

Fall 2010

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Recommended Citation

Tera Agyepong, *Children Left Behind Bars: Sullivan, Graham, and Juvenile Life without Parole Sentences*, 9 NW. J. INT'L HUM. RTS. 83 (2010).
<http://scholarlycommons.law.northwestern.edu/njihr/vol9/iss1/4>

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Children Left Behind Bars: *Sullivan, Graham, and Juvenile Life without Parole Sentences*

Tera Agyepong*

I. INTRODUCTION AND OVERVIEW

¶1 The community of nations condemns the practice of sentencing children to life without parole as a human rights violation. Its condemnation is expressed through treaties and customary international laws.¹ Short of the death penalty, life without parole (LWOP) is the harshest sentence a person can receive in the United States.² In December 2006, the United Nations adopted a resolution calling for the abolition of LWOP for children and young teenagers. The vote was 185 to 1, with the United States as the sole dissenter.³ Currently, the United States is the only country that sentences child⁴ offenders to spend the rest of their natural lives in prison.⁵ In 2005, 2,484 children were serving life without parole sentences in the United States.⁶

¶2 Very few countries have used LWOP to punish juvenile offenders. In fact, 135 countries have expressly rejected the sentence through their domestic laws, and 185 have done so in the UN General Assembly. Israel, Tanzania, and South Africa, countries that previously sentenced children to LWOP, have amended their laws to allow parole for juveniles in all cases.⁷ Although General Assembly statements are not binding, and ten countries have laws that could theoretically allow children to receive a LWOP sentence, there are no known cases of these countries actually using the sentence.⁸ The United States is the only known violator of international human rights standards prohibiting LWOP sentences for children.⁹

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¹ Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison*, 42 U.S.F. L. REV. 983, 986 (2008).

² *Id.* at 983.

³ See generally Adam Liptak, *Lifers as Teenagers, Now Seeking Second Chance*, N.Y. TIMES, Oct. 17, 2007, at A1.

⁴ This note uses the definition of "child" found in the Convention on the Rights of the Child, Article 1: "A child means every human being below the age of eighteen years." United Nations Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁵ Liptak, *supra* note 3; De la Vega et. al., *supra* note 1, at 989; Hilary Massey, Case Comment, *Disposing of Children: The Eight Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1085 (2006).

⁶ AMNESTY INTERNATIONAL & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 25 (2005) [hereinafter Amnesty & HRW]; De la Vega et. al., *supra* note 1, at 985.

⁷ De la Vega et. al., *supra* note 1, at 986.

⁸ *Id.* at 990 & n.20. These countries are Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka.

⁹ *Id.* at 985-86, 990.

¶3 How is it that the country that holds itself out as a beacon of light to the rest of the world, a country that portrays itself as a champion of human rights, treats its most vulnerable citizens in a way that most of the world frowns upon? Public fears about the rise of young ‘super-predators’¹⁰ during the 1990s fueled legislation aimed at incapacitating and incarcerating the most dangerous subset of youth in the United States.¹¹ Few, if any, children who receive LWOP sentences fit the profile of a super-predator, however. An estimated 59% of children received a LWOP sentence for their first criminal conviction.¹² Although 93% of these children received the sentence because they were convicted of homicide, 26% were convicted of felony murder.¹³ The United States’ practice of sentencing children to life in prison without parole is not only a misguided violation of the standards of decency of U.S. laws, but is also a violation of international human rights law.

¶4 The Supreme Court had the opportunity to prohibit the practice of sentencing children to LWOP when it heard the cases of *Sullivan v. Florida* and *Graham v. Florida*.¹⁴ The Court ruled that LWOP is only unconstitutional in cases where children committed non-homicide offenses.¹⁵ This paper argues that the Supreme Court wrongly decided *Sullivan* and *Graham* because juvenile LWOP violates both domestic and international human rights law. Under the Eighth Amendment as well as precedent including *Roper v. Simmons*, LWOP for juveniles is unconstitutional. Also, the Supreme Court should have turned to international human rights law as a basis for deciding that LWOP sentences for juveniles are unconstitutional.¹⁶ If the Court had used customary international law and international treaties like the Convention of the Rights of the Child (CRC), the Committee on the Elimination of Racial Discrimination (CERD), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the International Covenant on Civil and Political Rights (ICCPR) to evaluate juvenile LWOP, it would have reached the decision that LWOP sentences for all children are unconstitutional.

¹⁰ See generally John J. DiIulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23 (In 1995, Princeton University Professor John DiIulio coined the term ‘super-predator’ to warn the United States that a wave of dangerously vicious and violent youth, who mugged, raped, and murdered without remorse would descend upon them by the year 2010).

¹¹ AMNESTY & HRW, *supra* note 6, at 35-38.

¹² *Id.* at 1.

¹³ *Id.* at 27 (The felony murder rule is a form of strict liability in the criminal context. It criminalizes the acts that result in death of during the commission of a felony crime. There is no independent mens rea requirement. The 26% figure is based on a self-reported, non-random sample.); See also Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1062 (2008).

¹⁴ *Sullivan v. Florida*, 130 S. Ct. 2059 (2010); *Graham v. Florida*, 130 S. Ct. 2011 (2010).

¹⁵ *Id.*

¹⁶ Cf. *Roper v. Simmons*, 543 U.S. 551 (2005) (Writing for the majority, Justice Kennedy noted “[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty” *Id.* at 577). The Supreme Court’s decision to incorporate international standards when it abolished the death penalty in *Roper* was not without controversy. Justice Scalia argued, “though the view of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.” *Id.* at 622 (Scalia, J., dissenting). Legal scholars also decried the Court’s reference to international standards; See, e.g., Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL’Y REV. 33, 47-49 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*, 8 GREEN BAG 2D 261, 265 (2005).

Part I of this note provides the legal and historical backdrop of sentencing children to life without parole. Part II details the factual backgrounds of Sullivan and Graham and reviews the Supreme Court's resolution of these cases. The specific ways in which juvenile LWOP sentences violate international human rights law are detailed in Part III. Part IV will conclude the note with the argument that the United States will continue to violate international human rights law because the Supreme Court did not categorically ban LWOP in Graham.

II. A SOCIO-LEGAL HISTORY OF THE JUVENILE COURT AND THE EMERGENCE OF LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN

A. *Early Juvenile Courts and the Rehabilitative Ideal*

The conceptualization of childhood in the United States underwent a dramatic shift at the end of the nineteenth century, as children were no longer considered adults with miniature bodies.¹⁷ Progressive Era reformers like Julia Lathrop, Jane Adams, and Sophonsiba Breckinridge emphasized children's innocence, malleability, and vulnerability,¹⁸ and viewed deviant behavior as part of the development process.¹⁹ They believed that children who committed crimes could be rehabilitated and emphasized a rehabilitative ideal that condemned the practice of trying children in adult criminal courts and placing them in adult prisons.²⁰ As a result of their advocacy, juvenile courts were established throughout the country and children's cases began to be diverted away from adult criminal courts.²¹ Juvenile courts' jurisdiction began to be extended to both delinquent and dependent children, thus buttressing their image as benign, non-punitive, therapeutic institutions.²²

Until the 1960s, juvenile courts lacked standardized criminal procedures, and their operation was characterized by a lack of legal representation for accused children, indiscriminate sentencing, and wide judicial discretion over what factors would be considered in a hearing.²³ This resulted in arbitrary and unfair treatment of children put before the courts.²⁴ A due process revolution in juvenile courts occurred as a result of the

¹⁷ DAVID S. TANENHAUS, *Degrees of Discretion: The First Juvenile Court and the Problem of Difference in the Early Twentieth Century*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 105 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) [hereinafter Tanenhaus, *Degrees of Discretion*].

¹⁸ *Id.* at 107; DAVID S. TANENHAUS, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, (Margaret K. Rosenheim, et al. eds., 2002) [hereinafter Tanenhaus, *The Evolution*].

¹⁹ LEE TEITELBAUM, *Status Offenses and Status Offenders*, in A CENTURY OF JUVENILE JUSTICE 158, 162 (Margaret K. Rosenheim, et al. eds., 2002).

²⁰ Tanenhaus, *Degrees of Discretion*, *supra* note 17, at 107; Tanenhaus, *The Evolution*, *supra* note 18, at 42.

²¹ BARRY C. FELD, *BAD KIDS: RACE, AND THE TRANSFORMATION OF THE JUVENILE COURT* 63 (1999); Tanenhaus, *The Evolution*, *supra* note 18, at 42-44.

²² Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 17 (Delinquent children are children who have broken the law while dependent children include those who are wards of the state because they have been abandoned, neglected, or abused in their homes).

²³ *Id.* at 17-18.

²⁴ *Id.* at 18.

Civil Rights Movement and the Warren Court.²⁵ The Supreme Court's broad interpretation of the Fourteenth Amendment and the Bill of Rights led to rules that limited judicial discretion and instituted new procedures.²⁶ In *Kent v. United States*, decided in 1966, the Court required procedural due process waivers to safeguard against judicial waiver of proceedings.²⁷ The following year, *In re Gault* mandated that states provide children accused of crimes advance notice of charges, the right to counsel and to confront and cross-examine witnesses, a fair and impartial hearing, and the right to invoke the Fifth Amendment.²⁸

¶8 These Supreme Court decisions coincided with urban race riots and an increase in youth crime rates.²⁹ Conservative politicians capitalized on the backlash against the Civil Rights Movement by utilizing white voters' apprehensions about new race relations and crime to promote 'tough on crime' policies.³⁰ Discussions about crime became racially politicized, and the procedural changes in the juvenile justice system were maligned.³¹

B. Adult Time for Adult Crimes: The Abandonment of the Rehabilitative Ideal and the Politics of Race

¶9 Public support for the rehabilitative ideal in juvenile courts had significantly declined by the early seventies. By calling for law and order, announcing a War on Drugs, and advocating a crackdown on crime, politicians and the media developed a coded language by which they could discuss legitimate criminal policy issues while activating racial stereotypes and playing on society's racial fears without even mentioning race.³² Conservative politicians blamed the perceived breakdown in law and order on the Warren Court's decisions and characterized the new due process protections as coddling criminals.³³ The media shaped public perception by encouraging the belief that urban black males were responsible for committing all of the violent crimes.³⁴ The

²⁵ *Id.*

²⁶ *Id.* at 21.

²⁷ *Kent v. United States*, 383 U.S. 541 (1966). See also Barry C. Feld, *Race and the Jurisprudence of Juvenile Justice: A Tale in Two Parts 1950-2000*, in OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 122, 130 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

²⁸ *In re Gault*, 387 U.S. 1 (1967). See also Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, in READINGS IN JUVENILE JUSTICE ADMINISTRATION 365 (Barry C. Feld ed., 1999).

²⁹ Feld, *Unmitigated Punishment*, *supra* note 22, at 18-19.

³⁰ THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 74-77 (W. W. Norton & Company 1991); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY 107-110 (University of Chicago Press 1999); Feld, *Unmitigated Punishment*, *supra* note 22, at 25-27.

³¹ EDSALL & EDSALL, *supra* note 30, at 49-52, 111-112; Feld, *Unmitigated Punishment*, *supra* note 22, at 27, 33.

³² EDSALL & EDSALL, *supra* note 30, at 69-73; TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 90-98 (Princeton University Press. 2001); Feld, *Unmitigated Punishment*, *supra* note 22, at 27, 33.

³³ KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 30-43 (Oxford University Press 1997); Feld, *Unmitigated Punishment*, *supra* note 22, at 32.

³⁴ AMNESTY & HRW, *supra* note 6, at 25-26; SARA SUN BEALE, *News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 441-461 (2006); Feld, *Unmitigated Punishment*, *supra* note 22, at 31.

“get tough” policies that gained momentum in the seventies included both the resumption of capital punishment and the adoption of life without parole sentences for children.³⁵

¶10

This turn towards focusing on retribution as opposed to rehabilitation for juvenile offenders began with the highly publicized case of Willie Bosket.³⁶ In 1978, Bosket, a young African American male, was fifteen years old when he was convicted of shooting and killing two people in a New York subway. He was sentenced to five years in a youth facility, the maximum sentence for the crime under New York juvenile law.³⁷ As a result of cries for “get tough” measures for juveniles, the New York legislature instituted tougher penalties for children and passed laws allowing children to be tried as adults outside of the juvenile court system.³⁸ Similar laws were promulgated around the country and the rehabilitative ideal was replaced with a spirit of vengeance.³⁹ Before 1980, life without parole sentences were rarely imposed on children, but by 1989 the number of child offenders who received LWOP had increased markedly.⁴⁰

¶11

Conservative politicians together with the media reinforced the perceived relationship between race and crime throughout the seventies and eighties by employing language that conjured up images of animals and disease. Children in the inner-city were characterized as “wolf packs,” “wilding packs,” “vermin,” and “wild dogs” who went “prowling” among “decent citizens.”⁴¹ Politicians and academics like Richard Nixon and John DiIulio warned of the coming of a generation of young “super-predators” who would usher in an “epidemic of violence.”⁴² The media coverage surrounding the infamous 1989 Central Park jogger case, where five black and Latino boys were accused of assaulting and raping a white, female investment banker, epitomized this trend. The crime sent shockwaves across the country and was publicized through every major media outlet. Newspapers headlines featured titles like “Wolf-Pack’s Prey” and “Heroic Woman vs. Feral Beast.”⁴³ It was within this politically charged climate of fear, that the petitioner in *Sullivan*, a young African American male, was accused of raping an older white

³⁵ Barry C. 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, 55 (2008) [Hereinafter Feld, *A Slower Form of Death*]; Edsall & Edsall, *supra* note 29, at 74-77; ANDREW VON HIRSCH, *DOING JUSTICE*, 31-39 (1976); *See also Gregg v. Georgia*, 428 U.S. 153, 207-09 (1976) (where the death penalty was reinstated after the Court’s earlier decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (where the Court invalidated state death penalty statutes)).

³⁶ Cynthia L. Schirmer, *Punishing Children as Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT’L L. 715, 728 (2008).

³⁷ *Id.* at 728; Richard J. Meislen, *Carey, in Shift, Backs Trial in Adult Court for Some Juveniles*, N.Y. Times, June 30, 1978, at A1.

³⁸ Schirmer, *supra* note 36, at 728; Marcia Chambers, *Family Court Assailed as Overprotective on Crime*, N.Y. TIMES, March 1, 1982, at A1; Elsa Brenner, *Strengthening ‘Rules of Society’ for Violent Youths*, N.Y. TIMES, June 22, 1997, at WC1.

³⁹ Schirmer, *supra* note 36, at 728; Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 383 (1998).

⁴⁰ Amnesty & HRW, *supra* note 6, at 29-31; Feld, *Unmitigated Punishment*, *supra* note 22, at 31.

⁴¹ Dwight Conquergood, *The Power of Symbols*, (One City: The Chicago Council on Urban Affairs, 1996); Lynell Hancock, *Wolf Pack? The Press and the Central Park Jogger*, COLUM. JOURNALISM REV., Jan./Feb. 2003, at 38.

⁴² Feld, *Unmitigated Punishment*, *supra* note 22, at 31; Beckett, *supra* note 33, at 38; John DiIulio, *How to Stop the Coming Crime Wave 23-28* (New York Manhattan Institute 1996).

⁴³ Hancock, *supra* note 41, at 38. The four boys were tried and convicted of the crime even though no biological evidence linked them to the crime. Thirteen years later, a man whose DNA matched the biological evidence retrieved by the police confessed to the crime. *Id.* at 39-40.

woman.⁴⁴ By 1989, it was widely understood that the “get tough” and “law and order” campaigns were largely targeted at young black males.⁴⁵

¶12

By the mid-nineties, nearly every state had adopted punitive laws that allowed prosecutors to transfer more child offenders to adult criminal courts. A few states even lowered the age of juvenile jurisdiction from eighteen to seventeen years of age so that more children could automatically be placed in the adult system.⁴⁶ This climate of public hysteria and racial propaganda caused the number of children sentenced to life without parole to skyrocket. The rate of LWOP sentences for children peaked in 1996.⁴⁷

III. SUPREME COURT ROAD: *SULLIVAN V. FLORIDA* AND *GRAHAM V. FLORIDA*

A. *Sullivan v. Florida*

1. Factual Background and Procedural History

¶13

In 1989, the same year the hysteria over the Central Park Jogger case erupted, Joe Sullivan, a thirteen-year-old mentally disabled African American boy, was accused of raping an older white woman in Florida.⁴⁸ He became the youngest person in the country to be sentenced to life without parole.⁴⁹ Sullivan’s race was repeatedly stressed at his trial.⁵⁰ The victim, who never saw her attacker’s face, testified that her assailant was “a colored boy” with “kinky hair...he was quite black, and he was small.”⁵¹ Sullivan’s attorney, who waived opening statement, was alleged to have provided ineffective assistance of counsel.⁵² The trial concluded after eight hours, and the jury only took thirty-five minutes to convict Sullivan.⁵³ Despite a lack of biological or physical evidence linking Sullivan to the crime, he was sentenced to life in prison without the possibility of parole.⁵⁴

¶14

Sullivan became involved in the case when two older teens, fifteen-year-old Michael Gulley and seventeen-year-old Nathan McCants, convinced him to break into a home with them.⁵⁵ McCants stole some coins and jewelry, and then all three boys left the

⁴⁴ Liliana Segura, *Ugly Truth: Most U.S. Kids Sentenced to Die In Prison Are Black*, Global Research, Nov. 11, 2009.

⁴⁵ Feld, *Unmitigated Punishment*, *supra* note 22, at 34; Gilens, *supra* note 29, at 602.

⁴⁶ Feld, *Unmitigated Punishment*, *supra* note 22, at 34; JUVENILE CRIME, JUVENILE JUSTICE 223 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell eds., 2001).

⁴⁷ Amnesty & HRW, *supra* note 6, at 2; *See also* U.S. DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EASY ACCESS TO THE FBI’S SUPPLEMENTARY HOMICIDE REPORTS: 1980-2000, <http://ojjdp.ncjrs.org/ojstatbb/ezashr/asp/methods.asp>.

⁴⁸ Petition for Writ of Certiorari, *Sullivan v. Florida*, No. 08-7621 (*S. Ct.* filed Dec. 4, 2008) at 5 [hereinafter *Sullivan*, Petition for Cert]; Segura, *supra* note 44; Amnesty & HRW, *supra* note 6, at 31.

⁴⁹ Segura, *supra* note 44.

⁵⁰ Amy Bach, *All Locked Up: Did Joe Sullivan, Sentenced to Life at 13, Have a Fair Trial?*, SLATE, Nov. 4, 2009 at 2; Segura, *supra* note 44.

⁵¹ Segura, *supra* note 43; *Sullivan*, Petition for Cert, *supra* note 47, at 5.

⁵² *Sullivan*, Petition for Cert, *supra* note 48, at 21, 24; Bach, *supra* note 49.

⁵³ Brief of Respondent, *Sullivan v. Florida*, No. 08-7621 (*S. Ct.*) at 21 [hereinafter, Brief of Respondent, *Sullivan*]; Bach, *supra* note 50.

⁵⁴ *Sullivan*, Petition for Cert, *supra* note 47, at 5. The State of Florida had destroyed all biological evidence collected in the case. Brief for Petitioner, *Sullivan v. Florida*, No. 08-7621 (*S. Ct.* filed Jul. 16, 2009) at 3

⁵⁵ Segura, *supra* note 44; Petition for Cert, *supra* note 48, at 5.

home.⁵⁶ Later that day, someone returned to the home, and raped an elderly woman.⁵⁷ When questioned by the police, Gulley and McCants blamed Sullivan for the rape.

¶15 Prosecutors relied on the testimonies of Sullivan's older co-defendants at trial to convict him, even though one of them could have been the true assailant.⁵⁸ As a result of their testimonies, the older co-defendants were tried as juveniles and sentenced to short terms in a juvenile detention center.⁵⁹ Sullivan, on the other hand, continues to serve his sentence in adult prison and is now confined to a wheel chair because of multiple sclerosis.⁶⁰ Sullivan is one of only two people to be sentenced to life without parole at the age of thirteen.⁶¹

¶16 Sullivan tried to appeal his conviction. Despite the existence of numerous meritorious grounds for appeal, his appointed counsel filed an *Anders* brief asking to be withdrawn from the case.⁶² The intermediate appellate court affirmed the conviction without opinion in 1991, and Florida's Supreme Court affirmed the decision without review that same year.⁶³ In 1992, Sullivan filed an unsuccessful petition for post-conviction relief.⁶⁴

¶17 After the Supreme Court's decision in *Roper v. Simmons*, Sullivan filed a motion for post-conviction relief contending that *Roper* rendered his sentence of life without parole unconstitutional.⁶⁵ In 2007, the trial court dismissed his motion with prejudice after citing Florida Supreme Court cases that refused to extend *Roper* to life without parole cases.⁶⁶ Since the lower courts held that *Roper* was limited to capital cases, and sentencing a child to life without parole was not a constitutional violation, it concluded Sullivan's motion was untimely and dismissed it on procedural grounds.⁶⁷ The First District Court of Appeal summarily affirmed without opinion while denying rehearing en banc and certification to the Florida Supreme Court.⁶⁸ Sullivan filed a

⁵⁶ Sullivan, Petition for Cert, *supra* note 48, at 5.

⁵⁷ Bach, *supra* note 50.

⁵⁸ Sullivan, Petition for Cert, *supra* note 48, at 5; Gulley had an extensive criminal history that included one sexual offense. Bach, *supra* note 50.

⁵⁹ Sullivan, Petition for Cert, *supra* note 48, at 5; Bach, *supra* note 50.

⁶⁰ EQUAL JUSTICE INITIATIVE, *Cruel and Unusual: Sentencing 13- and 14-Year Old Children to Die in Prison 29* (2007) [hereinafter EJI Report]; Krista Gesaman, *18 And a Life To Go*, Newsweek Web Exclusive, Nov. 4, 2009.

⁶¹ *Id.* at 24.

⁶² Sullivan, Petition for Cert, *supra* note 48, at 2. An attorney files an *Anders* brief, named after *Anders v. California*, 386 U.S. 738 (1967), when he wishes to withdraw from a case because he believes the appeal is frivolous.

⁶³ *Id.* at 6.

⁶⁴ David L. Hudson, *Can Juveniles Be Sentenced to Life in Prison Without the Possibility of Parole?* (American Bar Association, 2009).

⁶⁵ Sullivan, Petition for Cert, *supra* note 48, at 6; FLA. R. CRIM. P. 3.850(b) provides:

A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a non-capital case or more than 1 year after the judgment and sentence become final in a capital case.

⁶⁶ In 2007, Sullivan filed another motion for DNA testing. The motion was denied after finding that the State of Florida had destroyed all biological evidence collected in the case. *Id.* at 5.

⁶⁷ *Id.* at 1, 7.

⁶⁸ *Id.* at 7.

petition for certiorari with the U.S. Supreme Court in December 2008, and the Court agreed to hear the case in May 2009.⁶⁹

2. Argument on Appeal: Does Sentencing Thirteen- and Fourteen-Year-Old Children to Life without Parole Violate the Eighth Amendment Bar on Cruel and Unusual Punishment?

i) *Petitioner's Argument*

¶18 The issue before the U.S. Supreme Court in the *Sullivan* case was whether the imposition of a life without parole sentence on a thirteen-year-old for a non-homicide offense violates Eighth Amendment's prohibition on cruel and unusual punishments.⁷⁰ The petitioner contended that life without parole sentences for thirteen- and fourteen-year-olds convicted of homicide and non-homicide offenses were unconstitutional.⁷¹ He also argued that *Roper* was controlling and required an invalidation of life without parole sentences imposed on thirteen-year-olds because the practice was cruel and extremely rare.⁷² In *Roper*, the Supreme Court held that children are less culpable than adults because 1) there are neurological and psychological differences between the brains of adolescents and adults, 2) adolescents are more vulnerable to peer pressure and outside influences than adults, and 3) adolescents lack the maturity of adults.⁷³ The *Roper* Court also concluded that juvenile death sentences contradicted both national and international standards of decency.⁷⁴ The petitioner contended that since life without parole sentences impose a "terminal, unchangeable, and once-and-for-all judgment" that a person is "forever unfit to be a part of civil society," the sentence is unlike lesser sentences which allow the possibility of release, but akin to a death sentence, which removes the possibility that a person will ever rejoin society.⁷⁵

¶19 *Sullivan* also argued that the imposition of life without parole sentences on young teenagers is an "aberrant, vanishingly rare" occurrence by citing statistics.⁷⁶ Although statutes in twenty-seven states allowed thirteen-year-olds to be sentenced to life without parole and an additional thirteen states allowed fourteen-year-olds to receive the sentence, only 9 thirteen-year-olds and 64 fourteen-year-olds were serving such a sentence.⁷⁷ These numbers represented an accumulation of life without parole sentences imposed on thirteen- and fourteen-year-olds since the 1970s.⁷⁸ Since no less than a quarter million children under the age of fifteen had been arrested for crimes for which

⁶⁹ *Sullivan v. Florida*, 129 S. Ct. 2157 (2009).

⁷⁰ Brief for the Petitioner at i, *Sullivan v. Florida*, No. 08-7621 (U.S. July 16, 2009) [hereinafter Brief for the Petitioner, *Sullivan*]. A jurisdictional issue was raised concerning the rarity of LWOP sentences for thirteen-year old non-homicide offenders and the unavailability of review in other federal courts despite the new Eighth Amendment standard promulgated in *Roper v. Simmons*. Because the Supreme Court did not deny cert and agreed to hear the petitioner's claim surrounding the Eighth Amendment issue, the jurisdictional issue will not be addressed here.

⁷¹ *Id.*

⁷² *Id.* at 5.

⁷³ *Roper*, 543 U.S. at 553, 589-600.

⁷⁴ *Id.* at 551, 561, 575-78.

⁷⁵ Brief for the Petitioner, *Sullivan*, *supra* note 70, at 5.

⁷⁶ *Id.* at 49.

⁷⁷ *Id.* at 50.

⁷⁸ *Id.* at 51.

the LWOP could have been imposed during that time period, Sullivan contended that the low number of children under the age of fifteen who had received the sentence was “indicative of [a] nationwide repudiation” of the practice.⁷⁹

¶20 Based on his “akin to death” and “cruel and unusual” arguments, the petitioner contended that life without parole sentences for thirteen- and fourteen-year-olds was inconsistent with *Roper*. In *Roper* the Supreme Court held that persons under the age of eighteen are constitutively different and less culpable than adults.⁸⁰ Sullivan concluded that the condemnation of a young teenager to life in prison without parole went against evolving standards of decency and is disproportionate to the moral culpability of the offender.⁸¹ Sullivan’s counsel conceded that it was conceivable, although not desirable, that a focus on thirteen- and fourteen-year-olds could lead the Court to adopt an approach that was unfavorable to the petitioner in *Graham*, since that petitioner was seventeen years of age when sentenced.⁸²

ii) *Respondent’s Argument*

¶21 The state of Florida did not directly address Sullivan’s arguments; instead it urged the Court to dismiss the case on jurisdictional grounds. It argued that the state court did not directly address the Eighth Amendment issue because the state court denied Sullivan’s motion on state procedural grounds and not constitutional grounds.⁸³ The Supreme Court agreed and dismissed the case on the grounds that it was procedurally banned from reaching a decision. However, the Supreme Court did address some of Sullivan’s arguments in its decision in *Graham v. Florida*. Sullivan could benefit from the Court’s decision in *Graham* since he is a member of the class of youth defined by the holding.

B. Graham v. Florida

1. Factual Background and Procedural History

¶22 Terrence Graham was one month shy of his eighteenth birthday when he was sentenced to life without parole because a judge held he violated the terms of his probation.⁸⁴ Graham, an African American male, was born to parents who were addicted to crack cocaine and likely suffered from a form of cocaine addiction at birth. In elementary school, Graham was diagnosed with Attention Deficit Hyperactivity Disorder.⁸⁵ Although his mother stopped smoking crack by the time he was eleven, his father continued to use the drug throughout his teenage years.⁸⁶ Graham wanted to move

⁷⁹ *Id.* at 50-51.

⁸⁰ *Id.* at 5-8, 61.

⁸¹ *Id.* at 5-8.

⁸² Transcript of Oral Argument at 16, *Sullivan v. Florida*, No. 08-7621 (S. Ct. 2010) [Hereinafter *Sullivan Transcript*].

⁸³ *Sullivan*, Petition for Cert, *supra* note 48, at 6-7.

⁸⁴ Brief of Respondent at 15, *Graham v. Florida*, No. 08-7412 (S. Ct. July 16, 2009) [hereinafter *Graham Merit Brief*]; Gesaman, *supra* note 60.

⁸⁵ Brief of Petitioner at 11, *Graham v. Florida*, No. 08-7412 (S. Ct. 2010).

⁸⁶ *Id.*

out of his home so that he would not have to be around his family.⁸⁷ Graham also suffered from depression by his late teens because of his turbulent home life.⁸⁸

¶23 At the age of sixteen, Graham was convicted of armed robbery, spent a year in a pre-trial detention center, and was then placed on probation for three years.⁸⁹ In 2004, seventeen-year-old Graham and two twenty-year-old co-defendants were arrested on suspicion of home invasion.⁹⁰ Graham, who was ultimately sentenced to LWOP for violating his probation, never admitted to the home invasion, a charge he insisted police were “trying to pin against” him.⁹¹

¶24 The Florida Department of Corrections (DOC) recommended that Graham receive either a forty-eight month prison sentence or a twenty-four months prison sentence followed by twenty-four months of probation. The Florida DOC based its recommendation on its finding that Graham had “the usual teenage problems” and up until the home invasion had been compliant with the terms of his probation.⁹² The court rejected the Florida DOC’s recommendations and concluded that Graham was incapable of rehabilitation and could not be deterred from committing future crimes.⁹³ Instead of giving Graham the recommended one or two years prison sentence, the judge sentenced him to life without the parole.⁹⁴ His two older co-defendants, on the other hand, were sentenced to eleven and thirty-five years in prison, respectively.⁹⁵ Graham filed a post-sentencing motion with the trial court, challenging the legality of the sentence on Eighth Amendment grounds. The Supreme Court of Florida denied discretionary review of the case and he was granted a writ of certiorari in May 2009.⁹⁶

2. Arguments on Appeal: Sentencing Juveniles to Life without Parole for Non-Homicide Offenses and the Eighth Amendment

i) *Petitioner’s Argument*

¶25 The question before the Court in *Graham* was whether the Eighth Amendment’s ban on cruel and unusual punishments prohibits the imposition of a life without parole sentence for a juvenile who has been convicted of a non-homicide offense.⁹⁷ Like Sullivan, Graham argued that a life without parole sentence was akin to the death penalty because it rejects rehabilitation and is irrevocable.⁹⁸ Unlike the petitioner in *Sullivan*, Graham’s arguments focused on the fact that the offense in question was a non-homicide.⁹⁹ Graham relied on the Eighth Amendment and underscored the Court’s conclusion in *Roper* that persons under the age of eighteen are

⁸⁷ *Id.* at 12.

⁸⁸ *Id.* at 11.

⁸⁹ Hudson, *supra* note 64.

⁹⁰ Graham Merit Brief, at 6-7; Hudson, *supra* note 64, at 76.

⁹¹ Brief of Petitioner, Graham, *supra* note 85, at 19.

⁹² *Id.* at 20.

⁹³ *Id.* at 21.

⁹⁴ *Id.*; Hudson, *supra* note 64, at 77.

⁹⁵ Brief of Petitioner, Graham, *supra* note 85, at 23.

⁹⁶ *Id.* at 24.

⁹⁷ *Id.* at i; Graham Merit Brief, at 1.

⁹⁸ Brief of Petitioner, Graham, *supra* note 85, at 24-25.

⁹⁹ *Id.* at 24.

constitutively different and less culpable than adults.¹⁰⁰ Moreover, Graham rejected the “death is different” argument and pointed to the Court’s precedent of examining an offender’s characteristics for both capital and non-capital offenses.¹⁰¹

¶26 Graham argued that the Supreme Court’s conclusion in *Roper* that children have diminished culpability and an infinite capacity to change required that it conclude that sentencing persons under the age of eighteen who had been convicted of non-homicide offenses to life without parole is unconstitutional.¹⁰² The petitioner also asserted that sentencing children who are convicted of non-homicide offenses to life without parole was “cruel” when compared to the gravity of the offense and violated the Eighth Amendment’s prohibition on grossly disproportionate punishment.¹⁰³

¶27 Graham concluded that the imposition of the sentence was also “unusual because most jurisdictions rarely, if ever, impose such a sentence.”¹⁰⁴ Statistics from Florida’s DOC showed that Graham’s sentence was 8.5 times greater than the average sentence for all adult violent offenders, 7.1 times greater than the average sentence for all adult offenders convicted of armed burglary, and 2.2 times greater than the average sentence for all adult offenders convicted of murder.¹⁰⁵ Moreover, Graham was one of only seventy-seven juvenile, non-homicide offenders in Florida serving life without parole.¹⁰⁶ Nationally, five thousand juvenile offenders in the adult criminal system have committed crimes comparable to or more serious than Graham.¹⁰⁷

¶28 The petitioner also highlighted the Court’s “well settled precedent” of considering a variety of factors when assessing proportionality.¹⁰⁸ Such factors include the sentence’s underlying penological purposes, the harshness of the sentence compared to the offense, the defendant’s characteristics, legislative judgments, and a comparison of sentencing laws and practices among the states and the international community.¹⁰⁹ Graham argued that based on the combination of all these factors, his sentence was cruel and unusual.¹¹⁰

ii) Respondent’s Argument

¶29 According to the state of Florida, the punishment was not “cruel and unusual” because the Eighth Amendment contained no textual or jurisprudential basis for a categorical ban on life without parole sentences for juveniles.¹¹¹ The state pointed to non-capital cases like *Harmelin v. Michigan*, where the Supreme Court held life without parole sentences are constitutional “for the mere possession of six hundred and seventy-

¹⁰⁰ *Id.* at 24-28.

¹⁰¹ The “death is different” argument emphasizes the uniqueness of capital punishment by underscoring that death is different from any kind of punishment because of its finality and termination of life. *Id.* at 25.

¹⁰² *Id.* at 24.

¹⁰³ *Id.* at 25-26, 54.

¹⁰⁴ *Id.* at 54.

¹⁰⁵ *Id.* at 58.

¹⁰⁶ *Id.* at 59.

¹⁰⁷ *Id.* at 60.

¹⁰⁸ *Id.* at 25; See also *Atkins v. Virginia*, 536 U.S. 304, 312-321 (2002).

¹⁰⁹ Brief of Petitioner, Graham, *supra* note 85, at 25-28; See also *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (establishing that in a non-death penalty case, that the Eighth Amendment must draw its meaning from the “evolving standards of decency that mark the progress of a maturing society”).

¹¹⁰ Brief of Petitioner, Graham, *supra* note 85 at 50-66.

¹¹¹ Graham Merit Brief, *supra* note 84, at 18.

two grams of cocaine,” and *Rummel v. Estelle*, where the Court held a life sentence for the commission of three non-violent offenses was constitutional.¹¹² Florida also argued that the state made a conscious decision to try him in adult court based on the serious nature of Graham’s crime. Moreover, Florida argued that if the Court concluded Graham’s sentence was disproportionate because of his age, the Court would undermine states’ efforts to penalize children who “engage in adult like crimes” by transferring them to adult systems.¹¹³

¶30 Florida rejected petitioner’s *Roper* analysis and argued that the Court’s prohibition of capital punishment for minors did not make harsh penalties like life without parole categorically unconstitutional.¹¹⁴ It argued that society already uses age as mitigating factor by having a separate system of justice for juveniles.¹¹⁵

3. The Supreme Court’s Resolution of the Issue

¶31 In a landmark ruling, the Supreme Court’s held in *Graham* that life without parole sentences for juveniles convicted of non-homicide offenses are unconstitutional.¹¹⁶ In his majority opinion, Justice Kennedy explained that the decision, which relied on *Roper*, “gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform.” The Court concluded that children “should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential....[Florida] has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed when he was a child in the eyes of the law. This the Eighth Amendment does not permit.”¹¹⁷ Neither Graham nor Sullivan argued that LWOP should be categorically banned for all children under seventeen; rather, their arguments focused on children under the age of seventeen who had been found guilty of a non-homicide offense. For this reason, it was unlikely that the Court would broaden its ruling by prohibiting LWOP for all children, including those who were convicted of homicide.

¶32 It is clear from the oral argument transcripts that most of the Justices were inclined to adjust the scheme for giving children life without parole sentences in some way.¹¹⁸ Justices Roberts and Alito seemed to be in favor of a proportionality review where each child would be sentenced depending upon the type of crime they committed and other circumstances surrounding their offense. Justices Stevens, Ginsburg, Kennedy, and Sotomayor, on the other hand, seemed to favor a categorical ban based on age or the type of offense committed.¹¹⁹ Justice Scalia and Thomas, however, did not make statements indicating they would favor any changes to the practice of imposing LWOP on juveniles. Although the Court decided to institute a categorical ban for non-homicide

¹¹² *Id.* at 18; *Harmelin v. Michigan*, 501 U.S. 1008, 1008-09 (1991); *Rummel v. Estelle*, 445 U.S. 263, 283-85 (1980).

¹¹³ Graham Merit Brief, *supra* note 84 at 18-19.

¹¹⁴ *Id.* at 19-20.

¹¹⁵ *Id.* at 20.

¹¹⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010). *Sullivan* was dismissed based on a procedural issue.

¹¹⁷ *Id.* at 2032- 33.

¹¹⁸ Transcript of Oral Argument at 12, 17,28-30, 33-34, 41, *Graham*, 130 S. Ct. 2011 (No. 08-7412) [Hereinafter Graham Transcript]; Sullivan Transcript, *supra* note 82 at 16.

¹¹⁹ Transcript of Oral Argument *passim*, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412); Transcript of Oral Argument *passim*, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621).

offenses, the proportionality review approach would have been in line with *Roper v. Simmons*. In *Roper*, the Court held that children’s neurological differences from adults, lack of maturity, and vulnerability to peer pressure made them categorically different and less culpable than adults; therefore, the death penalty for juveniles was disproportionate.¹²⁰

¶33 When the Court followed Graham’s logic—drawing a line at eighteen—it held that LWOP for children seventeen and under who are convicted of non-homicide offenses is unconstitutional, its decision was based on the Eighth Amendment. As it did in *Roper*, the Court also used international law as persuasive authority.¹²¹ In *Graham*, the Court found “support for [its] conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”¹²² Although the Court noted “the global consensus against the practice in question,” it also concluded “the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment.”¹²³

¶34 The *Graham* Court should have considered international standards when it made its decision because juvenile LWOP sentences violate several treaties to which the United States is either a signatory or state party.¹²⁴ LWOP sentences are prohibited under the Convention of the Rights of the Child (CRC), the Committee on the Elimination of Racial Discrimination (CERD), the United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the International Covenant on Civil and Political Rights (ICCPR). The treaty bodies charged with enforcing these treaties have found the United States out of compliance because it sentenced children to LWOP. If the Court had incorporated international standards into its decision in *Graham* by referencing the customary international law and the above mentioned conventions, its decision would be in compliance with international human rights standards. As it stands now, the United States continues to fail to meet these standards in the ICCPR and CERD because it continues to sentence children who committed homicides to LWOP. International law categorically bans LWOP sentences for children without exception. The Court’s decision to abolish the sentence only for children who committed non-homicide offenses falls short; the United States continues to act in violation of international law.

IV. SENTENCING CHILDREN CONVICTED OF NON-HOMICIDE OR HOMICIDE OFFENSES TO LIFE WITHOUT PAROLE VIOLATES INTERNATIONAL HUMAN RIGHTS STANDARDS

¹²⁰ *Roper*, 543 U.S. at 589.

¹²¹ *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Roper*, 543 U.S. at 562-63; *Thompson v. Oklahoma*, 487 U.S. 815, 848-50 (1988). See De La Vega & Leighton, *supra* note 1, at 14 for a similar discussion.

¹²² *Graham*, 130 S. Ct. at 2033.

¹²³ *Id.*

¹²⁴ The United States is a state party to the ICCPR, CERD, and Convention against Torture. Brief for Amnesty International at 25, et al. as Amici Curiae Supporting Petitioners, *Graham*, 130 S. Ct. 2011 and *Sullivan v. Florida* 130 S. Ct. 2059 (2010) (No. 08-7621) (S. Ct. filed Dec. 14, 2009) [hereinafter Amnesty Brief].

¶35 The international community, as well as international human rights law, condemns the practice of sentencing children to life in prison without the possibility of parole.¹²⁵ This condemnation is not qualified by the age of the child or the offense committed. Rather, this condemnation is categorical, as the international community views juvenile life without parole sentences as an abrogation of modern society's shared responsibility for child protection and rehabilitation.¹²⁶ Domestic laws should be amended so that they are in compliance with international human rights standards.

A. Jus Cogens and The Convention of the Rights of the Child

¶36 The Convention of the Rights of the Child (CRC) codifies an international customary norm that forbids sentencing children to spend life in prison without the possibility of parole.¹²⁷ Even though the United States is the sole country that has refused to ratify to the CRC, its provisions can still bind the United States. Juvenile LWOP sentences have been rejected and condemned by every nation in the world except the United States.¹²⁸ Most governments never allowed, expressly prohibit, or do not impose life without parole sentences because they violate principles of child protection and development.¹²⁹

¶37 A norm is considered customary international law when it is widespread, constant, and practiced uniformly by nations because of a legal obligation.¹³⁰ It relies, however, on the consent of different nations. The condemnation of sentencing children to life without parole is so universal that it has reached the level of a *jus cogens* norm.¹³¹ *Jus Cogens* norms have a higher status than customary international laws, and all nations are expected to comply with them.¹³² A norm attains *jus cogens* status when it meets three requirements: (1) it is general or customary international law; (2) it has not been modified by a new norm of the same status; and (3) a large majority of countries accept it as non-derogable.¹³³

¶38 The international prohibition against life without parole sentences for children fulfills these requirements and has thus reached the status of a *jus cogens* norm. First, as explained above, there is a widespread and consistent practice of refusing to sentence children to life without parole because it is seen as a violation of agreements to protect the life of the child.¹³⁴ Historically, very few countries have sentenced children to life without parole, and the United States rarely used this sentence before the 1990s.¹³⁵ Second, the norm continues to have universal acceptance and has recently been

¹²⁵ De La Vega & Leighton, *supra* note 1, at 3.

¹²⁶ *Id.*; Andrea Templeton, *Lost Potential: International Treaty Obligations and Juvenile Life Without Parole in Edmonds v. State of Mississippi*, 26 Law & Ineq. 233, 241-43 (2008).

¹²⁷ De La Vega & Leighton, *supra* note 1, at 1009.

¹²⁸ Amnesty Brief, *supra* note 124, at 9.

¹²⁹ De La Vega & Leighton, *supra* note 1, at 989-90.

¹³⁰ *Id.* at 1014; Amnesty Brief, *supra* note 124, at 11; Molly C. Quinn, *Life Without Parole for Juvenile Offenders: A Violation of Customary International Law*, 52 St. Louis L.J. 283, 285-87 (2007).

¹³¹ De La Vega & Leighton, *supra* note 1, at 1013-14; Amnesty Brief, *supra* note 124, at 13.

¹³² Amnesty Brief, *supra* note 124, at 9.

¹³³ *Id.*, at 13; De La Vega & Leighton, *supra* note 1, at 1014-17.

¹³⁴ De La Vega & Leighton, *supra* note 1, at 1015.

¹³⁵ *Id.* at 989-91, 1015.

reconfirmed by individual countries and international treaty bodies.¹³⁶ For example, the General Assembly adopted by vote a resolution for the immediate abolition of juvenile life without parole sentences by law in its 2006, 2007, and 2008 meetings. Of the one hundred and eighty-five nations that attended each meeting, the United States was always the only nation to dissent.¹³⁷ Third, there is near universal acceptance that the prohibition against life without parole sentences is legally binding, as codified by the Convention of the Rights of the Child. With the exception of the United States, all nations have ratified the CRC.¹³⁸ If the CRC is accepted as *jus cogens*, the United States' failure to ratify it does not relieve it of its responsibility to protect all children from LWOP, as the Convention mandates.¹³⁹

¶39 Article 3(1) provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law...or legislative bodies, the best interests of the child shall be the primary consideration.” The Article did not mandate that the best interests of the child be of primary consideration depending on their age or whether they have been convicted of a non-homicide. The mandate is categorical and without exception: the best interests of the children can never include sentencing children to LWOP, even if they have been convicted of a homicide.

¶40 Article 37(a) expressly prohibits sentencing children to life without parole: “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”¹⁴⁰ The Committee on the Rights of the Child, the body responsible for monitoring compliance with the CRC, clarified this prohibition in its 2007 General Comment when it recommended that “parties abolish all forms of life imprisonment for offences committed by persons under the age of eighteen.”¹⁴¹ The United States' practice of sentencing *any* child to life without parole represents a contravention of this principle.

¶41 Life without parole sentences for children also violate Article 37(b) of the CRC, which states that the “arrest, detention or imprisonment of a child ...shall be used only as a measure of last resort and for the shortest appropriate period of time.” Not only do life without parole sentences abrogate the provision that calls for the use of prisons as a last resort, the sentences fall far short of the call to incarcerate children for “the shortest period of time.” As the U.S. Supreme Court noted in *Roper*, it is almost impossible for a judge or jury to correctly determine whether a child can be rehabilitated, because their “characters” have not yet been formed.¹⁴² Even if it were possible to determine whether a child could be rehabilitated, judges or laypersons on juries, as opposed to doctors and psychiatrists, are not equipped to make such determinations. Any determination that a particular child is so incorrigible that they are fit not only for imprisonment, but

¹³⁶ *Id.* at 1015; Amnesty Brief, *supra* note 124, at 18-21; Res. 10/2, U.N. Doc. A/HRC/10/L.11, ¶ 11 (adopted Mar. 25, 2009); Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (2007).

¹³⁷ Amnesty Brief, *supra* note 124, at 20.

¹³⁸ De La Vega & Leighton, *supra* note 1, at 1009; Amnesty & HRW, *supra* note 6, at 99.

¹³⁹ De La Vega & Leighton, *supra* note 1, at 1015.

¹⁴⁰ CRC, *supra* note 4, Art.37(a). This note uses the definition of “child” found in the Convention of the Rights of the Child, Article 1: “A child means every human being below the age of eighteen years.” U.N. Convention on Rights of the Child, Art. 1, U.N. Doc. A/44/736, 28 I.L.M. 1456 (Nov. 20, 1989).

¹⁴¹ De La Vega & Leighton, *supra* note 1, at 1009.

¹⁴² *Roper*, 543 U.S. at 570, 598-99.

imprisonment for life without any hope of release, violates international standards of decency, as codified by this article.

¶42 Article 37(c) of the CRC mandates that every child “deprived of liberty shall be treated with humanity...In particular, every child deprived of liberty shall be separated from adults.” The Convention specifically prohibited incarcerating children alongside adults because they recognized the special challenges children who are housed with adults face. Most children who are sentenced to life without parole are imprisoned among adults, and are thus five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked by a weapon than minors who are housed in juvenile facilities.¹⁴³ Article 19(1) of the CRC mandates that state parties take “all appropriate...measures to protect the child from all forms of physical or mental violence...neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” Subjecting children to an environment where their chances of being physically and sexually assaulted are dramatically increased also falls short of “ensuring the survival and development of the child,” as mandated in Article 6(2).

¶43 The CRC also specifically requires that countries ensure the rights of the child “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language...national, ethnic, or social origin” in Article 2(1). The discriminatory application of life without parole sentences puts the United States in violation of the Convention on the Elimination of All Forms of Racial Discrimination, a treaty that it has both signed and ratified. As will be explained in the subsequent section, children of color in the United States have been disproportionately subjected to LWOP sentences and this will probably continue to occur despite the Court’s limitation of the sentence to homicide offense.

B. Discriminatory Impact & CERD as a Basis for Abolition of Juvenile LWOP

¶44 All of the children who have been sentenced to life without parole for non-homicide offenses are children of color.¹⁴⁴ Seventy one percent of the children serving life without parole sentences are children of color, even though they make up only 26% of the population.¹⁴⁵ Overall, African American children, who make up 60% of all children sentenced to life without parole, are sentenced to LWOP at a rate that is ten times higher than that of white youth.¹⁴⁶ In every single state that sentences juveniles to life without parole, African American children are sentenced at a rate that exceeds that of white youth.¹⁴⁷ In California, the rate is eighteen times that of white youth.¹⁴⁸

¶45 Unless one believes that African American children are more incorrigible and prone to violent behavior than white children, the extremely disproportionate rate at which they are sentenced to life without parole should signal the existence of widespread discrimination against them. A 2009 Special Report on Racism, Racial Discrimination,

¹⁴³ Amnesty & HRW, *supra* note 6, at 73.

¹⁴⁴ EJI Report, *supra* note 60, at 21, 24.

¹⁴⁵ Amnesty & HRW, *supra* note 6, at 39; Census Bureau, *supra* note 10.

¹⁴⁶ Amnesty & HRW, *supra* note 6, at 39.

¹⁴⁷ *Id.* at 42.

¹⁴⁸ Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, on his Mission to the United States of America (19 May-6 June 2008) G.A. A/HRC/11/36/Add.3 ¶ 51 (April 28, 2009).

and Xenophobia by the UN Special Rapporteur on Contemporary Forms of Racism found that racial disparities in life without parole sentences remained even after controlling for differences in arrest rates.¹⁴⁹ The discriminatory administration of life without parole sentences is not an aberration, as children of color generally receive harsher treatment than white youth for the same offenses, and widespread discrimination has been documented at every stage of the juvenile justice system.¹⁵⁰ The racially disparate nature of the application of life without parole sentences is a clear violation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), to which the United States is a party.¹⁵¹ States Parties to CERD agree to “promote and encourage . . . fundamental freedoms for all without distinction as to race, sex, language or religion.”¹⁵²

¶46 The Committee on the Elimination of Racial Discrimination, the official monitoring body for CERD, concluded in 2006 and 2008 that juvenile life without parole sentences are incompatible with the United States’ obligations under the treaty.¹⁵³ The disparate sentencing rates conflict with Article 5(a) of CERD, which asks State parties to guarantee to persons their “right to equal treatment before the tribunals.” The Committee noted with concern the disproportionate number of racial and ethnic minorities who received life without parole sentences. “In light of the disproportionate imposition of life imprisonment without parole on young offenders including children belonging to racial, ethnic and national minorities” the Committee recommended that the United States discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed and “review the situation of persons already serving such sentences.”¹⁵⁴

¶47 The persistence of racial disparities in the sentencing of children also violates Articles 2 and 6 of CERD. Article 2(1)(c) specifically provides that each State Party shall “take effective measures...to amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.” Article 6 similarly provides that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies...against any acts of racial discrimination.” Juvenile life without parole sentences clearly have the effect of perpetuating racial discrimination. The Supreme Court’s failure to prohibit the sentencing of any child to life without parole puts the United States in breach of CERD. Although the abolition of LWOP sentences for children through CERD because of their discriminatory impact would occur solely through a focus on children of color, children of all races would benefit from its complete abolition.

¹⁴⁹ *Id.*

¹⁵⁰ NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *And Justice for Some: The Differential Treatment of Youth of Color in the Justice System* 3 (2007), www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf, [hereinafter *And Justice for Some*]; KIM TAYLOR, *Symposium: Children, Crime, and Consequences: Juvenile Justice in America*, 14 STAN. L. & POL’Y REV 143, 149 (2003).

¹⁵¹ De La Vega & Leighton, *supra* note 1, at 995.

¹⁵² International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994.

¹⁵³ De La Vega & Leighton, *supra* note 1, at 1012. CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, at ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008) [Hereinafter, CERD Committee].

¹⁵⁴ CERD Committee, *supra* note 153, at ¶ 21.

C. Cruel Confinement as a Violation of the ICCPR

¶48 The United States is also a party to the International Covenant on Civil and Political Rights (ICCPR). Under several provisions of this Covenant, life without parole sentences are cruel when applied to children. As a result, the US is in violation of the ICCPR.¹⁵⁵ Article 7, like the Eighth Amendment, prohibits “cruel, inhuman or degrading treatment or punishment.”¹⁵⁶

¶49 Article 14(4) mandates that “in the case of juvenile persons...procedure[s] shall...take account of their age and the desirability of promoting their rehabilitation.” Article 14 is reinforced by Article 24(1), which states every child shall have “the right to such measures of protection as are required by his status as a minor on the part of his family, society, and the state.”¹⁵⁷ The mechanisms through which a significant number of children are sentenced to life without parole do not “take account of their age” as “required by [their] status as a minor.” A significant number of children sentenced to life without parole are sentenced according to mandatory sentencing schemes or sentenced to felony murder without individualized review by a judge.¹⁵⁸ Sentencing a child to die in prison without even attempting to determine whether they are truly unable to be rehabilitated flies in the face of Articles 14(4) and 24(1).

¶50 The incarceration of children who receive LWOP sentences alongside adults also violates Article 10(3) of the ICCPR, which specifically mandates that “[j]uvenile offenders shall be segregated from adults.” Article 10(3) also provides that the “essential aim” of the penitentiary system “shall comprise treatment of prisoners, the essential aim of which shall be their reformation and rehabilitation.”¹⁵⁹ Since many children sentenced to life without parole are denied access to the rehabilitative, educational, and vocational training available in prisons because they are never expected to return to society,¹⁶⁰ this practice clearly violates Article 10(3). The very judgment that children are irredeemable, as symbolized by sentencing them to life without parole, contradicts any purported rehabilitative goal.

¶51 The United States ratified the ICCPR with reservations to Articles 10(3) and 14(4). It reserved the right to treat juveniles as adults in “exceptional circumstances.” However, the large number of children serving LWOP sentences as a result of automatic sentencing schemes underscores the reality that the United States has not reserved the right to treat juveniles as adults only in exceptional cases. By definition, mandatory sentences preclude individual assessments of a child’s fitness for rehabilitation. During a 2006 meeting, the ICCPR Committee stated with regard to the United States that it was “concerned by the information that the treatment of children as adults is not only applied in exceptional circumstances.”¹⁶¹ Moreover, the Committee concluded that sentencing

¹⁵⁵ De la Vega & Leighton, *supra* note 1, at 1009.

¹⁵⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21. U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966), entered into force Mar. 23, 1976.

¹⁵⁷ De la Vega & Leighton, *supra* note 1, at 1010.

¹⁵⁸ Amnesty & HRW, *supra* note 6, at 27, 90-93.

¹⁵⁹ *Id.* at 73.

¹⁶⁰ De la Vega & Leighton, *supra* note 1, at 1009.

¹⁶¹ International Covenant on Civil and Political Rights. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee on the United States of America, 87th Sess. July 10-28, 2006 (CCPR/C/USA/CO/3) (Sept. 15, 2006), para. 34.

children to life without parole is not in compliance with Article 24(1) of the Covenant and mandated that the United States “ensure that no such child offender is sentenced to life imprisonment without parole, and should...review the situation of persons already serving such sentences.”¹⁶²

D. Cruel Treatment and Punishment as a violation of the Convention against Torture

¶52 The United States’ practice of sentencing children to life imprisonment without the possibility of parole also violates the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). Each State Party to the Convention is expected to prevent “acts of cruel, inhuman or degrading treatment or punishment.”¹⁶³ In 2006, the Committee Against Torture, the international body that oversees compliance with the Convention, expressed concern over the large number of children sentenced to life imprisonment in the United States. In the Committee’s conclusions and recommendations against torture given the United States, it concluded that the US should address the question of LWOP for children as it “could constitute cruel, inhuman or degrading treatment or punishment” in violation of the treaty.¹⁶⁴ The neglect, physical abuse, sexual abuse, and psychological trauma children who are sentenced to LWOP experience¹⁶⁵ meet the minimum standard for any definition of torture. For these reasons, the practice of increasing the chances that children will be subjected to known traumas by giving them LWOP sentences constitutes a violation of the Convention Against Torture.

V. CONCLUSION

¶53 Juvenile life without parole sentences violate the CRC, CERD, ICCPR, and Convention Against Torture. The United States’ simultaneous violation of these treaties in light of *jus cogens* norms and the Eighth Amendment makes the practice especially troubling. Even more troubling is the lack of evidence that LWOP has any deterrent effect on youth.¹⁶⁶ If the Supreme Court had weighed the practice of sentencing children to LWOP against customary international law and international treaties, such as the Convention of the Rights of the Child (CRC), the Committee on the Elimination of Racial Discrimination (CERD), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the International Covenant on Civil and Political Rights (ICCPR), it would have had a stronger impetus to categorically ban juvenile LWOP in *Graham*. Juvenile LWOP is not only a misguided violation of the standards of decency in the Eighth Amendment but is a violation of international human rights law as well.

¹⁶² *Id.*

¹⁶³ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994.

¹⁶⁴ Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, at para. 35, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

¹⁶⁵ Amnesty & HRW, *supra* note 6, at 73; Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1 (1989)

¹⁶⁶ De la Vega & Leighton, *supra* note 1, at 3.

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When society sentences children to life without parole, it implicitly tells them that they are irredeemable and incapable of positive change.¹⁶⁷ Children in the United States—the only group of children who will continue to receive this harsh sentence—cannot be more violent, incorrigible, and less deserving of humane treatment than children in other parts of the world.¹⁶⁸ The Supreme Court had the opportunity to rectify this injustice by ending juvenile LWOP when it rendered its decisions in *Graham* and *Sullivan*. Although the Court's decision in *Graham* was a victory to a number of children who had committed non-homicide offenses, it fell short of a categorical ban. The Supreme Court's failure to incorporate international human rights treaties into its analysis means that thousands of children will continue to spend their lives behind bars.

¹⁶⁷ Amnesty & HRW, *supra* note 6, at 82.

¹⁶⁸ De la Vega & Leighton, *supra* note 1, at 990.