

# THE UNITED STATES STANDS ALONE: AN INTERNATIONAL CONSENSUS AGAINST JUVENILE LIFE WITHOUT PAROLE SENTENCES

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## I. INTRODUCTION

Efren Paredes, Jr., a Latino high school honor student who participated in Key Club, foreign language club, and soccer team, was arrested when he was fifteen years old.<sup>1</sup> On March 8, 1989, while Efren was at home eating pizza according to witnesses, Rick Tetzlaff, a store manager at the grocery store where Efren worked, was shot to death during a robbery.<sup>2</sup> Steve M., another high school student, admitted to being involved in planning the murder and robbery.<sup>3</sup> Steve M., however, wanted to negotiate a deal with police and implicated four people in the crime, including Efren.<sup>4</sup> When the other suspects were informed that they were being charged with the murder and robbery, they told police that Efren was responsible for the crime, even though Efren was not friends with the other suspects and did not participate in any activities with them.<sup>5</sup> Moreover, when the police conducted a search of the other suspects' homes they found the money and the murder weapon from the robbery.<sup>6</sup> Nonetheless, despite conflicting stories, lack of hard evidence against Efren, and no prior criminal record, fifteen-year-old Efren was sentenced to life without parole<sup>7</sup>—one of the harshest punishments the law provides. To this day, Efren continues to claim his innocence.<sup>8</sup>

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<sup>1</sup> *Efren Paredes, Jr. Case History*, 4EFREN, 8, 13 (Dec. 10, 2010), <http://www.4efren.com/resources/Case+History.pdf>.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2, 8. Efren was an honor student and the other suspects were not. *Id.* at 8.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Efren Paredes, Jr. Case History*, *supra* note 1, at 9, 12–15. Efren was found guilty by eleven white jurors. *Id.* at 9. The other suspect, Jason W.—a white male—only received a six-month sentence in the juvenile detention center. *Id.* at 12. He subsequently served time in state and federal prison on unrelated charges. *Id.* at 12–13. Disturbingly, the prosecutor did not press any charges against Steve M., the white

Efren Paredes, Jr. is only one of many minors—those who are younger than eighteen years old—sentenced to life without parole (“LWOP”).<sup>9</sup> A recent study conducted by Human Rights Watch and Amnesty International revealed that there are currently at least 2574 inmates incarcerated in the United States who have been sentenced to spend the rest of their lives in prison without the possibility of parole for crimes they committed as adolescents.<sup>10</sup> In the 2010 case, *Graham v. Florida*, the Supreme Court ruled that the Eighth Amendment prohibits LWOP sentences for juveniles who commit non-homicide crimes.<sup>11</sup> However, before the Court decided *Graham*, an estimated 109 juveniles received LWOP sentences for non-homicides in the United States.<sup>12</sup> Despite the landmark ruling in *Graham*, however, the United States continues to impose LWOP sentences on juveniles who commit homicide or felony murder. Twenty-six percent of juveniles serving LWOP sentences were convicted of felony murder even though the juvenile did not actually kill or even intend to kill anyone.<sup>13</sup>

While the United States continues to impose LWOP sentences on juvenile offenders who commit homicide and felony murder, this practice is uncommon elsewhere in the world.<sup>14</sup> Unlike the United States, most countries have ratified the United Nations Convention on the Rights of the Child (“CRC”).<sup>15</sup> The CRC, if adopted by the United States, would offer

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male who admitted to being an accomplice in the murder and robbery. *Id.* at 13. Steve M. has also subsequently been arrested and charged on numerous occasions for unrelated crimes. *Id.*

<sup>8</sup> *Id.* at 21.

<sup>9</sup> See Sara Kruzan, *Sentenced to Life Without Parole*, NAT’L CTR. FOR YOUTH L., [http://www.youthlaw.org/juvenile\\_justice/6/sara\\_kruzan/](http://www.youthlaw.org/juvenile_justice/6/sara_kruzan/) (last visited Oct. 26, 2010). Sara Kruzan grew up with a drug addicted, abusive mother and a father who was in prison. *Id.* When Sara was only eleven-years-old, she met a thirty-one-year-old man named “G.G.” who sexually molested her and used her as a prostitute. *Id.* Sara killed G.G. when she was sixteen. *Id.* She was subsequently tried as an adult and sentenced to LWOP. *Id.* Astoundingly, Sara’s older male co-defendant, who was also involved in the murder, was never prosecuted. *Id.*

<sup>10</sup> PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION (2009); HUMAN RIGHTS WATCH, STATE DISTRIBUTION OF ESTIMATED 2,574 JUVENILE OFFENDERS SERVING JUVENILE LIFE WITHOUT PAROLE (2009), available at [http://www.hrw.org/sites/default/files/related\\_material/JLWOP\\_Table\\_May\\_7\\_2009.pdf](http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf) [hereinafter STATE DISTRIBUTION]. In this note, the words “minor,” “youth,” “juvenile,” “adolescent” and “child” refer to individuals who are under the age of 18.

<sup>11</sup> *Graham v. Florida*, 130 S.Ct 2011, 2034(2010) (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.”).

<sup>12</sup> PAOLO G. ANNINO ET AL., *supra* note 10, at 2. “Non-homicide” refers to criminal convictions that do not involve any type of homicide. It does not include convictions for felony murder or attempted homicides.

<sup>13</sup> Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. FAM. STUD. 11, 68 (2007).

<sup>14</sup> Molly C. Quinn, Comment, *Life Without Parole for Juvenile Offenders: A Violation of Customary International Law*, 52 ST. LOUIS U. L.J. 283, 294 (2007).

<sup>15</sup> See generally United Nations Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]; Jelani Jefferson & John W. Head, *In Whose “Best Interests”?* – An International and Comparative Assessment of US Rules on Sentencing of Juveniles, 1 HUM. RTS. & GLOBALIZATION L. REV. 89, 92, 103 (2008); Alice Farmer & Jennifer Turner, *Children of Lesser Rights: The United States Failure to Ratify the Convention on the*

protection to inmates who had been sentenced as a minor to life imprisonment without parole.<sup>16</sup>

This Note seeks to analyze the juvenile criminal justice systems in the United States in light of practices around the world, paying particular attention to the imposition of juvenile LWOP sentences. Part II of this Note focuses on international legal standards and practices relating to the imposition of LWOP for crimes committed as juveniles. Part III examines the evolution of U.S. laws and policies regarding juvenile justice. Part IV analyzes how the United States became one of the most punitive countries in the world in terms of juvenile criminal justice. This part pays special attention to the history of race and politics in the United States, which led to the tough-on-crime era. Part V focuses on recent neurological research on adolescent brains. Part VI notes current U.S. efforts to comport with international law and standards. Specifically, this part analyzes whether proposed legislation will actually mean freedom for inmates sentenced to LWOP as minors. Part VII concludes this Note by offering recommendations to current U.S. policies.

## II. INTERNATIONAL STANDARDS AND PRACTICES AFFECTING JUVENILE JUSTICE

### A. THE ADOPTION OF THE TREATY

There are many international juvenile sentencing standards; this Note, however, focuses mainly on the standards enumerated in CRC Article 37(a), (b) and (c). The United Nations adopted the CRC in 1989, and, as of 2008, 193 countries have formally agreed to be bound by its provisions.<sup>17</sup> Political leaders around the globe recognized that adolescents' rights were inadequately protected without an express treaty ensuring the welfare of minors. Thus, the CRC was drafted to guard the fundamental rights of minors and to safeguard the liberties of those sentenced to LWOP.<sup>18</sup>

Before delving into the details of CRC Article 37(a), it is important to note its drafting history. The drafting history demonstrates how some delegations considered the prohibition on life imprisonment of juvenile offenders as a necessary and crucial component of the CRC. The first draft, adopted in 1989, included a prohibition on life imprisonment of juvenile offenders, which survived subsequent redrafting.<sup>19</sup> Furthermore, the provision on juvenile justice included in the final draft of the treaty reflected the international consensus against juvenile LWOP sentences. The

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*Rights of the Child*, in HUMAN RIGHTS BEGIN AT HOME 33 (2009), available at [http://www.aclu.org/files/inlhumanrights/childrensrights/asset\\_upload\\_file948\\_39509.pdf](http://www.aclu.org/files/inlhumanrights/childrensrights/asset_upload_file948_39509.pdf).

<sup>16</sup> Farmer & Turner, *supra* note 15, at 34.

<sup>17</sup> *Id.*; Jefferson & Head, *supra* note 15, at 103.

<sup>18</sup> Farmer & Turner, *supra* note 15, at 34; Quinn, *supra* note 14, at 299.

<sup>19</sup> Quinn, *supra* note 14, at 304.

treaty received “precedent-setting global support,” as more nations partook in the signing ceremony and ratified the CRC than any other United Nations human rights treaty.<sup>20</sup>

Article 37(c) sets the standards for separating adult and youth offenders, which will be discussed in detail in Part III.B. Article 37(a) of the CRC addresses the issue of LWOP and ensures that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”<sup>21</sup> Specifically, “life imprisonment without possibility of release shall [not] be imposed for offences committed by persons below eighteen years of age.”<sup>22</sup> Further, subsection (b) states, “[t]he arrest, detention or imprisonment of a child shall be . . . for the shortest appropriate period of time.”<sup>23</sup> Thus, Article 37, in letter and spirit, makes clear that the practice of imposing LWOP on juvenile offenders runs contrary to the standards set forth in the CRC.

#### B. CUSTOMARY INTERNATIONAL LAW

The CRC codifies and echoes customary international practices by prohibiting juvenile LWOP sentences. The International Court of Justice, established in 1945 as the “principal judicial organ of the United Nations,” has acknowledged customary international law as a source of law under Article 38(1)(b) of its statute.<sup>24</sup> Customary international law is based on generally practiced international customs.<sup>25</sup> It is recognized as a legitimate source of international law that imposes legal obligations on countries to conform to customary norms.<sup>26</sup> According to the Restatement (Third) of Foreign Relations Law of the United States, “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>27</sup>

To qualify as a customary international law, two elements must be met. First, there must be “general and consistent state practice.”<sup>28</sup> A prohibition against imposing juvenile LWOP adequately meets this first requirement. The vast majority of countries expressly prohibit LWOP sentences for

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<sup>20</sup> *Id.* at 305 (quoting Cynthia Price Cohen, *The Role of the United States in Drafting of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 185, 185 (2006)).

<sup>21</sup> CRC, *supra* note 15.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *The Court*, INTERNATIONAL CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Oct. 26, 2010); Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 933, 3 Bevans 1179, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. The ICJ Statute establishes a vital part of U.N. Charter, Article 92.

<sup>25</sup> Quinn, *supra* note 14, at 285.

<sup>26</sup> *Id.*

<sup>27</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

<sup>28</sup> Quinn, *supra* note 14, at 295. The term “state” used in this Note refers to a political association that has sovereignty over a particular area and population, as opposed to political units like the states in the U.S.

juvenile offenders: 192 countries are party to the precedent-setting CRC, and the United States is the only country that still practices such sentencing.<sup>29</sup> In addition to the CRC, juvenile LWOP sentences violate other international treaties, including: the International Covenant on Civil and Political Rights; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the United Nations Guidelines for the Prevention of Juvenile Delinquency; the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment; the American Declaration of Rights and Duties of Man; and the Inter-American Convention to Prevent and Punish Torture.<sup>30</sup> Some of these treaties will be discussed in more detail below.<sup>31</sup>

The second element, *opinio juris*, is the subjective element of customary international law, which requires states to follow a “practice from a sense of legal obligation.”<sup>32</sup> The fact that countries known to have previously sentenced juvenile offenders to LWOP, have abrogated this practice after ratifying the CRC, is strong evidence of *opinio juris*.<sup>33</sup> Furthermore, Article 45 of the CRC allows non-governmental organizations to ensure state compliance with the treaty.<sup>34</sup> State supervision by these organizations provides additional evidence that countries have abolished the practice of sentencing juveniles to LWOP due to a sense of legal obligation. Hence, the *opinio juris* requirement is satisfied.

#### C. COUNTRIES IN CONFORMITY WITH CUSTOMARY INTERNATIONAL LAW

Very few countries have sentenced child offenders to LWOP. South Africa and Tanzania, both of which admitted to dispensing LWOP sentences on juvenile offenders, changed their practices and have given adolescents who were sentenced to LWOP the opportunity to receive parole.<sup>35</sup> Specifically, in 1999, South Africa reported that it had four juveniles serving LWOP sentences.<sup>36</sup> Today, no minors serve LWOP sentences in South Africa and neither Tanzania nor South Africa sentences adolescents to LWOP.<sup>37</sup>

In addition, even countries such as Burkina Faso and Kenya, which had laws allowing juvenile LWOP sentences but no documented instances, have

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<sup>29</sup> Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S. F. L. REV. 983, 1015–16 (2008). Accord Quinn, *supra* note 14, at 295. See *infra* Part III.A.

<sup>30</sup> Juvenile Justice Reform Committee, *Life Without Parole For Juvenile Offenders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (June 2009), [http://www.aacap.org/cs/root/policy\\_statements/life\\_without\\_parole\\_for\\_juvenile\\_offenders](http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders).

<sup>31</sup> See *infra* Part III.A–B.

<sup>32</sup> Quinn, *supra* note 14, at 300.

<sup>33</sup> See *infra* Part II.C.

<sup>34</sup> Quinn, *supra* note 14, at 302.

<sup>35</sup> de la Vega & Leighton, *supra* note 29, at 996–1001.

<sup>36</sup> *Id.* at 999.

<sup>37</sup> *Id.*

amended their laws to prohibit it.<sup>38</sup> Further, Australian law allows for juvenile LWOP sentences, but there are currently no juveniles serving LWOP.<sup>39</sup> Nonetheless, Australia has adopted the provisions of the CRC, and is therefore obligated to bar the practice of imposing LWOP sentences on persons under the age of eighteen. Laws in these aforementioned countries have come to reflect the international standards by prohibiting LWOP sentences.

Many countries have also followed the CRC's "shortest appropriate period of time" standard in their juvenile sentencing practices. For example, Spain's law provides that police detention of minors cannot last any longer than twenty-four hours.<sup>40</sup> Also, South Africa changed its constitution to include that a "child may be detained only for the shortest appropriate period of time."<sup>41</sup> Thus, it is apparent that most countries' laws and practices seek to comport with international standards on fairness in juvenile justice.

### III. THE UNITED STATES PRACTICE OF IMPOSING JUVENILE LWOP SENTENCES

#### A. THE UNITED STATES STANDS ALONE

The United States and Somalia are the only two countries that have not ratified the CRC.<sup>42</sup> In 2006, the United Nations Committee Against Torture—an organization that monitors implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States is a party to—criticized the United States for its practice of condemning juveniles to LWOP.<sup>43</sup> The committee expressed its disapproval, stating "[t]he State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences."<sup>44</sup> Further, the committee opined that juvenile life sentences "could constitute cruel, inhuman or degrading treatment or punishment."<sup>45</sup> The committee also expressed its concerns regarding U.S. laws that allow juvenile offenders to

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<sup>38</sup> *Id.* at 996.

<sup>39</sup> *Id.* at 1005.

<sup>40</sup> Jefferson & Head, *supra* note 15, at 122–23.

<sup>41</sup> *Id.* at 123.

<sup>42</sup> *Id.* at 103.

<sup>43</sup> Quinn, *supra* note 14, at 299; Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observation of the Human Rights Committee: United States of America*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) [hereinafter *Concluding Observations*].

<sup>44</sup> *Concluding Observations*, *supra* note 43, at 11.

<sup>45</sup> de la Vega & Leighton, *supra* note 29, at 1011; Comm. Against Torture, *Monitoring the Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, OHCHR <http://www2.ohchr.org/english/bodies/cat/> (last visited Oct. 26, 2010).

receive LWOP sentences, especially given how this extreme punishment is not limited to extraordinary circumstances.<sup>46</sup>

In July of 2006, the United States was called to testify before the Human Rights Committee (“the Committee”), which enforces the International Covenant on Civil and Political Rights, in Geneva, Switzerland.<sup>47</sup> The U.S. delegation advised the Committee that child offenders who received LWOP sentences were the “worst of the worst.”<sup>48</sup> Instead of ratifying the CRC, the United States placed a reservation on the treaty agreeing to only treat adolescents as adults in exceptional circumstances.<sup>49</sup> Yet, it is clear that this draconian punishment in the United States is not reserved for “extraordinary circumstances.” Although *Graham* prohibits LWOP sentences for non-homicide crimes, juvenile offenders in the United States still may receive LWOP sentences for homicide and felony murder.<sup>50</sup>

Furthermore, 26 percent of adolescents serving LWOP sentences were convicted of felony murder even though the child did not kill anyone and was just an accomplice to a murder.<sup>51</sup> For example, in *People v. Petty*, the Michigan Supreme Court affirmed a LWOP sentence that was imposed on a fifteen-year-old boy who did not kill the victim, but encouraged his twelve-year-old accomplice to kill the victim.<sup>52</sup>

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<sup>46</sup> *Concluding Observations*, *supra* note 43, at 11. Efen Paredes’s case, discussed earlier, is an example of an extraordinary circumstance that lends support to the committee’s criticism.

<sup>47</sup> Frontline, *When Kids Get Life: Interviews: Alison Parker, Senior Researcher, Human Rights Watch*, PBS (May 8, 2007), <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/interviews/parker.html> [hereinafter *Interviews: Alison Parker*].

<sup>48</sup> *Interviews: Alison Parker*, *supra* note 47. Alison Parker, a senior researcher for Human Rights Watch, traveled to Geneva in 2006 where the U.S. delegation claimed to only be punishing children with LWOP sentences in exceptional circumstances. *Interviews: Alison Parker*, *supra* note 47. In an interview conducted by Frontline, Ms. Parker stated:

I’m confronted by members of my own government in Geneva who are claiming that these children are hardened criminals who have been convicted of the gravest of offenses, that they are the worst of the worst, and that we use the sentence only in rare cases. And it’s embarrassing. It’s embarrassing for me as a human rights attorney, but it’s also embarrassing for me as an American. . . . I’m embarrassed by the use of life without parole against child offenders in the United States. I’m embarrassed by the audacity of the United States to impose this punitive and final sentence on children, to not give them a second chance. . . . [T]his has really made us a pariah in the international community, and it’s something that I’m very embarrassed about.

*Interviews: Alison Parker*, *supra* note 47.

<sup>49</sup> *Interviews: Alison Parker*, *supra* note 47. Concededly, the U.S. has one of the highest rates of homicide in the world. However, even countries with higher rates of homicide (Columbia, South Africa, Jamaica, Venezuela, Russia, Mexico, Estonia, Latvia, Lithuania, and Thailand) are parties to the CRC. *Juvenile Homicide*, YOUTH VIOLENCE PROJECT, <http://youthviolence.edschool.virginia.edu/juvenile-violence/juvenile-homicide.html> (last visited Oct. 26, 2010).

<sup>50</sup> *Graham v. Florida*, 130 S.Ct. 2011 (2010). See Marsha Levick, *Kids Really Are Different: Looking Past Graham v. Florida*, 87 CRIM. L. REP. 1, 3 (July 14, 2010) (“*Graham* itself opened the door to extending its ruling to juvenile felony murder cases.”).

<sup>51</sup> Feld, *supra* note 13, at 68.

<sup>52</sup> 665 N.W2d 443, 445 (Mich. 2003); see discussion of Dillon P. *infra*.

Because of the varying degrees of participation presented in felony-murder cases, imposing LWOP sentences under the felony-murder doctrine also creates a problem of constitutionality. Imposing the same LWOP sentence on a juvenile defendant who minimally participated in a crime, as would be imposed on an adult who substantially participated in the crime, reeks of inconsistency. For example, Dillon P. was seventeen years old when he was convicted of first degree felony murder.<sup>53</sup> On the day of the murder, Dillon met with two friends—a fifteen-year-old and an eighteen-year-old.<sup>54</sup> Dillon and his friends got into a fight with two university students.<sup>55</sup> Dillon admits that he initiated the fight, knocking one of the students to the ground.<sup>56</sup> The fifteen-year-old acquaintance subsequently stabbed and killed the student, while the eighteen-year-old stole the students' wallets.<sup>57</sup> Dillon explained that he did not know that the other juvenile was carrying a knife or that his acquaintances were going to rob the students.<sup>58</sup> Nonetheless, Dillon was sentenced to LWOP.<sup>59</sup> The fifteen-year-old who stabbed and killed the victim was sentenced to twenty years for first degree murder, but was released after serving ten years.<sup>60</sup> The eighteen-year-old pleaded guilty to manslaughter for a twelve-year to twenty-year sentence.<sup>61</sup> He was also released after serving ten years.<sup>62</sup> Meanwhile, Dillon has served eighteen years in prison and will spend the rest of his life there.<sup>63</sup>

As more fully discussed below, a study comparing LWOP sentences imposed on minors and adults shows that minors frequently receive harsher sentences than their adult counterparts.<sup>64</sup> Notably, between 1985 and 2001, adolescents convicted of murder were more likely to be sentenced to LWOP than were adults.<sup>65</sup> Because of inconsistencies in sentencing, *inter alia*, the law should refrain from imposing these disproportionate sentences and instead take into account the less-culpable nature of juveniles, especially juveniles convicted of non-homicides.

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<sup>53</sup> CHILDREN'S LAW CTR. OF MASS., UNTIL THEY DIE A NATURAL DEATH: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN MASSACHUSETTS (Sept. 2009) [hereinafter UNTIL THEY DIE].

<sup>54</sup> UNTIL THEY DIE, *supra* note 53.

<sup>55</sup> UNTIL THEY DIE, *supra* note 53.

<sup>56</sup> UNTIL THEY DIE, *supra* note 53.

<sup>57</sup> UNTIL THEY DIE, *supra* note 53.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 19; see *supra* note 9 and accompanying text.

<sup>65</sup> AMNESTY INT'L & HUM. RTS. WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 32–33 (2005).

## B. JUVENILES SUFFER HARSHER PUNISHMENT THAN ADULTS

The United States ratified the International Covenant on Civil and Political Rights (“ICCPR”) in 1992.<sup>66</sup> ICCPR Article 7 prohibits “cruel, inhuman or degrading treatment or punishment.”<sup>67</sup> Imposing LWOP sentences on juveniles is undoubtedly cruel and inhumane punishment. Although the public may believe that youths who receive LWOP sentences are the “worst of the worst” with vicious criminal histories, most of the youths who received these harsh sentences were first time offenders.<sup>68</sup>

Article 37(c) to the CRC addresses the issue of adult separation from adolescents in the criminal system, stating:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so . . . .<sup>69</sup>

The corresponding provision in the ICCPR Article 10(3), stresses that “[j]uvenile offenders shall be segregated from adults and be accorded to treatment appropriate to their age and legal status.”<sup>70</sup> Despite the fact that the U.S. ratified the ICCPR in 1992, there are approximately 2574 inmates incarcerated in adult facilities who have been sentenced to spend the rest of their lives in prison without the possibility of parole for crimes they committed as adolescents.<sup>71</sup>

Unsurprisingly, minors who are punished in the adult criminal justice system often suffer much harsher punishments than adults. Adolescents who enter the adult prisons are generally defenseless and weak and, thus, are more susceptible to violence, rape, and being forced to join gangs.<sup>72</sup> According to the Prison Rape Elimination Act of 2003, juveniles in adult facilities are five times more likely to be victims of rape and sexual abuse

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<sup>66</sup> de la Vega & Leighton, *supra* note 29, at 1010.

<sup>67</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–20 (1992), 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf> [hereinafter ICCPR].

<sup>68</sup> *Report Summary – The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, HUM. RTS. WATCH, <http://hrw.org/legacy/campaigns/lwop/summary.htm> (last visited Oct. 26, 2010) [hereinafter *Report Summary*]. See *supra* notes 45–52 and accompanying text and figures.

<sup>69</sup> CRC, *supra* note 15 (emphasis added).

<sup>70</sup> ICCPR, *supra* note 67 at art. 10(3).

<sup>71</sup> de la Vega & Leighton, *supra* note 29, at 1010; STATE DISTRIBUTION, *supra* note 10.

<sup>72</sup> *Interviews: Alison Parker*, *supra* note 47. See also EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14- YEAR OLD CHILDREN TO DIE IN PRISON (2007) (providing information regarding prison rape in the U.S.). Every child entering the adult system will inevitably experience a difficult period of adjustment. Calvin P. who is now 28 years old and had no prior juvenile record before entering prison, stated, “You just grow up very fast. . . . I came in as a child. You want to be blind to it, but then you see people get beat, getting raped and killing themselves.” UNTIL THEY DIE, *supra* note 53, at 23.

than juveniles who are in juvenile facilities.<sup>73</sup> Young, vulnerable inmates are often targeted by prison staff and fellow inmates because of their small stature, lack of social network—gang affiliation for example—and because they are easily intimidated by their adult counterparts.<sup>74</sup> Juvenile inmates are what criminologists call the “prototype” rape victim.<sup>75</sup>

The U.S. Department of Justice reported that more than 3200 young inmates had been raped or sexually abused in 2009 by fellow inmates or prison staff.<sup>76</sup> In other words, almost one out of eight youths reported being sexually abused while in prison in 2009.<sup>77</sup> Comparing this number to similar studies of adult inmates suggests that a juvenile inmate is twice as likely as an adult inmate to be raped.<sup>78</sup> Moreover, it is very likely that the statistics reported by the Justice Department are an undercount, considering how many juveniles fail to report incidences of rape and sexual abuse, due to shame. One corrections officer who was interviewed for an article in the *New Republic* said that the chance of a young inmate avoiding rape is “almost zero. . . . He’ll get raped within the first twenty-four to forty-eight hours.”<sup>79</sup> Young inmates are not only at risk for sexual and physical abuse; they are also at risk for a host of sexually transmitted diseases, including H.I.V. Victims of rape also have increased rates of depression and suicide.<sup>80</sup>

The United States may not have ratified the CRC, but the fact that almost every nation in the world has reviewed Article 37(c) and ratified the treaty should send a message to U.S. lawmakers that adult separation is a crucial component in juvenile justice system.<sup>81</sup> Moreover, the United States has ratified the ICCPR, which stresses the issue of adult separation in Article 10(3) of its provisions. Needless to say, adult separation is a necessary measure in comporting with international standards of decency.

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<sup>73</sup> Prison Rape Elimination Act of 2003, PL 108-79, 117 Stat. 972 (2003).

<sup>74</sup> CTR. ON JUVENILE & CRIMINAL JUSTICE, THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS 3 (July 1997), available at [http://www.cjcj.org/files/the\\_risks.pdf](http://www.cjcj.org/files/the_risks.pdf) [hereinafter THE RISKS JUVENILES FACE].

<sup>75</sup> *Id.* at 3.

<sup>76</sup> Carrie Johnson, *Justice Study Tracks Rape, Sexual Abuse of Juvenile Inmates*, WASH. POST, Jan. 8, 2010, at A05.

<sup>77</sup> Nicholas D. Kristof, *Kids in Crisis (Behind Bars)*, N.Y. TIMES, Jan. 28, 2010.

<sup>78</sup> *Id.*

<sup>79</sup> THE RISKS JUVENILES FACE, *supra* note 74. Rodney Hulin Jr., who was a 16-year-old first time offender sent to an adult prison, was raped within a week of his incarceration. Kristoff, *supra* note 77. His father recounts his story: “For the next several months, my son was repeatedly beaten by the older inmates, forced to perform oral sex, robbed, and beaten again . . . . He could no longer stand to live in continual terror.” *Id.* Shortly thereafter, Rodney Hulin Jr. hanged himself. *Id.*

<sup>80</sup> See Prison Rape Elimination Act of 2003, PL 108-79, 117 Stat. 972 (2003); see also Press Release, Campaign for Youth Justice, 7500 Youth in Adult Jails: Report, (Nov. 15, 2007), available at [http://www.campaign4youthjustice.org/Downloads/PressReleases/Jailing\\_Juveniles\\_Press\\_Release\\_11-15-07.pdf](http://www.campaign4youthjustice.org/Downloads/PressReleases/Jailing_Juveniles_Press_Release_11-15-07.pdf) (“Youth have the highest suicide rates of all inmates in jail. They are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility”)(emphasis omitted).

<sup>81</sup> Ethiopia’s constitution reflects the CRC’s provision on the separation of adult and children: “[J]uvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State . . . shall be kept separately from adults.” Jefferson & Head, *supra* note 15, at 124. South Africa’s constitution affords a child the right to be “kept separately from detained persons over the age of 18 years.” *Id.*

Therefore, the United States should stop subjecting juveniles to the adult criminal justice system in which they can be sentenced to spend the rest of their lives in prison.

#### IV. HOW THE UNITED STATES BECAME THE MOST PUNITIVE COUNTRY IN THE WORLD IN TERMS OF JUVENILE JUSTICE

##### A. HISTORY OF RACE AND CRIME POLICY IN THE UNITED STATES

It is curious how the United States, a country with numerous laws designed to protect the rights of adolescents, such as labor laws, and whose government is strongly committed to eradicating child trafficking, became one of the harshest countries in the world when it comes to punishing adolescents. Further, it is astonishing that the United States is one of only two countries in the world that has not ratified the CRC. To understand how the United States became such a punitive nation, it is necessary to look into its history of race and criminal law policies.

There was once a period where the United States was a leader in the field of juvenile criminal justice. During the 1820s, the goal of the criminal justice system was centered on rehabilitating criminals. The public sentiment during that time was that those who were involved in criminal activities were influenced by structural forces, or had a difficult childhood.<sup>82</sup> During the 1890s, it was understood that juveniles were different from adults and that they had the capacity to change. This understanding led to the creation of the first juvenile court in Cook County, Illinois in 1899.<sup>83</sup> Decades later, during the 1960s, many of the Warren Court's decisions still reflected the nation's paternalistic views of juvenile offenders as victims of structural forces and provided procedural safeguards to protect them, while emphasizing their lack of individual choice.<sup>84</sup> Unfortunately, however, racial animus, crack cocaine, and firearms changed the way juveniles were treated and viewed in the juvenile justice system.

The late 1960s, the race riots following the overruling of the Jim Crow laws negatively shaped the perceptions of many White Americans regarding "Black grievances."<sup>85</sup> During this period, crime rates increased as the baby boomers reached their teens, and the increase was most felt in areas with a predominantly African American population.<sup>86</sup> As previously

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<sup>82</sup> Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 85 (2008).

<sup>83</sup> *Interviews: Alison Parker*, *supra* note 47.

<sup>84</sup> Feld, *supra* note 13, at 23; see *In re Gault*, 387 U.S. 1, 3 (1967) (finding that due process entitles juveniles to most of the procedural protections that were afforded to adults).

<sup>85</sup> Feld, *supra* note 13, at 25. "Black grievances," such as the Civil Rights Movement, were viewed by many White Americans as hostile and aggressive. *Id.* at 32.

<sup>86</sup> *Id.* at 24.

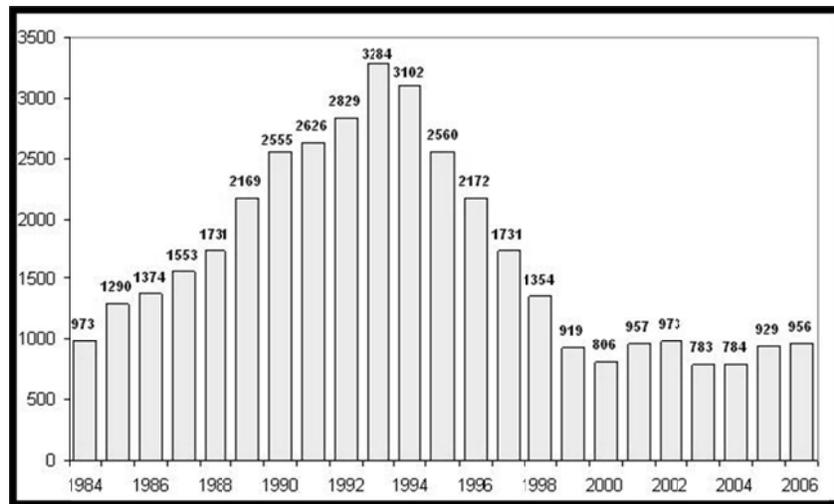
noted, until the late 1960s, rehabilitative ideologies dominated criminal justice. By the 1970s, however, against the backdrop of racial sentiments and the fear that was sparked by the race riots, support for rehabilitative views of criminal justice dramatically declined.<sup>87</sup> Punitive policies would soon replace rehabilitative models of juvenile criminal justice.

#### B. THE EMERGENCE OF CRACK COCAINE

African American youth homicide rates increased starting in the late 1980s, which increased racial tensions.<sup>88</sup> The increase in homicide rates could be attributed, in part, to the booming crack cocaine drug industry that was more common in the economically impaired African American neighborhoods.<sup>89</sup> The 1990s signified the peak of the drug's popularity, as it spread rapidly across the country.<sup>90</sup> Figure 1 effectively illustrates the sharp rise in juvenile arrests for homicide during the peak of the "crack cocaine era."<sup>91</sup>

**Figure 1.**

#### Juvenile Arrests for Homicide: 1984-2006



The flourishing crack cocaine industry undoubtedly contributed to the increase in homicides: as youth participation in the thriving crack market

<sup>87</sup> *Id.* at 26–27.

<sup>88</sup> *Id.* at 27.

<sup>89</sup> *Id.* at 27.

<sup>90</sup> Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 REV. ECON. & STATS. 519, 519 (2000).

<sup>91</sup> *Juvenile Homicide*, *supra* note 49. In this Note, the “crack cocaine era” refers to the late 1980s–1990s.

increased, so did their proclivity to carry firearms for protection.<sup>92</sup> Unsurprisingly, this dangerous blend of drugs and firearms led to the dramatic increase of juvenile arrest rates for violent crimes.<sup>93</sup> As shown in Figure 1, between 1986 and 1993, the United States experienced a dramatic upsurge in juvenile arrests for violence.<sup>94</sup> During that time period, the juvenile homicide rate increased by nearly three times the average rate, and the juvenile rate of using firearms to kill victims quadrupled.<sup>95</sup>

Although the national rise in homicide rates during the late 1980s was not at an unprecedented level, the rise was concentrated among persons under the age of twenty-five, and the increase in homicide rates for juveniles under the age of eighteen was unprecedented.<sup>96</sup> Specifically, homicide rates for juveniles more than tripled during the crack cocaine era.<sup>97</sup> African American males under the age of twenty-five accounted for the majority of youth violence and homicide.<sup>98</sup> Arguably, it was the prevalence of African American youth involved in homicides that established LWOP in the juvenile criminal justice arena.<sup>99</sup> As seen in Figure 1, after 1994 the violent crime rates plummeted. Nevertheless, the involvement of African American youths in homicides left a lasting impression in the eyes of the public, and consequently on the juvenile criminal justice system.

#### C. “ADULT TIME FOR ADULT CRIME”: “GET TOUGH” POLICIES OF THE 1980S AND 1990S

Prior to the 1980s, imposing LWOP on adolescents was a rare punishment.<sup>100</sup> At the inception of the juvenile court movement, juvenile justice focused on rehabilitation rather than incarceration.<sup>101</sup> However, as violence and the use of guns increased during the crack cocaine era, conservatives pledged to “get tough” on juvenile offenders, arousing anti-Black sentiments.<sup>102</sup>

During this period, the tough-on-crime reformers portrayed child offenders as vicious adult criminals and justified transferring them into the

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<sup>92</sup> Feld, *supra* note 13, at 28–29.

<sup>93</sup> *Id.* at 29; Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1, 4–5 (2002).

<sup>94</sup> Feld, *supra* note 13, at 29.

<sup>95</sup> *Id.* at 31.

<sup>96</sup> Cook & Laub, *supra* note 93, at 5. In the 1970s, arrest rates for violent index crimes (“rape, robbery, aggravated assault, and criminal homicide”) were quite stagnant. *Id.* at 6. Between 1984 and 1994, the arrest rates for violent index crimes doubled. *Id.*

<sup>97</sup> *Id.* at 3.

<sup>98</sup> *Id.* at 13.

<sup>99</sup> See *infra* Part IV.C for a discussion of the tough-on-crime reformers and the racially spurred panic of the 1990s.

<sup>100</sup> *Report Summary*, *supra* note 68.

<sup>101</sup> Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 501 (2009).

<sup>102</sup> Feld, *supra* note 13, at 27.

adult system by arousing concerns about public safety.<sup>103</sup> In addition, they advised lawmakers that adolescents who committed violent crimes were inherently dangerous and could not be reformed.<sup>104</sup> Ultimately, the tough-on-crime efforts successfully convinced a fearful majority that rehabilitation was ineffective for these youthful “super-predators.”<sup>105</sup>

Many of the tough-on-crime messages disseminated during the crack cocaine era had underlying racial innuendos, as it was implicitly understood that the politics applied largely to African America youths. As analysts warned the public of “super-predators,” John Dilulio, a political scientist at Princeton University, added to the racially spurred panic of the crack cocaine era, by eliciting fear that the country would be swarming with sadistic adolescents “spawned by crack-head mothers” from poverty stricken neighborhoods.<sup>106</sup> In their 1996 book, Dilulio and his coauthors attributed the epidemic of youth violence in the 1980s to the fact that “America is now home to thickening ranks of juvenile ‘super-predators’—radically impulsive, brutally remorseless youngsters,”<sup>107</sup> while blaming the epidemic on “moral poverty”—adolescents growing up without love, care, and guidance from responsible adults.<sup>108</sup> While these messages were seemingly tainted with racial undertones, they proved to be influential with the public: the juvenile justice system, facing severe public challenge, transformed from a rehabilitative system into a vengeance-based system of criminal justice.<sup>109</sup>

Most states responded to the racially spurred panic and the public’s demand for harsher punishments by passing initiatives increasing the severity of penalties. Such initiatives included creating measures to shove more juveniles into the adult system.<sup>110</sup> Some states lowered the age for adult court jurisdiction and granted prosecutors wide latitude to file charges against juveniles directly in adult court.<sup>111</sup>

Between 1988 and 1992, the rate at which adolescents were prosecuted and sentenced as adults increased by a startling 68 percent.<sup>112</sup> Some states limited or completely terminated juvenile court hearings for certain

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<sup>103</sup> Buss, *supra* note 101, at 500.

<sup>104</sup> Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B. C. L. REV. 1083, 1088 (2006).

<sup>105</sup> *Id.* at 1089.

<sup>106</sup> Joe Domanick, *Prisoners of Panic: Media Hype and Political Quick Fixes Have Swelled Our Inmate Population*, L.A. TIMES, Jan. 6, 2008.

<sup>107</sup> WILLIAM J. BENNETT, JOHN DIULIO & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* 27, 59 (1996).

<sup>108</sup> *Id.* at 59.

<sup>109</sup> See Buss, *supra* note 101, at 500.

<sup>110</sup> de la Vega & Leighton, *supra* note 29, at 991; UNTIL THEY DIE, *supra* note 53, at 26 (“Between 1992 and 1994, 24 states either created or expanded statutes that automatically waived juveniles into adult courts.”).

<sup>111</sup> Massey, *supra* note 104, at 1088.

<sup>112</sup> de la Vega & Leighton, *supra* note 29, at 991.

crimes.<sup>113</sup> Moreover, at least fourteen states gave prosecutors full discretion to try juveniles as adults.<sup>114</sup> From 1990 to 2004, the number of juveniles housed in adult jails increased 208 percent.<sup>115</sup> Most of the juvenile sentencing laws created during this period have remained the same.

It is unsettlingly that even though crimes rates have been steadily declining since 1994, as shown in Figure 1, the estimated rate at which states sentence juveniles to LWOP has tripled since fifteen years ago.<sup>116</sup> Moreover, as the number of juveniles housed in adult jails declined, the percentage of juveniles held as adults continued to increase. For instance, in June of 2004, 87 percent of juveniles were held as adults; in 2000, eighty percent were held as adults; and in 1994, 76 percent of juveniles were held as adults.<sup>117</sup> Furthermore, in the ten-year span between 1990 and 2000, the number of youth murderers had declined, but the number of those youths who were sentenced to LWOP rose from around 3 percent to 9 percent.<sup>118</sup> Today, it has become easier for states to prosecute and sentence a minor as an adult. All states allow adult criminal prosecution of juveniles if circumstances permit, subjecting them to LWOP sentences.<sup>119</sup>

#### D. THOMPSON AND PROGENY: SUPREME COURT VIEWS ON JUVENILE OFFENDERS

Surprisingly, while adolescents were readily cast into the adult criminal justice system, thereby being subjected to harsher punishments, the U.S. Supreme Court, in a string of cases, recognized that adolescents were less culpable than their adult counterparts. The Supreme Court first examined the culpability of a juvenile offender in *Thompson v. Oklahoma* in 1988.<sup>120</sup> In *Thompson*, a fifteen-year-old boy and three others participated in a brutal murder; the fifteen-year-old boy was subsequently sentenced to death for his role in the crime.<sup>121</sup> The Supreme Court eventually granted certiorari to consider whether the death sentence was appropriate for the boy.<sup>122</sup> Justice Stevens specifically stated that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 991–92.

<sup>115</sup> *Id.* at 992.

<sup>116</sup> *Id.* See *supra* Part IV.A & Figure 1. In 1996, the number of child offenders that received the LWOP sentence peaked at 152. *Report Summary, supra* note 68.

<sup>117</sup> Labelle, *supra* note 82 at 116–17. These figures are just estimates because of the difficulty of tracking children who are being held in adult facilities in the United States. *Id.* at 117. Many states do not hold separate records for juveniles serving their sentence in adult facilities, allowing them to get lost in the adult system. *Id.*

<sup>118</sup> de la Vega & Leighton, *supra* note 29, at 992.

<sup>119</sup> Massey, *supra* note 104, at 1088–89.

<sup>120</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988).

<sup>121</sup> *Id.* at 819.

<sup>122</sup> *Id.* at 820.

adult.”<sup>123</sup> The Court further explained that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”<sup>124</sup> The Court opined that sentencing the young fifteen-year-old petitioner was cruel and unusual, and violated the Eighth Amendment.<sup>125</sup>

Later in 2002, the Supreme Court banned the execution of mentally retarded persons in *Atkins v. Virginia*.<sup>126</sup> The Court held that the execution of a mentally retarded person was prohibited by the Eighth Amendment.<sup>127</sup> Writing for the majority, Justice Stevens cited the underdeveloped mental capacities of those with mental retardation as a major factor behind the decision: “Because of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>128</sup>

Juveniles’ underdeveloped mental capacities also influence their behaviors and choices, and like those who suffer from mental retardation, juveniles “do not act with the level of moral culpability”<sup>129</sup> as do adults. Recent research demonstrated that the frontal lobe—which controls operations such as impulse control and moral reasoning—in the juvenile brain does not fully develop until late adolescence;<sup>130</sup> thus, like mentally retarded offenders, juveniles are similarly deficient in impulse control, moral judgment, and reasoning.

In 2005, in the seminal *Roper v. Simmons*, the Supreme Court banned the death penalty for juveniles.<sup>131</sup> In prohibiting the death penalty, the Supreme Court opined that because of the anatomical difference in the adult and adolescent brain, juvenile offenders are less culpable than adults.<sup>132</sup> Yet, adults are punished less severely than their juvenile counterparts in some cases.<sup>133</sup>

The Court noted the three major differences between juveniles and adults to argue that juveniles cannot be categorized as the “worst offenders”: (1) youth lack a sense of responsibility more often than adults; (2) “juveniles are more vulnerable or susceptible to negative influences and

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<sup>123</sup> *Id.* at 835. The Court expressed that the basis for its conclusion was “too obvious to require extended explanation.” *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 838.

<sup>126</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 306.

<sup>129</sup> *Id.*

<sup>130</sup> See *infra* Part IV.A.

<sup>131</sup> *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

<sup>132</sup> *Id.* at 570.

<sup>133</sup> See *infra* Part III.B discussing how minors sentenced as adults generally suffer harsher punishment than adults.

outside pressures, including peer pressure”; and (3) the character and personality traits of juveniles are underdeveloped and “not as well formed as that of an adult.”<sup>134</sup> Thus, in conformance with *Thompson*, the Court again recognized the diminished capacities of juvenile offenders.<sup>135</sup>

In addition to recognizing findings from brain studies, the Court addressed the implications of international law.<sup>136</sup> The decision in *Roper* takes notice of the fact that the United States is the only country in the world that is known to still practice the sentencing of adolescents to LWOP, stating:

Our determination that the death penalty is disproportionate punishment for offenders under [eighteen] finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. . . . [T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of “cruel and unusual punishments.”<sup>137</sup>

The Court has already recognized the marked differences in the adolescent and adult brain, and there is no reason to turn a blind eye to these behavioral studies when it comes to juvenile LWOP cases.<sup>138</sup> Although the Court's decision in *Graham* that LWOP sentences for juveniles who commit non-homicide crimes was a good first step, the Court should apply the reasoning from *Thompson* and its progeny for juveniles who commit homicide and felony murder.

## V. NEUROLOGICAL FINDINGS

### A. BRAIN STUDIES REVEAL STRIKING DIFFERENCES IN THE ADOLESCENT AND ADULT BRAINS

Ignoring the differences that separate children from adults is cruel and misguided when it comes to the imposition of LWOP on child offenders. As discussed earlier, the Supreme Court recognizes the limited mental capacities of young children. Moreover, paternalistic laws in the United States recognize juveniles' limited capacity to make decisions. Consider, for example, age restrictions for activities such as driving, entering into contracts, drinking alcohol, and voting. Notwithstanding the common

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<sup>134</sup> *Roper*, 543 U.S. at 569–70.

<sup>135</sup> *Id.* at 569–70.

<sup>136</sup> *Id.* at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102–03 (plurality opinion)) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”). Similarly, in the case of juvenile LWOP, the “civilized nations of the world” are essentially in unanimity that juvenile LWOP should not be imposed. *Id.*

<sup>137</sup> *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 102–03 (plurality opinion)).

<sup>138</sup> See *infra* Part V.A–B.

recognition that minors lack adult decision-making capabilities, recent studies have confirmed that minors are neurologically different from adults. To fully grasp the reasoning set forth in *Roper v. Simmons*, a discussion of the adolescent brain is essential.

Researchers believe that the brain undergoes an extreme change during the adolescent years.<sup>139</sup> Studies completed in the last five years on brain development have led scientists to conclude “that adolescent brains are far less developed than previously believed.”<sup>140</sup> Researchers have discovered that the adolescent brain experiences an extreme overproduction of “gray matter,” which is the tissue in the brain that does the “thinking.”<sup>141</sup> The teenage brain subsequently undergoes a period of “pruning” where the brain quickly removes the gray matter.<sup>142</sup> During this period, the brain produces “white matter” that makes the brain’s operations more efficient and accurate.<sup>143</sup> These changes continue until a person’s early twenties.<sup>144</sup>

The frontal lobe and the amygdala are the two main areas of the brain that control how a person acts. The adolescent brain relies greatly on the amygdala, which controls basic functions, such as instinct and survival.<sup>145</sup> The frontal lobe—which controls operations such as impulse control, moral judgment, and reasoning—does not completely develop until late adolescence.<sup>146</sup> According to Dr. Ruben C. Gur, a neuropsychologist and director of the Brain Behavior Laboratory at the University of Pennsylvania, “the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.”<sup>147</sup> Hence, because the frontal lobe does not fully develop until late adolescence, minors cannot think logically or reason as well as adults. Dr. Gur explains that the frontal lobe is “involved in behavioral facets germane to many aspects of criminal culpability.”<sup>148</sup>

In another area of research that measures blood flow in the brain, scientists have discovered more evidence that there is a stark difference between the adolescent and adult brain. Studies show that during performance of the same task, there is a discernible difference in the neural activity between an adult’s brain and an adolescent’s brain. In adolescents,

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<sup>139</sup> Christopher L. Dore, *What to Do With Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1306 (2008).

<sup>140</sup> JUVENILE JUSTICE CTR., CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY, ADOLESCENCE, BRAIN DEVELOPMENT, AND LEGAL CULPABILITY 1 (2004).

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Dore, *supra* note 139, at 1307.

<sup>146</sup> *Id.*

<sup>147</sup> JUVENILE JUSTICE CTR., *supra* note 140, at 3.

<sup>148</sup> *Id.* at 2.

blood flow increases to the amygdala and not the undeveloped frontal lobe.<sup>149</sup> In contrast, the adult brain, blood flows to the developed frontal lobe.<sup>150</sup> Thus, an adult and a teenager will react and respond differently to a task.

B. CRUEL AND UNUSUAL PUNISHMENT FOR THE NOT SO MORALLY  
BLAMEWORTHY

Research clearly establishes that decision-making capabilities between adults and adolescents are markedly different. Adolescents, compared to adults, are more prone to risk-taking behavior. “[W]ith half or more of adolescents exhibiting drunk-driving, sex without contraception, use of illegal drugs, and minor criminal activities, ‘reckless behavior becomes virtually a normative characteristic of adolescent development.’”<sup>151</sup> However, this type of reckless adolescent behavior ceases as adolescents reach adulthood and their brains develop fully. Undoubtedly, adolescents have the remarkable ability to be rehabilitated.

In addition to brain research, psychological research has revealed that most juvenile offenders on death row experienced some type of childhood trauma.<sup>152</sup> In contrast, the majority of adolescents in the general population experienced no childhood trauma.<sup>153</sup> In 2003, Dr. Chris Mallet, a public policy director at Bellefaire Jewish Children’s Bureau, found the following: 74 percent of death row juvenile offenders “experienced family dysfunction, 60 [percent] were victims of abuse and/or neglect, 43 [percent] had a diagnosed psychiatric disorder, 38 [percent] suffered from substance addictions, [and] 38 [percent] lived in poverty.”<sup>154</sup> Dr. Mallet’s studies confirmed what researchers in 1987 and 1992 had discovered: most “juveniles sentenced to death had backgrounds of abuse, psychological disorders, low IQ, indigence, and/or substance abuse.”<sup>155</sup> This type of trauma can be linked to poor decisions and behaviors in adolescents. Moreover, the research provides a link between environmental factors and criminal activities. These psychological and neurological studies support the assertion that convicted adolescents can be reformed and rehabilitated.

In addition, effective models of juvenile rehabilitation support the notion that juveniles have the ability to change and rehabilitate. For example, the current German system of juvenile sentencing focuses on

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<sup>149</sup> Dore, *supra* note 139, at 1308.

<sup>150</sup> *Id.*

<sup>151</sup> L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *NEUROSCIENCE & BIOBEHAVIORAL REVS.* 417, 421 (2000) (citations omitted).

<sup>152</sup> JUVENILE JUSTICE CTR., *supra* note 140, at 3.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

rehabilitation.<sup>156</sup> Germany discontinued traditional sentencing in the 1970s and replaced it with alternative measures enumerated in its Juvenile Justice Act.<sup>157</sup> Rehabilitative alternatives to incarceration included probation, community service, and a system of fines.<sup>158</sup> The German criminal justice system focuses its efforts on educating the youth. If educational measures fail to be successful, only then is imprisonment with the possibility of parole and probation used.<sup>159</sup> Furthermore, there is no LWOP for youth offenders under the German criminal justice system.<sup>160</sup> As a result of the innovations in the German juvenile justice system, the number of youths incarcerated in Germany decreased by more than 50 percent between 1982 and 1990.<sup>161</sup>

In the United States, several states have similarly utilized alternative approaches to incarcerating youths. For example, the Georgia Justice Project minimizes the rates of juvenile recidivism by instituting counseling, treatment, and employment and education programs.<sup>162</sup> The rate of recidivism in Georgia is around 19 percent, as compared to the national average of over 60 percent.<sup>163</sup> Nationally, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative operates eighty sites in twenty-one states and the District of Columbia.<sup>164</sup> The program encourages collaboration between justice agencies and community organizations, with the goal of preventing adolescents from falling into a life of crime.<sup>165</sup> The program is centered on rehabilitation.<sup>166</sup> Many counties that have participated in this program have experienced success in terms of decreasing their juvenile detention populations.<sup>167</sup>

The successful rehabilitative models of juvenile criminal justice, along with the recent revelations in brain and psychological research, provide support for basing sentencing decisions on individualized considerations. They also provide support for the argument that LWOP is inappropriate as applied to adolescents because of their noted ability to change and rehabilitate.

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<sup>156</sup> de La Vega & Leighton, *supra* note 29, at 1019.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1020.

<sup>161</sup> *Id.* at 1019.

<sup>162</sup> *Id.* at 1022.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1023.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1024.

## VI. EFFORTS TO COMPORT WITH INTERNATIONAL STANDARDS

## A. STATE REFORM EFFORTS ACROSS THE UNITED STATES

Although the United States is the only nation in the world that actually imposes LWOP on child offenders, individual states are making reform efforts to comport with international laws and norms. Currently, twelve U.S. jurisdictions have prohibited or have not used this unforgiving sentence:<sup>168</sup> Alaska, Colorado, District of Columbia, Kansas, Kentucky, Maine, New Mexico, New York, Oregon, Utah, Vermont, West Virginia.<sup>169</sup> Other states that are making efforts towards eradicating juvenile LWOP sentences include Arkansas, California, Florida, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Nebraska, and Washington.<sup>170</sup> Although the United States is timidly moving towards juvenile rights in the criminal setting, it should be noted that this trend is not going to have a serious impact on LWOP. If state legislation is too modest, like California's proposed bill discussed in detail below, the rising trend of imposing these sentences will trump any state reform efforts.<sup>171</sup>

## B. CALIFORNIA'S MODEST APPROACH TOWARD JUVENILE JUSTICE

California has the third highest number of inmates serving LWOP sentences for crimes they committed as minors.<sup>172</sup> California holds about 250 inmates serving juvenile LWOP sentences.<sup>173</sup> Forty-five percent of California youths sentenced to LWOP for "murder, did not actually kill the victim."<sup>174</sup> Most of the youths were convicted of felony murder because they were involved in another felony when the murder occurred.<sup>175</sup> These adolescents are not the worst of the worst criminals. Nonetheless, California has imposed LWOP sentences on adolescents as young as fourteen years old.<sup>176</sup>

Even so, California has made cautious efforts to bring the state somewhat in line with international norms. In 2007, the California State Senate approved proposed Senate Bill 999, the Juvenile Life Without Parole Reform Act, which would have lowered juvenile LWOP sentences to

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<sup>168</sup> *Calif Senate OKs Bill on Juvenile Delinquents*, INQUIERER.NET (June 4, 2009), [http://services.inquirer.net/print/print.php?article\\_id=20090604-208810](http://services.inquirer.net/print/print.php?article_id=20090604-208810) [hereinafter *Calif Senate*]; Frontline, *Map Juveniles Serving Life Without Parole in the U.S.*, PBS (May 8, 2007), <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html> hereinafter [Frontline].

<sup>169</sup> Frontline, *supra* note 168.

<sup>170</sup> *Calif Senate*, *supra* note 168.

<sup>171</sup> See *Infra* Part VI.B–D.

<sup>172</sup> Editorial, *When 'Life' is Cruel*, L.A. TIMES, Jan. 14, 2010.

<sup>173</sup> *Id.*

<sup>174</sup> *Calif Senate*, *supra* note 168.

<sup>175</sup> *Id.*

<sup>176</sup> *California's Juvenile Injustice System*, L.A. TIMES, Apr. 30, 2009, available at <http://articles.latimes.com/2009/apr/30/opinion/ed-life30>.

a twenty-five-years-to-life sentence.<sup>177</sup> However, the Bill did not pass. Subsequently on June 4, 2009, Senate Bill 399 was introduced into the Senate. The Senate approved legislation that would have allowed judges to resentence persons sentenced to juvenile LWOP.

The 2009 Fair Sentencing for Youth Act, or California Senate Bill 399, introduced by democratic Senator Leland Yee, would have given inmates serving juvenile LWOP sentences the possibility of parole.<sup>178</sup> The Bill would have required the Board of Parole Hearings to review juvenile LWOP cases once the juvenile had served ten years, and if the juvenile satisfied certain criteria, a court could recall the original sentence and resentence the juvenile.<sup>179</sup>

The Bill was passed on a bipartisan 23-15 vote in the Senate.<sup>180</sup> While two California Assembly committees approved the Bill, it ultimately failed to pass the final Assembly vote on August 30, 2010.<sup>181</sup>

Arguably, Senate Bill 399 was an extremely modest proposal; nonetheless, it was a move toward a more sound policy. Under Senator Yee's proposed legislation, a child offender would not have been able to request a new hearing until ten years after the juvenile had been sentenced.<sup>182</sup> However, the child offender would also have needed to meet three out of the following eight criteria in order to benefit from this Bill:

- (A) The defendant was convicted pursuant to felony murder or aiding and abetting murder provision of laws.
- (B) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.
- (C) The defendant committed the offense with at least one adult codefendant.
- (D) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.
- (E) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in

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<sup>177</sup> *California Takes Step to End Life Without Parole for Children*, HUMAN RIGHTS WATCH (Apr. 16, 2007), <http://www.hrw.org/en/news/2007/04/16/california-takes-step-end-life-without-parole-children>.

<sup>178</sup> S.B. 399, 2009–2010 Leg., 2009–2010 Sess. (Cal. 2009); Editorial, *supra* note 172; *Calif Senate*, *supra* note 168.

<sup>179</sup> S.B. 399, 2009–2010 Reg. Sess. (Cal. 2009).

<sup>180</sup> *Calif Senate*, *supra* note 171.

<sup>181</sup> Editorial, *supra* note 172; *What happened to Senate Bill 399?*, FAIR SENTENCING FOR YOUTH, <http://www.fairsentencingforyouth.org/legislation/how-sb399-will-work/> (last visited Oct. 26, 2010).

<sup>182</sup> Editorial, *supra* note 172.

the offense.

(F) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or taking action that demonstrates the presence of remorse.

(G) The defendant has maintained family ties or connection with other through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(H) The defendant has had no violent disciplinary violations in the last five years in which the defendant was determined to be the aggressor.<sup>183</sup>

The Bill was by no means a formula for release. For example, if a juvenile petitioned the court for a hearing, he or she must have met three of the eight criteria set forth in the Bill in order to get a resentencing hearing. If the request was granted, and the juvenile offender was given an indeterminate sentence, the juvenile would have had the opportunity to have a parole suitability hearing after serving the minimum term of that sentence.<sup>184</sup> The parole board does not need to grant parole for the juvenile offender, especially for an inmate who has not had access to programs and rehabilitative services while in prison. California's efforts were admirable with the introduction of Senate Bill 399; in reality, the proposed legislation was only a small step toward compliance with international norms on human rights.<sup>185</sup>

### C. PAROLE FOR JUVENILES SERVING LWOP SENTENCES

A discussion of the parole process is helpful in understanding the point argued above in Part VI.B. The parole process is so long and drawn out that it does not actually guarantee freedom for many. Being granted the opportunity for parole does not guarantee that an individual will be granted parole, especially in the indeterminate sentencing realm—seen often in murder cases.<sup>186</sup> Thus, if a juvenile serving an LWOP sentence is granted the opportunity for parole

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<sup>183</sup> S.B. 399, 2009–2010 Leg., 2009–2010 Sess. (Cal. 2009).

<sup>184</sup> W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 912 n.97 (2009) (explaining that the minimum eligible parole release date. MPRD is what the prisoner must serve before his parole hearing; merely serving it does not mean that the parole board will find the prisoner suitable).

<sup>185</sup> See *infra* Parts V.C–D for a discussion on the California parole process.

<sup>186</sup> Steve Disharoon, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177, 179 (2009).

after a new law such as the one proposed by Senate Bill 399 is passed, the juvenile's sentence will most likely be reduced to an indeterminate one.

When an inmate is given an indeterminate sentence in California, the Board of Parole Hearings ("BPH") is charged with determining when, and if, the inmate is released.<sup>187</sup> If, in the rare instance, the BPH finds an inmate suitable for parole, the BPH will set a release date.<sup>188</sup> The BPH is comprised of commissioners, a majority of who have backgrounds in law enforcement or military service.<sup>189</sup> Arguably, their backgrounds make them less inclined to find inmates suitable for parole, especially those inmates who have not gone through prison programs or been rehabilitated. Adolescents with LWOP sentences are at the bottom of the waiting list for programs.<sup>190</sup>

#### D. THE EFFECT OF CALIFORNIA'S TOUGH-ON-CRIME POLITICS ON PAROLE

It is rare for the BPH to find inmates suitable for parole.<sup>191</sup> The Board may not even grant parole to inmates who are suitable, making it almost impossible for inmates serving juvenile LWOP sentences—who had virtually no opportunity to go through a prison program—to be found suitable for parole. Ronald Hayward's case illustrates how difficult it is to be granted parole even with an excellent institutional record.<sup>192</sup> Hayward spent twenty-seven years in prison before he was granted parole.<sup>193</sup> On December 15, 1978, after a motorcycle gang member allegedly assaulted and attempted to rape his girlfriend, Hayward fought and stabbed the motorcycle gang member to death.<sup>194</sup> Hayward was convicted of second-degree murder and sentenced to fifteen-years-to-life.<sup>195</sup> While in prison, Hayward obtained his GED and had an exceptional vocational record.<sup>196</sup> He avoided major disciplinary actions for over twenty years and avoided minor disciplinary actions for over ten years.<sup>197</sup> He led prison tours, remained drug and alcohol free, received positive psychological evaluations, and made solid parole plans for his release.<sup>198</sup> Despite Hayward's exceptional programming and institutional behavior, he was denied parole a total of eleven times.<sup>199</sup> While the BPH did grant Hayward parole twice, then

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<sup>187</sup> *Id.*

<sup>188</sup> CAL. PENAL CODE § 3041 (Deering 2011). *See generally* CAL. CODE REGS. tit. 15, §§ 2232–38, 2245–2273, 2280–2292, 2400–2411, 2420–2429.1, 2430–2439.1 (2010).

<sup>189</sup> Disharoon, *supra* note 186, at 179.

<sup>190</sup> *Interviews: Alison Parker, supra* note 47.

<sup>191</sup> Disharoon, *supra* note 186, at 180.

<sup>192</sup> *See Hayward v. Marshall*, 512 F.3d 536, 538–39 (9th Cir. 2008).

<sup>193</sup> *Id.* at 538, 539.

<sup>194</sup> *Id.* at 538.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 538, 539.

<sup>199</sup> *Id.* at 539.

California Governor Gray Davis reversed the BPH's decision on both occasions.<sup>200</sup> Hayward filed a state habeas corpus petition in November, 2003 and was denied by all state-level courts.<sup>201</sup> Subsequently, Hayward filed a federal habeas corpus petition that was denied by the district court.<sup>202</sup> Finally, the Ninth Circuit reversed, stating "no evidence in the record supports a determination that Hayward's release would unreasonably endanger public safety."<sup>203</sup> He was finally granted parole twenty-seven years later, at the age of sixty-four.<sup>204</sup>

As illustrated in *Hayward*, the Governor's veto power presents another obstacle to parole. California Proposition 89, passed in 1988, grants the governor this authority.<sup>205</sup> If the BPH or courts find an inmate suitable for parole in California, the governor is permitted to affirm, revise, or reverse the decision.<sup>206</sup> In the landmark case *In re Lawrence*, Sandra Lawrence was granted parole by the BPH four times, only to face gubernatorial reversals.<sup>207</sup> Governors Pete Wilson, Gray Davis, and Arnold Schwarzenegger, all of whom were presented with the BPH's recommendations, reversed every grant of parole.<sup>208</sup> It was only after Lawrence went through the state habeas process that she was finally granted parole by the second district court of appeal.<sup>209</sup> After the attorney general appealed to the California Supreme Court, the court granted certiorari and affirmed the lower court's decision, holding that the proper standard of review for parole suitability decisions is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous."<sup>210</sup>

Certainly, *Lawrence* made an impact on parole decisions after 2008. However, the gubernatorial body, with its authority to reverse the BPH's decisions, remains a roadblock on the road to freedom. For example,

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<sup>200</sup> *Id.* at 540. During Governor Gray Davis's reign in office, he essentially had a blanket policy of no parole for inmates who were convicted of murder. *Governor's No Parole Policy Challenged in L.A. Superior Court*, ACLU OF S. CAL. (May 29, 2001), <http://www.aclu-sc.org/releases/view/100162>. When interviewed by the Los Angeles Times about the possibility of parole for convicted murderers, Governor Davis stated, "If you take someone else's life, forget it." *Id.* In 1999, the Board of Prison Terms held around 2000 parole suitability hearings for inmates serving life terms. *Id.* Only sixteen inmates were found suitable and Governor Davis reversed all sixteen decisions. *Id.* In 2000, in a similar situation, the Board found nineteen inmates suitable for parole. *Id.* Governor Davis reversed every decision except for one. *Id.* See also Joey Hipolito, *In re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CALIF. L. REV. 1887 (2009).

<sup>201</sup> *Hayward*, 512 F.3d at 539, 540—41. Habeas Corpus is a remedy to challenge the propriety of proceedings before the parole board. *In re Streeter*, 423 P.2d 976, 977 (Cal. 1967).

<sup>202</sup> *Hayward*, 512 F.3d at 541.

<sup>203</sup> *Id.* at 544.

<sup>204</sup> *Id.* at 538.

<sup>205</sup> CAL. CONST. art. V, § 8(b).

<sup>206</sup> Disharoon, *supra* note 186, at 180.

<sup>207</sup> *In re Lawrence* 190 P.3d 535, 538 (Cal. 2008) (approving the Ninth Circuit Court of Appeals decision in *Biggs v. Terhune* 336 F.3d 910 (9th Cir. 2003)). *In re Lawrence* is also a federal landmark case in the Parole process.

<sup>208</sup> *Id.* at 543.

<sup>209</sup> *Id.* at 538.

<sup>210</sup> *Id.* at 539.

California's former Governor, Arnold Schwarzenegger, was considered to have a more lenient policy when it came to granting parole for inmates convicted of murder; but, it was by no means a liberal policy.<sup>211</sup> In the first place, the Parole Board grants relatively few dates. Of these dates, California allows its governors to review the Board's decisions; most grants of parole are reversed after review by the gubernatorial body.<sup>212</sup> Although, an inmate may file a petition for writ of habeas corpus in state and federal court challenging the Governor's reversal, the process could take many years. The habeas statute requires a state prisoner to exhaust state remedies prior to filing a federal habeas petition.<sup>213</sup> If the initial habeas petition is denied, the state prisoner must complete the state's appellate review process if the inmate wishes to file a federal habeas petition.<sup>214</sup>

In view of the parole process, even if a bill like California Senate Bill 399 is approved and passed into legislation, there is no guarantee that an inmate serving an LWOP sentence will ever get released on parole. Thus, as mentioned above, the state trend towards international standards of juvenile justice will have no significant impact in the United States unless there is an absolute bar on the imposition of these cruel and inhuman sentences on adolescents.

## VII. CONCLUSION

Vengeance is all that is gained by condemning a child to LWOP; it is sentencing a child to die in prison. Indeed, a majority of juvenile offenders who end up serving LWOP sentences have been involved in serious, violent crimes. Thus, the purpose of this Note is not to argue that the crimes committed by juvenile offenders do not warrant any punishment, nor is this Note advocating for the immediate release of juvenile offenders who are currently serving LWOP sentences. Rather, this note advocates that because LWOP sentences are excessive when imposed on juvenile offenders, juveniles should at least be afforded an opportunity for a parole hearing to determine whether they can be safely released to the community.

This Note provided three main points in support for the contention that juveniles should not be given LWOP sentences: (1) the sentence does not comport with the laws of civilized nations; (2) juvenile LWOP is at odds with the U.S. Supreme Court opinions; and (3) juveniles have the greatest potential to rehabilitate into productive citizens. Moreover, with the decline of the crack cocaine industry and the increasing difficulty for youth to

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<sup>211</sup> See Harriet Chiang, *Governor Paroles Killer—Apparent New Policy: Schwarzenegger, Unlike Davis, Heeds Judgment of Board*, S.F. CHRON., Nov. 22, 2003, at A1.

<sup>212</sup> See Michael Rothfeld, *Is This Paroled Killer Still a Threat?*, L.A. TIMES, July 13, 2008, at A1.

<sup>213</sup> 28 U.S.C. §§ 2254(b)(1), (c) (2006).

<sup>214</sup> *Woodford v. Ngo*, 548 U.S. 81, 92 (2006).

access firearms, the changes that were put in place to combat the influx of juvenile crimes are no longer necessary or appropriate today.

Customary international law acknowledges that children cannot be categorized as adult offenders because their lack of psychological development impairs reasoning and moral judgment.<sup>215</sup> The trend of proscribing juvenile LWOP sentences—a customary international norm—highlights the fact that the United States’ practice is questionable and looked upon with disapproval. Further, the consensus reflected in the international treaties and laws, is telling: sentencing juvenile offenders to life in prison without the possibility of parole is cruel and unusual punishment that should be prohibited by the Eighth Amendment. Every juvenile should be afforded the opportunity of a parole hearing given his or her remarkable ability to rehabilitate.

The fact that the United States is the only known country that currently practices this sentencing on juvenile offenders is noteworthy. The United States imposes these disproportionately harsh sentences on minors despite the fact there is a widespread public sentiment against it. As our judicial system is based on principles of fairness and justice, the greatest punishment should not be imposed on those who are not the most blameworthy.<sup>216</sup> Even if the U.S. Supreme Court does not find that juvenile LWOP sentences falls within the ambit of cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution, U.S. lawmakers should note the differences in adolescent brains as explained in *Roper v. Simmons*. Locking up child offenders for LWOP when they have the greatest capacity for rehabilitation is not sound policy. Thus, the U.S. Congress and state legislatures should consider abiding by the provisions in the CRC, as juveniles are less morally culpable for their actions and are more receptive to change.

In addition, lawmakers should keep in mind when enacting legislation that inmates serving juvenile LWOP sentences never have a chance to rehabilitate because they are essentially at the bottom of the totem pole for access to programs. As discussed above, bills, such as California Senate Bill 399, can be too modest and may not make a significant impact in our juvenile criminal justice system. Because of the lengthy parole process, inmates serving juvenile LWOP sentences that are given the opportunity for parole by means of new legislation still may never see freedom. Therefore, it is important to note that bills enacted to counteract the harsh juvenile

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<sup>215</sup> See *Roper v. Simmons*, 543 U.S. 551, 569–575 (2005) (discussing the difference between juvenile and adult offenders, noting that the differences are “too marked and well understood”).

<sup>216</sup> See *id.* at 570 (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”). See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). (“The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”).

LWOP practices may not be enough to comport with international standards. These bills will have no significant impact in the United States unless states put an absolute bar on the imposition of these cruel sentences on children.