Crimes: First degree murder
Age: 17
Where: Ventura, California
Crime date: May 5, 2004

Summary

Rudolfo Sandoval shot and killed a random victim with a shotgun.

Facts

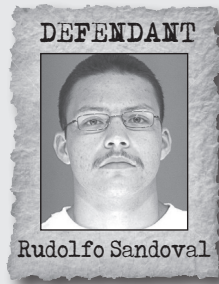
Rudolfo Sandoval was a member of the Ventura Avenue Gangsters. The gang is Ventura's most prominent Hispanic criminal street gang, and its members commit a variety of crimes within the community, from assaults to drug-related offenses to murder.

Members of the Ventura Avenue Gang view most other gangs as their rivals, but they dislike gangs from Montalvo in particular. According to gang-crime experts, a Ventura Avenue Gang member's stock would rise in the gang if he were to shoot a random white male in Montalvo.

On May 4, 2004, Sandoval struck a man in the head with a shotgun and then gave the shotgun to Javier Acevedo, a fellow gang member, who shot up the victim's car.

The following evening, Sandoval and Acevedo decided to "go cruising" around Montalvo in Acevedo's car, which contained Acevedo's 12-gauge Mossberg shotgun. At around 11:25 p.m., as the two drove down Wolverine Street in Montalvo, they spotted Ryan Briner, a 26-year-old white male walking toward his parents' home at the end of the cul-de-sac.

Though unemployed, Briner was well engaged in his community and neighborhood and could frequently be



seen surfing, skateboarding, and playing his guitar. He had briefly attended college was considering returning to major in criminal justice.

Sandoval and Acevedo exchanged words with Briner as they drove by him. They made a U-turn at the end of the street and parked. Sandoval, bearing the shotgun, and Acevedo walked toward Briner.

Briner, fearing a fist fight, removed his shirt and wrapped it around his fist. But when he was just a few feet from Briner, Sandoval fired the shotgun, blowing a two-inch hole in Briner's chest. Briner collapsed and, bleeding profusely, attempted to flee toward home, leaving a trail of blood in the street.

Sandoval fired a second shot, striking Briner in the back. Briner fell to the ground and bled to death. Sandoval and Acevedo returned to the car and drove away. Many people, including Briner's mother, witnessed the shooting. Briner's mother ran out into the street, saw her bloodied son on the ground, and suffered broke down in tears.

After leaving the murder scene, Acevedo and Sandoval drove to Acevedo's grandmother's home, where Sandoval shaved his head to avoid detection. They managed to avoid police scrutiny for over six months, until Acevedo was stopped by police officers for a traffic offense. A search of his car revealed shotgun ammunition, methamphetamine, a ski-mask, and the 12-gauge shotgun used to kill Briner.

Both before and after his arrest, Sandoval told many people that he shot Briner.

Sources

Letter from Michael Frawley, Chief Deputy District Attorney, Ventura, CA, to Charles Stimson (Oct. 24, 2008) (on file with author); California v. Sandoval, No. 2006015816 (Sup. Ct. Cal. County of Ventura. Oct. 15, 2007); Lynne Barnes, *Killer of Ventura Man, 26, Sought*, L.A. TIMES, May 7, 2004, at 3; Raul Hernandez, *20 Year-Old Man Gets Life Sentence in Shotgun Death*, VENTURA COUNTY STAR, Jan. 23, 2008. ■

NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

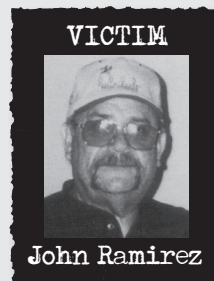
that mitigated against the juvenile death penalty in *Roper* support continued application of life without parole for juvenile offenders.

First, “objective indicia” demonstrate a “national consensus” in support of life without parole for juvenile offenders. The raw numbers are overwhelming: 43 states, the federal government, and the District of Columbia allow life without parole for juvenile offenders; only seven states forbid it.¹³⁶ Of those 44 (the 43 states and D.C.), only five could be “knocked out” because in practice they employ the sentence only rarely or not at all.¹³⁷

By this initial measure, then, 86 percent of states, containing over 90 percent of the national population, have and use life without parole for juvenile offenders.¹³⁸ Further, in 26 of those states, life without parole is the mandatory sentence for anyone—

11 Case Study

Defendant: Adam Sarabia
Victims: John Ramirez
Joann Wotkyn
Crimes: Two counts, first degree murder
Residential burglary
Auto theft
Age: 16
Where: Santa Paula, California
Crime date: October 21, 2002



Adam Sarabia entered the home through an unlocked garage door. Armed with a baseball bat, he slipped into the sleeping couple’s bedroom and hit them repeatedly with the bat, aiming for their heads and faces.

Sarabia then went downstairs to the kitchen, where he found a knife, and returned to the bedroom to stab and slash Ramirez and Wotkyn. He left the bedroom, walked downstairs, and took the car keys from Wotkyn’s purse. He drove off in the family car, cruising around town and showing the car off to friends before abandoning it at a shopping center after learning that the bodies had been discovered.

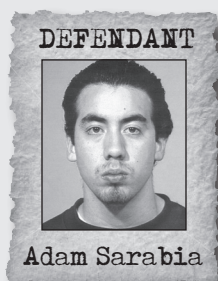
Sarabia also took the victims’ cell phone, which he used to call his friends.

Summary

Adam Sarabia broke into a home and bludgeoned and stabbed a man and woman to death before stealing their car. He used their cell phone to brag to his friends about the crime.

Facts

John Ramirez and JoAnn Wotkyn, a couple in their 50s, were asleep in their bed in the early morning hours of October 21, 2002. They lived in a neat two-story house in the city of Santa Paula, California.



adult or juvenile—convicted of first-degree murder, evincing the states’ comfort in applying this sentence to the most serious offenders.¹³⁹

Data on the trend in state laws point in the same direction. Since the 1980s, states have gotten tough on juvenile crime, passing many laws allowing for the automatic transfer of juvenile offenders from the juvenile justice system into regular criminal courts. Only 14 states had such laws in place in 1979, but by 2003, the number had reached 31, with an additional 14 states allowing prosecutors to decide whether to file charges in juvenile or criminal court.¹⁴⁰ At the same time, many states have reduced the age at which juvenile court jurisdiction ends and have expanded the scope, specified in age and by offense, of automatic transfer statutes.¹⁴¹ The result is that a larger proportion of juvenile offenders than ever before are now subject to adult

Later that day, Ramirez’s son learned that his father had not shown up for work. He drove to his father’s house and saw that it was dark and that the car was missing. He knocked; there was no response. He called the police.

The police found Ramirez’s and Wotkyn’s bodies in their bed, laying in a puddle of blood. Blood was also spattered on the walls.

When he was arrested a week and a half later, Sarabia was wearing a sweatshirt that had tiny blood spatters on the sleeves. The blood-stained baseball bat was found in Sarabia’s garage, and a pair of blood-spattered tennis shoes were found in his bedroom. The blood was a match for Ramirez and Wotkyn. Sarabia’s father gave police Ramirez’s cell phone, which he had taken from his son.

According to the prosecutor, Senior Deputy District Attorney Richard E. Simon, Sarabia showed no remorse for the violent murders:

Sarabia is a pure sociopath who committed two horrific murders against two innocent victims with whom he had no connection. His reaction

to his crime was completely unremorseful and cold-blooded. The interview with Sarabia was chilling. He never admitted to the crime, nor did he deny it. He just didn’t seem to care. If I could have gone for the death penalty, I gladly would have. I believe Adam Sarabia is one of the most evil human beings I have ever prosecuted. He is a poster boy for life without possibility of parole for juvenile offenders.

Sources

Memorandum from Richard Simon, Senior Deputy District Attorney, County of Ventura, CA, to Michael Frawley, Chief Deputy District Attorney, County of Ventura, CA (Oct. 15, 2008) (on file with author); Peggy Kelly, *Adam Sarabia Enters Not Guilty Plea in Murder of Wotkyns, Ramirez*, SANTA PAULA TIMES, Mar. 14, 2003, available at http://www.santapaulatimes.com/news/fullstory.php/aid/4555/Adam_Sarabia_enters_not_guilty_plea_in_murder_of_Wotkyns,_Ramirez.html; California v. Sarabia, 2005 WL 1871015 (Cal.App. 2 Dist. 2005). ■

courts and adult punishment, including life without parole, sometimes as a mandatory sentence.

The unsurprising result of this legislative activity is that more juveniles are receiving sentences of life without parole. Even opponents of life sentences for juvenile offenders acknowledge that use of this sentencing tool is on the rise. A 2008 University of San Francisco report, for example, estimates that “the rate at which states sentence minors to life without parole remains at least three times higher than it was 15 years ago.”¹⁴² The same report states that “the sentence was rarely imposed until the 1990s,” providing a strong indication of the strength of the trend in favor of life sentences for juvenile offenders.¹⁴³

Against this trend stand two states: Colorado, which changed its parole statute in 2006 to allow those who are sentenced to life for offenses committed while under the age of 18 to seek parole after serving 40 years,¹⁴⁴ and Montana, which in 2007 abrogated restrictions on parole eligibility for a half-dozen classes of offenders, including juveniles.¹⁴⁵ Meanwhile, at least six state legislatures, as well as the U.S. Congress, have considered but declined to pass legislation to eliminate or restrict the sentence.¹⁴⁶

The Court’s determination of its “independent judgment” in Roper rests on the continued availability of life without parole for juvenile offenders.

So there is a national consensus on life without parole for juvenile offenders. The same objective indicia considered in *Roper* show that this consensus is overwhelmingly in favor of it.

Roper’s second factor, “the Court’s own determination in the exercise of its independent judgment,” would be difficult to apply were it not for the fact that the Court has already undertaken the analysis. While its findings on the culpability of juveniles could be seen as applying against life sentences,¹⁴⁷ the Court was clear that its analysis applies only to capital sentencing.

This makes logical sense: The Court simply concluded that since juveniles could not possibly be within the class of “the worst offenders,” sentencing them to death would necessarily violate its requirement that death be limited to the narrow category of offend-

ers whose “extreme culpability makes them the most deserving of execution.”¹⁴⁸ Juveniles cannot be among the worst, reasoned the Court, because the death penalty’s marginal deterrent effect is vanishingly small relative to “life imprisonment without the possibility of parole...itself a severe sanction, in particular for a young person.”¹⁴⁹ Thus, the Court’s determination of its “independent judgment” in *Roper* rests on the continued availability of life without parole for juvenile offenders.

Third, the international “unanimity” in which the Court found solace in *Roper* simply does not exist for life-without-parole sentences.¹⁵⁰ The sentence is available in at least 11 countries, including Australia, and most of those countries share America’s common-law heritage.¹⁵¹ Further, a multitude of countries allow sentences of long durations for juvenile offenders, which in some instances may be the practical equivalent of life without parole.¹⁵² Other countries, meanwhile, have agreed to prohibit the sentence but have not done so in practice.¹⁵³

Thus, the “weight of international opinion” in common-law countries is mixed and far lighter overall than in the case of the death penalty. And as the Court acknowledges, even very weighty evidence of foreign practices does not control U.S. law and can provide only “significant confirmation” of the Court’s judgments under U.S. law.¹⁵⁴

The two primary factors in *Roper*—national consensus and the Court’s own judgment—preclude the same result as *Roper* in the life-without-parole context, assuming that the Court is even willing to take the unprecedented step of expanding the reach of its death jurisprudence. It is far more likely that the Court would hew to its “narrow proportionality” line, never moving beyond the initial inquiry: *viz.*, whether the penalty is grossly disproportionate to the crime.

Any other result would require the Court to radically revise the entirety of its Eighth Amendment jurisprudence as concerns both capital and non-capital offenses, throwing the entire nation’s criminal justice system into chaos. Even a more activist Court that was less divided over the question in *Roper* would balk at that prospect.

5

The U.S. Has No International Obligation to Ban Juvenile Life Without Parole

Many opponents of life without parole for juvenile offenders claim that the continued use of this sentence puts the United States in breach of its obligations under international law.¹⁵⁵ Specifically, they name three treaties as barring the administration of this sentence in the United States: the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention Against Torture.

All of these assertions are false.

Increasingly, political activists have been using the aspirational language that is often present in international agreements to advance their domestic political agendas, especially when their causes fail to win support in the United States among voters and legislators.¹⁵⁶ As described above, some activists and academics go further, claiming that the laws of foreign nations, as opposed to treaties that the United States may have signed, ratified, and implemented, should determine the meaning of domestic laws and even the U.S. Constitution.¹⁵⁷

This view is known as internationalism and, in its more extreme forms that incorporate foreign law, transnationalism.¹⁵⁸ Neither, whatever its merits, is availing in this case. A careful analysis of the treaties and, crucially, the United States' obligations under them refutes the claim that international law precludes U.S. states from sentencing juvenile offenders to life without parole.

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The Constitution Is America's Fundamental Law

The Constitution is America's fundamental law, and it controls how treaties interact with its provisions and other domestic laws.¹⁵⁹ That road map can be found in Article VI:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

For the United States to become a party to a treaty, the President first must sign the treaty and send it to the Senate, at least two-thirds of which must give its advice and consent before the treaty can be ratified.¹⁶⁰ After the Senate has voted to give its consent to ratification, the President may then ratify it, if he so chooses, by signing the instrument of ratification.¹⁶¹ Treaties that have not been approved in this way are generally not

12 Case Study

Defendant: Chawa See
Victims: Robert Trevino
Crimes: Murder with special allegations
Conspiracy to commit murder
with special allegations
Age: 16
Where: Visalia, California (Tulare County)
Crime date: October 1, 2006

Summary

Chawa See shot a 15-year-old boy in the head with a .380 caliber semiautomatic handgun, killing him almost instantly.

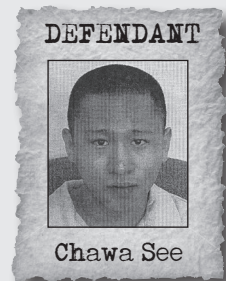
Facts

Chawa See was a member of the Oriental Troop gang, an Asian street gang active in the north central area of

Visalia, California. Robert Trevino, a 15-year-old former member of the Norteno gang, lived on NE Fourth Street in Visalia, part of the area the Oriental Troop gang considered its “turf.”

On October 1, 2006, Trevino was outside his house playing football with younger boys—neighbors, not gang members. See and four of his fellow gang members decided to confront Trevino. After covering their faces with bandanas, they walked over to NE Fourth Street and approached Trevino. Several bystanders advised Trevino to go inside to avoid the confrontation, but he told them that he was doing nothing wrong and had nothing to fear.

See and his “posse” came nearer, and one of them, 19-year-old Billy Her, shook Trevino’s hand to distract



NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

binding on the United States.¹⁶² Even in the extremely rare circumstance that treaties or parts of treaties become a part of “customary” international law and thereby binding upon the United States even though unratified, they still cannot by themselves override domestic statutes.¹⁶³

Many treaties, even if ratified, do not themselves preempt existing domestic laws, but must await subsequent legislation to implement their terms.¹⁶⁴ Only “self-executing” treaties—those that do not require implementing legislation—become the type of federal law that can preempt conflicting state and federal laws.¹⁶⁵

Few modern treaties, however, are self-executing, and often a treaty will provide on its face that it is not self-executing. Whether express or implied, courts will not enforce treaties that are not self-executing until an act of Congress specifies how the rights or privileges are to be enforced.¹⁶⁶ Thus, treaties that are not self-executing and that have not been implemented by Congress (which may include specifying available causes of action, remedies, court jurisdiction, etc.) do not themselves establish domestically binding legal remedies.

him. That was when See pulled out a .380 caliber semiautomatic handgun and, from a distance of less than three feet, shooting Trevino in the head, killing him almost instantly.

Trevino’s grandmother, hearing the shot, ran outside. She found her grandson on the sidewalk. “I touched his face to see if he would move,” she later testified, but he was “already gone.”

See fled the scene. He later admitted the murder to a female friend, and the handgun was found under his bed.

At See’s sentencing hearing, Superior Court Judge James Hollman stated that See and his gang showed sophistication and brutality in the planning of their assault on Trevino. “It was done in the middle of the day, very brazenly,” Hollman said. “They did it with masks on their

faces. They wanted to make it clear to everyone what they were doing.”

Sources

Letter from Don Gallian, Assistant District Attorney, Tulare, CA, to Charles Stimson (Aug. 26, 2008) (on file with author); Tim Bragg & Susie Pakoua Vang, *Teen’s death latest in string of tragedies*, FRESNO BEE, Oct. 3, 2006, at A1; *15-year-old arrested in Visalia homicide*, FRESNO BEE, Oct. 8, 2006, at B4; Tim Bragg, *4 teens to be charged as adults in Visalia killing*, FRESNO BEE, Oct. 19, 2006, at B1; Tim Bragg, *Teen admits to role in Visalia slaying, detective says*, FRESNO BEE, Jan. 26, 2007, at B1; Michael Miyamoto, *3 Murder Suspects in Custody After Escape*, TULARE ADVANCE-REGISTER, Dec. 13, 2007, at 1A; Tim Bragg, *Handshake a prelude to Visalia death*, FRESNO BEE, Apr. 10, 2007, at B7; Tim Bragg, *Visalia case nets 2 teens life terms*, FRESNO BEE, May 21, 2007, at B1. ■

Further, the United States often does not agree to be bound by every term of an international convention, and it cannot do so if some terms conflict with the U.S. Constitution. As a matter of national sovereignty, the United States may adopt whatever portion of international conventions it deems appropriate, a practice that has a long pedigree under international law. When nations sign or ratify a treaty, they often enter “reservations” and “understandings” that govern the treaty’s domestic and international implementation.¹⁶⁷

Many treaties, even if ratified, do not themselves preempt existing domestic laws, but must await subsequent legislation to implement their terms.

The Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement...made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the

legal effect of certain provisions of the treaty in their application to that State.”¹⁶⁸ Under the convention’s formulation, reservations are effective so long as they are not prohibited by the treaty or incompatible with its “object and purpose.”¹⁶⁹ Understandings serve to notify other parties to the treaty of a nation’s interpretation of specific terms, particularly as those terms apply to its laws.¹⁷⁰ Both reservations and understandings may alter the application of a treaty’s terms to a particular party.

Once a treaty has been properly executed and implementing legislation has been enacted, there is the question of how it interacts with other laws. In general, a federal statute and a properly executed treaty have equal status in law, with the latter in time taking precedence.¹⁷¹ This is true, though, only to the extent that a conflict actually exists between the two; to the extent possible, courts interpret statutes so as to avoid violation of international obligations.¹⁷² Therefore, if Congress passes a law that clearly contradicts earlier treaty obligations, courts will enforce the law over the treaty.¹⁷³ The obligations of properly executed and implemented treaties, being a part of federal law, can be enforced against the states under the Supremacy Clause, but only if they do not violate the U.S. Constitution, including fundamental protections of state sovereignty.¹⁷⁴

Finally, courts employ several special rules of interpretation when applying treaties. First, when interpreting the meaning of treaty language, courts generally “rely on clarifications, interpretations, and understandings of a treaty formulated by the executive

branch.”¹⁷⁵ Second, courts will not infer an obligation from a treaty that has not been articulated in clear terms.¹⁷⁶ These rules, taken together, impose a greater burden of clarity and specificity than is generally required of statutory law.

The result of these requirements is that those who would wield vague language in international treaties against state laws have a number of hurdles to clear before a court even considers the substance of their claims, and failure to clear even one of these hurdles will defeat the claim.

13 Case Study

Defendant: Martize M. Smolley
Victims: Kelly Houser
Amy Allen
Crimes: Two counts, felony first degree murder
Two counts, first degree murder
Unlawful possession of a firearm
Age: 16
Where: Peoria, Illinois
Crime date: June 14, 2004

Summary

Martize Smolley shot and killed a mother and daughter who had stopped at an ATM on their way to an ice cream parlor.

Facts

On the evening of June 14, 2004, Martize Smolley announced to his friend Monterius Hinkle that he was going to “get some money.” He armed himself with a 9mm semiautomatic handgun and headed out toward Jefferson Street.

At about the same time, Kelly Houser and her teenage daughter, Amy Allen, decided to get some ice cream and enjoy a summer evening together. On their way to the

ice cream parlor, Houser stopped at an ATM to get some cash.

Smolley was waiting across the street for someone to use the ATM. He watched Houser park beside it. As Houser withdrew \$10, he approached the car from behind, on the driver’s side. Smolley removed the gun from his waistband and stuck it through the driver’s-side front window. He demanded money. Frightened and surprised, Houser started to drive the car away.

Smolley fired a single shot. The bullet struck Houser in the left cheek, perforating her brain stem, and exited through the back right side of her head. It then entered the left side of Allen’s head, lodged in her brain. Both victims died instantly.

Smolley fled to his apartment. He told Hinkle, “I just shot some lady down there.”

The gun used to kill Houser and Allen was discovered under Smolley’s bed, and he ultimately confessed to the murders.

Sources

Letter from Kevin W. Lyons, State’s Attorney, Peoria County, IL, to Charles Stimson (Nov. 11, 2008) (on file with author); *DailyDigest*, PANTAGRAPH (Bloomington, IL), Sept. 4, 2004, at B; Andy Kravetz, *Peorian*, 17, *Faces Mandatory Life Sentence for Deaths of Mother and Daughter*, JOURNAL STAR (Peoria, IL), July 27, 2005; *Illinois v. Smolley*, 873 N.E.2d 8 (Ill.App. 2007). ■

NO PHOTOS FOR THIS CASE STUDY AVAILABLE

The U.S. Is Not a Party to the Convention on the Rights of the Child

Article 37(a) of the Convention on the Rights of the Child (CRC) states, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age.” This lan-

14 Case Study

Defendant:	Donald Torres
Victims:	Harry Godt Jennifer Godt Jon Godt (age 4) Jennifer Godt (age 1½)
Crimes:	Four counts, first degree murder Four counts, felony murder
Age:	14
Where:	Middletown, Delaware
Crime date:	February 24, 1989

Summary

Donald Torres broke into his neighbor’s house, doused the floor with kerosene, set the house ablaze, and watched as the flames spread, killing a family of four.

Facts

Shortly before midnight on February 24, 1989, 14-year-old Donald Torres broke into the home of his neighbors, the Godts. He found a can of kerosene, spread the liquid over the kitchen floor and stairway leading to the bedrooms, and ignited the kerosene with a lighter and some newspaper.

Torres went outside and watched as the flames spread. He saw Harry Godt run from the house in his underwear, screaming about his family, and then re-enter the burning home in an attempt to save them. The flames quickly reached the home’s kerosene heater and then engulfed the entire house. By the time the fire department had

extinguished the blaze, the home, as well as three neighboring residences had been destroyed.

Harry Godt’s body was found inside the house, where he had died trying to shield his wife, Jennifer, from the flames. The bodies of the Godts’ two children (Jon, age four, and Samantha, age one and a half) lay nearby.

While the fire raged, Torres returned to his home and told his parents that he had been asleep, in his clothes, in his room when he had been awakened by the commotion down the street. Over the next several weeks, however, he bragged to at least three friends that he had started the fire and admitted as much to his mother.

When questioned by police two months after the fire, Torres initially denied any involvement but eventually admitted that he had intentionally started the fire to get back at Harry Godt because Godt had accused Torres of teaching his son, Jon, to play with matches. Torres acknowledged that he knew that the rest of the Godt family was in the home when he started the fire.

Torres was convicted by a jury and sentenced to eight consecutive terms of life without the possibility of parole.

Sources

Letter from Paul Wallace, Chief of Appeals, Department of Justice, Wilmington, DE, to Charles Stimson (March 24, 2009) (on file with author); Torres v. Delaware, 608 A.2d 731, (Del. 1992); Torres v. Delaware, 642 A.2d 837 (Del. 1994); Torres v. Kearney, 2005 WL 3263098 (D.Del. 2005); Torres v. Delaware, 2009 WL 1175048 (Del.Supr. 2009). ■

NO PHOTOS FOR THIS CASE STUDY AVAILABLE

guage, observe opponents of life-without-parole sentences for juvenile offenders, unambiguously prohibits imposition of life without parole on juveniles.¹⁷⁷

The United States, however, has not ratified the CRC. Although President Clinton signed the treaty in 1995, the Senate has never consented to ratification.¹⁷⁸ Since the United States is not a treaty party, it is therefore not bound by Article 37 or any other provision of that treaty. Even if it were self-executing, the treaty is not a part of U.S. law.

Nonetheless, some claim that the CRC is binding on the United States even though it has never been ratified. They make two arguments. The first is that, because the U.S. signed the treaty, it is prohibited from taking actions that would defeat its “object and purpose” and that continuing to allow life-without-parole sentences for juvenile offenders is such an action.¹⁷⁹ The second is that, because the CRC has been ratified by nearly every other country in the world, it constitutes customary international law that is binding on the United States.¹⁸⁰

Neither of these arguments is valid.

The “object and purpose” argument goes as follows: (1) Article 18 of the Vienna Convention on the Law of Treaties—a treaty that the

U.S. has only signed but some provisions of which have been accorded the status of customary law—states that if a nation has signed a treaty but has not ratified it, the nation is still “obliged to refrain from acts which would defeat the object and purpose of [the] treaty”; (2) allowing practices contrary to the treaty would defeat its object and purpose; (3) thus, because sentencing juveniles to life without parole is forbidden by the CRC, Article 18 requires that the United States, as a CRC signatory, desist from this practice.

This argument contains two fundamental errors. The first is that the class of “acts which would defeat the object and purpose of a treaty” does not include all acts that are prohibited under the treaty. The very use of the phrase “object and purpose” rather than “terms” or “provisions” indicates that the two classes are not equivalent. Article 18 is, in both practice and custom, far narrower, forbidding “only actions deliberately calculated to undermine a state’s ability eventually to comply, including and especially any uniquely irreversible action.”¹⁸¹

*The United States has not ratified the
Convention on the Rights of the Child.*

Allowing states to impose sentences forbidden by the CRC (on the questionable assumption that Congress even has the power to forbid such sentences at all) in no way prevents eventual compliance should the treaty ever be ratified; indeed, it is a position that, following ratification, could be reversed immediately by Congress, relying on its treaty power and the Supremacy Clause.¹⁸² It is far more likely, though, that ratification would be accompanied by a reservation rejecting the prohibition on life-without-parole sentences for juvenile offenders.

The second error is the assertion that Article 18 requires signatory nations to *change* their laws to comply with unratified treaties. Quite the opposite: Article 18 does not create an obligation to undertake specific actions, such as passing new laws, but only

15 Case Study

Defendant: Norman Willover
Victims: Priya Mathews
 Jennifer Aninger
 Frances Anne Olivo
Crimes: Two counts, first degree murder
 Attempted murder
 Drive-by shooting
 Felony murder
Age: 17
Where: Monterey, California
Crime date: January 31, 1998

Institute of International Studies. Norman Willover, recently escaped from a juvenile rehabilitation center in Utah, had just purchased a semiautomatic handgun at a party and told a friend that he was going to return to Monterey, California, and “cap some people . . . get some money and live the good life.”

On the evening of January 31, 1998, Mathews and Aninger left a coffee shop and decided to walk down to Monterey’s Municipal Wharf to enjoy the natural beauty of the ocean, night sky, and Monterey hills. A car drove toward them. Inside it were Willover and fellow members of the Oriental Boyz gang; they had been looking for someone to rob.

The two women heard yelling from the car but ignored it, not realizing that it was directed at them or that Willover and his crew were demanding money.

Willover pointed his gun at Mathews and Aninger and began firing. Mathews was shot in the back,

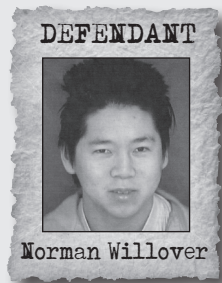
Aninger in the head and arm. Proud and happy after shooting the two girls, Willover exchanged “props” (congratulations) with his fellow gang members in the car.

Summary

Norman Willover tried to rob two female students and then shot them, killing one and severely injuring the other.

Facts

Friends Priya Mathews and Jennifer Aninger were language students at the Monterey



NO ADDITIONAL PHOTOS FOR THIS CASE STUDY AVAILABLE

an obligation to *refrain* from undertaking certain types of actions. A nation is therefore under no obligation to change its laws to match a treaty's terms upon becoming a signatory; it merely must "refrain" from changes that would prevent eventual implementation of the treaty if it were ratified.

Thus, having signed but not ratified the CRC does not oblige the United States to change its laws to prohibit life-without-parole sentences for juvenile offenders. Absent ratification, Congress lacks the power to accomplish such an end as against the states.¹⁸³

Further, the U.S. Constitution demands this result. A maximally broad construction of Article 18 would render the Constitution's ratification requirement a nullity, because the nation would be completely bound by any treaty that was merely signed.

Willover and his group changed cars at a friend's house, out of fear police would be looking for them. They all drove to Seaside, where Willover spotted a possible robbery target. He encouraged a fellow gang member, Joseph Manibusan, to rob the woman. Manibusan fired six shots through the driver's-side window at Frances Anne Olivo, a mother of six.

Doctors at the Community Hospital of Monterey saved Jennifer Aninger's life by opening her skull for a few days until the swelling went down. Her brain injury left her without a sense of smell and impaired her sense of taste. The bullet that hit her left arm has left that limb permanently impaired.

Mathews died of her wounds.

Willover was tried and convicted by a jury. He was sentenced to life without parole for the murder of Mathews; a consecutive sentence of twenty-five years to life for the intentional discharge of the firearm relating to the murder of Mathews; life without parole for the murder of Olivo; fifteen years to life for the attempted murder of Aninger; and twenty-five years to

life for the intentional discharge of the firearm relating to the attempted murder. Manibusan, tried separately for the murder of Olivo, was convicted and sentenced to death.

Since the trial, Frances Olivo's family has been vocal in their approval of the sentences received by Willover and Manibusan. Leticia Parsels, Olivo's niece, explained their position: "Life without parole was the verdict. It was determined by the court that these crimes were not juvenile. These crimes were committed by two individuals who knew the difference between right and wrong. Just knowing [they] got life without parole gave our family some contentment and closure."

Sources

Letter from Stephanie Hulsey, Assistant District Attorney, Monterey County, CA, to Charles Stimson (Oct. 8, 2008) (on file with author); Letter from Jennifer Aninger, victim, to Charles Stimson (Mar. 30, 2009) (on file with author); Virginia Hennessey, *Wharf Shooting Changed Victim's Life*, MONTEREY COUNTY HERALD, Sept. 27, 2000, at B1; Willover v. Scribner, 2007 WL 2122641 (N.D. Cal. 2007). ■

Even were this the customary meaning of Article 18 (which it is not¹⁸⁴), customary international law simply cannot overrule the clear text and requirements of the U.S. Constitution, which requires, in addition to signing, ratification.

Likewise, the CRC itself has not attained the status of binding customary international law such that it imposes international expectations upon non-parties. Customary international law “is the law of the international community that ‘results from a general and consistent practice of states followed by them from a sense of legal obligation.’”¹⁸⁵ This standard demands far more than even widespread ratification. The fact, then, that the CRC has been ratified by many states does not render it binding on a non-party.

Moreover, the ongoing practices of many of the states party to the CRC, such as France, Brazil, and Venezuela, are not at all consistent with many of the convention’s provisions.¹⁸⁶ By their own admission, several states party to the CRC sentence juveniles to life without parole or reserve the right to do so.¹⁸⁷ Finally, even if it were customary international law, it probably would not by itself overturn contrary domestic law, but rather would merely render the United States out of compliance with international norms.¹⁸⁸

The International Covenant on Civil and Political Rights Does Not Prohibit Juvenile Life Without Parole in the U.S.

A second international treaty that some argue forbids sentencing juveniles to life without parole is the International Covenant on Civil and Political Rights (ICCPR), the primary human rights treaty for the protection of civil and political rights, which, unlike the CRC, was ratified by the United States in 1992. Specifically, activists claim that such sentences are a prohibited form of punishment for juveniles under Articles 7, 10, and 14 of the treaty.¹⁸⁹

This, too, is unavailing.

The Senate made quite clear when ratifying the treaty that it is not self-executing—that is, it does not preempt existing U.S. law and is not directly enforceable except to the extent that it has been implemented in legislation by the states and Congress.¹⁹⁰ Without this limitation, which was undertaken specifically to preclude courts from relying on the treaty’s broad provisions to rewrite domestic law, the Senate would not have ratified it.¹⁹¹

Further, the ICCPR is silent regarding the sentence of life without the possibility of parole, much less under what circumstances that sentence may be imposed on juveniles. Instead, Article 7 contains a general prohibition on “cruel, inhuman or degrading treatment or punishment” without defining or further elaborating upon the meaning of those words.¹⁹²

Moreover, the U.S. entered a reservation to Article 7 to protect its laws against that potentially capacious language. This reservation specified that the United States will consider itself bound by that provision only “to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”¹⁹³ As a result, Article 7 (to the extent executed) cannot impose any additional obligations on the United States beyond those already required by the Fifth, Eighth, and Fourteenth Amendments, none of which prohibits sentencing juveniles to life without parole.

The International Covenant on Civil and Political Rights is silent regarding the sentence of life without the possibility of parole.

Whether Article 7’s prohibition on “cruel, inhuman or degrading treatment or punishment” would otherwise encompass such sentences remains an open question—one that is debated every four years when the U.S. submits its report to the United Nations Human Rights Committee.¹⁹⁴ As concerns the domestic law of the United States, however, the question is moot because of the rider and the treaty’s non-self-executing status.

Claims that Articles 10 and 14 of the ICCPR prohibit such sentences are likewise unsupported. Article 10(3), which addresses permissible conditions of confinement, declares, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”¹⁹⁵ Article 14 does not deal with conditions of confinement, but rather addresses criminal procedure. Specifically, regarding juveniles, it states, “In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”¹⁹⁶

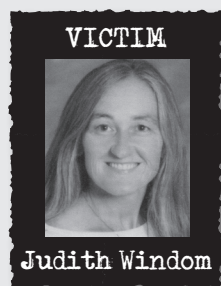
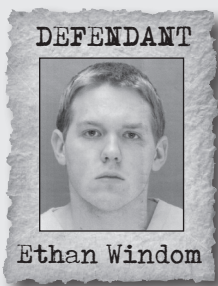
As with Article 7, the U.S. entered a specific reservation regarding Articles 10 and 14, expressly reserving “the right, in exceptional circumstances, to treat juveniles

as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.”¹⁹⁷ Moreover, to make clear to the Human Rights Committee and the other ICCPR states parties regarding U.S. views concerning incarceration, the U.S. entered a separate understanding that states: “The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.”¹⁹⁸

Read together, these reservations and understandings eviscerate the argument that Article 10 or Article 14 obliges the United States to cease sentencing juveniles to life imprisonment without parole. Notwithstanding any broad interpretation of the text of these articles, the U.S. reservation contemplates that juveniles may be tried and sentenced the same as adults under “exceptional circumstances,” such as murder and

16 Case Study

Defendant: Ethan Allen Windom
Victims: Judith Windom
Crimes: Second degree murder
Age: 17
Where: Boise, Idaho
Crime date: January 25, 2007



Summary

Ethan Allan Windom battered his mother with a barbell and then killed her with a kitchen knife.

Facts

Ethan Allan Windom lived with his mother, Judith Windom, in Boise, Idaho. Judith was a high school teacher and worked with disabled students. Ethan

attended the local public high school, where he received good grades.

Windom was an avid weight lifter and took creatine, a supplement, to enhance his weight-lifting ability. He was 5’8” tall, weighed 220 pounds, and was very muscular.

By late 2006, his relationship with his mother had deteriorated significantly. Windom bullied his mother into giving up the master bedroom, which he took for himself, and moving into the smallest bedroom in the house. He turned the living room into a weight-lifting and exercise room. Whenever his mother wouldn’t acquiesce to his demands, Windom would scream at her, shove her, and intimidate her physically.

Despite that his mother purchased expensive clothes for him, or whatever else he demanded, Windom was angry with her. That Christmas, he told his brother, who had moved out of the house to escape Windom’s violence, “That bitch is going to get what she deserves.” He also bragged that he knew how to kill a person and how to trick a psychologist into making a false diagnosis.

His mother, meanwhile, told her friends and Windom’s father that she feared for her safety and her life.

other violent felonies, and that they may be imprisoned for the purposes of “punishment, deterrence, and incapacitation,” all of which are significantly furthered by the sentence of life without parole.¹⁹⁹

In sum, these articles, through the lens of the United States’ reservations and understandings, alter existing U.S. law little or not at all, and they certainly do not cast legal doubt on sentencing juveniles to life without parole.

The Convention Against Torture Does Not Prohibit Juvenile Life Without Parole in the U.S.

Some argue that the sentencing of juveniles to life without parole violates the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Windom became obsessed with a fictional character, Patrick Bateman, from the book *American Psycho* and emulated his lifestyle. He told friends that he admired psychopaths like Bateman because they are “the smartest group of guys. And they’re the most interesting. They have an exciting life.”

On the night of, January 25, 2007, while his mother was asleep, Windom loaded all of his weights onto one end of a dumbbell. He sneaked into his mother’s room and bludgeoned her head until he had no strength left in his arms. Then he then stabbed her with a kitchen knife—at least 30 times in the head and at least 16 times in her heart and lungs. Then he cut her throat and left the knife lodged in her brain, where police found it. The beating was so severe that the officers who discovered Windom’s mother could not identify her as having a face.

Windom cleaned up and then replaced the voicemail greeting on their home telephone with one explaining that his mother was out of town on a trip. Then he hitchhiked and walked across town to his father’s residence. It was the middle of the night He woke his father and stepmother, telling them that someone had killed his mother. They called the police.

After Windom was arrested, he insisted that a stranger had committed the crime and forced Windom to stick the knife into his mother’s brain. During interrogations, he taunted the officers about their personal lives and inferior intelligence.

Then he confessed. He explained that he had been thinking about killing someone for some time. He smiled while describing the killing and snickered over the details. He said that he felt “nothing.”

Although charged with first degree murder, Windom struck a plea agreement and pleaded guilty to second degree murder. He was sentenced to life without the possibility of parole.

Sources

Letter from Greg H. Bower, County Prosecutor, Boise, ID, to Charles Stimson (Oct. 9, 2008) (on file with author); Blake McCoy, *Ethan Windom, 17, Gets Life in Prison for Mom’s Murder*, 2News TV (Boise, Idaho), Dec. 12, 2007, available at <http://www.2news.tv/news/local/12419411.html>; Idaho v. Windom, 2009 WL 961232 (Idaho App. 2009). ■

Punishment (CAT), which the United States ratified in 1994.²⁰⁰ Article 16 of the CAT requires that a party to the treaty “shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...when such acts are committed by...a public official or other person acting in an official capacity.”²⁰¹

The argument, then, is that such sentences amount to “cruel, inhuman or degrading treatment or punishment” under the treaty. Yet, contrary to that argument, the official monitor of CAT implementation does not agree that the text of Article 16 prohibits such sentences.

The official monitor of the Convention Against Torture implementation does not agree that it prohibits sentencing of juveniles to life without parole.

The Committee Against Torture considered the issue directly in its most recent report on the United States, as it had in previous reports.²⁰² But unlike in other areas, where the committee specifically contested U.S. interpretations of the

CAT and stated that the U.S. “should adopt” specific measures to be in full compliance, it could state only that sentencing juveniles to life without parole “could constitute cruel, inhuman or degrading treatment or punishment” and that the U.S. should therefore “address the question” of their propriety.²⁰³ The committee, in other words, seems to disapprove of such sentences but still could not say that they actually violated the treaty.

Additionally, just as it did with the ICCPR, the United States entered a reservation to Article 16, agreeing to be “bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term... means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”²⁰⁴ Thus, even were life-without-parole sentences for juvenile offenders ordinarily prohibited by Article 16 (which they are not), that prohibition would not be a part of U.S. law and would not be enforceable against the states.

6 Conclusion: A Lawful and Appropriate Punishment

The United States has a juvenile crime problem that far exceeds the juvenile crime problems of other Western countries. Over the years, state legislatures have responded to this increase in the volume and severity of juvenile crime by providing for sentences that effectively punish offenders, incapacitate them, and deter serious offenses. They have determined by an overwhelming majority that fulfilling their duty to protect their citizens requires making available life-without-parole sentences for juvenile offenders.

The sentence stands up to constitutional scrutiny. All state supreme courts and federal courts that have considered the question have concluded that life without parole for juvenile offenders does not violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Supreme Court's proportionality standard—the highest level of scrutiny it has applied to non-capital punishment—does not prohibit states from punishing murder and other serious offenses with lengthy prison terms; the Court has said that judges should second-guess state legislatures' determinations of criminal punishment only in the rarest cases where the punishment is wholly disproportionate to the harm of the offense.

All state supreme courts and federal courts that have considered the question have concluded that life without parole for juvenile offenders does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

Most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system. Every state has a juvenile justice system, and those courts handle the majority of crimes committed by juveniles.²⁰⁵ But some crimes evince characteristics that push them beyond the leniency otherwise afforded to juveniles: cruelty, wantonness, a complete disregard for the lives of others. Some of these offenders are tried as adults, and a small proportion of those tried as adults are sentenced to life without

parole—the strongest sentence available to express society’s disapproval—to incapacitate the criminal and deter the most serious offenses.

For years, opponents of this sentence have been lobbying for its abolition, but any change in policy in this area should be based on facts and real numbers, not on manufactured data, slanted stories, and flagrant misinterpretations of the law. Legislators should view these activists’ glossy reports with extreme skepticism: They are less academic studies than they are lobbyists’ brochures.

Nevertheless, lobbying to effect change through the democratic process is preferable to judicial activism, which the activists now seek to promote. A fair look at the Constitution, whether from the perspective of original meaning or from the perspective of current interpretation, provides no basis for overruling the democratic processes of 43 states, the District of Columbia, and the U.S. Congress. Neither do international law, even under broad and sweeping interpretations of its terms, or the misleading and sometimes just wrong statistics and stories marshaled in activists’ studies.

Used sparingly, as it is, life without parole is an effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.

This report has referred repeatedly to the misleading nature of the case studies contained in the many reports produced by activist groups that seek to restrict the availability of life-without-parole sentences for juvenile offenders. Again and again, these case studies omit crucial facts, ignore determinations made by juries or sometimes even by the offender’s own admission, and significantly downplay the horrid crimes that landed the perpetrators in prison.

In an attempt to demonstrate the bias of these activist reports and correct the mistaken impressions left with their readers, this appendix presents, side-by-side, the case study text used in those reports and the factual recitations from those same cases as determined by the courts and, in several instances, by impartial reporters. To be clear, none of the text in the right-hand column was written by the authors of this report; it is all quoted verbatim from the sources cited.

Offender	Activist Case Studies ¹	The Facts of the Case
Ashley Jones	<i>“At 14, Ashley tried to escape the violence and abuse by running away with an older boyfriend who shot and killed her grandfather and aunt. Her grandmother and sister, who were injured during the offense, want Ashley to come home.”²</i>	<p>“Geramie Hart, who celebrated his 16th birthday a few weeks before these crimes, and his 14-year-old girlfriend, Ashley Jones, apparently planned to kill members of Ashley’s family because her family did not approve of Ashley’s relationship with Hart....</p> <p>“Late in the evening on August 29, 1999, Deroy was in the den watching television. His wife, daughter, and younger granddaughter were asleep in</p>

1. The text quoted in each case is the entirety of the description of the criminal offense in the report cited, including, as relevant to the offense, information bearing on criminal intent. For most cases, the reports contained additional text, not quoted in this appendix, on such topics as the offender’s thoughts and aspirations, the offender’s family and living circumstances, and prison conditions.

2. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 25 (2007).

Offender

Ashley Jones (*continued*)

The Facts of the Case

their rooms. Ashley let Hart into the house; he was armed with Deroy's .38 caliber pistol, which Ashley had given him earlier. Ashley and Hart entered the den, and Hart shot Deroy twice in the face. Deroy did not die immediately; he stumbled toward the kitchen. Ashley and Hart then entered Millie's bedroom and shot her three times."³

"When Ashley realized her aunt was still breathing, she hit her in the head with a heater, stabbed her in the chest and attempted to set her room on fire. Mary Nalls, hearing the gunshots, awakened and began to step out of bed. Geramie and Ashley entered her room and shot her once in the shoulder. Geramie continued to pull the trigger, but there were no more bullets."⁴

"Ashley and Hart returned to discover that Deroy was still alive. Hart hit him with various objects and stabbed him repeatedly, leaving the knife in his back. Ashley poured charcoal lighter fluid on her grandfather and set him on fire. Ashley's sister, Mary, woke up and Ashley led her into the kitchen area. She saw her grandfather on the floor of the den; he was on fire but still alive, Mary said. Hart forced Deroy Nalls to disclose where he kept his money, and after Mr. Nalls complied, Hart stabbed him in the throat.

"Mrs. Nalls, who survived after being stabbed, could not remember whether Hart or Ashley had stabbed her. Ashley poured the charcoal fluid on Mrs. Nalls, then they set her on fire. Ashley and Hart watched Mrs. Nalls burn, and Hart urged Ashley to pour more of the flammable liquid on her. Mary Jones attempted to leave the kitchen, but Ashley grabbed her sister and began hitting her. Hart pointed the gun at the 10-year-old and said, 'This is how you are going to die.' Ashley said, 'No, let me do it,' and stabbed her sister 14 times. Hart and Ashley piled sheets, towels, and paper on the floor and set the pile on fire.

"Hart and Ashley took \$300 that was hidden beneath Deroy and Mary Nalls's mattress and drove away in the Nallses' vehicle. Mary Jones, who had pretended to be dead, helped her grandmother out of the house and contacted others for assistance."⁵ ■

3. Hart v. Alabama, 852 So.2d 839, 842 (Ala. Crim. App. 2002).

4. Order Finding Fact from Guilt Phase of Trial at 2, State v. Jones (Ala. 10th Cir. Ct. 2002) (No. CC-2000-0151).

5. Hart, 852 So.2d at 842 (Ala. Crim. App. 2002).

Offender Activist Case Studies

Emily Fetters *“Emily was arrested for murdering her aunt, a woman that she ‘had no reason to harm and had spent every summer and most weekends with since [she] was three years old.’”⁶*

The Facts of the Case

“The record reveals defendant began planning to elope from Orchard Place in mid-October. Jessica Wilhite testified that during her conversations with defendant she explained Klehm had a lot of money and she (defendant) and Tisha Versendaal planned to kill her and take her truck and money.

“Tisha Versendaal was also a resident of Orchard Place. She testified she also had conversations with defendant about eloping. She explained defendant planned to kill Klehm by stabbing her and cutting her throat while she was sitting in a chair. Further, defendant had informed her Klehm had money kept in a safe....

“Jeanie Fox was defendant’s suite mate at Orchard Place and accompanied her at the time of the homicide. She testified she and defendant each packed a bag and left Orchard Place together. As they were leaving, defendant mentioned to her that she was going to kill her aunt.... The two girls eventually made their way to the home of a friend of defendant and there obtained a small paring knife. Defendant joked about killing Klehm before leaving the apartment....

“After the van left, the two girls went up to the house and Klehm let them in. At some point, defendant pulled Fox into a side room and again informed her that she was going to kill her aunt. Defendant then returned to the kitchen area where Klehm was sitting. Thereafter, defendant struck Klehm on the head from behind with a kettle while Klehm was seated in the kitchen. Klehm got up and asked her what happened. Defendant then struck her in the head again with a frying pan. Defendant then asked Fox for the paring knife. She got on top of Klehm and attempted to slit her throat. Defendant then got a bigger kitchen knife and proceeded to stab Klehm in the back.

“During the attack, Klehm was screaming and asked Fox for help. Klehm also attempted to reach for a phone

6. AMNESTY INTERNATIONAL/HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 43 (2005).

Offender

Emily Fetters (*continued*)

The Facts of the Case

in the kitchen area. Defendant told her ‘no’ and removed the phone from the hook. After the attack, defendant removed her bloody clothing. She then took some necklaces and began looking for the keys to her aunt’s safe and truck but was unable to locate them.... After police arrived defendant cried and stated repeatedly she had killed her aunt.”⁷ ■

7. Iowa v. Fetters, 562 N.W.2d 770, 773 (Iowa Ct. App. 1997).

Offender**Activist Case Studies****The Facts of the Case****Joseph Jones**

“One afternoon, while 13-year-old Joseph, who is black, was riding his bike, his uncle and an 18-year-old friend told him to invite home a white girl they knew from the neighborhood. Thinking nothing of it, Joseph complied. When the older teens began beating and sexually assaulting the girl, Joseph turned to run. His older and bigger uncle forced him to participate. After Joseph left, the girl was killed by the older teens, who threatened Joseph not to tell anyone.”⁸

“[Ten-year-old] Tiffany Long’s body was discovered under a heavy cloth in the backyard of 614 Lakeside Avenue. A TV cable was looped around her neck, and her shirt was stained with fecal matter. S.B.I. Crime Scene Specialist William Lemons found a pool of blood in the right front bedroom and drag marks in the house and on a path outside the house. He found a backpack purse by the back porch, later identified as Tiffany’s, which contained, among other things, church ‘bus bucks,’ candy, an earring, and a note which read ‘Dorthia loves Harold.’...

“Examination of Tiffany’s corpse showed that she had lacerations on her head, wounds from the back of her head down to her skull, and ligature marks around her neck, which indicated strangulation. Dr. John Butts, the Chief Medical Examiner of North Carolina and an expert in forensic pathology, determined that the cause of Tiffany’s death was ‘blows to the head that broke, cracked the skull, caused bruising and bleeding over the brain and within the brain.’ He also opined that the lacerations on Tiffany’s head were caused by a heavy object with a narrow edge. Additionally, Tiffany’s vagina and rectum showed signs of trauma....

“On 21 October 1998, defendant was taken into police custody and interviewed in the presence of his aunt... Defendant gave a statement, which was re-read to him sentence by sentence. Upon reviewing it, he signed it. In the statement, defendant said he brought Tiffany to 614 Lakeside Avenue after being requested to do so by Dorthia Bynum. Once there, he admitted to placing his penis in Tiffany’s rectum and being present when Tiffany was hit on the head with the bed rail. He also stated that he helped drag Tiffany’s body outside and threw the bed rail over the fence in the backyard.”⁹

“I’ve been in the legal field for 35 years now. Of those 35, in prosecution over 27 years, and I’ve dealt with

8. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 31 (2007).

9. State v. Jones, 556 S.E.2d 644, 646–47 (N.C. Ct. App. 2001).

Offender

Joseph Jones (*continued*)

The Facts of the Case

quite a number of very brutal crimes,' [Alamance County District Attorney Rob Johnson] said. "This one ranks right up there with the most brutal crimes that I've dealt with in terms of violence and ugliness."¹⁰ ■

10. Keren Rivas, *The Tiffany Long Case: Part III—The Prosecutors*, TIMES-NEWS (NORTH CAROLINA), October 20, 2008.

Offender**Activist Case Studies****The Facts of the Case****Kentay Lee**

“Ken-Tay was 14 years old when he and an older teenager were invited to a New Year’s Eve party by a 30-year-old man. After being served numerous drinks, smoking marijuana, and after aggressive maneuvers by the older man, Ken-Tay and the older teenager responded violently and fatally injured the man.”¹¹

“On 31 December 1998, Edward Mingo and his brother William Mingo hosted a New Year’s Eve party.... William recruited people from the street to enlarge the party. William encountered two teenagers later identified as Terrence Henderson and defendant [Kentay Lee] and brought them to the party....

“[Later that night] Defendant and Henderson slipped back into the building after a resident opened the doors as he was leaving. The camera recorded defendant and Henderson exit[ing] the building at 12:24 p.m. Defendant was now wearing a leather jacket later identified as belonging to Edward.

“On 2 January 1999, William walked to his brother’s apartment to return his glasses...and found Edward dead, lying face down on the floor.

“Officers entered the apartment and observed that the couch, living room wall, and floor were covered in blood. Detective Robert Buening testified that the living room and bedroom had been ransacked, and that he saw various injuries on Edward’s body. He collected a bloody hammer, covered with hair tissues and traces of scalp.

“Dr. James Sullivan performed an autopsy on Edward’s body. Dr. Sullivan recorded multiple trauma injuries, including: three cutting wounds, six lacerations or gashes on the head, bruising across the forehead, and approximately twelve other cutting wounds on his back, chest, arm pit, and leg. Dr. Sullivan opined that these trauma injuries, probably resulting from a box cutter and a hammer, caused Edward’s death.”¹²

“Kentay was also arrested on January 8, 1999 and made a [taped] statement to police.... According to Kentay, after the last guest left Eddie’s apartment, Kentay said to Terrence, ‘I fixing to get him’ and Terrence said, ‘I got your back.’ Kentay then ‘tackled’ Eddie, and ‘put

11. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 31 (2007).

12. State v. Lee, 558 S.E.2d 883, 885 (N.C. Ct. App. 2002).

Offender

Kentay Lee (*continued*)

The Facts of the Case

him in a chokehold as hard as [he] could and just started choking him. And then Terrence cut him.’ Kentay also stated that he was the one who found the knife, which he described as a box cutter, in the couch and that he handed it to Terrence before he (Kentay) ‘rushed’ Eddie.... Kentay additionally stated that he hit Eddie in the head with the hammer ‘once or twice or three times’ when Eddie said ‘he was going to get his 9.’ Kentay also stated that there was five dollars in the pocket of Eddie’s jacket, and that he took a phone from the apartment.”¹³

“At the end of the confession, [Police Officer Bobby] Buening asked Lee what he thought about the killing.

“Buening: ‘Are you sorry for what you did?’

“Lee: ‘Sorry, no. But I won’t do it again though.’”¹⁴ ■

13. Brief of Defendant-Appellant at 7–8, *State v. Lee*, 558 S.E.2d 883 (N.C. Ct. App. 2002) (No. COA00-1486).

14. Gary L. Wright, *Jurors Hear Teen Confess to Killing*, CHARLOTTE OBSERVER, July 1, 2000, at B1.

Offender**Activist Case Studies****The Facts of the Case****Quantel
Lotts**

“When an argument over a toy ended in the death of his stepbrother, Quantel was convicted of murder and sentenced to death in prison, despite pleas from his stepmother that he have a chance for parole.”¹⁵

“Quantel loved his stepbrother Michael and spent a lot of time with him. On the day of the crime, however, the two boys got into an argument. Michael was stabbed with a knife and died.”¹⁶

“Lotts fatally stabbed 17-year-old Michael Barton outside a residence in Leadington on Nov. 14, 1999. The defendant was 14 years old when the murder occurred....

“At the time of the murder, Lotts and Barton lived in the same residence at the edge of Park Hills. They lived with Barton’s mother and Lotts’ father. The two boys were visiting friends in Leadington when the stabbing occurred. There had been an earlier confrontation between the two in the residence, according to testimony presented by Special Prosecutor Michael Hendrickson of the Missouri Attorney General’s Office. Other testimony indicated that after the argument was taken outside the house, Lotts stabbed Barton twice in the chest with a hunting knife....

“A jury deliberated less than two hours at the conclusion of Lotts’ trial in Farmington in November of 2002 before finding him guilty of first-degree murder and armed criminal action.”¹⁷ ■

15. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 8 (2007).

16. *Id.* at 30.

17. Leroy Sigman, *Lotts’ Murder Conviction Upheld by Appeals Court*, DAILY JOURNAL ONLINE (MISSOURI), January 22, 2004.

Offender**Activist Case Studies****The Facts of the Case****Phillip Shaw**

“Phillip was with a group of older boys in an abandoned building when one of them was shot by two masked gunmen. Phillip immediately ran home and called the police.”¹⁸

“On May 10, 1995, a group of friends was shooting craps in the basement of the residence at 3932 Blaine in urban St. Louis. The group included Eugene Perkins, Keith Macon, Castidel Wooten, and Shaw’s co-defendant at trial, Rodney Smith. Smith discussed a plan to rob an acquaintance, Burston, who was expected to join in the craps game later. Burston was known to wear much jewelry and carry cash on his person. Perkins and Wooten agreed to participate in the plan. Their role was to shoot craps with Burston while Smith was hiding. Smith would then emerge and rob Burston.

“Burston eventually arrived at the craps game. Shortly thereafter, the group was told to leave the basement, whereupon they decided to relocate their game to a vacant house across the street at 3931 Blaine. At this point, Smith told Perkins he was going to get defendant to assist in the robbery. Perkins, Wooten, and Burston continued the game in the vacant house, where they were joined by newcomers Aubrey Williams and William Ruffin.

“Defendant and Smith entered the vacant house through a rear window. Defendant was armed with a .357 caliber handgun, Smith with a .44. Rather than attempting to rob Burston, the two defendants immediately began shooting at him. Burston sustained nine gunshot wounds to various parts of his body. He died from shots to the head and chest. Frank Stubitz, a fire-arms examiner for the City of St. Louis Police Department, testified that two, possibly three, bullets found in the victim’s body were fired from defendant’s gun. When the police found Burston’s body, his shoes were missing and he was not wearing any jewelry.”¹⁹ ■

18. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 30 (2007).

19. State v. Shaw, 14 S.W.3d 77, 80 (Mo. Ct. App. 1999).

Offender**Activist Case Studies****The Facts of the Case****T.J.
Tremble**

“T.J. Tremble was arrested just four months after Michigan enacted harsh new laws permitting 14-year-old children to be tried as adults. As police held and interrogated him overnight, they refused to permit his worried parents to see him and denied requests for an attorney. T.J. was convicted of first-degree murder and automatically sentenced to death in prison with no consideration of his age or background.”²⁰

“On the night of April 19, police say Tremble pedaled his bicycle about two miles to the home of Pete and Ruth Stanley, armed with a .22-caliber rifle. Investigators said evidence showed Tremble broke into the home and fatally shot the Stanleys as they slept in bed.

“Dennis Stanley vividly recalls the telephone call from police telling him to come to his parents’ home.

“I got called at 2:20 a.m. You would not believe how much I still wake up in the middle of the night and the clock is within a few minutes of 2:20 a.m.,” he said.

“Tremble was arrested the same night after police, responding to a car in a ditch, found him at the wheel of Peter Stanley’s car.

“Shortly after his arrest, Tremble confessed to police to shooting the Stanleys, saying he didn’t know why he did it. He said he wanted a car to drive to visit a friend....

“[While in prison] Tremble has been in trouble for gambling, fighting and ‘dangerous contraband’ related to his getting homemade tattoos from other inmates.”²¹ ■

20. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 29 (2007).

21. Eric English, *Life, Reconsidered*, BAY CITY TIMES (MICHIGAN), December 4, 2005, at A1.

Offender Activist Case Studies**The Facts of the Case****Alexis
Veal**

“Court documents indicate that after running away, Alexis entered the home of a woman under the pretense of needing to use the phone, and she was later found to have taken and used the woman’s car and credit cards. The sixty-six-year-old woman was found dead from multiple stab wounds.”²²

“Catherine Haynes, age sixty-six, was stabbed to death at her Waterloo home sometime between 6:00 p.m. on June 15 and 6:00 a.m. on June 16, 1993....

“At about 8:45 or 9:00 p.m., victim Catherine Haynes visited briefly at a neighbor’s house across the street from her own house....

“Between 10:00 and 11:00 p.m., a number of long-distance telephone calls were placed from Haynes’ residence to the residences of friends and relatives of defendant Veal....

“At about midnight on June 15, Veal drove around in Haynes’ car near a Waterloo convenience store, showed several young people that she had some credit cards, and offered to pay their way if they accompanied her to Cedar Rapids....

“Defendant Veal told Parsons that she needed to get rid of the car and parked it about a block away from Richardson’s house. Veal hid the clothes she had been wearing earlier—the green slacks and white shirt—in a bush....

“Haynes’ body was discovered at her Waterloo home that afternoon. She was wearing the same clothes she had worn when she visited with her neighbors the previous evening. She apparently had struggled with her murderer and had been stabbed twenty-three times.

“During the afternoon of the next day, June 17, while walking with Parsons near Richardson’s Cedar Rapids house, defendant Veal threw Haynes’ credit cards and car keys into a trash can....

“In Haynes’ house, investigators found Veal’s fingerprint on a table and a false fingernail, which had been attached to one of Veal’s fingers, near Haynes’ body in an upstairs hall. A footprint found in an upstairs bedroom matched those made by Veal’s shoes. Veal’s clothes and person provided further evidence. Her white shirt and green pants were stained with human blood, although witnesses had seen no such stains at 6:00 p.m. on June 15. Veal’s shoes had bloodstains that were consistent with Haynes’ blood but inconsistent with Veal’s blood.”²³ ■

22. AMNESTY INTERNATIONAL/HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 51 (2005).

23. *State v. Veal*, 564 N.W.2d 797, 804–05 (Iowa 1997).

Amnesty International and Human Rights Watch, in the course of preparing their report criticizing life-without-parole sentences for juvenile offenders, began their research by interviewing or corresponding with over 300 prisoners who had been convicted for crimes that they committed before turning 18. The two groups also interviewed the parents and close family members of some of these prisoners, as well as their attorneys.

The groups state clearly, albeit in an easily overlooked appendix to their report, that they “have not sought to verify each of the specific allegations made.” Further, they “recognize that some [allegations] may be embellished or altered in the telling.” Despite this risk of basic factual inaccuracy, the groups argue that their methodology provides an “elegant testimony to the prisoners’ senses of their experiences.”²⁴

For this report, we relied on a set of sources and a methodology that are very different from those employed by Amnesty International and Human Rights Watch. In July 2008, we mailed an initial letter to 243 of the largest prosecutors’ offices in the states that authorized life-without-parole sentences for juvenile offenders. Our list included prosecutors serving at all levels of state criminal-justice systems, from district and county attorneys to state attorneys general. In the letter, we requested digests of any cases in which juvenile offenders were prosecuted as adults and ultimately received a sentence of life without parole. For each case, we asked that the office provide the names of the offenders and victims, photographs of the offenders and victims, basic information about the crime, a list of charges, a brief account of the case, and any media reports about the case contained in their files.

24. AI/HRW REPORT, *supra* note 9, at 117.

In September and December of 2008, we sent follow-up letters requesting the same information.

Of the case digests provided as a result of our requests, we selected 16 that were typical of the larger group and the population of juvenile offenders serving life-without-parole sentences. All of the offenders in the cases that we selected had been convicted of homicides, reflecting the convictions of the overwhelming majority of juvenile offenders sentenced to life without parole—93 percent, according to Amnesty International and Human Rights Watch, with the next-highest category, “other violent crimes,” accounting for only 3.7 percent of sentences.²⁵

Rather than rely on the case digests provided to us by prosecutors—an approach that could be criticized as inviting bias—we obtained court records for every case, usually including a “finding of facts” by the trial judge or a summary of the facts by an appellate court. For crimes with multiple perpetrators, we obtained the court records of each individual charged, not just the defendant who was the focus of our case study. From these court records, we compiled lists of the eyewitnesses, victims, and defendants in each case. These lists were then used to search for news articles, which were added to our case files. For many cases, we also browsed through the local newspapers from the days following the crime to pick up additional articles.

Our case studies are based primarily on court orders and opinions—that is, findings of fact as determined by a judge or jury that are, for purposes of the law, definitive. News reports supplied additional details, as did letters from prosecutors and victims’ families—but only to the extent that those letters were consistent with and supported by neutral sources.

Unlike the case studies in other reports on juvenile life-without-parole sentences, we strove for neutrality, redrafting as necessary to remove biased language, potentially misleading grammar and sentence construction, and “weasel words.” We also avoided referring to victims and offenders in different manners (e.g., referring to victims by their first names and offenders by their last names), recognizing that such uneven treatment can humanize one party while dehumanizing the other.

25. *Id.* at 27.

Finally, each case study contains full citations to the principal sources.

With this rigorous methodology, our intention was not to provide “an elegant testimony” to anyone’s “sense of their experiences,” but to convey the kinds of factual situations that arise in typical cases that result in juvenile offenders being sentenced to life without parole—a rare occurrence. It is our hope that these factual accounts will facilitate better-informed discussion of the issue of life-without-parole sentences for juvenile offenders than has been possible to date.

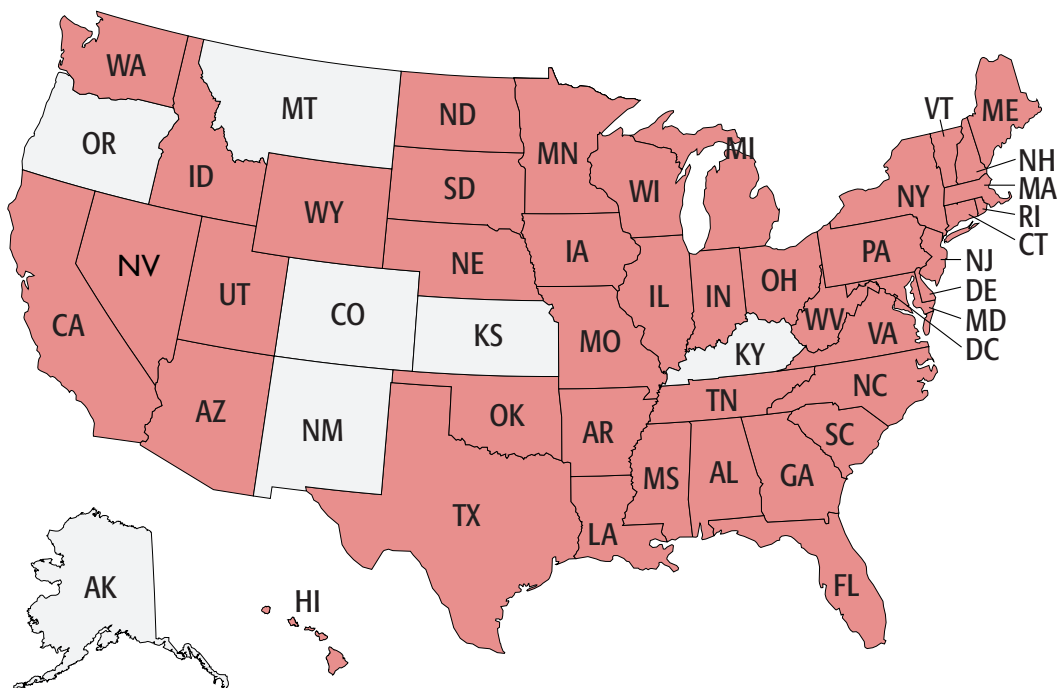
States with statutes allowing life sentences without parole for juvenile offenders are shown in red type.

Alabama	ALA. CODE §§ 13A-5-6, -9, -40, -45 (2009)
Alaska	
Arizona	ARIZ. REV. STAT. ANN. § 13-752 (2008)
Arkansas	ARK. CODE ANN. § 5-4-104 (West 2009)
California	CAL. PENAL CODE §§ 37, 128, 190–190.5, 209, 218, 219, 11418, 12310 (West 2009)
Colorado	
Connecticut	CONN. GEN. STAT. § 53a-35a (West Supp. 2008)
Delaware	DEL. CODE ANN. tit. 11, § 4209 (2009)
Florida	FLA. STAT. ANN. § 775.082 (West 2009)
Georgia	GA. CODE ANN. §§ 16-5-1, 16-6-1, 17-10-7, 17-10-16 (West 2009)
Hawaii	HAW. REV. STAT. §§ 571-22, 706-656, 706-657 (2008)
Idaho	IDAHO CODE ANN. § 18-4004 (2009)
Illinois	730 ILL. COMP. STAT. ANN. 5/5-8-1 (West 2009)
Indiana	IND. CODE ANN. §§ 35-50-2-3 (West 2009), -8.5 (West Supp. 2009), -9 (West 2009)
Iowa	IOWA CODE ANN. §§ 902.1, .14 (West 2009)
Kansas	
Kentucky	

Louisiana	LA. REV. STAT. ANN. §§ 14:30 (2008), :30.1 (2009); LA. CHILD. CODE ANN. art. 305 (2009)
Maine	ME. REV. STAT. ANN. tit. 15, § 3101; tit. 17-A, § 1251 (2009)
Maryland	MD. CODE ANN., CRIM. LAW §§ 2-201, -202, -203 (West 2009)
Massachusetts	MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2009)
Michigan	MICH. COMP. LAWS ANN. §§ 750.316, 750.520b, 769.1, 791.234(6) (West 2009)
Minnesota	MINN. STAT. ANN. §§ 609.055, .106 (West 2009)
Mississippi	MISS. CODE ANN. § 97-3-21 (West 2008)
Missouri	MO. ANN. STAT. §§ 211.071, 565.020 (West 2008)
Montana	MONT. CODE ANN. § 46-18-222(1) (2007)
Nebraska	NEB. REV. STAT. §§ 28-105, ²⁶ 29-2522 (2008)
Nevada	NEV. REV. STAT. ANN. § 200.030 (West 2007)
New Hampshire	N.H. REV. STAT. ANN. § 630:1-a (2009)
New Jersey	N.J. STAT. ANN. §§ 2A:4A-26, 2C:11-3 (West 2009)
New Mexico	
New York	N.Y. PENAL LAW §§ 70.00(5), 70.05, ²⁷ 490.25, 490.45, 490.55 (McKinney 2009)
North Carolina	N.C. GEN. STAT. ANN. § 14-17 (West 2009)
North Dakota	N.D. CENT. CODE § 12.1-32-01 (2008)
Ohio	OHIO REV. CODE ANN. §§ 2903.01, 2907.02, 2909.24, 2929.02, 2929.03, 2971.03 (West 2009)

26. *But see* State v. Conover, 703 N.W.2d 898, 903–04 (Neb. 2005).

27. A “juvenile offender” is an offender aged 13, 14, or 15. N.Y. PENAL LAW § 10.00(18); N.Y. FAMILY COURT ACT § 301.2 (McKinney 2009). Thus, the sentence of life without parole would not apply to offenders under the age of 16.



- States with statutes allowing life sentences without parole for juvenile offenders
- States that do not allow life sentences without parole for juvenile offenders

Oklahoma	OKLA. STAT. tit. 21 § 701.9 (2009)
Oregon	OR. REV. STAT. ANN. § 161.620 (West 2009) ²⁸
Pennsylvania	18 PA. STAT. ANN. § 3301 (West 2008); 42 PA. STAT. ANN. § 9714 (West 2008)
Rhode Island	R.I. GEN. LAWS §§ 11-23-2, 11-23-2.1, 11-39-2, 12-19.2-4 (2009)
South Carolina	S.C. CODE ANN. § 17-25-45 (2008)
South Dakota	S.D. CODIFIED LAWS §§ 22-6-1, 24-15-4 (2008)
Tennessee	TENN. CODE ANN. §§ 39-13-202, 204 (West 2009)

28. *But see* OR. REV. STAT. ANN. § 419B.552 (West 2009). An emancipated minor is recognized as an adult for the purpose of Oregon criminal laws and therefore could be sentenced to life without parole. *Id.*; OR. REV. STAT. ANN. § 163.105 (West 2009). This is, of course, an exceedingly narrow exception and so is not reflected in the table.

Texas	TEX. FAM. CODE ANN. § 54.04 (Vernon 2009), ²⁹ TEX. PENAL CODE ANN. § 12.31 (Vernon 2009)
Utah	UTAH CODE ANN. §§ 76-3-206, 78A-6-602 (West 2008)
Vermont	VT. STAT. ANN. tit.13, § 2303 (2008)
Virginia	VA. CODE ANN. § 18.2-10 (West 2008)
Washington	WASH. REV. CODE ANN. § 10.95.030 (West 2009)
West Virginia	W. VA. CODE ANN. §§ 49-5-10, 61-2-2, 62-3-15 (West 2009)
Wisconsin	WIS. STAT. ANN. § 973.014 (West 2009)
Wyoming	WYO. STAT. ANN. § 6-2-101 (2009)
District of Columbia	D.C. CODE §§ 22-1804a, 22-2104, ³⁰ 22-2106, 22-3020, 22-3153, 22-4502 (2009)
Puerto Rico	

29. A “child” is defined as an individual who is “under 17 years of age” or “seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.” TEX. FAM. CODE ANN. §§ 51.02(2), 51.04(a) (Vernon 2009).

30. Though this provision prohibits sentences of life without parole for juveniles who have committed first-degree murder, the sentence remains intact for other offenses, including multiple felony convictions and apparently other types of murder. *See, e.g.*, D.C. CODE § 22-1804a(a)(2) (2009) (empowering courts to impose a sentence “up to, and including, life without possibility of release” on any offender convicted of a crime of violence who has “previously been convicted of 2 prior crimes of violence not committed on the same occasion”).

Appendix 4 Recommended Reading

Following are sources that we relied upon in the creation of this report or that are especially informative for those who are researching the issue of life-without-parole sentences for juvenile offenders.

- Benjamin Adams & Sean Addie, *Delinquency Cases Waived to Criminal Court, 2005*, OJJDP FACT SHEET, June 2009, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf>.
- Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).
- Lee A. Casey & David B. Rivkin, Jr., *International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers*, Heritage Foundation BACKGROUNDER No. 1961, August 18, 2006, available at <http://www.heritage.org/Research/WorldwideFreedom/bg1961.cfm>.
- Robert Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J. L. & PUB. POL'Y 291 (2005).
- Frank Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J. L. & PUB. POL'Y 223 (2006).
- David Forte, *Cruel and Unusual Punishment*, in THE HERITAGE GUIDE TO THE CONSTITUTION 363–65 (Edwin Meese III ed., 2005).
- Respondent's Brief in Opposition, *Graham v. Florida*, No. 08-7412 (U.S. filed Feb. 3, 2009), available at http://www.scotusblog.com/wp/wp-content/uploads/2009/05/08-7412_bio.pdf.
- DANIEL HOROWITZ, COMMENTS ON SB399 TO STATE SENATE 10 (2009), available at http://sb399.com/images/SB_399_Comments_by_Daniel_Horowitz.pdf.
- National Organization of Victims of “Juvenile Lifers,” <http://www.jlwopvictims.org> (Internet resource page curated by

the family of a victim of a juvenile offender sentenced to life without parole).

- Michael Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004).
- Michael Ramsey, *Treaty Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 205–09 (Edwin Meese III ed., 2005).
- Respondent's Brief in Opposition, *Sullivan v. Florida*, No. 08-7621 (U.S. filed Mar. 20, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/05/08-7621_bio.pdf.
- State's Answering Brief, *Torres v. Delaware*, No. 504 (Del. Supr. filed Dec. 17, 2008).
- Moin Yahya, *Deterring Roper's Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More than Adults*, 11 PENN. ST. L. REV. 53 (2006).

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Several family members of victims of juveniles sentenced to life without parole graciously agreed to speak with us, providing crucial insight into these crimes, their effects on communities, and how they regard the sentence.

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1. For 2004 and 2005: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 202, tbl.319 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/law.pdf>. For 1980, 1985, 1990, and 1997–2005: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 199, tbl.316 (2004), available at <http://www.census.gov/compendia/statab/2006/tables/06s0316.xls>. For 1992–1994 and 1995: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 13, tbl.309 (2001), available at <http://www.census.gov/prod/2002pubs/01statab/law.pdf>. For 1988–1989 and 1991: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 14, tbl.323 (1995), available at <http://www.census.gov/prod/1/gen/95statab/law.pdf>. For 1987: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 173, tbl.293 (1989), available at <http://www2.census.gov/prod2/statcomp/documents/1989-01.pdf>. For 1986: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 165, tbl.279 (1988), available at <http://www2.census.gov/prod2/statcomp/documents/1988-03.pdf>. For 1984: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 173, tbl.297 (1986), available at <http://www2.census.gov/prod2/statcomp/documents/1986-01.pdf>. For 1983: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 173, tbl.293 (1985), available at <http://www2.census.gov/prod2/statcomp/documents/1985-04.pdf>. For 1982: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 183, tbl.303 (1984), available at <http://www2.census.gov/prod2/statcomp/documents/1984-03.pdf>. For 1981: U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *Law Enforcement, Courts, and Prisons*, 5 STATISTICAL ABSTRACT OF THE U.S. 181, tbl.304 (1983), available at http://www2.census.gov/prod2/statcomp/documents/1982_83-03.pdf.
2. See *supra* note 1.
3. Following the academic literature, this report uses the term “juvenile offender.” See, e.g., Joseph Sanborn, *Juveniles’ Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 149 (2009). The term “juvenile killer” would be equally appropriate, because almost all juveniles sentenced to life without parole have committed homicides.
4. See *infra* app. III.
5. See, e.g., *Calderon v. Schribner*, No. 2:06-cv-00770-TMB, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009) (upholding life sentence without parole for a 17-year-old convicted of kidnapping for ransom with bodily injury, but not death); *Culpepper v. State*, 971 So.2d 259 (Fla. Dist. Ct. App. 2008), cert. denied, 981 So.2d 1199 (Fla. 2008) (holding that *Roper* does not provide basis for claim that mandatory life without parole imposed on 14-year-old for murder violates the Eighth Amendment); *Tate v. State*, 864 So.2d 44 (Fla. Dist. Ct. App. 2003) (finding no Eighth Amendment violation from imposition of mandatory life sentence on 12-year-old for murder of six-year-old); *Phillips v. State*, 807 So.2d 713 (Fla. Dist. Ct. App. 2002) (holding life without parole imposed on 14-year-old for murder of eight-year-old not violative of the Eighth Amendment); *People v. Cooks*, 648 N.E.2d 190 (Ill. Ct. App. 1995) (holding mandatory life sentence given to 14-year-old for double murder did not violate Eighth Amendment); *People v. Bentley*, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000) (finding 14-year-old murderer’s mandatory non-parolable life sentence did not violate state or federal prohibition against cruel and unusual punishment); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life sentence without parole for a 15-year-old convicted of kidnapping and forcibly raping a nine-year-old victim over two months); *State v. Jensen*, 579 N.W.2d 613 (S.D. 1998) (holding life sentence given to 14-year-old who murdered cab driver was not grossly disproportionate); *State v. Howell*, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (holding natural-life sentence for 14-year-old did not violate the state and constitutional prohibitions on cruel and unusual punishment); *State v. Loukaitis*, 1999 WL 1044203 (Wash. Ct. App. 1999) (finding Eighth Amendment analysis not necessary where 14-year-old given life without parole for murdering a teacher and two students and wounding another); *State v.*

Massey, 803 P.2d 340 (Wash. Ct. App. 1990) (finding natural-life sentence given to 13-year-old for murder did not violate the Eighth Amendment). *But see* Naovarath v. State, 779 P.2d 944 (Nev. 1989) (relying on the Nevada Constitution and the Eighth Amendment to the U.S. Constitution to strike down a sentence of life without parole imposed on a 13-year-old who had been molested by the man he killed); *In re Nunez*, 173 Cal. App.4th 709 (Ct. App. 4th Dist. 2009) (vacating a sentence of life without parole imposed on an offender who committed a kidnapping when he was 14 years old on the grounds that the sentence was disproportionate compared to the penalty for murder and therefore “serves no valid penological purpose”). While *Naovarath* and *Nunez* each upset a sentence of life without parole, neither called into question the constitutionality of the sentence as applied to juvenile offenders.

6. *See, e.g.*, *United States v. Pete*, 277 Fed. Appx. 730, 734 (9th Cir. 2008); *United States v. Feemster*, 483 F.3d 583, 588 (8th Cir. 2007), *vacated on other grounds*, 128 S. Ct. 880 (2008); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007); *Calderon v. Schribner*, No. 2:06-CV-00770-TMB, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009); *Price v. Cain*, No. 07-937, 2008 U.S. Dist. LEXIS 23474, *17–23 (W.D. La. March 4, 2008); *Pineda v. Leblanc*, No. 07-3598, 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); *Douma v. Workman*, No. 06-CV-0462-CVE-FHM, 2007 WL 2331883, *3 (N.D. Okla. Aug 13, 2007).

7. 543 U.S. 551 (2005).

8. Its primary funders are the now-defunct JEHT Foundation, Peter Lewis, the Joyce Foundation, and George Soros’s Open Society Institute, which has provided grants to or advised all of the major groups advocating against life-without-parole sentences for juvenile offenders and played a leadership role in organizing their efforts. *See generally* Joseph Lawler, *The Anti-Incarceration Movement: A Crisis Not Wasted*, ORGANIZATION TRENDS, May 2009, *available at* <http://www.capitalresearch.org/pubs/pdf/v1241118291.pdf> (describing the efforts of the Open Society Institute and other groups to “empty the prisons”); Open Society Institute, Criminal Justice, <http://www.soros.org/initiatives/usprograms/focus/justice/about> (last visited June 29, 2009) (describing the Institute’s support of “advocacy, litigation, strategic research and analysis, public education, communications and organizing efforts to...reverse the policies and practices that criminalize...youth.”); Open Society Institute, Grants, Scholarships, & Fellowships, Law & Justice, <http://www.soros.org/grants/research/results.php?s=issue&issue=Law+%26+Justice> (last visited June 29, 2009) (a partial listing of the Institute’s grant-making activities). The institutional ties are also visible in the acknowledgement sections of activist groups’ reports.

9. *See* AMNESTY INT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS*

IN THE UNITED STATES (2005), *available at* <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> [hereinafter AI/HRW REPORT]; EQUAL JUSTICE INITIATIVE, *CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON* (2007), *available at* <http://www.eji.org/eji/files/20071017cruelandunusual.pdf> [hereinafter EJI REPORT]; CENTER FOR LAW AND GLOBAL JUSTICE, UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW, *SENTENCING OUR CHILDREN TO DIE IN PRISON* (2007), *available at* http://www.usfca.edu/law/home/CenterforLawandGlobalJustice/LWOP_Final_Nov_20-new.pdf [hereinafter USF REPORT].

10. *Graham v. State*, 990 So.2d 1058 (Fla. 2008), *cert. granted*, 129 S.Ct. 2157 (May 4, 2009); *Sullivan v. Florida*, 987 So.2d 83 (Fla. Ct. App. 2008), *cert. granted*, 129 S.Ct. 2157 (May 4, 2009). As of June 30, 2009, the two cases had not been joined for purposes of oral argument.

11. CAL. PENAL CODE § 190.2 (West 2009).

12. S. 999, 2007–08 Leg., Reg. Sess. (Cal. 2007).

13. *See* S. Comm. on Public Safety Bill Analysis, S.B. 999, 2007–2008 Session (Cal. Apr. 16, 2007), *available at* http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0951-1000/sb_999_cfa_20070416_152001_sen_comm.html.

14. Legislative Counsel of California, Bill History for S. 999, 2007–2008 Leg., Reg. Sess. (Cal. 2007).

15. *See* Supporters: Fair Sentencing for Youth, <http://www.fairsentencingforyouth.org/supporters/> (last visited June 29, 2009).

16. As one critic has pointed out, even history’s most notorious killers would satisfy at least three of the criteria, thereby qualifying for recall, resentencing, and probably a more lenient sentence. DANIEL HOROWITZ, *COMMENTS ON SB399 TO STATE SENATE 10* (2009), *available at* http://sb399.com/images/SB_399_Comments_by_Daniel_Horowitz.pdf.

17. *See, e.g.*, Press Release, California State Senator Leland Yee, Committee Approves Bill to Reform Life Sentences for Minors (April 14, 2009).

18. *See, e.g.*, AI/HRW REPORT, *supra* note 9, at 1–2; Fair Sentencing for Youth, <http://www.fairsentencingforyouth.org> (last visited June 28, 2009).

19. S. Comm. on Public Safety Bill Analysis, S.B. 399, 2009–2010 Session (Cal. Apr. 13, 2009). Not surprisingly, the 59 percent statistic seems to be taken directly from the Amnesty International/Human Rights Watch 2005 report. AI/HRW REPORT, *supra* note 9, at 1, 28. Presumably, it refers to convictions for felony murder and aiding and abetting murder, both of which are defined as murder in the law, making the statement at best highly misleading. *See, e.g.*, CAL. PENAL CODE § 189 (West 2009) (“Any murder... which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem,

kidnapping, train wrecking, or [torture or sexual assault]...is murder in the first degree.”) (emphasis added).

20. S. Comm. on Public Safety Bill Analysis, S.B. 399, 2009–2010 Session (Cal. Apr. 13, 2009).

21. *Id.*

22. *Infra* notes 150–53 and surrounding text.

23. For example, the bill’s sponsor has also claimed incorrectly that “there is not a single juvenile sentenced to life without parole outside of the U.S.” Press Release, California State Senator Leland Yee, Committee Approves Bill to Reform Life Sentences for Minors (Apr. 14, 2008); Fair Sentencing for Youth, International Consensus, <http://www.fairsentencingforyouth.org/get-the-facts/international-consensus/> (last visited June 25, 2009). Research by opponents of life-without-parole sentences for juvenile offenders, however, contradicts this assertion. *See, e.g.*, AI/HRW REPORT, *supra* note 9, at 105. The sponsor’s press and legislative materials claim repeatedly that *Roper* prohibited the death penalty for juvenile offenders “due to concerns about brain development.” *See, e.g.*, Press Release, California State Senator Leland Yee, Committee Approves Bill to Reform Life Sentences for Minors (Apr. 14, 2008) (press releases from June 2, 2009, May 22, 2009, and May 28, 2009, also make this claim). However, *Roper*, which discusses juveniles’ “lack of maturity” and susceptibility to “negative influences,” does not even mention their physiological development. *Roper*, 543 U.S. at 569. The bill’s sponsor claims repeatedly that “[n]ationally, eleven jurisdictions have prohibited this sentence including New York, Colorado, and the District of Columbia.” *See, e.g.*, Press Release, California State Senator Leland Yee, Committee Approves Bill to Reform Life Sentences for Minors (Apr. 14, 2008) (press releases from June 2, 2009, May 22, 2009, and May 28, 2009, also make this claim). This is also untrue. *See infra* app. III. The bill’s sponsor claims repeatedly that “the International Covenant on Civil and Political Rights...prohibits this sentence [life without parole for juveniles].” *See, e.g.*, Press Release, California State Senator Leland Yee, Committee Approves Bill to Reform Life Sentences for Minors (April 14, 2008) (press releases from June 2, 2009, May 22, 2009, and May 28, 2009, also make this claim). This is also untrue. *See infra* notes 189–198 and surrounding text.

24. *E.g.*, AI/HRW REPORT, *supra* note 9; EJI REPORT, *supra* note 9; USF REPORT, *supra* note 9.

25. *See, e.g.*, USF REPORT, *supra* note 9, at 1; ILLINOIS COALITION FOR THE FAIR SENTENCING OF CHILDREN, CATEGORICALLY LESS CULPABLE 1 (2008), *available at* http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf; Bryan A. Stevenson, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison*, 20 J. INST. OF CRIMINOLOGY 135 (2008), *available at* <http://www.eji.org/eji/files/08.05.08%20BAS%20Article%20CICJ.pdf>; Connie

de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983–1044 (2008); Editorial, *A Shameful Record*, N.Y. TIMES, Feb. 6, 2008; Editorial, *Children in Prison: Locked-Up Forever*, SEATTLE POST-INTELLIGENCER, Oct. 19, 2007, *available at* http://www.seattlepi.com/opinion/336139_prisoned.html; Stan Diel, *Alabama Among 19 States Where Teens Get Life, No Parole*, BIRMINGHAM TIMES, Oct. 18, 2007, *available at* <http://www.eji.org/eji/node/231>; Fred Grim, *Draconian Sentences for Kids Needs Fix*, MIAMI HERALD, Feb. 5, 2009, *available at* <http://www.eji.org/eji/node/278>; Editorial, *From Puberty to the Grave*, BIRMINGHAM TIMES, Oct. 22, 2007; Editorial, *Kids Behind Bars, For Life*, PHILADELPHIA DAILY NEWS, Oct. 26, 2007, *available at* <http://www.eji.org/eji/files/10.26.07%20Philadelphia%20Daily%20News%20-%20Kids%20Behind%20Bars,%20For%20Life.pdf>; Meg Laughlin, *For Young People in Prison, Life Sentence Can Mean No Parole*, ST. PETERSBURG TIMES, Mar. 1, 2009, *available at* <http://www.tampabay.com/news/courts/article979774.ece>; Adam Liptak, *A Life Term for Rape at 13: Cruel and Unusual?*, N.Y. TIMES, Feb. 2, 2009, at A12; Adam Liptak, *Lifers as Teenagers, Now Seeking Second Chance*, N.Y. TIMES, Oct. 17, 2007; Kari Lydersen, *Illinois Weighs Second Chances; Some See Juvenile Sentencing Laws As Overly Harsh*, WASH. POST, March 3, 2008; Eartha Jane Melzer, *As Bill to Ban Life Imprisonment for Children Languishes, Inequalities of Defense Persist*, MICH. MESSENGER, Apr. 13, 2009, *available at* <http://michiganmessenger.com/16689/as-bill-to-ban-life-imprisonment-for-children-languishes-inequities-of-defens-persist>; Lauren Pearle, *Broken Promises: The Challenge of Juvenile Justice*, ABC News, May 17, 2007, *available at* <http://abcnews.go.com/TheLaw/story?id=3183886&page=1>; Rose Russell, *It’s Cruel to Sentence Teens Ages 13, 14 to Die in Prison*, TOLEDO BLADE, Jul. 26, 2008, *available at* <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20080726/COLUMNIST24/807260322>; Bryan Stevenson, Executive Director, Equal Justice Initiative, Letter to the Editor, *Shouldn’t Throw Away Kids Before They Mature, Not Even Ashley Jones*, BIRMINGHAM NEWS, Nov. 25, 2007; Study Finds Dozens of Young Teens Sentenced to Live in Prison Without Possibility of Parole, 21 N.Y.U. TODAY (2007), *available at* <http://www.nyu.edu/nyutoday/article/885>; Editorial, *Too Young to Die in Prison*, BALTIMORE SUN, Oct. 23, 2007; Mathew Bigg, *Dozens of Children in U.S. Face Life in Prison*, Reuters, Mar. 21, 2008; Children Sentenced to Die in Prison (Pacifica Radio Broadcast Mar. 26, 2008), *available at* <http://uprisingradio.org/home/?p=2507>; Report Compares Teen Sentencing Around the World (NPR radio broadcast Oct. 17, 2007); *Does Roper Suggest Young Juve LWOP Is Unconstitutional?*, Sentencing Law & Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2007/10/does-roper-sugg.html (last visited June 25, 2009); *Life Without Parole: Too Harsh for Juveniles?*, Associated Press, Dec. 8, 2007, *available at* <http://www.msnbc.msn.com/id/22160493>.

26. AI/HRW REPORT, *supra* note 9, at 1, 25, 35, 52, 124.

27. See Appellant’s Opening Brief at 8, *Torres v. Delaware*, No. 504 (Del. Supr. filed Nov. 14, 2008). Brian Stevenson, Executive Director of the Equal Justice Initiative, represented the appellant. *Id.* at cover. The appellant’s brief cites the Equal Justice Initiative’s report on juvenile life-without-parole sentences. *Id.* at 8 (“While at least 2,225 people in the United States are serving sentences of life without parole for crimes they committed under the age of 18, extensive research found that only 73 people in the United States are serving such sentences for crimes committed when they were fourteen or younger.”).

28. Oral Argument, *Torres v. Delaware*, No. 504 (Del. Supr. held Feb 4, 2009), available at http://courts.delaware.gov/Courts/Supreme%20Court/oral%20arguments/2009-02-04_504_2008_Torres_v_State.MP3. In this argument, counsel for Donald Torres cited misleading statistics regarding the number of states that had mandatory sentences of life without parole for juveniles and that had discretionary sentences for first-degree murderers. Deputy Attorney General Paul Wallace, who argued on behalf of the State of Delaware, took issue with the numbers asserted by Torres’s counsel and provided the court with accurate statistics. He stated that 49 states permit a 14-year-old to be prosecuted as an adult for first-degree murder, 44 states permit juveniles to receive a life-without-parole sentence for first-degree murder, and only 29 states mandate a life-without-parole sentence for a juvenile who is tried as an adult and convicted of first-degree murder.

29. See Petition for Writ of Certiorari, *Sullivan v. Florida*, No. 08-7621 (U.S. filed Dec. 4, 2008). Petitioner, Joe Harris Sullivan, is represented by Bryan A. Stevenson, Executive Director of the Equal Justice Initiative. *Id.* at 3. According to the petition, “As of 2005, there were at least 2225 people in the United States serving life-without-parole sentences for crimes committed as juveniles, but less than half of one percent of these prisoners were thirteen or younger at the time of the offense.” *Id.* at 3–4. This certainty is misleading. See *infra* notes 39–67 and surrounding text. It also states, “Since the conclusion of the state court proceedings, it has become clear that the United States is now the only country to impose life-without-parole sentences for offenses committed before the age of eighteen.” Petition for Writ of Certiorari at 4, *Sullivan v. Florida*. This statement is contradicted by the Equal Justice Initiative’s own report, which lists other countries whose laws allow that sentence for juvenile offenders. EJI REPORT, *supra* note 9, at 13. The Amnesty International/Human Rights Watch report states that at least 14 other countries allowed life-without-parole sentences for juvenile offenders in 2005. AI/HRW REPORT, *supra* note 9, at 106. At least 11 countries retain those laws today. *Infra* notes 150–53 and surrounding text.

30. EJI REPORT, *supra* note 9, at 25.

31. Finding of Fact from Guilt Phase of Trial, *Alabama v. Jones*, No. CC-2000-0151 (Cir. Ct. Jefferson Cty. Ala. May 25, 2001).

32. For an example, see the cover of the University of San Francisco School of Law’s report, which depicts a boy no older than eight years old. USF REPORT, *supra* note 9. See also EJI REPORT, *supra* note 9 (this report’s unnumbered opening pages contain pictures of juveniles who appear to be from eight to 12 years old).

33. See AI/HRW REPORT, *supra* note 9, at 4, 19, 29, 43, 59, 68.

34. See *infra* notes 155–202 and surrounding text.

35. See AI/HRW REPORT, *supra* note 9, at 86, 115; EJI REPORT, *supra* note 9, at 11; USF REPORT, *supra* note 9, at 16.

36. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 n.1 (2004); *Roper*, 543 U.S. at 568 (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”).

37. See *infra* notes 99–155 and surrounding text.

38. Use of the term “district attorney’s office” is generic to indicate the felony prosecutor of jurisdiction in any particular county or state. We contacted offices of state’s attorneys, offices of attorneys general, offices of prosecuting attorneys, and a variety of other offices with different titles. Each office contacted prosecuted felony homicide cases, including those committed by juvenile offenders.

39. AI/HRW REPORT, *supra* note 9, at 1, 25, 31, 52, 124.

40. USF REPORT, *supra* note 9, at i, ii, 2, 4, 15.

41. AI/HRW REPORT, *supra* note 9, at 118.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. The states were Alabama, Colorado, Georgia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming. AI/HRW REPORT, *supra* note 9, at 118–119.

47. *Id.* at 119.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*
56. *Id.* at 25.
57. *Id.* at 120.
58. *Id.*
59. *Id.*
60. *Id.* (emphasis added).
61. *Id.*
62. *Id.*
63. *Id.*
64. Letter from Susan E. Urso, Assistant Attorney General of the Juvenile Prosecution Unit, Department of Attorney General, State of Rhode Island, to Charles D. Stimson, Senior Legal Fellow, The Heritage Foundation (August 4, 2008) (letter on file with authors).
65. *Id.*
66. AI/HRW REPORT, *supra* note 9, at 35.
67. See, e.g., Appellant's Opening Brief at 8, *Torres v. Delaware*, No. 504 (Del. filed Nov. 14, 2008) ("While at least 2225 people in the United States are serving sentences of life without parole for crimes they committed under the age of 18, extensive research has found that only 73 people in the United States are serving such sentences for crimes committed when they were fourteen or younger.") (citing EJI REPORT, *supra* note 9, at 5, 20; AI/HRW REPORT, *supra* note 9, at 26); Petition, *Sullivan v. Florida*, *supra* note 29, at 3–4 ("As of 2005, there were at least 2,225 people in the United States serving life-without-parole sentences for crimes committed as juveniles, but less than one half of one percent of these prisoners were thirteen or younger at the time of the offense.") (citing EJI REPORT, *supra* note 9, at 20, n.27; AI/HRW REPORT, *supra* note 9, at 21, 26). *Sullivan*, like *Torres*, is represented by Bryan A. Stevenson, Executive Director of the Equal Justice Initiative. *Id.* at cover.
68. In a recent speech, U.S. Supreme Court Justice Ruth Bader Ginsburg asked, regarding the controversy over the use of foreign law in U.S. courts, "Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?" Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, April 12, 2009, at A14. But as several critics of such practices have observed, the Court's most common use of foreign precedents, especially in Eighth Amendment cases, is usually just a counting game, completely ignoring nations' differing circumstances and traditions, as well as the legal substance of foreign precedents. Michael Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 79 (2004). Even assuming the legitimacy of this method, the Court has often struggled—and failed—to get the count right. *Id.* at 77–78.
69. Howard Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN, Nov. 2008, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf> [hereinafter *Juvenile Arrests*].
70. *Id.*
71. *Id.*
72. DIVISION FOR POLICY ANALYSIS AND PUBLIC AFFAIRS, UNITED NATIONS OFFICE ON DRUGS AND CRIME, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS (1998–2000) 10–12 (2004), available at http://www.unodc.org/pdf/crime/seventh_survey/7pv.pdf [hereinafter SEVENTH SURVEY].
73. *Id.*
74. *Id.*
75. *Id.* Measured by crimes per 100,000 inhabitants, England/Wales had 9,744.98 crimes, while the United States had 8,922.76. *Id.*
76. *Id.* at 99–100.
77. *Id.* at 154–155. The U.N. Report does not indicate whether that statistic includes all juveniles prosecuted in both adult and juvenile courts.
78. *Id.*
79. *Id.*
80. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 28–29 (2002), available at <http://whqlibdoc.who.int/hq/2002/9241545615.pdf>.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST, EIGHTH EDITION (2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf.
86. *Id.*
87. SEVENTH SURVEY, *supra* note 72, at 283–284.
88. *Id.*
89. *Id.*
90. *Roper*, 543 U.S. at 551.
91. See generally *Harmelin v. Michigan*, 501 U.S. 957, 966–93 (1991) (Scalia, J., plurality opinion).
92. *Id.* at 968–69.

93. *Id.* at 976.
94. *Baze v. Rees*, 128 S.Ct. 1520, 1558 (2008) (Thomas, J., concurring).
95. *Harmelin*, 501 U.S. at 979 (Scalia, J., plurality opinion) (quoting an objection at the Massachusetts Convention that Congress was “nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on [it], but that racks and gibbets may be amongst the most mild instruments of [its] discipline”).
96. *Id.*; David Forte, *Cruel and Unusual Punishment*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 364 (Edwin Meese III ed., 2005).
97. *In re Kemmler*, 136 U.S. 436, 447 (1890).
98. *Baze*, 128 S.Ct. at 1560 (Thomas, J., concurring) (quoting H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 35 (1977)).
99. *Baze*, 128 S.Ct. at 1560 (Thomas, J., concurring).
100. *Id.*
101. *Weems v. U.S.*, 217 U.S. 349, 380–81 (1910).
102. *Id.*
103. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded criminals violates the Eighth Amendment’s prohibition on “cruel and unusual punishments”).
104. 501 U.S. 957 (1991).
105. Wayne Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 *WAKE FOREST L. REV.* 681, 700–04 (1998).
106. *Harmelin*, 501 U.S. at 1001 (1991) (Kennedy, J., concurring).
107. *Id.* at 1005 (Kennedy, J., concurring).
108. *Id.* at 961.
109. *Id.* at 1003, 1005–06 (Kennedy, J., concurring).
110. *Id.* at 999 (Kennedy, J., concurring).
111. *Id.* at 995–96 (“We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.”).
112. *Solem v. Helm*, 463 U.S. 277, 290–92 (1983). Though *Solem* could be read to suggest that a somewhat broader swath of punishments may be subject to proportionality analysis, the precedents strongly suggest otherwise, and the Court unambiguously narrowed its applicability in *Harmelin* and *Ewing*. Scott Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *HASTINGS L.J.* 457, 479–80 (1989) (observing, post-*Solem*, “Even those Justices supporting a disproportionality analysis have emphasized that successful challenges will be rare and that great deference is owed to the legislature’s judgment.”); *supra* notes 107, 110–11 and surrounding text; *infra* notes 114–16 and surrounding text.
113. *Solem*, 463 U.S. at 293 (“Most would agree that negligent conduct is less serious than intentional conduct A court, of course, is entitled to look at a defendant’s motive in committing a crime.”). This suggests that a severe penalty imposed for a criminal offense that lacks a sufficiently strong *mens rea* element could fail proportionality analysis—e.g., life without parole for a merely negligent act. Imposing certain punishments, then, may constitutionally require the government to prove criminal intent; this would seem to apply equally to adult and juvenile offenders, reasonably placing a greater burden, in practice, on the government at the trial stage for juvenile offenders who may evince immaturity. See *Roper*, 543 U.S. at 620–21 (2005) (Scalia, J., dissenting) (explaining that juries do “appreciate the significance of a defendant’s youth when faced with details of a brutal crime”); *Rice v. Cooper*, 148 F.3d 747, 752 (finding that a juvenile offender who challenged his sentence to life without parole “was morally responsible in the further sense of having sufficient mental capacity to form the intent required to be found guilty of the crime”).
114. 538 U.S. 11 (2003). Though supported by only a plurality, O’Connor’s opinion in *Ewing* stated the holding of the case according to the *Marks* rule. *Marks v. United States*, 430 U.S. 188, 193 (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”).
115. *Ewing*, 538 U.S. at 25.
116. *Id.* at 26, 28 (internal quotation marks omitted).
117. See *Petition for Writ of Certiorari* at 4–9, *Graham v. Florida*, No. 08-7412 (U.S. filed Nov. 20, 2008); *Petition for Writ of Certiorari* at 19–21, *Sullivan v. Florida*, No. 08-7621 (U.S. filed Dec. 4, 2008); AI/HRW REPORT, *supra* note 9, at 3, 86, 104, 113; USF REPORT, *supra* note 9, at 16.
118. *Abramson*, *supra* note 36, at 117 n.1; *Roper*, 543 U.S. at 568.
119. *Roper*, 543 U.S. at 561, 564.
120. *Id.* at 564–67.
121. *Id.* at 564–65.
122. *Id.* at 565–66.
123. *Id.* at 567.
124. *Id.* at 564.
125. *Id.* at 568; *Harmelin*, 501 U.S. at 995–96 (“It is true that petitioner’s [life-without-parole] sentence is unique in that it is the second most severe known to the law; but life

imprisonment *with* possibility of parole is also unique in that it is the third most severe.”).

126. *Roper*, 543 U.S. at 569–70.

127. *Id.* at 570.

128. *Id.* at 571–72.

129. *Id.* at 571.

130. *Id.* at 572.

131. *Id.* at 575.

132. *Id.* at 578.

133. *Id.* at 577.

134. *Id.* at 578–79.

135. *Roper* is actually quoted on the cover and discussed in the first paragraph of the Equal Justice Initiative’s report on life-without-parole sentences for juvenile offenders. EJI REPORT, *supra* note 9, at 3. See also USF REPORT, *supra* note 9, at 16 (relying on *Roper* to argue that international law requires the United States to prohibit life-without-parole sentences for juvenile offenders); Petition for Writ of Certiorari at v. Sullivan v. Florida, *supra* note 29 (table of authorities listing *Roper* as being cited “passim”—that is, too many pages to list); *id.* at 6, 7, 8, 9, 13, 15, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 31 (citing *Roper*); Petition for Writ of Certiorari at 4, 5, 6, 9, Graham v. Florida, No. 08-7412 (U.S. filed Nov. 20, 2008) (citing *Roper* in support of invalidating a life-without-parole sentence imposed on a juvenile offender).

136. *Infra* app. III. Another recent survey identified 43 states, plus Washington, D.C., as allowing life-without-parole sentences for juvenile offenders. USF REPORT, *supra* note 9, at 5.

137. *Id.*

138. *Infra* app. III; U.S. Census Bureau, National and State Population Estimates: 2000 to 2008, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited June 29, 2009).

139. AI/HRW REPORT, *supra* note 9, at 25 n.44.

140. Richard Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., Aug. 2008, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

141. *Id.*

142. USF REPORT, *supra* note 9, at 6.

143. *Id.*

144. COLO. REV. STAT. § 17-22.5-104(d)(IV) (2006).

145. MONT. CODE ANN. § 46-18-222(1) (2007).

146. Those states are California, Michigan, Nebraska, Florida, Washington, and Louisiana. Claudia Rowe, *A Look at Why State Teens Can Get Life Without Parole*, SEATTLE POST-INTELLIGENCER, Feb. 5, 2009, at A1. Similar legislation

has been introduced at least twice at the federal level. Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 110th Cong. (2009); Juvenile Justice Accountability and Improvement Act of 2007, H.R. 4300, 109th Cong. (2007). The 2007 bill attracted only two supporters out of the 435-member House of Representatives. At the time of publication, the more recent bill had attracted no more support.

147. A view taken by several academics. See, e.g., Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 499, 513–14 (2009); Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 1013 (2008) (an article based on the University of San Francisco Law School’s 2007 report); Barry Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 19, 26, 43–56 (2008); Victor Streib & Bernadette Schrempp, *Life Without Parole for Children*, 21 CRIM. JUST. 4 (2007); Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1180–82 (2005). But see Moin Yahya, *Detering Roper’s Juveniles: Using a Law and Economics Approach To Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More than Adults*, 11 PENN. ST. L. REV. 53, 98–106 (2006) (arguing that “[i]f Roper is correct in assuming that juveniles are reckless, voracious consumers of the present, who have little fear of punishment because of their underdeveloped brains, then harsher punishments are needed to control them.”).

148. *Roper*, 543 U.S. at 568.

149. *Id.* at 572.

150. The Court’s claims of international unanimity in *Roper* and other cases was certainly overblown. See, e.g., Michael Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 77–79 (2004) (describing how briefs relied on by the Court in *Adkins* and *Lawrence* relied on shoddy, results-oriented empirical methods).

151. HUMAN RIGHTS COUNCIL 10TH SESSION, UNITED NATIONS, STATEMENT ON JUVENILE SENTENCING (2009), available at <http://www.crin.org/resources/infoDetail.asp?ID=19806>. As recently as 2005, 14 nations explicitly allowed the punishment. AI/HRW REPORT, *supra* note 9, at 106–07 (2005).

152. Pakistan, for example, has sentenced juvenile offenders aged 10 and 12 to sentences of 273 years and 63 years, respectively. AMNESTY INTERNATIONAL, PAKISTAN: PROTECTION OF JUVENILES IN THE CRIMINAL JUSTICE SYSTEM REMAINS INADEQUATE 18 (2005), available at <http://www.amnesty.org/en/library/info/ASA33/021/2005/en>.

153. For example, at least ten nations that have ratified the Convention on the Rights of the Child, which prohibits the sentence, are known to permit it. HUMAN RIGHTS COUNCIL 10TH SESSION, UNITED NATIONS, STATEMENT ON JUVENILE SENTENCING (2009), available at <http://www.crin.org/resources/infoDetail.asp?ID=19806>.
154. *Roper*, 543 U.S. at 578.
155. AI/HRW REPORT, *supra* note 9, at 94–109; USF REPORT, *supra* note 9, at 14–18; EJI REPORT, *supra* note 9, at 13.
156. See, e.g., AI/HRW REPORT, *supra* note 9, at 94, 95, 96 (quoting vague language from the United Nations Declaration on the Rights of the Child and the International Covenant on Civil and Political Rights); *supra* note 146 (listing states where legislation to prohibit life-without-parole sentences for juvenile offenders has failed).
157. See, e.g., AI/HRW REPORT, *supra* note 9, at 107–08; USF REPORT, *supra* note 9, at 16–17.
158. See Harold Koh, International Law as a Part of Our Law, 98 Am. J. Int'l L. 43, 54–55 (“What sense does it make to construe evolving, universally recognized constitutional concepts such as ‘due process’ and privacy solely in light of national historical tradition, while ignoring strong, contemporary indicia from kindred nations...?”). For a discussion of the applicability of foreign law to life-without-parole sentences under the Eighth Amendment, see *supra* notes 117–154 and surrounding text.
159. Edwin Meese III, *The Meaning of the Constitution*, in THE HERITAGE GUIDE TO THE CONSTITUTION 5 (Edwin Meese III ed., 2005).
160. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(1), 303 cmt. a (1987).
161. *Id.* at § 303 cmt. d.
162. In some rare cases, treaties may become customary international law, though this is unlikely to bind those who are subject to U.S. law without the consent of the President and the Senate. See *infra* note 188. In other cases, Congress (that is, both the Senate and the House of Representatives) may authorize the President to enter into an international agreement. This arrangement, sometimes controversial, has not been used to accede to the kind of multilateral agreements discussed in this paper. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987).
163. Even a concession by an American official that the U.S. is out of compliance with international practice cannot change binding domestic law. It certainly would not empower a court to do anything about the supposed non-compliance with international norms. See *infra* note 188.
164. *Medellin v. Texas*, 128 S.Ct. 1346, 1356–57 (2008).
165. *Foster v. Nelson*, 27 U.S. 253, 314–15 (1829) (explaining that, had the treaty at issue “acted directly on the subject” (i.e., been self-executing), it “would have repealed those acts of Congress which were repugnant to it”); Dennis Arrow, *Treaties*, in THE HERITAGE GUIDE TO THE CONSTITUTION 245 (Edwin Meese III ed., 2005).
166. *Id.*; *Foster*, 27 U.S. at 314 (“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”); *Medellin*, 128 S.Ct. at 1356 (explaining that “while treaties may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”) (internal quotation marks omitted).
167. See U.S. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2009 (2009) (listing all treaties to which the United States is a party, as well as all reservations and memoranda of understanding concerning those treaties).
168. Vienna Convention on the Law of Treaties, art. 2(d), May 23, 1969, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
169. *Id.* at art. 19.
170. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314(2), 314 cmt. d (1987).
171. *Id.* at § 115(1)(a); *Arrow*, *supra* note 165, at 245.
172. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (explaining that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).
173. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (statutes should be construed so as not to conflict with international obligations only “where fairly possible” to do so) (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936)).
174. *Id.* at §§ 111 cmt. d, 115 cmt. e, 302(2) (1987) (stating that, though an international agreement is federal law and therefore superior to state law, “No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.”). Although the scope of the treaty power is

broad, there are limits to what the President and Senate can agree to that might otherwise violate constitutional federalism. For example, the United States could not effectively enter a treaty that purports to give some states more representation in the U.S. Senate than others. Nor could it agree by treaty to end state sovereignty generally. What burdens on or injuries to federalism are possible through the treaty power is open to debate, but the asserted power to end or modify constitutional state criminal sentences unilaterally is a questionable one.

175. *Arrow*, *supra* note 165, at 245; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(2) (1987) (“Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch.”).

176. *Medellin*, 128 S.Ct. at 1358, 1362 (explaining that textual clarity is required to create a legal obligation). Generally, unclear terms may be evidence that a treaty, or a section of a treaty, is not self-executing. If it has been executed, however, “it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

177. Convention on the Rights of the Child, Nov. 20, 1989, <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

178. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS FOR THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

179. AI/HRW REPORT, *supra* note 9, at 99.

180. AI/HRW REPORT, *supra* note 9, at 98–108; USF REPORT, *supra* note 9, at 16–18.

181. Lee A. Casey & David B. Rivkin, Jr., *International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers*, Heritage Foundation BACKGROUND No. 1961, August 18, 2006, available at <http://www.heritage.org/Research/WorldwideFreedom/bg1961.cfm>; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i (explaining that the obligation “to refrain from acts that would defeat the object and purpose” of a treaty prohibits acts with consequences that “might be irreversible” but not those that allow compliance to “be effected later”).

182. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1), 111 cmt. a, j (1987).

183. *U.S. v. Morrison*, 529 U.S. 598, 618 (2000) (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”); *id.* at 619 n.8 (“[T]he principle that the Constitution created a Federal Government of limited powers,

while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.”) (internal quotation marks omitted). However, the federal government probably could condition receipt of federal funds on a state’s prohibiting the sentencing of juvenile offenders to life without parole. *South Dakota v. Dole*, 483 U.S. 203, 207 (upholding a federal statute conditioning receipt of federal funds on adoption of a minimum drinking age of 21 on the grounds that “objectives not thought to be within Article I’s enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”) (internal citation omitted).

184. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 n.6 (discussing the Article’s origins in European civil law).

185. Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817–18 (1997) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(2), 102 n.4 (1987)).

186. See, e.g., U.N. Comm. on the Rights of the Child [UNCAT], *Report on the Forty-Sixth Session*, ¶ 33(35), U.N. Doc. CRC/C/46/3 (April 22, 2008) (faulting Venezuela for “extrajudicial killings of children at the hands of law enforcement officials and deaths of children in police custody”); UNCAT, *Report on the Forty-Fourth Session*, ¶¶ 257, 265, U.N. Doc. CRC/C/44/3 (Mar. 13, 2008) (faulting Honduras for its “very high number of disappearances and extrajudicial killings of children, including at hands of members of the police force,” regular “beatings during and after apprehension of persons below 18” by police, and torture of children); UNCAT, *Report on the Forty-Fifth Session*, ¶ 236, U.N. Doc. CRC/C/45/3 (Mar. 12, 2007) (faulting Uruguay for “torture and degrading treatment by law enforcement officials of children while held in detention”); UNCAT, *Report of the Forty-Third Session*, ¶¶ 160, 204, U.N. Doc. CRC/C/43/3 (Mar. 9, 2007) (faulting Ethiopia for sexual violence against children by the police and military and for the torture, rape, and killing of minority children by the military); UNCAT, *Report on the Forty-Second Session*, ¶¶ 67, 73, U.N. Doc. CRC/C/42/3 (March 11, 2006) (faulting Colombia for “numerous instances of violence by the regular military forces whereby children have been killed,” “the unbroken pattern of impunity [for such killings] and the continuous tendency to refer serious violation [sic] of human rights to the military justice system,” and torture by “State agents, including members of the military”); UNCAT, *Report on the Forty-First Session*, ¶ 477, U.N. Doc. CRC/C/41/3 (May 12, 2006) (faulting Hungary for “arbitrary detentions, police brutality and ill-treatment in detention facilities”); UNCAT, *Report on the Fortieth Session*, ¶ 146, U.N. Doc. CRC/C/153 (Mar. 17, 2006) (faulting Algeria for “a number of cases of torture or inhuman and degrading

treatment of children”); UNCAT, *Report on the Thirty-Ninth Session*, ¶¶ 126, 141, 192, 193 U.N. Doc. CRC/C/150 (Dec. 21, 2005) (faulting the Philippines for “extrajudicial killings of children by military soldiers...and by so-called death squads,” “a number of reported cases of torture, inhuman and degrading treatment of children, particularly for children in detention,” and its “very low” minimum age of criminal responsibility (9 years)); UNCAT, *Report on the Thirty-Eighth Session*, ¶¶ 480, 507, U.N. Doc. CRC/C/146 (July 19, 2005) (faulting Iran for sentencing children “to various types of torture or other cruel, inhuman or degrading treatment or punishment, such as amputation, flogging or stoning,” and executing juveniles); UNCAT, *Report on the Thirty-Seventh Session*, ¶ 59, U.N. Doc. CRC/C/143 (Jan. 12, 2005) (faulting Brazil for “summary or arbitrary executions” of children by “military policemen or former policemen”); UNCAT, *Report on the Thirty-Sixth Session*, ¶ 631, U.N. Doc. CRC/C/140 (Sep. 27, 2004) (faulting France for “illegal networks of forced [child] labour”).

187. AI/HRW REPORT, *supra* note 9, at 104–107.

188. This type of conflict actually has not arisen in the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n.4 (1987). “But customary law is made by practice, consent, or acquiescence of the United States, often acting through the President, and it has been argued that the sole act of the President ought not to prevail over a law of the United States.” *Id.*

189. AI/HRW REPORT, *supra* note 9, at 95–98.

190. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, 4783–84 (1992).

191. The Senate stated that its advice and consent was subject to several declarations, the first of which states, “That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” *Id.* at 4784.

192. International Covenant on Civil and Political Rights, art. 7, December 16, 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. The Convention Against Torture, to which the U.S. is a party, contains a similar prohibition. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 16, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

193. United Nations Treaty Collection, International Covenant on Civil and Political Rights 14, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf> (Reservation 3 of the United States of America).

194. See International Covenant on Civil and Political Rights, art. 40, December 16, 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

195. *Id.* at art. 10(3).

196. *Id.* at art. 14(4).

197. United Nations Treaty Collection, International Covenant on Civil and Political Rights 14, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-4.en.pdf> (Reservation 5 of the United States of America).

198. *Id.* (Understanding 3 of the United States of America).

199. *Id.* See *Roper*, 543 U.S. at 571–72 (stating that the sentence of life without parole has a strong deterrent effect for a juvenile offender).

200. EJI REPORT, *supra* note 9, at 13; USF REPORT, *supra* note 9, at 15.

201. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 16, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

202. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

203. *Id.* One of the authors of this report led the delegation from the Department of Defense that presented the United States’ Second Periodic Report to the CAT in Geneva in May 2006 and testified on May 5 and 8 before the committee. The committee did not raise the issue of life-without-parole sentences for juvenile offenders on either day.

204. United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 6, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-9.en.pdf> (Reservation I(1) of the United States of America).

205. Fully 70 percent of arrests in 2006 involving youth eligible for processing in their state’s juvenile justice system were referred to juvenile court; only 8 percent were referred to a criminal court. *Juvenile Arrests*, *supra* note 69, at 5.



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