

Taking Lives: How the United States has Violated the International Covenant of Civil and Political Rights by Sentencing Juveniles to Life without Parole

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Introduction

In the wake of the Supreme Court's recent decision in *Roper v. Simmons*,¹ which outlawed death sentences for juveniles, several human rights organizations have questioned the legality of life sentences without parole for juvenile offenders.² In the United States, courts can sentence juveniles as young as twelve years-old to life in prison without the possibility of parole, placing most of these juveniles in adult facilities.³ The United States continues to do this despite international law and opinion to the contrary.⁴ Specifically, this comment will argue that life sentences without parole for juveniles violate Articles 7, 10(3), and 14(4) of the International Covenant for Civil and Political Rights.⁵

Part I of this comment introduces the relevant articles and reservations of the international agreements, as well as background on the condition of juveniles currently serving life without parole.⁶ Next, Part I lays out the international and

¹ *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

² See generally ALISON PARKER, U.S. PROGRAM OF HUMAN RIGHTS WATCH AND AMNESTY INT'L, *United States of America: The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 60, 85 (Amnesty Int'l Staff et al. eds., 2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> [hereinafter Amnesty Int'l Report] (reporting that the United States is violating international law by sentencing juveniles to life without parole).

³ *Id.* at 18 (pointing out that Delaware, Florida, Hawaii, Maryland, Michigan, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Tennessee have no minimum age at which courts can sentence juveniles to life without parole).

⁴ See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171; discussion *infra* II.B-E (discussing how the sentence of life without parole for juveniles violates the ICCPR, and how other countries are now using different, more moderate types of punishments for juveniles as substitutes for life without parole).

⁵ See discussion *infra* Parts II.B-C (arguing that due to conditions and lack of rehabilitation for juvenile offenders, life sentences without parole for juveniles violate these articles of the International Covenant on Civil and Political Rights [hereinafter ICCPR]).

⁶ See discussion *infra* I.A (providing context for understanding the situation of juveniles serving life without parole in the United States).

domestic case law on the sentence of life without parole for juveniles, and ends with a discussion of *Roper v. Simmons*, the Supreme Court decision that outlawed the death penalty for juveniles in the United States.⁷

Part II begins by dispelling the argument that the United States' reservations to the ICCPR preclude the United States from having to follow the articles of the ICCPR relevant to the issue of juveniles serving the sentence of life without the possibility of parole.⁸ The remainder of Part II discusses how life sentences without parole violate Articles 14(4), 10(3), and 7 of the ICCPR.⁹ While some of the policy information in Part II might not ordinarily be relevant to a legal argument, in this case judicial decisions, both international and domestic, have relied mainly on policy arguments in deciding whether or not to uphold sentences for juveniles.¹⁰

⁷ See *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005); discussion *infra* Parts I.E-I.G (presenting case law from the IACHR, the ECHR, and the United States on life without parole).

⁸ For text of the United States' Reservations, Understandings, and Declarations, see SENATE COMM. ON FOREIGN RELATIONS, International Covenant on Civil and Political Rights, S. Exec. Doc. No. 102-23, 102d Cong., 2d Sess. 6-21 (1992) [hereinafter Reservations] (allowing the United States to continue to sentence juveniles to life without parole). See discussion *infra* Parts II.A (concluding that the United States' reservation to the treaty runs contrary to the object and purpose of the ICCPR, *supra* note 4 and is thus invalid under the Vienna Convention on the Law of Treaties).

⁹ See discussion *infra* Parts II.B-F (arguing that life sentences without parole for juveniles violate the ICCPR, *supra* note 4, because they are cruel and unusual and do not take into account the aim of rehabilitation).

¹⁰ See *Naovarath v. State*, 779 P.2d 944, 947 (Nev. 1989) (reiterating that the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary). The Court held that the only thing to guide one as to what is cruel and unusual is his or her conscience. *Id.*; see also *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. C.H.R., Report No. 41/99 ¶ 125 ¶ 77-90 (1999) (relying on newspaper articles and government reports depicting the sexual and physical abuse of minors in Honduran prisons as evidence that keeping minors in prison with adults is cruel and unusual punishment). This is a clear example of a court using evidence that would not traditionally be

Part III of this comment recommends that the United States outlaw the sentence of life in prison without parole for juveniles either through a Supreme Court decision or state law.¹¹ In the alternative, it recommends that the United States at least pass legislation separating juveniles and adults in prisons and jails and providing for the rehabilitation of all juveniles.¹²

I. Background

Part I will provide information on the current status of juveniles serving the sentence of life without parole as well as information on the relevant provisions and reservations to international agreements which the United States has violated.¹³ Domestic case law on both the juvenile death penalty and life sentences without parole are relevant to this comment because both take into account the differences between juveniles and adults in their decisions to allow or disallow the various punishments.¹⁴ Finally, the international case law on the sentence of life without parole for juveniles demonstrates that this penalty now runs against international norms for many of the same reasons contemplated in United States domestic case law.¹⁵

used in a legal argument, but is important here because the decision relies on the conscience of the judiciary. *Id.*

¹¹ See discussion *infra* Part III.A (handing down such a decision or passing such legislation would demonstrate the United States' respect for international law).

¹² See discussion *infra* Part III (asserting that this would show respect for international law).

¹³ See discussion *infra* Parts I.A-B (providing the text of Articles 7, 10(3) and 14(4) of the ICCPR *supra* note 4, as well as information regarding the United States' reservation to the ICCPR *supra* note 4, allowing it to sometimes treat juveniles as adults in its justice system).

¹⁴ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (outlawing the juvenile death penalty due primarily to differences in the development of juveniles and adults); *Naovarath*, 779 P.2d at 949 (finding the sentencing of juveniles to life without parole unconstitutional in the state of Nevada by using reasoning similar to that used by the Supreme Court in *Roper* to find the death penalty unconstitutional).

¹⁵ See *T. v. United Kingdom*, 170 Eur. Ct. H.R. ¶ 121 (1999) (holding that the sentence of detention at her majesty's pleasure is illegal under

A. Juveniles in Adult Prisons

On average, the United States justice system incarcerates 107,000 juveniles per day.¹⁶ The justice system places 14,500 of them in adult facilities.¹⁷ Separating youth and adults in prison is important for several reasons, but mainly because of the different purposes of the juvenile and adult justice systems: the purpose of the juvenile justice system is to rehabilitate, whereas the main purpose of the adult system is to punish.¹⁸

B. The International Covenant for Civil and Political Rights and the United States' Reservations

The United Nations created the ICCPR in 1966 and it came into force in 1976.¹⁹ This treaty is the first document to formally address juvenile rights in judicial proceedings.²⁰ Although the United States signed this treaty in 1979, it did

international law where no tariff is set). Without a tariff, the sentence of detention at her majesty's pleasure is equivalent to the sentence of life without parole in the United States. *Id.* A tariff is a set number of years after which a board will review the prisoner's sentence, much like a parole board in the United States. *Id.*

¹⁶ JAMES AUSTIN ET AL., JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4 (U.S. Dep't of Justice, Bureau of Justice Assistance 2000) [hereinafter Dep't of Justice Report].

¹⁷ *Id.* at 4 (this statistic is particularly of note because most of the youth sentenced to life without parole are serving their sentences in adult facilities).

¹⁸ Wayne A. Logan, *Proportionality and Punishment: Imposing Life without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 685 (1998) (basing this conclusion on the idea that juveniles lack the moral and judgmental maturity of their elders, and hence are less deserving of legal culpability, and the belief that those of tender age can yet be channeled away from long-term criminal behavior).

¹⁹ See ICCPR, *supra* note 4, at 1.

²⁰ Roger J.R. Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, 29 CREIGHTON L. REV. 1563, 1579 (1996) (indicating that, although the notion of children's rights in general has a long history, the incorporation of their rights in the justice system has been a recent development).

not actually ratify the treaty until 1992.²¹ The first article of the ICCPR relevant to this comment, Article 7, states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²² Article 10(3) of the ICCPR calls for the separation of juveniles from adults in the justice system.²³ Similarly, Article 14(4) of the ICCPR states that justice systems should take into account the age of juveniles and the desirability of their rehabilitation when punishing them.²⁴

While the United States ratified the ICCPR on September 8, 1992, it did so with several qualifications, including an exception allowing the United States to reserve the right, in exceptional circumstances, to treat juveniles as adults.²⁵

²¹ See Jennifer Brown and Connie de La Vega, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735, 752 (1998) (claiming that the reason for ratifying the treaty with reservations signified the Bush Administration's desire to obtain the United States' acceptance of the ICCPR, *supra* note 4 without altering United States domestic law and practice).

²² Reservations, *supra* note 8 (defining "cruel, inhuman, or degrading treatment or punishment" as the cruel and unusual punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States).

²³ ICCPR, *supra* note 4, at Article 10(3) (announcing that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation, and that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status).

²⁴ ICCPR, *supra* note 4, at Article 14(4). See *T. v. United Kingdom*, 170 Eur. Ct. H.R. ¶ 46 (1999) (holding that a sentence of detention at her majesty's pleasure without a tariff violates Article 14(4) of the ICCPR); discussion *supra* note 20 (giving an explanation of why the sentence of detention at her majesty's pleasure without a tariff is equivalent to the sentence of life without parole).

²⁵ See Reservations, *supra* note 8 (declaring that the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system, but that, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 and paragraph 4 of Article 14). See also Brown and de La Vega, *supra* note 21, at 754 (determining that the United States could

C. The International Convention on the Rights of the Child

In addition to the ICCPR, the other main international human rights convention that addresses the issue of juvenile justice is the Convention on the Rights of the Child.²⁶ The United States signed this convention, but has not ratified it.²⁷ The Rights of the Child specifically prohibits the imposition of the sentence of life without parole on juveniles.²⁸ In the wake of this treaty, countries have made a variety of reforms in their juvenile justice systems.²⁹ Overall, while many countries now employ a “get tough” on youth approach and implement adult punishments for juveniles, the countries often use intermediate sanctions in place of adult forms of punishment.³⁰

not use this reservation to allow the imposition of the death penalty on juveniles because this would go against the object and purpose of the ICCPR).

²⁶ Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1577 UNTS 3, 1993 U.S.T. LEXIS 106 [hereinafter Rights of the Child] (finding this convention is relevant because it has provisions identical to the relevant articles in the ICCPR, *supra* note 4 and international courts cite these provisions in passing down rulings on life without parole and imprisonment for juveniles).

²⁷ *Id.* (observing that the only other country in the world not to sign this treaty is Somalia).

²⁸ *Id.*, *supra* note 26, Art. 37(a) (announcing that no country shall impose neither capital punishment nor life imprisonment without the possibility of release for offences committed by persons below eighteen years of age).

²⁹ See Levesque, *supra* note 20, at 1579 (surveying the changes in punishments for juveniles occurring throughout the international community as a result of new international treaties dealing with children’s rights). For example, New Zealand’s Children, Young Persons and Their Families Act of 1989 provides a new mandate for juvenile justice. *Id.* (involving families in juvenile justice decisions, keeping children in their homes, strengthening and maintaining the child-family relationships, and promoting the development of the child in the home).

³⁰ *Id.* at 1579 (examining examples of alternative punishments that China and Britain use which implement community-based corrections for both pre-delinquency intervention and post-release intervention). These countries also make use of non-custodial sentences for all but the most violent juvenile offenders. *Id.* (favoring these types of “intermediate” punishments over punishments like life without parole, which most would classify as “harsh”).

Though the United States has signed onto the Rights of the Child, it appears that it has failed to take its recommendations as seriously as others in the international community.³¹ Indeed, the United States continues to apply a punitive approach to juvenile justice including the sentencing of juveniles to life without parole.³²

D. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties states that a reservation to a treaty is not acceptable if the reservation is incompatible with the “object and purpose” of the treaty.³³ The ICCPR specifically points to this provision in general comment 24(52) in its discussion of reservations to the ICCPR in particular.³⁴ The United States’ reservation to the ICCPR is incompatible with the “object and purpose” of the ICCPR and is not valid.³⁵

³¹ *Id.* at 1580 (suggesting that this is likely because previous attempts to reform the juvenile justice system in this country have been fairly unsuccessful and because policy responses in this area are subject to misinformed public opinion). *See, e.g.*, *State v. Green* 502 S.E.2d 819, 829 (N.C. 1998) (considering that public concern about increased violence led the South Carolina legislature to allow courts to try and sentence fourteen year-olds as adults).

³² *Compare* *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (establishing the punitive purpose of punishment as an expression of society’s outrage, or the “just desserts” theory of punishment) *with* *Levesque*, *supra* note 20, at 1577 (discussing the other two purposes of punishment: deterrence and segregation from society).

³³ *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art. 19, 1155 U.N.T.S. 331, 336-37, 8 ILM 679 (1969) (declaring that a party “may, when signing, ratifying, accepting, approving, or acceding to a treat, formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty”).

³⁴ *See* ICCPR, *supra* note 20, at General Comment 24(52), ¶ 6 (specifying that the object and purpose test from the Vienna Convention does govern the ICCPR).

³⁵ *See* Reservations, *supra* note 8 (allowing the United States to reserve the right, in exceptional circumstances, to treat juveniles as adults); *Brown and de La Vega*, *supra* note 21, at 754 (demonstrating that this reservation could not be used to allow the United States to impose the death penalty on juveniles because this would go against the object and purpose of the treaty). The purpose of the ICCPR is to protect the rights of citizens within

E. Domestic Case Law on the Death Penalty for Juveniles and Age as a Factor in the Totality of the Circumstances Test

Despite the United States' reservations to the ICCPR, the United States has in fact recognized that its justice system must treat juveniles differently than adults.³⁶ The Supreme Court first allowed age to play a role in criminal procedure in a case determining whether or not police obtained a statement from a suspect voluntarily.³⁷ In *Haley v. State of Ohio*, the Court found that, because a child was involved, a special level of scrutiny had to be used when examining the record.³⁸

In *Roper v. Simmons*, the Court noted three main reasons why the death penalty was considered cruel and unusual when applied to juveniles.³⁹ First, scientific and sociological studies confirm that a lack of maturity and an

a State's boundaries, specifically with regard to the rights enumerated in the treaty. *Id.* The United States is violating this purpose failing to uphold several treaty provisions discussed in part II.B and II.C of this article.

³⁶ See discussion *infra* Part I.E.

³⁷ *Haley v. State of Ohio*, 332 U.S. 596, 601 (1948) (reversing a murder conviction based on the confession of a fifteen-year-old boy). The Court reversed the conviction because the police interrogated the boy for five hours, starting at midnight, without warning him of his rights, and without his having had benefit of the advice of friends, family or counsel, and because the confession was involuntary and the police extracted it by methods violating the due process requirements of the Fourteenth Amendment. *Id.*

³⁸ *Id.* (emphasizing that this is a fifteen year-old boy involved in the case, who relays of police questioned through the dead of night). The Court admitted that mature men possibly might stand the ordeal from midnight to 5 a.m. *Id.* (distinguishing that a boy "of tender years" is not a match for the police in such a contest).

³⁹ *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (overturning the death sentence of a seventeen year-old boy who committed a capital murder because the Court found the sentence unconstitutional under the Eighth Amendment). After *Roper* had run its course in the Missouri state courts, the petitioner re-filed his case when the Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), and granted the case certiorari on the grounds that the death penalty for juveniles violated the Eighth and Fourteenth Amendments. *Roper*, 543 at 559 (citing *Atkins*, which held that sentencing a mentally retarded person to death violated the Eighth and Fourteenth Amendments).

underdeveloped sense of responsibility are more likely to exist in juveniles than in adults.⁴⁰ Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure.⁴¹ Finally, the character of a juvenile is not as well formed as that of an adult.⁴² Because of these factors, the Court held that there was an unacceptable likelihood that when sentencing juveniles to death, the fact finder would only take into account the brutal nature of the crime, without regard for the previously mentioned factors justifying the diminished culpability of youth.⁴³ Thus, the Court abolished the death penalty for juveniles.⁴⁴

F. International Case Law on the Sentencing of Juveniles to Life in Prison without Parole from the European Court of Human Rights (“ECHR”) and the Inter-American Commission on Human Rights (“IACHR”)

International case law from both the ECHR and IACHR⁴⁵ has looked unfavorably upon the sentence of life without parole for juveniles.⁴⁶ Both courts have pointed to provisions in the ICCPR and similar human rights treaties.⁴⁷

⁴⁰ *Id.* (resulting in impetuous and ill-considered actions and decisions, which states recognize by prohibiting those who are under eighteen from voting, serving on juries, and marrying without parental consent).

⁴¹ *Id.* (stating that this is partially explained by the fact that juveniles have less control, and less experience with control over their own environment).

⁴² *Id.* at 570 (viewing the personality traits of juveniles as transitory, and thus rendering suspect any conclusions that juveniles could fall among the worst offenders).

⁴³ *Id.* at 573 (acknowledging that even expert psychologists have difficulty differentiating between the juvenile offender whose crime reflects transient immaturity, and the juvenile offender whose crime reflects irreparable corruption).

⁴⁴ *Id.*

⁴⁵ For more information on the founding and purpose of these courts see: http://www.echr.coe.int/echr/Homepage_EN and http://www.oas.org/en/topics/human_rights.asp respectively.

⁴⁶ See discussion *infra* Parts II.F.1-2 (introducing cases from the United Kingdom, Turkey, and Honduras all of which have found the sentence of life without parole for juveniles to violate international human rights law).

⁴⁷ See discussion *infra* Parts II.F.1-2 (finding that life sentences without parole for juveniles violate the ICCPR, *supra* note 4, the Convention on the Rights of the Child, and the American Convention on Human Rights).

The development of juveniles has also been an integral part of many of their opinions just as it has been in United States domestic case law.⁴⁸

1. *Cases from the ECHR*

Recently, in a highly publicized case, *T. v. United Kingdom*,⁴⁹ two ten-year-olds kidnapped a two-year-old from a shopping mall and bludgeoned him to death.⁴⁹ The European Court of Human Rights held that it could only allow the sentence of two juveniles to imprisonment “at her majesty’s pleasure” if the court set a “tariff” to satisfy the requirements of retribution and deterrence.⁵⁰

In *Hussain v. United Kingdom*, the court sentenced a sixteen-year-old defendant to detention during her majesty’s pleasure for the murder of the defendant’s two-year-old brother.⁵¹ In this case, the government argued that the sentence was essentially punitive and was automatically based on the gravity of the crime, regardless of the defendant’s mental state

⁴⁸ Compare *T. v. United Kingdom*, 170 Eur. Ct. H.R. at ¶ 41 (holding that a policy which ignores at any stage the child’s development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy) with *Roper*, 543 U.S. at 569-70 (recognizing three developmental differences between juveniles and adults that led the Court to conclude that children are less culpable than adults).

⁴⁹ *T.*, 170 at ¶ 7.

⁵⁰ *Id.* at ¶ 98; *Bernadine Dohrn, Something’s Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L.J. 749 (2006) (explaining that the “tariff” approach involves breaking down the life sentence into component parts, namely retribution, deterrence and protection of the public); the “tariff represents the minimum term the prisoner will have to serve to satisfy these requirements, thus the tariff is equivalent to the number of years an inmate must be incarcerated in the United States before he has the possibility for parole.” *Id.* (clarifying that if there was no tariff, and the sentence was simply “at her majesty’s pleasure,” it would be the equivalent of life without parole in the United States).

⁵¹ *Hussain v. United Kingdom*, 22 Eur. Ct. H.R. at ¶ 11 (1996) (articulating that the lower court sentenced the boy based only on the appalling nature of his crime).

or dangerousness.⁵² The court agreed and thus ruled that a court must review the sentence at reasonable intervals.⁵³

2. Case from the IACHR

In addition to the ECHR, the IACHR has delivered opinions on the unlawful detention of juveniles in adult prison facilities.⁵⁴

In the case *Minors in Detention v. Honduras*, the IACHR found that, considered in conjunction with one another, the American Convention, Article 19,⁵⁵ and the Honduran Constitution, Article 122(2),⁵⁶ require the state to house juveniles separately from adult inmates.⁵⁷ In making its decision the IACHR cited several instances of abuse, sexual violations, and subhuman conditions.⁵⁸

⁵² *Id.* at ¶ 53 (contending that this is the same criteria for sentencing adults to mandatory life, and sentences for juveniles should be differentiated due to their mental state).

⁵³ *Id.* (deciding that an indeterminate sentence for a juvenile could only be justified by dangerousness and a need to protect the public, not for purposes of retribution or deterrence).

⁵⁴ Dohrn, *supra* note 49, at 768 (writing that, although the IACHR has been hearing cases for twenty years less than the ECHR, the IACHR has produced an emerging line of children's rights cases that balance state interests with a powerful delineation of children's interests and needs).

⁵⁵ *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. C.H.R., Report No. 41/99 (1999) (involving the unlawful arrest of street children, orphans, and vagrants who were incarcerated in Tegucigalpa's central prison and held in an adult facility, sometimes with approximately eight adult prisoners in each cell); *id.* at ¶ 69 (announcing that Article 19 of the American Convention states that "every minor child has the right to the measures of protection required by his status as a minor on the part of his family, society, and the state").

⁵⁶ *Id.* at ¶ 73-4 (considering that Article 122(2) of the Constitution of Honduras stipulates that no child under the age of 18 shall be confined in a jail or a prison).

⁵⁷ *Id.* at ¶ 75.

⁵⁸ *Id.* at ¶ 88-9 (citing several Honduran newspaper articles discussing the rapes of minor prisoners in Honduran prisons).

G. Domestic Case Law on the Sentencing of Juveniles to Life without Parole

There is no federal legislation prohibiting life sentences without parole for juveniles. The Supreme Court of the United States will consider the issue of life sentences without parole for juveniles for the first time during its November 2009 term; thus, this comment relies on state decisions in this area.⁵⁹ In *Naovarath v. State*, the Nevada Supreme Court found it unlikely that sentencing a juvenile to life without parole will satisfy any of the three purposes of punishment: retribution, deterrence, and segregation of offenders from society.⁶⁰

It is true that several other cases have upheld the sentencing of juveniles to life in prison without parole.⁶¹

⁵⁹ At the time this article was written, the Supreme Court had never heard, nor agreed to hear, a case considering the sentence of life without parole for juveniles. On November 9, 2009 the Supreme Court heard the first cases on this sentence: *Graham v. Florida*, 982 So. 2d 43 and *Sullivan v. Florida*, 2009 WL 3712819.

⁶⁰ *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (observing that given the lesser culpability of children for their bad actions, their capacity for growth, and society's special responsibility to children, it is hard to see how this amount of retribution would be necessary to serve society's interest). The deterrence purpose is in no way satisfied. *Id.* (concluding that most juveniles simply do not have the ability to make the kind of cost-benefit analysis that would be necessary for deterrence to work, and that even if a juvenile is able to make this analysis, it is unlikely that he or she would be able to differentiate between life with the possibility of parole and life without the possibility of parole when considering the consequences of his or her actions). As far as segregation from society, the court claimed that a judge does not have the capacity to decide how long a juvenile should be kept off the streets. *Id.* (rationalizing that instead the parole board, years down the line, would be better equipped to make such a decision).

⁶¹ See *Blackshear v. State*, 771 So.2d 1199 (Fla. App. 2000) (upholding a sentence of life imprisonment without parole which was passed down only after the juvenile violated the probation that attached to his crime since the defendant was twenty when he violated his probation, even though he committed the original crime as a juvenile); *State v. Green*, 502 S.E.2d 819, 819 (N.C. 1998) (affirming a sentence of life without parole for a juvenile convicted of first-degree rape and burglary because the court felt that the legislature had a valid reason for allowing this sentence to be used

However, these cases upheld life sentences based on case specific distinctions that were unrelated to age.⁶² Furthermore, these cases did not engage in any analysis of whether sentencing youth to life without parole constitutes cruel and unusual punishment.⁶³ Only one of the cases, *Green v. State*, actually ruled that the punishment itself was not cruel and unusual.⁶⁴ In this case, the North Carolina Supreme Court cited reasoning similar to that put forth by the United States in its reservation to the ICCPR regarding the infliction of capital punishment.⁶⁵ According to case law, there is no clear legal definition of what constitutes cruel and unusual punishment.⁶⁶ It is a fluid concept that depends on the individual judge's sense of humanitarianism.⁶⁷ Finally, it is important to note that in the case *Harmelin v. Michigan* seven of nine justices on the Supreme Court found it possible to find that a sentence of life

for juvenile offenders); *State v. Massey*, 803 P.2d 340 (Wash. App. 1990) (reaffirming a juvenile's life sentence without the possibility of parole for the crime of first-degree murder because the juvenile waived his right to be tried for the crime in juvenile court).

⁶² See *Blackshear*, 771 So.2d at 1201 (clarifying that the life sentence here was permissible because the defendant was not being sentenced for the crime he committed as a juvenile, but sentenced for violations of the probation committed when he was twenty years-old); *Massey*, 803 P.2d at 348 (observing that the reason the sentence was not cruel and unusual was because the defendant waived his rights to be tried for the crime in juvenile court, where he could not have been sentenced to life in prison).

⁶³ See *Blackshear*, 771 So.2d at 1201; *Massey*, 803 P.2d at 348.

⁶⁴ *Green*, 502 S.E.2d at 834 (finding that the defendant's punishment in this case is severe, but not cruel and unusual).

⁶⁵ See *id.* at 829. (reasoning that the legislature, which is democratically elected, should make decisions regarding punishment, and what is considered cruel and unusual, and at what age a juvenile may be tried in an adult court). But see *Hussain v. United Kingdom*, Eur. Ct. H.R. at ¶ 49 (1996) (advising that the acceptability to the public of an early release should not be part of the assessment in giving a juvenile a sentence of life without the possibility of parole).

⁶⁶ See *Naovarath v. State*, 779 P.2d 944, 946-48 (citing an unpublished opinion of Supreme Court Justice Frank Murphy that stated, "More than any other provision in the Constitution the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary.")

⁶⁷ See *Green*, 502 S.E.2d at 829 (writing that what is cruel and unusual punishment depends on evolving standards of decency).

without parole could be so disproportionate that one could consider it cruel and unusual under the Eighth Amendment.⁶⁸

II. Analysis

The United States' reservation to the ICCPR does not exempt the United States from following the relevant articles of the ICCPR, nor does it make it legal under international law for the United States to continue to sentence juveniles to life without parole.⁶⁹ The developmental differences between children and adults cited by decisions striking down life sentences without parole for juveniles outweigh the punitive and deterrent purposes of the sentence.⁷⁰

A. The United States' Reservation to the ICCPR Does Not Allow the United States to Continue to Sentence Juveniles to Life without Parole

The United States' reservation to the ICCPR is invalid because it contradicts the object and purpose of the ICCPR.⁷¹ The purpose of the ICCPR is to protect the rights of citizens within a state's boundaries.⁷² The manner in which the United States implements life without parole for juvenile offenders directly contradicts explicit language of the ICCPR.⁷³ Any reservation that allows for a sentence that directly violates

⁶⁸ Harmelin v. Michigan, 501 U.S. 957 (1991) (stating that, although a majority of justices voted that in this specific case a sentence of life without parole is not cruel and unusual, in concurring and dissenting opinions, seven justices said that they believed there were cases where one could consider the sentence of life without parole cruel and unusual punishment).

⁶⁹ See discussion *infra* Part II.A (arguing that this reservation contradicts the object of the ICCPR).

⁷⁰ See discussion *infra* Parts II.D, II.E, and II.F.

⁷¹ See discussion *infra* note 70 and accompanying text.

⁷² Brown and de La Vega, *supra* note 21, at 755 (considering that the purpose of human rights treaties is for the state to assume various obligations, not in relation to other states, but towards all individuals within its jurisdiction).

⁷³ See discussion *infra* Parts II.B and II.C (discussing how implementing the sentence of life without parole for juveniles in the United States directly violates Articles 7, 10(3) and 14(4) of the ICCPR).

provisions of the treaty goes against its object and purpose, and, thus, is not a lawful reservation.⁷⁴

B. Placing Children in Adult Prisons Violates Articles 10(3) and 7 of the ICCPR

The fact that the United States subjects children in certain instances to adult prison facilities is a direct violation of Article 10(3) of the ICCPR.⁷⁵ This article states that jails and prisons must separate juveniles from adults.⁷⁶ Meanwhile, the United States currently has 14,500 juveniles being held in adult facilities.⁷⁷ In addition, the IACHR has found it illegal under the Convention on the Rights of the Child to keep juveniles and adults in the same prisons.⁷⁸ While the Commission did not use the ICCPR to reach this conclusion, the same reasoning for the enforcement of this provision can be applied to both treaties.⁷⁹ In the IACHR's reasoning for finding it illegal to house juveniles and adults together, it cites article 5(1) of the Convention, which states that no child shall be subjected to cruel, inhuman, or degrading punishment or treatment.⁸⁰ This provision of the Convention on the Rights of

⁷⁴ *Cf.* Brown and de La Vega, *supra* note 20, at 754 (applying similar reasoning as to why a United States reservation to the ICCPR, *supra* note 4 for the use of the death penalty on juveniles is invalid).

⁷⁵ ICCPR, *supra* note 4, at Art. 10(3) (stating that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status).

⁷⁶ ICCPR, *supra* note 4, at Art. 10(3).

⁷⁷ Report, AUSTIN, *supra* note 16, at 9 (emphasizing that on any given day, 107,000 juveniles are incarcerated, and of these, 14,500 are placed in adult facilities).

⁷⁸ *See* *Minors in Detention v. Honduras*, Case 11.491, Inter-Am. C.H.R., Report No. 41/99 ¶ 125 (1999) (explaining that Article 5(5), taken in combination with Article 19 of the Convention, makes clear the State's duty to house detained minors in facilities separate from those housing adults).

⁷⁹ *Compare* Rights of the Child, *supra* note 26, at Art. 19 (recalling that the IACHR has interpreted this treaty to include ensuring that detention facilities house minors separately from adults) *with* ICCPR, *supra* note 4, at Art. 10(3) (stating that juvenile offenders shall be segregated from adults and be accorded treatment appropriate for their age and legal status).

⁸⁰ *Minors in Detention*, Case 11.491, Inter-Am. C.H.R., ¶¶ 125, 127 (1999); Rights of the Child, *supra* note 26, Art. 5(1).

the Child is identical to Article 7 of the ICCPR, which also protects children from cruel, inhuman, and degrading punishment.⁸¹

Integrating juvenile and adult prisoners is cruel and inhuman for several reasons: first, juveniles housed with adults are more likely to face physical and sexual abuse; second, there are differences in sleeping and eating patterns between children and adults; and studies have indicated that there are increased effects of isolation on juveniles not observed in adults.⁸²

In *Minors in Detention*, the IACHR ruled that Honduras could not house minors in the same facility as adults.⁸³ In the Commission's reasoning it cited multiple instances of rape, physical assault, abuse, and neglect.⁸⁴ In the United States, there are similar problems resulting from the incarceration of juveniles with adults that also cause life sentences without parole for minors to be cruel, inhuman, and degrading.⁸⁵ The main reason is that children are innately

⁸¹ See Rights of the Child, *supra* note 28, at Art. 5(1); ICCPR, *supra* note 4, at Art. 7.

⁸² See discussion *infra* Part II.B and note 9 (recalling that it is important to note that what constitutes cruel, inhuman and degrading punishment is not well defined, and depends in large part on the conscience of the judiciary).

⁸³ *Minors in Detention*, Case 11.491, Inter-Am. C.H.R., C.H.R., ¶ 125 (1999) (reasoning that a state could not interpret a law calling for the special protection of children as requiring only the creation of juvenile courts, and that it must require the creation of juvenile detention facilities as well).

⁸⁴ *Minors in Detention*, Case 11.491, Inter-Am. C.H.R., ¶ 89 (1999) (proffering several instances of sexual abuse of minors in adult prisons both in newspaper articles and even from Supreme Court magistrate Blanca Valladares).

⁸⁵ See generally Report, PARKER, *supra* note 2 (discussing the psychological impact on juvenile offenders of incarcerating them with adults including loneliness, hopelessness, and isolation); COALITION FOR JUVENILE JUSTICE, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Court*, 45 (2003) (noting that when the justice system places youth in prison with adults, they are particularly vulnerable to depression, sexual exploitation and physical assault).

different from adults.⁸⁶ To treat them as adults can cause many problems that can result in serious injury or even death.⁸⁷

One important difference between children and adults, which the justice system does not take into account when placing juveniles in adult facilities, is the increased effects that the isolation of an adult facility has on juveniles.⁸⁸ Most prisoners, particularly those serving long sentences, lose social support and family connections.⁸⁹ While this might not be considered inhumane for an adult, youth in adult prisons are likely to be much more dependent on family relationships than adult inmates, and they may suffer these losses at an earlier age, causing them to endure their loss longer than adult inmates.⁹⁰

Encouragingly, a number of corrections officials around the country are creating special provisions for the teenagers in their prisons.⁹¹ For example, an adult facility may take concrete steps to house teenage inmates in a separate

⁸⁶ COALITION FOR JUVENILE JUSTICE, *supra* note 84, at 36 (saying that certain parts of the brain—particularly the frontal lobe and the cable of nerves connecting both sides of the brain—are often not fully formed, which can limit cognitive ability). This is also the part of the brain that has to do with making good judgments, moral and ethical decisions, and reining in impulsive behavior. *Id.*

⁸⁷ See discussion *supra* note 83; *id.* at 35 (reporting that the suicide rate for youth held in adult jails is five times the rate of the general jail population and eight times the rate for adolescents held in juvenile facilities); *id.* (adding that there are also more commonplace distinctions: teenagers have different nutritional, sleep, and exercise need).

⁸⁸ See discussion *supra* note 83 (describing the specific effects of isolation on juveniles).

⁸⁹ Report, PARKER, *supra* note 2, at 60 (quoting one juvenile serving life without parole as saying that since being in prison she felt as though she lost her whole family and did not even know if they were dead or alive).

⁹⁰ *Id.* at 85; Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 539 (1997) (positing that the side effects of such isolation may cause protracted depression, apathy and the development of a profound sense of hopelessness).

⁹¹ See, e.g., Sara Rimer, *States Adjust Adult Prisons to Needs of Youth Inmates*, N.Y. TIMES, July 25, 2001, at A1 (discussing a Nevada program where inmates aged 16 to 21 that have been convicted of mostly robbery and drug-related offenses occupy a separate building in the prison).

wing.⁹² Yet, given the crowded conditions and day-to-day chaos that govern most jails and prisons, encounters like the humiliation and taunting by adult inmates are often inevitable during meals, in the recreation yard, and at the library.⁹³ Thus, the failure of United States prisons and jails to take into account the differences between juveniles and adults makes life sentences without parole for juveniles cruel and inhuman punishment under Article 7 of the ICCPR.⁹⁴

C. The Lack of Rehabilitation of Juvenile Offenders Sentenced to Life without Parole Violates Articles 14(4) and 10(3) of the ICCPR

In order to comply with Articles 14(4) and 10(3) of the ICCPR, authorities must rehabilitate juveniles while in prison.⁹⁵ This comment examines rehabilitation facilities in adult prisons, since this is where most juveniles serving life without parole are located,⁹⁶ in order to demonstrate that the United States has violated Articles 14(4) and 10(3) of the ICCPR.⁹⁷ The lack of funding and availability of opportunities for higher education or vocational training are evidence of this

⁹² See e.g., *id.*

⁹³ COALITION FOR JUVENILE JUSTICE, *supra* note 85, at 46 (giving an example of a Georgia prison where, because of chronic staffing shortages, some adult inmates are given the job of patrolling the juvenile cells). These young prisoners have described incidents where adult prisoners reach through their cell bars to grab them, throw things on them and spit or toss mop water onto their food before handing it over. *Id.*

⁹⁴ See discussion *supra* Part I.B (writing that Article 7 protects all human beings from cruel inhuman or degrading treatment or punishment).

⁹⁵ See discussion *supra* Part I.B (laying out the text from Articles 10(3) and 14(4) of the ICCPR).

⁹⁶ COALITION FOR JUVENILE JUSTICE, *supra* note 85, at 45 (conceding that while in a few states youth with adult sentences are housed in juvenile facilities, this situation is relatively unique).

⁹⁷ See discussion *supra* Part I.B (providing background on the text of Article 14(4)); 72 C.J.S. PRISONS § 59 (2006) (noting that programs commonly understood to be rehabilitation programs in prisons are education and vocational training programs, as well as drug treatment programs).

violation.⁹⁸ Post-secondary education is only available to youth offenders serving life without parole if someone can pay the course fees, which tend to be beyond the means of most offenders' families.⁹⁹

This attitude about the lack of funding for prisoners serving life without parole extends beyond just the educational realm.¹⁰⁰ Due to scarcity of resources, some states have instructed their correctional systems to only invest in those who may rejoin society someday, and to disengage from those who never will.¹⁰¹ Not providing resources for vocational and educational opportunities for juveniles sentenced to life without parole, the two main sources of rehabilitation in United States prisons, is a clear violation of Articles 10(3) and 14(4).¹⁰²

⁹⁸ Higher Education Amendments of 1998, Pub. L. 105-244, § 821, 112 Stat. 1581 (1998) (stating that incarcerated youth must be under the age of twenty-five and within five years of release to acquire functional literacy, life, and job skills through the pursuit of a postsecondary education). Because of a recent cutback in the Pell Grant Program, federal government no longer provides funding only for the education of juveniles sentenced to life without parole. U.S. Dep't of Educ., Federal Pell Grant Program, <http://www.ed.gov/programs/fpg/index.html> (last visited Oct. 24, 2009) (explaining that "the Federal Pell Grant Program provides need-based grants to low-income undergraduate and certain post-baccalaureate students to promote access to postsecondary education").

⁹⁹ See, e.g., AMNESTY INT'L REPORT, *supra* note 2, at 69 (quoting a juvenile serving life without parole as saying, "I have received my GED. I also have graduated an eighteen-month program for behavior modification. It took twenty-eight months. I can do nothing else because the state offers nothing else for life without-ers, but I am working on college courses in criminal justice through [a] correspondence course which I pay for with the help of my family").

¹⁰⁰ See AMNESTY INT'L REPORT, *supra* note 2, at 82 (noting that in addition to the lack of education, the allocation of funds away from juveniles sentenced to life without parole causes them to be angry and violent, leading causes for many to use drugs or join prison gangs).

¹⁰¹ AMNESTY INT'L REPORT, *supra* note 2, at 72 (quoting two correction facilities officers, one from Pennsylvania and the other from California, as saying that they reserve vocational and educational programs primarily for prisoners awaiting release back into society due to a shortage of resources).

¹⁰² See discussion *supra* notes 98-99 and accompanying text.

D. Applying the Roper Analysis to Life without the Possibility of Parole Makes it Clear that Life Sentences without Parole for Juveniles Violate International Law

Before applying the *Roper* reasoning, it is important to note that the idea of treating juveniles differently than adults in the criminal justice system has been common in the United States for close to fifty years.¹⁰³ *Roper* has simply extended this idea from the pre-trial and trial phases of criminal procedure to the sentencing phase.¹⁰⁴ *Roper* cited three reasons why youth differ from adults and, thus, should not be subjected to the death penalty.¹⁰⁵ The Court in *Roper* also pointed out that courts usually rely on legislatures to take into account these same factors that require the reduced culpability of youth when considering sentencing juveniles to life without parole, but like in death penalty cases the Court found that there is a danger that this is not occurring.¹⁰⁶ Judges and juries see the brutal nature of the crime, causing them to ignore the diminished culpability that should be a deciding factor in the sentencing of juvenile offenders.¹⁰⁷ The same can be said for

¹⁰³ See *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (suggesting that the assessment of the voluntariness of the confessions of juvenile deserves a higher level of scrutiny than is appropriate for adults, due to inevitable differences between juveniles and adults).

¹⁰⁴ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (outlining the developmental differences between juveniles and adults that are the basis for their reduced culpability in the commission of crimes).

¹⁰⁵ *Id.* at 569-70 (relying on evidence of developmental differences between children and adults to demonstrate that juveniles do not possess the extreme culpability that must exist when a person is sentenced to the death penalty). The Court cited its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which allowed for an entire category of individuals, such as the mentally retarded to be “categorically less culpable” than the average criminal. *Roper*, 543 U.S. at 567 (inferring that juvenile could also be a category of individuals that are less culpable for their crimes).

¹⁰⁶ *Id.* at 572-73 (rejecting the argument that jurors be allowed to consider mitigating arguments related to youth on a case-by-case basis and to impose the death penalty if justified).

¹⁰⁷ *Id.* at 573 (determining that an unacceptable likelihood exists that the brutal nature of a juvenile’s crime could overpower mitigating arguments based on youth as a matter of course, even where the juvenile’s objective

sentencing juveniles to life without parole, as well as any other sentence.¹⁰⁸

However, life without parole is unique in that it does not take into account the developmental factors the *Roper* decision articulates.¹⁰⁹ This more developed sense of responsibility and increased ability to resist negative influences, therefore, could change the likelihood that the offender will commit another heinous crime.¹¹⁰ However, unlike other sentences, life without parole does not take into account this possibility.¹¹¹ Thus if courts were to apply *Roper*'s reasoning in doling out these sentences it would evident why the United States should outlaw life sentences without parole for juveniles.¹¹²

E. International Case Law has Used Reasoning Similar to Roper to Find the Sentence of Life without Parole for Juveniles Illegal Under International Law

The ECHR has put forth reasoning similar to that in *Roper* and *Naovarath* in finding life without parole unlawful for juvenile offenders.¹¹³ Similar to the Court's holding in

immaturity, vulnerability, and lack of true depravity should require a sentence less than death).

¹⁰⁸ *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (suggesting that society only has a right to more limited retribution against a child offender than an adult offender).

¹⁰⁹ *Roper*, 543 U.S. at 551, 572 (implying that juveniles become less susceptible to peer pressure and less likely to make ill-considered decisions as they age).

¹¹⁰ *See id.* at 570 (speculating that it is likely that a minor will reform his or her "character deficiencies").

¹¹¹ *Naovarath*, 779 P.2d at 948 (distinguishing life without parole from other lesser sentences based on the high "degree of retribution [of this sentence] represented by [its] hopelessness").

¹¹² *Roper*, 543 U.S. at 573 (demonstrating that the fact finder's inability to take into account the offender's diminished culpability coupled with the fact that the offender is likely to change in the future make death sentences for juveniles unconstitutional).

¹¹³ *T. v. United Kingdom*, 170 Eur. Ct. H.R. (1999) ¶ 41 (establishing that "a policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy").

Roper, in *Hussain v. United Kingdom* the ECHR held that the court could not sentence a juvenile to life without parole for purposes of retribution or deterrence,¹¹⁴ The development of the adolescent brain was key to the ECHR's decision.¹¹⁵

In the more recent case, *T v. United Kingdom*, the ECHR again noted the illegality of the sentence of life without the possibility of parole for juvenile offenders.¹¹⁶ In this decision, the ECHR directly cited article 14(4) of the ICCPR.¹¹⁷

Although it is true that no one can be sure if the factors that caused the juvenile to commit his crime will change, or if the likelihood of committing a crime will decrease for all offenders, but rather than not giving juveniles another chance,

¹¹⁴ *Hussain v. United Kingdom*, 22 Eur. Ct. H.R., ¶ 53 (holding that an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public, and that such considerations should center on an assessment of the young offender's character and mental state); *Roper*, 543 U.S. at 572 (concluding that neither retribution nor deterrence provide adequate justification for imposing the death penalty on juvenile offenders).

¹¹⁵ *Hussain*, Eur. Ct. H.R. at ¶ 53 (declaring that a failure to have regard for the changes that inevitably occur with maturation would mean that young persons detained would be treated as having forfeited their liberty for the rest of their lives which might well violate the prohibition against torture, inhuman, or degrading treatment or punishment); *Roper*, 543 U.S. at 570 (concluding that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient [because,] as [they] mature, the impetuosity and recklessness" may subside (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993))).

¹¹⁶ *T. v. United Kingdom*, 170 Eur. Ct. H.R. (1999) ¶ 41 (insisting that "a policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy").

¹¹⁷ *See id.* at ¶ 46; *Roper*, 543 U.S. at 578 (demonstrating the weight of international law, specifically the ICCPR, in the Supreme Court's decision to outlaw the death penalty for juveniles and thus showing that the United States grants similar weight to international human rights law to that of the ECHR).

a parole board could make those decisions further down the road.¹¹⁸

E. Domestic Case Law in the United States has Found the Sentence of Life without Parole for Juveniles to be Unconstitutional Under the Eighth Amendment and, in Cases where the Court has Upheld the Sentences, the Reasoning is Either Distinguishable or Invalid

In *Naovarath v. State*, the Nevada Supreme Court applied reasoning akin to *Roper* and the ECHR cases for banning life without parole in the case.¹¹⁹ Similar to *Hussain*, the court stated that the purposes of deterrence and retribution were not served by sentencing a juvenile to life without the possibility of parole.¹²⁰

However, other case law has upheld life sentences without parole for juveniles based on the proposition that the sentence deters juveniles from committing future crimes.¹²¹ In

¹¹⁸ Cf. *Hussain v. United Kingdom*, 22 Eur. Ct. H.R. (1996) ¶ 53 (finding that a juvenile offender's dangerousness to society is a characteristic that is susceptible to change over time).

¹¹⁹ See *Naovarath v. State*, 779 P.2d 944, 948-49 (Nev. 1989) (finding that the sentence of life without parole for juvenile offenders violates the Eighth Amendment); discussion *supra* note 112 (detailing arguments that the judges made in *Roper* and *Hussain* which were similar to the one the court made in *Naovarath* regarding the effect of childhood development on the sentencing of juveniles).

¹²⁰ *Naovarath*, 779 P.2d at 948 (stating that "given the undeniably lesser culpability of children for their bad actions, their capacity for growth and society's special obligation to children, almost anyone will be prompted to ask whether *Naovarath* *deserves* the degree of retribution that the hopelessness of a life sentence without the possibility of parole [represents], even for the crime of murder" (emphasis in original)); *id.* (deciding that "it is hard to claim" that it is possible to deter juveniles with the threat of life in prison without parole, since juveniles are not capable of making the "cost-benefit analysis that attaches any weight to the possibility" of future punishment" (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

¹²¹ *State v. Green*, 502 S.E.2d 819, 830-31 (N.C. 1998) (finding that the state legislature could conclude that the threat juvenile crimes pose to the individual and society is "momentous enough to warrant the deterrence and degree of retribution of" a life sentence without parole (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991)).

State v. Green, the court found that the legislature had an adequate reason stated in its legislative history to keep the sentence of life without parole for juvenile offenders, and that the punishment did not violate the Eighth Amendment.¹²² The court stated that there was clear public concern about the recent increase in crime, and that this was why the state decreased the age at which a juvenile could be treated as an adult.¹²³ However, this legislative reasoning does not take into account any of the reasoning the Supreme Court put forth in *Roper* regarding the development of juveniles.¹²⁴ The prevention of crime and deterrence, while undoubtedly important objectives, will not be furthered by allowing juveniles to be sentenced to life without parole.¹²⁵ As the court stated in *Naovarath*, the same factors that make juveniles less culpable than adults also render them less capable of being deterred by future punishments.¹²⁶ Thus, the sentence of life without parole for juveniles does not serve the deterrent function of punishment.¹²⁷

III. Recommendations

Given international standards, coupled with the fact that a sentence of life without parole for juveniles does not serve any deterrent purpose as a punishment, the United States, as both individual states and as a whole, must take affirmative action in the form of either a judicial decision or

¹²² *Green*, 502 SE.2d at 829-30 (considering the long history of courts granting deference to state legislatures with regard to matters of criminal law).

¹²³ *Id.* (presuming that treating a juvenile as an adult includes allowing a court to sentence a juvenile to life without parole).

¹²⁴ *See Roper v. Simmons*, 543 U.S. 552, 569-70 (2005) (delineating the developmental reasons that juveniles are different from adults).

¹²⁵ Levesque, *supra* note 20, at 1581 (dismissing public opinion on this matter as “misinformed”).

¹²⁶ *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (writing that juveniles do not make the type of “cost-benefit analysis that attaches any weight to the possibility’ of future punishment” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)); *see also Roper*, 543 U.S. at 570-71 (applying the same reasoning in finding the death penalty for juveniles to be unconstitutional under the Eighth Amendment).

¹²⁷ *Id.* at 571.

legislation outlawing the sentence of life without parole for juveniles in order to comply with the ICCPR.¹²⁸ Alternatively, the United States must, at the very least, ensure all juveniles are completely separated from adults in prison and that there is adequate rehabilitation for all juveniles in prison in order to comply with Articles 10(3) and 14(4) of the ICCPR.¹²⁹

A. Supreme Court Decision or Legislation Banning Life Sentences without Parole for Juveniles

The best remedy for the United States' violations of the ICCPR would be a Supreme Court decision outlawing the sentence of life without parole for juvenile offenders.¹³⁰ Not only would this bring the United States into compliance with the ICCPR, but it would also show a greater respect for international law by the United States and would avoid increasing charges of hypocrisy from countries around the world.¹³¹ Alternatively, states should enact legislation banning life without parole for juveniles.¹³² The states are better suited

¹²⁸ See discussion *supra* Parts II.B-C (concluding that the sentence of life without parole for juveniles violates the ICCPR); discussion *supra* Part II.F (demonstrating that sentencing juveniles to life without parole is not an effective method of deterring these individual from committing crimes).

¹²⁹ See discussion *supra* Part I.B. (detailing the text of Articles 10(3) and 14(4)).

¹³⁰ See, e.g., *Naovarath*, 779 P.2d at 949 (exemplifying a judicial decision outlawing the sentence of life without parole for juveniles); cf. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). A decision with similar reasoning to *Roper*, using similar arguments about the development of children and citing to international law would be the ideal remedy for the present situation of the United States.

¹³¹ *Brown and de La Vega*, *supra* note 21, at 770 (noting that “[t]he United States has made statements” that all Americans enjoy “the individual rights and freedoms set forth in the ICCPR” under the Constitution, federal law, and state law). Clearly this is not true since the sentence of life without parole for juveniles violates Article 7, 10(3) and 14(4) of the ICCPR. See discussion *supra* Parts II.B-C.

¹³² See, e.g., AMNESTY INT’L REPORT, *supra* note 2, at 89 (providing examples of states that proposed legislation eliminating life sentences without the possibility of parole for juvenile offenders). In 2005, Colorado considered legislation that would have eliminated this sentence by giving judges the ability to periodically re-examine a juvenile’s progress in prison. *Id.*

to implement this legislation because this is where most legislation regarding criminal sentencing is already created.¹³³ This is not a suggestion that all juveniles must be released at some point, but instead a suggestion that the possibility should always be considered.¹³⁴

B. Legislation Regulating and Improving Youth Rehabilitation Programs in Prisons and Separation of Juvenile Prisoners from Adult Prisoners

If the United States does not abolish the sentence of life without parole for juveniles, it cannot comply with the ICCPR.¹³⁵ “Rehabilitation” means that it is essential that incarcerated juveniles be given another chance to be productive members of society.¹³⁶ While this comment acknowledges that this may not be possible for all juveniles, sentencing a minor to life imprisonment without parole gives him or her absolutely no chance of rehabilitation.

The United States can come into further compliance with Articles 10(3) and 14(4) by passing legislation regulating the rehabilitation of prisoners.¹³⁷ In order to comply with

¹³³ 21 AM. JUR. 2D *Criminal Law* § 12 (2009) (stating that the power to define and punish crimes is a part of the state’s sovereign power to maintain order); *see also* State v. Green, 502 S.E.2d 819, 829 (N.C. 1998) (citing State v. Cradle, 188 S.E.2d 296, 303 (N.C. 1972) (granting substantial deference to the state legislature to decide the proper punishment for individuals convicted of a crime)).

¹³⁴ *See Naovarath*, 779 P.2d at 948 (arguing that “the parole board is best suited to make this judgment” sometime in the future, as opposed to the trial judge).

¹³⁵ *See* ICCPR, *supra* note 4, Art. 14(4) (mandating that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation); discussion *supra* Part II.C (demonstrating that the sentence of life without parole does not promote rehabilitation, which must be the essential aim of the punishment of juveniles according to Article 10(3) of the ICCPR).

¹³⁶ T. v. United Kingdom, 170 Eur. Ct. H.R., ¶ 46 (holding that life without parole for a juvenile offender does not take into account the idea of rehabilitation as put forth in the ICCPR).

¹³⁷ *See* discussion *infra* Part III.B.

Articles 10(2)(b) and 10(3) of the ICCPR,¹³⁸ the United States should implement legislation requiring that prisons and jails house juveniles serving life sentences without parole separately from adult inmates.¹³⁹ The United States should implement this legislation at the state level since the state usually deals with criminal law.¹⁴⁰ This legislation could either place these juveniles in juvenile facilities, or create completely separate housing facilities with their own dining rooms and common areas for juveniles within adult facilities.¹⁴¹

In order to comply with Article 14(4) of the ICCPR, the United States must change the way in which it treats its juvenile offenders.¹⁴² Legislation should require that incarcerated youth receive regular, special, and vocational education services in accordance with the state law for public schools, the rules and regulations of the state board of education, the regulations of the Fourteenth Amendment of the U.S. Constitution, and the Individuals with Disabilities Education Act (IDEA).¹⁴³ This is imperative – whether or not

¹³⁸ ICCPR, *supra* note 4, Arts. 10(2)(b), 4, Art. 10(3) (declaring that “accused juvenile persons shall be separated from adult and brought as speedily as possible for adjudication” and “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation and juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status”).

¹³⁹ See discussion *supra* Part II.C.

¹⁴⁰ See *supra* note 133 and accompanying text.

¹⁴¹ See, e.g., DEP’T OF JUSTICE REPORT, *supra* note 16, at 58 (noting that when New York State reduced the age for being tried as an adult from 18 to 16, the department “established the Adolescent Reception and Detention Center (ARDC) at Rikers Island in East Elmhurst, New York, to hold young male adults, 16 to 18 years old [.]” and that this center still serves the same purpose today).

¹⁴² ICCPR, *supra* note 4, Art. 14(4).

¹⁴³ See DEP’T OF JUSTICE REPORT, *supra* note 16, at 67 (recommending that all prisons and jails offer youth “an average of 5.5 hours of daily instruction, 5 days a week, by qualified teachers, in an environment that facilitates learning”). Additionally, “youth ought to be assigned to grade levels with curricula that are in accordance with their educational level, and they should receive academic credit for their educational achievements.” *Id.*; see also *id.* at 58-9 (discussing the program at the

the United States chooses to ban the sentence of life in prison without parole. If the United States bans the sentence of life without the possibility of parole, education will help these juveniles become more productive members of society if and when they are released from prison.¹⁴⁴ If the sentence remains, an education can give them a sense of accomplishment and allow them to interact with other inmates and their teachers in a positive manner. Further it can potentially decrease feelings of hopelessness and isolation, thereby making the sentence less cruel and inhuman, according to Article 7 of the ICCPR, as well as rehabilitative, as Article 14(4) requires.¹⁴⁵

Finally, legislation should require that prisons provide mental health and social services to assist youth offenders in adjusting to prison conditions, as well as in coping with the length of their sentences.¹⁴⁶ This would help with the feelings

Adolescent Reception and Detention Center and Rose M. Singer Center at Riker's Island where the prisons provide juveniles sentenced as adults with New York City teachers and require them to attend classes each day).

¹⁴⁴ AMNESTY INT'L REPORT, *supra* note 2, at 67 (concluding that juveniles enter prison "during the years when education and skill development are most crucial"); *cf.* COALITION FOR JUVENILE JUSTICE, *supra* note 85, at 84 (telling the story of a 16-year-old offender who was sent to an Arizona prison "for getting high on carburetor cleaner"). Because "he already had two juvenile felony convictions—both of them for nonviolent offenses—his transfer into the adult system was automatic." *Id.* When he served his sentence, "he was returned to society with no job skills and the same eighth-grade education with which he entered the system." *Id.* He was not able to find a job and "lasted only two months in the community before committing an armed robbery." *Id.* (noting that "at age 20, Cortez is serving a sentence of seven and a half years").

¹⁴⁵ See Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 539 (1997); discussion *supra* Parts I.B and II.B (setting out the text of Articles 7 and 14(4) of the ICCPR and arguing that the isolation juveniles face in prison is part of what makes the sentences of life without parole for juveniles a violation of Article 7 of the ICCPR); discussion *supra* Part II.C (positing that the lack of education for juveniles serving life without parole in the United States is a violation of Article 14(4) of the ICCPR).

¹⁴⁶ See Haney, *supra* note 145, at 579 (finding that "[f]or many disturbed offenders, it appears that criminality is a problem that is secondary to their legitimate psychological difficulties" (quoting Kenneth Adams, *Who are*

of increased hopelessness and thoughts of suicide brought on by a sentence of life without the possibility of parole, as well as giving juveniles a different way of coping with the stresses of imprisonment.¹⁴⁷ These are some of the factors of a life sentence without parole that make it cruel and inhuman under Article 7 of the ICCPR; correcting these problems would bring the United States into compliance with the provision.¹⁴⁸

IV. Conclusion

Criminal procedure in the United States should treat juveniles and adults differently in terms of determining a sentence, and once that sentence is determined, with regard to implementing that sentence.¹⁴⁹ It is important to treat these populations differently because of the differences in juvenile development that make juveniles less culpable for their conduct.¹⁵⁰

It is clear that the United States should not subject juveniles to the sentence of life without the possibility of parole: such a sentence completely rejects the idea of rehabilitation in violation of Article 14(4) and 10(3); it imposes a sentence on people who likely cannot understand what that sentence means;¹⁵¹ and it places these children in

the Clients? Characteristics on Inmates Referred for Mental Health Treatment, 72 PRISON J. 120, 134 (1992)); *see, e.g.*, DEP'T OF JUSTICE REPORT, *supra* note 16, at 59 (discussing the program at the Adolescent Reception and Detention Center and Rose M. Singer Center at Riker's Island which provides mental health services to juveniles, including group, individual, and family counseling, in addition to regular social services).

¹⁴⁷ Haney, *supra* note 145, at 539.

¹⁴⁸ *See* discussion *supra* Part II.B (arguing that the isolation and loneliness related to the sentence play a major role in making life without parole for juveniles cruel and inhuman in violation of Article 7 of the ICCPR).

¹⁴⁹ *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (instructing that when, as in this case, a mere child--an easy victim of the law--is before the court, special care in scrutinizing the record must be used).

¹⁵⁰ *See Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

¹⁵¹ *See Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (speculating that an appreciation of the difference between sentences of life with and life without the possibility of parole will not deter a thirteen-year-old child's homicidal conduct).

prison with adults,¹⁵² which is extremely detrimental to both their physical and mental health in violation of Article 7 of the ICCPR.¹⁵³ Both international and domestic case law have held that a life sentence without parole for juveniles is cruel and inhuman based on what is known about childhood development.¹⁵⁴ The United States should take action by abolishing or passing legislation regulating the sentence of life without parole for juveniles in order to come into compliance with the ICCPR.

¹⁵² See DEP'T OF JUSTICE REPORT, *supra* note 16, at 4 (stating that of 107,000 youth incarcerated, 14,500 are placed in adult facilities).

¹⁵³ COALITION FOR JUVENILE JUSTICE, *supra* note 85, at 45 (noting that when courts place youth in prison with adults, they are particularly vulnerable to depression, sexual exploitation and physical assault).

¹⁵⁴ *Id.*