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Recommended Citation

Robert Johnson, & Sonia Tabriz, *Death By Incarceration as a Cruel and Unusual Punishment When Applied to Juveniles: Extending Roper to Life Without Parole, Our Other Death Penalty*, 9 U. Md. L.J. Race Relig. Gender & Class 241 (2009).

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**DEATH BY INCARCERATION AS A CRUEL AND UNUSUAL
PUNISHMENT WHEN APPLIED TO JUVENILES:
EXTENDING *ROPER* TO LIFE WITHOUT PAROLE,
OUR OTHER DEATH PENALTY**

ROBERT JOHNSON, PH.D.*

AND SONIA TABRIZ**

I. INTRODUCTION

In *Roper v. Simmons*,¹ the United States Supreme Court held that juveniles² could not be subjected to the death penalty.³ The Court emphasized that the well-documented immaturity of juveniles makes them less culpable for their crimes and less easily deterred by the threat of punishment.⁴ The Court also stressed the unformed characters of juveniles, which raised the possibility of reform and even forgiveness for their crimes⁵—neither reform nor forgiveness is possible with a final and irrevocable punishment such as execution, because ending a juvenile’s life prevents him from attaining “a mature understanding of his own humanity.”⁶ Finally, the Court emphasized “evolving standards of decency” as evidenced by a number of state legislatures prohibiting the execution of juveniles and the increasingly rare execution of juveniles in states where capital sentences are permissible.⁷ For these reasons, the Court held that death by execution,

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1. 543 U.S. 551 (2005).

2. Juveniles are offenders who committed their crimes before turning eighteen. *See id.* at 574–75.

3. *Id.* at 568.

4. *Id.* at 569–71.

5. *Id.* at 570.

6. *Id.* at 574. The Court emphasizes that “there are two distinct social purposes served by the death penalty: ‘retribution and deterrence of capital crimes by prospective offenders.’” *Id.* at 571. As noted, these apply to juveniles with “lesser force” due to their “diminished culpability.” *Id.* at 572. Significantly, while the Court does not categorize reform or forgiveness as formal penological objectives, it is implied that, in principle, they are possible with any punishment that offers a chance for the person to attain a “mature understanding of his own humanity,” which requires at least the prospect of reentry into the free society. *Id.* at 574. *See also* ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 314–321 (3rd ed. 2002).

7. *Roper*, 543 U.S. at 567. (“As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of

when applied to juveniles, is cruel and unusual punishment and violates the Eighth Amendment to the Constitution of the United States.⁸

In this article, we maintain that the Eighth Amendment also prohibits sentencing juveniles to life without parole because this sanction is a death sentence in its own right. A sentence of life without parole amounts to “death by incarceration”⁹ since offenders are sentenced to die in prison, making this sanction “our other death penalty.”¹⁰ Our justice system should not subject juveniles to death by incarceration for the same reasons that the Court in *Roper* prohibited the use of death by execution with juveniles. It is well established and accepted by the Court that, as a class, juveniles are inherently immature, impulsive, and vulnerable to social pressure.¹¹ Their characters are not fully formed, and hence the Court in *Roper* viewed them as capable of change, and deserving of the opportunity to change.¹² These inherent attributes of adolescents reduce the culpability of juveniles and their susceptibility to deterrence,¹³ making a final and irrevocable sanction like death by incarceration fundamentally inappropriate.

Moreover, death by incarceration, like death by execution, denies juveniles the opportunity to mature and earn forgiveness for their transgressions. The Court in *Roper* held that juvenile offenders are inherently immature and irresponsible, but they often outgrow these characteristics in adulthood under normal social conditions.¹⁴

its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”) See also *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring) (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”).

8. U.S. CONST. amend. VIII. See also *Roper*, 543 U.S. at 560, 568.

9. Accordingly, we use interchangeably the terms “death by incarceration,” “life without parole” (abbreviated as “LWOP”), and “our other death penalty.” More often than not, we use the term death by incarceration to emphasize that it is death—whether by execution or incarceration—that is the intended result of America’s two death penalties. Also, we use the term “lifer” to refer to offenders serving a life-without-parole sentence.

10. Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America’s Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 THE PRISON J. 328 (2008), available at <http://tpj.sagepub.com/cgi/reprint/88/2/328.pdf>. See also EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14- YEAR-OLD CHILDREN TO DIE IN PRISON 4 (2008).

11. *Roper*, 543 U.S. at 569–71.

12. *Id.*

13. *Id.*

14. See *id.* at 570 (“[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity

However, prisons do not promote—and rarely even permit—this positive growth and maturation. Prisons are, by definition, settings of punishment, not forgiveness.¹⁵ A lifetime of prison, in other words, amounts to a lifetime of adolescent immaturity in a setting expressly designed to inflict punishment.

Finally, death by incarceration is the most common sentence imposed on adult capital murderers, since juries tend to select life without parole over death by execution.¹⁶ The rate at which juries select death sentences (death by execution) has dropped dramatically

and recklessness that may dominate in younger years can subside” (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1992))). *See also id.* (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood” (quoting Elizabeth S. Scott & Laurence Steinberg, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003))).

15. The modern prison is devoted to “warehousing, punishment, and retribution.” *See H. BRUCE FRANKLIN, PRISON WRITING IN THE 20TH CENTURY* 338 (Penguin, 1998). *See also* ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 3 (3rd ed. 2002); ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE*, 208–11 (2008).

16. *See* DEATH PENALTY INFORMATION CENTER, *FACTS ABOUT THE DEATH PENALTY* (September 17, 2009), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. *See also* AMNESTY INTERNATIONAL USA, *DEATH PENALTY TRENDS* (Aug. 2009), *available at* <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>. *See also* AMNESTY INTERNATIONAL USA, *EXECUTIONS BY STATE IN THE U.S.* (Sept. 22, 2009), *available at* <http://www.amnestyusa.org/death-penalty/death-penalty-facts/executions-by-state/page.do?id=1011590>. It is revealing that the State of Texas, which until recently did not allow capital juries to consider LWOP as an alternative to death by execution, has had far and away the highest rate of capital sentences and executions in the nation. *Id.* Uniformly, states that offered LWOP as a sentencing option have dramatically lower rates of capital sentences and executions. *Id.* *See also* Paul Purpura, *Surge in Death Penalty Prosecutions Slows in Jefferson Parish*, *THE TIMES-PICAYUNE* (New Orleans), Jul. 6, 2009, *available at* http://www.nola.com/news/index.ssf/2009/07/surge_in_capital_cases_slows_i.html. In the words of Denny Leboeuf of New Orleans, director of the ACLU’s John Adams Project, “Executions are down, death sentences are down, capital prosecutions are down...” *See also* Interview with Harun Shabazz, Death Penalty Defense Unit, Office of the Maryland State Public Defender’s Office (Jun. 17, 2009) (“since the LWOP sentencing option was introduced in Maryland in 1987, jurors are more likely to give a non-death sentence in a capital case. Moreover, prosecutors are more likely to enter a plea agreement in which the death notice is dropped. For instance, in Baltimore County, cases litigated under the old rules (with no LWOP sentencing option) resulted in a 44% death sentence rate. Subsequently, cases litigated under the new rule (with the LWOP sentencing option) resulted in a 19% death sentence rate.”). Thus, the experience in Maryland is that the rate of death sentences has dropped substantially since the introduction of life without parole as an option. *See also* DEATH PENALTY INFORMATION CENTER, *STUDIES: OHIO PROSECUTORS INCREASINGLY SEEKING LIFE WITHOUT PAROLE INSTEAD OF DEATH PENALTY* (citing A. Welsh-Huggins, *Ohio Prosecutors Using New Life Without Parole Option*, *AKRON BEACON J.*, Jun. 22, 2008) (“there has been a sharp drop in the use of the death penalty in Ohio as prosecutors are taking advantage of a new law allowing them to seek a sentence of life without parole without first pursuing the death penalty”).

while the popularity of death by incarceration has grown.¹⁷ This trend reaffirms the role of death by incarceration as our “other death penalty.” As such, death by incarceration should be excluded from use with juvenile offenders. Following the logic of *Roper*, lifetime incarceration is too severe a sanction for a juvenile offender who is less culpable than an adult offender and possesses an inherent ability to change under suitable conditions. We contend that a life sentence *with* the possibility of parole should constitute the most extreme sanction permissible for juvenile offenders. This sentence leaves open the opportunity for personal change, forgiveness, and ultimately, a chance at life in free society.

II. THE ESSENTIAL GOALS OF PUNISHMENT, RETRIBUTION AND DETERRENCE, CANNOT BE ACHIEVED BY DEATH BY INCARCERATION WHEN APPLIED TO JUVENILE OFFENDERS

Roper barred the execution of juveniles, in part, because juveniles as a class are inherently immature, impulsive, short-sighted, and vulnerable to social pressure.¹⁸ Moreover, their characters are not fully formed.¹⁹ In other words, juveniles are immature through no fault of their own; their personalities are works in progress.²⁰ By clear implication, juveniles can change and hence might one day earn forgiveness for their transgressions. As a result of these attributes, the Court in *Roper* determined that the two main purposes of punishment, retribution and deterrence, cannot be successfully achieved when the death penalty (death by execution) is applied to juveniles.²¹ Juveniles should not be subjected to final and irrevocable sanctions like the death penalty as a proportionate punishment for even the worst crimes.²² The death sentence will not effectively deter juveniles since they lack self-control.

17. AMNESTY INTERNATIONAL USA, DEATH PENALTY TRENDS (Aug. 2009), <http://www.amnestyusa.org/abolish/factsheets/DeathPenaltyFacts.pdf>.

18. *Roper*, 543 U.S. at 569 (“[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”).

19. *Id.* at 569–71.

20. See Andrew Von Hirsch, *Proportionate Sentences for Juveniles: How Different Than Adults?* 3 PUNISHMENT AND SOC’Y 221, 223 (2001).

21. *Roper*, 543 U.S. at 574.

22. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 131–39 (2008). By contrast, an adult who is merely immature is fully culpable for his actions. The immaturity of adult offenders is seen as an aggravating condition, adding to the likelihood of severe punishment.

We suggest that retribution and deterrence cannot be achieved by sentencing juveniles to death by incarceration, our other death penalty. Offenders sentenced to death by incarceration experience a civil death. By “civil death” we mean that “their freedom—the essential feature of our civil society—has come to a permanent end.”²³ Therefore, in the same way that the final and irrevocable nature of death by execution makes it an ill-suited and disproportionate punishment for juvenile offenders, the final and irrevocable nature of death by incarceration is too severe a sanction for juveniles as well.

The sentence of death by incarceration is explicitly designed to bring finality to life sentences by precluding the possibility of parole.²⁴ Under the sentence of death by incarceration, it can be said as a matter of law that “life means life” because these prisoners are slated to spend the remainder of their natural lives behind bars, gaining release only upon their deaths.²⁵ This sentence, like a death sentence, is final and absolute by its very terms. And while it is true that any sentence can be changed while the prisoner is alive, the fact that sentences of death by incarceration can, in theory, be changed during the life of the prisoner may lead some to infer that this sanction is not, in practice, final and irrevocable. But as we have noted, sentences of death by execution also can be changed during the life of the condemned prisoner, a life that can extend for many years (over twenty years on some death rows).²⁶

In fact, sentences of death by execution *are* changed often, because these sentences are frequently the subject of successful litigation. Some litigation, for example, has given rise to decisions that

23. Johnson, *supra* note 10, at 328–29 (2008).

24. ASHLEY NELLIS & RYAN KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 1, 4 (2009), available at http://www.sentencingproject.org/doc/publications/inc_noexit.pdf (“Even though life sentences [h]ave existed for a long time, historically they were generally indeterminate, with the possibility of parole to serve as an incentive for behavioral modifications and improvements . . . The expansion of LWOP sentencing in particular was intended to ensure that ‘life means life.’”).

25. See SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 37 (2005). Even so, prosecutors may try to raise doubts about whether life without parole really means that the prisoner is locked up for his life. Unless such doubts are directly addressed by the defense, there may be a tendency for jurors to doubt the finality of this sanction since, in principle, any sanction, including death by execution, can be changed at some point in the future. Similarly, some jurors are inclined to doubt the finality of death by execution because they doubt the finality of all sentences.

26. DEATH PENALTY INFORMATION CENTER, TIME ON DEATH ROW, <http://www.deathpenaltyinfo.org/time-death-row> (last visited Dec. 27, 2009) (“Death row inmates in the U.S. typically spend over a decade awaiting execution. Some prisoners have been on death row for well over 20 years.”).

emptied existing death rows²⁷ or removed certain classes of people from the purview of death by execution.²⁸ These various cases resulted in the release of thousands of formerly condemned prisoners into the general prison population with life or life without parole sentences.²⁹ Moreover, beyond the sweeping effects of changes in case law, sentences of death by execution are regularly overturned on an individual basis. Research reveals that as many as sixty percent of capital sentences are reversed on appeal, leading to sentences of life without parole (death by incarceration), life with parole, and, in some cases, to lesser, negotiated sentences or even acquittal.³⁰ There is no comparable body of cases that applies to sentences of death by incarceration, and existing evidence suggests that these sentences are rarely voided or changed for any reason.³¹ Thus, in practice, death by incarceration may well be *more* final and irrevocable than sentences of death by execution.³²

Offenders sentenced to death by incarceration, like prisoners condemned to death by execution, experience a final and irrevocable sentence that culminates in deaths that are untimely and undignified.³³ Long-term prisoners, and especially those serving terms of life without

27. See *Furman v. Georgia*, 408 U.S. 238 (1972). See also *Woodson v. North Carolina*, 428 U.S. 280 (1976).

28. See *Ford v. Wainwright*, 477 U.S. 399 (1986) (exempting the insane from the execution-eligible population). See also *Coker v. Georgia*, 433 U.S. 584 (1977) (exempting rapists); *Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting the mentally retarded); *Roper v. Simmons*, 543 U.S. 551 (2005) (exempting juveniles).

29. See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, 2007 – STATISTICAL TABLES (2007), <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st10.htm>. Of the 7,547 persons sentenced to death between 1977 and 2007, 3,228 (or 42.8%) have been removed from death row primarily because of successful appeals. *Id.* See generally JOAN M. CHEEVER, *BACK FROM THE DEAD: ONE WOMAN’S SEARCH FOR THE MEN WHO WALKED OFF AMERICA’S DEATH ROW* (2006).

30. See James S. Liebman, Jeffrey Fagen & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, ii–iii (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

31. See SUNDBY, *supra* note 25, at 38 (“[S]ince 1978 in California, no one has ever had a life sentence commuted to a lesser sentence.”).

32. See Paul Purpura, *Surge in Death Penalty Prosecutions Slows in Jefferson Parish*, THE TIMES-PICAYUNE (New Orleans), Jul. 6, 2009, available at http://www.nola.com/news/index.ssf/2009/07/surge_in_capital_cases_slows_i.html. The drop in death sentences, in the words of Jelpi Picou, executive director of the Capital Appeals Project in New Orleans, “reflects the emerging view that life without parole is an incredibly serious punishment and that juries, prosecutors, the public and family members of victims are increasingly preferring the certainty of [this] sentence over the confusions, delays, multiple retrials and high error rates that are inherent in capital cases.” *Id.*

33. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 151–63 (2nd ed. 1998).

parole, can be expected to experience poor health relative to their cohorts in the free world. This problem escalates dramatically after they reach the age of fifty, leading to shortened life expectancies and early deaths.³⁴ Most of these prisoners die “alone, unmourned, a disgrace in the person’s own eyes as well as in the eyes of society.”³⁵

34. See James W. Marquart, Dorothy E. Merianos & Geri Doucet, *The Health Related Concerns of Older Prisoners: Implications for Policy*, 20 *AGING & SOCIETY* 79, 85 (2000). See also Seena Fazel et al., *Health of Elderly Male Prisoners: Worse than the General Population, Worse than Younger Prisoners*, 30 *AGE & AGEING* 403, 404–06 (2001), available at <http://ageing.oxfordjournals.org/cgi/reprint/30/5/369.pdf>.; CHRISTOPHER J. MUMOLA & MARGARET E. NOONAN, U.S. DEP’T OF JUSTICE, DEATHS IN CUSTODY STATISTICAL TABLES 15 (2009), available at <http://www.ojp.usdoj.gov/bjs/dcrp/dcst.pdf>; Melonie Heron et al., *Deaths: Final Data for 2006*, NAT’L VITAL STATISTICS REP., Apr. 17, 2009, at 1, 22, available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf. (For a six year period (2001-2006), the annual average rate of illness-related death in state prison rose sharply from thirty per 100,000 for inmates aged twenty-five to thirty-four, to 118 per 100,000 for those aged thirty-five to forty-four, and then up to 493 deaths per 100,000 for those forty-five to fifty-four and quadrupling again to 1,987 per 100,000 for those fifty-five and over. The comparable mortality rate for Americans in the free world for men fifty-five and over is 659.7 per 100,000, or fully two thirds lower than the prison rate. The older prisoners dying in prison today are not primarily prisoners serving LWOP, but these mortality figures suggest that this is the death rate those prisoners will likely experience as they age.); Brie Williams & Rita Abralades, *Growing Older: Challenges of Prison and Reentry for the Aging Population*, in *PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES* 56, 56, 58–59, 61–64 (Robert Greifinger ed., 2007). Although prisoners have complicated health histories and the delivery of health care services in prison is an immensely challenging undertaking, these statistics are nevertheless troubling.

35. Johnson, *supra* note 10, at 344. See also RONALD H. ADAY, *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS* 128 (2003); John Corley, *Life in Four Parts: A Memoir, in EXILED VOICES: PORTALS OF DISCOVERY – STORIES, POEMS, AND DRAMA BY IMPRISONED INMATES* 41, 53–54 (Susan Nagelsen ed., 2008). Anecdotal evidence on untimely and undignified deaths in prisons can be quite compelling. Describing the frequency of death in Angola prison in a recent seven-year period, LWOP inmate John Conley observed the following: “196 prisoners died in Angola, an average of about 30 per year. Five were killed by the state, two were killed by other inmates, four killed themselves. The 185 others, average age slightly over fifty, died of a variety of ailments and diseases. Seven were thirty or younger; the youngest was nineteen. Nineteen were over seventy, the oldest eighty-three.” The grim circumstances of these deaths were described as follows: “They died from the recklessness and deprivation of their pasts, the drugs and booze, the poverty leading to undiagnosed health conditions. They died because years of continuous incarceration sucked the very life from them, slowly, a day at a time, a torment worse than an inquisitorial persecution. They died in dark rooms behind locked doors calling for their mamas.” *Id.* at 53. See also Marilyn Buck, *Dear Liz*, 30 *FEMINIST STUD.* 274 (2004). The horrors of a death in prison are the subject of prisoner poetry, including a poem by Marilyn Buck, an LWOP inmate (a “lifer”), called “Dear Liz”: “we talked of death / there was no one else who would / talk of death makes people nervous / tongues stutter / we are all dying every day / you told me you wanted to scream / you’re not dying / like I’m dying / alien forms feed on my flesh / they are nearly finished.” See also Marilyn Buck, *Not a Life Sentence*, 30 *FEMINIST STUD.* 276 (2004). Buck’s “Not a Life Sentence” is about a woman serving a short term who dies before her sentence ends due to poor medical care, a chronic complaint of prisoners: “only a few years to do / the prisoner’s health crumbles / their complaints callously dismissed / shut up in correction’s closets / only a year left to do / the prisoner dies.” *Id.* Often, prisoners are

In cases of death by incarceration as well as death by execution, death is the intended and expected outcome of the sentence. With both sanctions, death is untimely because it is hastened by the actions of the state. These deaths are also undignified, occurring with the stigma of dying in the intrinsically degrading conditions of America's maximum security prisons.³⁶

Death by incarceration is a death sentence and should therefore be reserved, alongside death by execution, for the worst offenders. Today, as a practical matter, we restrict death by execution to adults convicted of capital murder.³⁷ If we maintain this restriction with sentences of death by incarceration, we would achieve retributive justice: culpable adult capital murderers would give their civil lives—permanently forfeiting their freedom—in return for the natural lives they have taken.³⁸ Any other application of the sentence of death by incarceration would be unjustified; the punishment would be excessive and therefore disproportionate to the crime committed. By this reckoning, we argue that death by incarceration should be reserved for the crime of capital murder committed by an adult offender, subject to the procedural safeguards attendant to capital trials.³⁹ Much of the Supreme Court's death penalty jurisprudence is premised on the notion that "death is different," meaning that death is uniquely final, irrevocable, and severe.⁴⁰ It is our contention that death by execution is different from other sanctions in essentially the same way that death by incarceration is different from other sanctions.

demonized even in death, dying in shackles, in isolation from even the few friends they may have made in prison. See Margeret Ratcliff, *Dying Inside the Walls*, 3 J. PALLIATIVE MED. 509, 509-11 (2000). See also ERIN GEORGE, *A WOMAN DOING LIFE* (forthcoming 2010).

36. See Robert Johnson, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 647, 661-65 (James R. Acker et al. eds., 2d ed. 2003); VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 184-86, 193-94, 222 (quoting Robert Johnson & Ania Dobrzanska eds., Oxford Univ. Press 4th ed. 2009) (1996).

37. See DEATH PENALTY INFORMATION CENTER, *DEATH PENALTY FOR OFFENSES OTHER THAN MURDER*, <http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder> (last visited Dec. 27, 2009). There are capital crimes on the books other than murder, but no one has been executed for a crime other than murder since the reinstatement of the modern death penalty in 1976. *Id.*

38. See Robert Johnson, *A Life for a Life?*, 1 JUST. Q. 569, 577-78 (1984); see also JOHNSON, *supra* note 33, at 242-43.

39. See Johnson, *supra* note 10, at 344; see also *Gregg v. Georgia*, 428 U.S. 153, 188 (1975); Hugo Adam Bedau, *Death is Different: Studies*, in *THE MORALITY, LAW AND POLITICS OF CAPITAL PUNISHMENT* 4 (1987).

40. See also *Gregg*, 428 U.S. at 188; Bedau, *supra* note 39, at 4.

For our purposes here, it is clear that the sentence of death by incarceration should be strictly prohibited for *any* juvenile crime, no matter how severe. The Court in *Roper* offers support for this proposition: “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”⁴¹ Death by incarceration is one of the two most severe penalties prescribed by the law—each a form of death penalty. Therefore, based upon the Court’s own reasoning in *Roper*, this sanction should be prohibited with regard to juvenile offenders.

The sentence of death by incarceration also fails to serve as a viable deterrent, which was another primary purpose of punishment considered by the Court in *Roper*, in the same way that death by execution fails to serve as a viable deterrent.⁴² Life without parole is, of course, a severe sanction, but the Court made no effort to argue that juveniles would be deterred by this sanction any more effectively (or ineffectively) than by a sentence of death. The opposite is likely true, based upon the reasoning of the Court. Death by incarceration involves a death in prison that will be, in many cases, even more distant in time, and hence more abstract and psychologically remote to juveniles than death by execution.

The Court pointed to the inherent immaturity and impulsivity of juveniles to explain why they are less culpable for their crimes and less likely to be deterred by the threat of punishment.⁴³ By the same token, juveniles are also unlikely to be deterred by the threat of death by incarceration. Because juveniles are characterized by “an underdeveloped sense of responsibility,”⁴⁴ they are far less likely to have performed an intricate cost-benefit analysis—a characteristic of a mature adult—prior to committing their crime. It is also unlikely that a juvenile can fully comprehend the absolute nature of a death penalty, whether by incarceration or by execution. Death by incarceration is a final and irrevocable sanction that unfolds over years or even decades in captivity, culminating in an untimely, undignified, and often

41. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

42. Juveniles have been recognized by the Court as unlikely to employ “the kind of cost-benefit analysis that attaches any weight to the possibility of execution.” *Id.* at 561–62. The Court did note that any “residual deterrent effect” of the death penalty was not lost since “the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” *Id.* at 572.

43. *Id.* at 569–71.

44. *Id.* at 569.

physically painful death due to violence or debilitating illness.⁴⁵ These deaths are, in our view, likely more painful and perhaps even less dignified than deaths by execution. We wonder if the typical adult offender can fully appreciate the enormity of death by incarceration and the nature of death in confinement at some unknown but often distant point in the future. If adult felons are unlikely to fully comprehend the sentence of death by incarceration, surely it is beyond a juvenile's comprehension.

As the plurality held in *Thompson v. Oklahoma*,⁴⁶ an earlier Supreme Court case prohibiting the execution of juveniles ages fifteen and under, the notion of deterrence among juveniles is "so remote as to be virtually nonexistent."⁴⁷ Successful deterrence requires that the potential offender possess a fully developed and rational mind. *Thompson* and, subsequently, *Roper*, which extended the ban on executions to all juveniles, demonstrates that the Court has agreed that juveniles are, by nature, immature in their thoughts and actions, and hence incapable of grappling with the sorts of concepts and ideas that would lead to deterrence.⁴⁸ Thus, deterrence not only fails to provide an adequate justification for sentencing juveniles to death by execution, but also fails to provide an adequate justification for sentencing juveniles to death by incarceration.

III. DEATH BY INCARCERATION FAILS TO PROVIDE JUVENILE OFFENDERS WITH A CHANCE AT REFORM AND FORGIVENESS

In keeping with the Court's contention in *Roper*, all juvenile offenders, no matter how serious their crimes, should be afforded the possibility of reform. According to *Roper*, "the signature qualities of youth are transient: as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."⁴⁹ As a result, "a greater possibility exists that a minor's character deficiencies will be reformed."⁵⁰

45. Violence (including suicide) and illness (including AIDS) are the main causes of death in prison. See CHRISTOPHER J. MUMOLA & MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, DEATHS IN CUSTODY STATISTICAL TABLES 3 (2009), available at <http://www.ojp.usdoj.gov/bjs/dcrp/dst.pdf>.

46. 487 U.S. 815 (1988).

47. *Roper*, 543 U.S. at 572.

48. *Id.* at 561; *Thompson*, 487 U.S. at 835.

49. *Roper*, 543 U.S. at 570.

50. *Id.*

A sentence of death by incarceration would preclude reform⁵¹ and the possibility to earn forgiveness, which *Roper* also found true of death by execution.⁵² Prisons are not settings of forgiveness. Nor are they settings in which young persons can mature into responsible, moral adults. Prisons are monuments to punishment and exclusion, and the code of life in prison embodies the exact sort of immaturity, impulsivity, and aggression that the Court in *Roper* claims that juveniles may overcome if given suitable punishments.⁵³ Under present sentencing practices, however, juveniles as young as thirteen years old, some of them first time offenders, have been sentenced to death by incarceration.⁵⁴ To deny juveniles, as a matter of law, any hope that they may one day escape the moral cesspool that is prison, is to condemn them to a lifetime of extreme suffering that is ended only by their deaths. More importantly, to deny them even the opportunity to be heard by a parole board is to ignore the most basic premise upon which the Court in *Roper* ruled: “When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”⁵⁵

A sentence of death by incarceration extinguishes the juvenile’s life in a free society, condemning him to a mere existence in the often brutal netherworld of prison. A life relegated to prison, where emotional immaturity is the norm, effectively extinguishes the juvenile’s potential to attain “a mature understanding of his own humanity.”⁵⁶ As they age, juveniles serving life without parole can

51. *Id.* at 569–71.

52. *Id.*

53. See ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 19–20, 135–55 (Wadsworth Publ’g Co. 3rd ed. 2002) (1986). See also VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 77, 112–14, 148–51, 159–64, 195, 217–18, 223–24 (citing Robert Johnson & Ania Dobrzanska eds., Oxford Univ. Press 4th ed. 2009) (1996).

54. See EQUAL JUSTICE INITIATIVE, *CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON* 4 (2008).

55. *Roper*, 543 U.S. at 573–74 (2005).

56. *Id.* at 574. See also Johnson, *supra* note 10, at 340 (2008).

I don’t know how I’m going to [make it]. There’s a man who lives next door to me. He’s about seventy years old and his crime was multiple murders back in the sixties. He has been in here ever since... Sometimes I wonder if and how I’m going to manage living in here that long. I think when you come to prison you stop developing which is why he is also very childish. He got arrested at a very young age like me and I wonder. I think it’s pretty obvious that I stopped developing the minute I was arrested. You don’t develop in here. That stops and you are basically stuck at whatever age you were when you were arrested. So, I see this seventy

become more emotionally stable within the highly structured routine of prison life, but they typically do not become more emotionally mature and autonomous; if anything, lifers become less emotionally mature and autonomous and more dependent on prison routine to manage their daily existence.⁵⁷ They live on the surface of things, by routine and rote; their lives are superficial, which is why lifers seem not to mature emotionally as the years pass. They typically get through each day on “automatic pilot,” with little thought or reflection. Prisons can be compared to a deep freeze in the sense that personal autonomy—the capacity for mature self-management—stops at the point of entry into prison.

If one needed a good working definition of cruel punishment, it would be a lifetime of extreme suffering that commences when the offender is a child, unformed in character and susceptible to environmental pressures pushing him toward a future that is beyond his comprehension, let alone his control. Can anyone seriously contend—or better, provide evidence—that a juvenile has any meaningful understanding of a sentence to prison for the remainder of his life? Given the coping deficiencies common to children, together with the inordinately long sentences that stretch out before them, a sentence of death by incarceration is a sanction more cruel even than death by execution. Death by execution at least offers an end to the offender’s suffering within a decade or so, and can be legally accelerated if the prisoner drops his appeals and submits to execution.⁵⁸ By contrast, many lifers and other prisoners are confined

year old man with the mentally [sic] of a twenty-three year old and I was arrested when I was nineteen. *Id.*

57. Robert Johnson & Ania Dobrzanska, *Mature Coping Among Life-Sentence Prisoners: An Exploratory Study of Adjustment Dynamics*, 30(6) CORRECTIONS COMPENDIUM 8–9, 36–38 (2005). See also Johnson *supra* note 10 at 342. LWOP inmates and other long-term inmates often cope better—and in a narrow sense, more maturely—with the stresses of prison life than they did with the stresses of life in the free world, though the younger the prisoner is when he starts his term, the more difficult the subsequent adjustment. See also VICTORIA R. DE ROSIA, *LIVING INSIDE PRISON WALLS: ADJUSTMENT BEHAVIOR* 29, 39–40 (1998).

58. See Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?* 16 TEMP. POL. & CIV. RTS. L. REV. 225, 248–49 (2006); ROBERT JOHNSON, *LIFE UNDER SENTENCE OF DEATH: HISTORICAL AND CONTEMPORARY PERSPECTIVES*, IN *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 647 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2nd ed. 2003). Death row confinement can offer comparable stresses, but the duration of death row confinement, on average, is much shorter than the period of time in confinement served by LWOP inmates (“lifers”). See also John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 939–40, 951–52 (2005); Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. AND BEHAV. 956, 962 (2008); Terry A. Kupers, *What To Do With the*

in modern prisons in what amounts to long-term solitary confinement, and go long periods without access to radio, television, or the company of others. The law provides no escape for them. Psychological research suggests that the mental life of the long-term prisoner in maximum, and especially supermaximum, incarceration is a tumultuous and precarious one, and one marked by acute suffering, even agony, that must seem endless to the prisoner.⁵⁹

Moreover, the punishment of death—the execution itself—especially using lethal injection, is quick and may even be physically painless, particularly compared to the agony often associated with the deaths suffered by lifers, who die from traumatic violent attack, suicide, or chronic and often debilitating illness. And even if execution is physically painful, the pain of execution lasts minutes, not days, months, or years, as is typically the case with deaths due to illness, a main cause of death among lifers.⁶⁰ It is clear, then, that the suffering of prisoners condemned to death row is no more intense than that of prisoners relegated to long-term solitary confinement or even regular maximum-security confinement for the remainder of their lives. For juveniles, the remainder of their lives can extend for sixty, seventy, or even eighty years, which makes a sentence of death by incarceration a remarkably severe and invasive sanction.

In the words of one juvenile prisoner sentenced to death by incarceration, “I wish I still had the death sentence. . . Really, death has never been my fear. What do people believe? That being alive in prison is a good life? This is slavery.”⁶¹ The slavery reference, though unsettling, may be apt. The profound arbitrariness of sentencing juveniles to death by incarceration is magnified by the racially biased way in which this death penalty is administered. Black juvenile

Survivors? Coping With the Long-Term Effects of Isolated Confinement, 35 CRIM. JUST. & BEHAV. 1005, 1014 (2008); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME AND JUST. 441, 476–88 (2006). See generally David Lovell, *Patterns of Disturbed Behavior in a Supermax Population*, 35 CRIM. JUST. AND BEHAV. 985 (2008).

59. Haney, *supra* note 58, at 956 and accompanying text (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124 (2003)).

60. Christopher J. Mumola, MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001-2004, BUREAU OF JUSTICE DATA BRIEF, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mcdsp04.pdf>.

61. Cepparulo, *supra* note 58, at 225.

offenders receive the sentence of death by incarceration as much ten times more than white juvenile offenders.⁶²

Arbitrary and extreme suffering virtually eliminates any possibility that a juvenile can improve himself and mature as a human being. Meaningful, positive change is only possible if juvenile offenders have some hope that they may one day return to society. The opportunity to be considered by a parole board gives juveniles a reason to strive to grow and show that they are worthy of another chance at life in the free world. For some juvenile offenders, release may never materialize. No one is guaranteed forgiveness and second chances must be earned. As a practical matter, lifers with parole eligibility typically are released at a very low rate—as low as .01 or .02 percent per year in California.⁶³ But hope is kept alive by the promise that a

62. See Letter from David C. Fathi, Director, US Program, Human Rights Watch, to the Secretary of the Committee on the Elimination of Racial Discrimination (Feb. 26, 2008), available at <http://www.hrw.org/en/news/2008/02/26/united-states-was-not-forthcoming-and-accurate-its-presentation-cerd> (“Among the 2,381 US prisoners currently serving LWOP for crimes they committed as children, there are staggering racial disparities, with black youth serving LWOP at a per capita rate ten times higher than white youth.”); Letter from Human Rights Organizations to the Committee on the Elimination of Racial Discrimination (Jun. 4, 2009), available at <http://www.hrw.org/en/news/2009/06/04/letter-human-rights-organizations-cerd-regarding-juvenile-life-without-parole-us>.

63. See Alexander Cockburn, *Dead Souls*, THE NATION, May 4, 2009, at 9 (stating that [t]he focus on LWOP tends to blur the fact that it is very hard for lifers not doing LWOP to get out on parole. Scott Handleman, an attorney in San Francisco who has spent much time representing prisoners in parole cases, has been helpful with the chastening data. In California last year, 31,051 prisoners were serving sentences of life with the possibility of parole. Of those, 8,815 have passed their “minimum eligible parole date,” meaning they have served long enough to be receiving parole hearings. Of those, 6,272 had hearings on the Board of Parole’s calendar last year. (Some prisoners serving beyond their minimum eligible parole date do not get hearings in a given year because they were denied for multiple years in a prior hearing.) Only 272 lifers were found suitable for parole by the board in 2008.

Moreover, the board’s decisions in these 272 cases were subject to Governor Schwarzenegger’s review. The California governor has the power, in murder cases, to reverse the board’s ruling and take away the parole date. For other life-sentence crimes, he can order the board to reconsider its decision. So only a fraction of those whose parole cases got reviewed were actually released to the streets. In 2007 the board found 172 lifers suitable for parole; Governor Schwarzenegger reversed 115 of those decisions, referred eighteen back to the board for reconsideration, modified two and let stand only thirty-seven. That means in 2007 somewhere between thirty-seven and fifty-seven life-term prisoners got out of prison in the whole state of California. Out of the roughly 30,000 prisoners who were serving sentences of life with the possibility of parole in 2007, somewhere around 0.1 percent to 0.2 percent of these prisoners were released... [R]elease for lifers is a rare phenomenon.).

person will at some point get a parole hearing—an opportunity to be heard, re-evaluated, and possibly granted a second chance at normal life. Hope, in turn, gives young offenders a reason to resist the destructive forces at work in prison and to prepare for a future in the free world.⁶⁴

IV. DEATH BY INCARCERATION IS THE PRIMARY PUNISHMENT IMPOSED ON ADULT CAPITAL MURDERERS, EVIDENCE THAT IT IS A CRUEL AND UNUSUAL PUNISHMENT FOR JUVENILE OFFENDERS

The Court in *Roper* barred the execution of juveniles, in part, because executions were seen to violate “evolving standards of decency that mark the progress of a maturing society”⁶⁵ and, thus, were cruel and unusual punishment. The Court used the behavior of state legislatures as the measure of current standards of decency because legislatures presumably pass laws that reflect the current standards of decency of the American people. In *Roper*, the Court considered evidence that several state legislatures had recently passed laws that prohibited the execution of juveniles,⁶⁶ that no legislature has passed laws in recent years that allowed the execution of juveniles, and that the practice of actually executing juveniles was increasingly rare.⁶⁷ In other words, death by execution was alive and well with adult offenders, but was falling into disuse with juvenile offenders. The Court in *Roper* also noted that Western countries that share our democratic values had long ago banned the execution of juveniles,⁶⁸ and concluded that the actions of the state legislatures, perhaps buttressed by international trends,⁶⁹ indicated that our “evolving standards of decency” prohibit the execution of juveniles as a matter of

64. See JOHN IRWIN, *LIFERS: SEEKING REDEMPTION IN PRISON*, 90–93, 101–02, 104 (2009). The hope that they might atone for their crimes, redeem themselves, and once again live free appears to be a driving force in the adjustment of some and perhaps many lifers as they age behind bars.

65. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

66. *Id.* at 559–60 (citing *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (en banc)).

67. *Id.* at 567.

68. *Id.* at 578 (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. . .”). See *id.* at 575 (It is noted explicitly that the “juvenile death penalty” has been abolished “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community...”).

69. *Id.* at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

constitutional law.⁷⁰ Juvenile offenders, the Court maintained, were “categorically less culpable than the average criminal.”⁷¹ As a result, no matter how egregious the crime,⁷² the execution of a juvenile offender would be excessive and hence would violate the Eighth Amendment ban on cruel and unusual punishment.

Western countries that share our democratic values and prohibit the execution of juveniles have also abolished the use of executions with adults.⁷³ Since there is no substantial trend toward general abolition in the United States, this international trend toward abolition, standing alone, seems to have no bearing on the Supreme Court’s capital punishment jurisprudence.⁷⁴ However, we suggest that “evolving standards of decency,” as they apply to the death penalty with adults, may be seen today in America’s capital juries. Increasingly, capital juries are foregoing death by execution in favor of life without parole.⁷⁵ It is a matter of record that, in many such cases, life without parole is expressly described by defense attorneys and even judges as a form of death penalty, namely, death by incarceration.⁷⁶

70. The Court opined that “[t]he death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime” (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002)). *Id.* at 568. According to the *Roper* Court, “[t]hese rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.” *Id.* at 568–69. In *Roper*, this narrow category was construed to include all juveniles because of their distinctive immaturity, consequently excluding them from death by execution sentences. *See id.* at 564–70.

71. *Id.* at 567.

72. *See Roper*, 543 U.S. at 556–57. The crime in *Roper* was grievous by any standard, so the Court has clearly determined that the persons in the category “juvenile offender” can commit heinous offenses for which they are never fully culpable. The prosecutor in the *Roper* case indicated that the crime “involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.” *Id.* at 557. The facts of the case, as summarized in the *Roper* holding, pointed to a calculated, cold-blooded, and indeed wanton infliction of violence on a bound, gagged, and utterly helpless older woman. *Id.* at 556–57.

73. *See* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS IN 2008, at 5, 8, 17 (2009), available at <http://www.amnesty.org/en/library/asset/ACT50/003/2009/en/0b789cb1-baa8-4c1b-bc35-58b606309836/act500032009en.pdf> (“Europe and Central Asia is now virtually a death penalty free zone following the abolition of the death penalty in Uzbekistan for all crimes. There is just one country left—Belarus—that still carries out executions.”). In addition, the United States is the primary source of executions in the Americas. The only countries that execute more than the United States are China, Iran and Saudi Arabia. *Id.*

74. *See Roper*, 543 U.S. at 577–78.

75. *See supra*, note 17.

76. *See* Lisa Rogers, *Judge to Holladay: ‘You Get to Come Out of Prison in a Pine Box,’* GADSDEN TIMES (Alabama), Jun. 26, 2009, available at <http://www.gadsdentimes.com/article/20090626/NEWS/906269983/-1/NEWS04?Title=Judge->

The declining rates of traditional death sentences (death by execution) in capital cases imply that death by incarceration is becoming our main death penalty and consequently the sentence we are using to punish what we have deemed to be the worst offenders: adult capital murderers. This trend alone suggests that death by incarceration is an excessive sanction for other adult offenders whose offenses are less serious than capital murder. And by this same logic, death by incarceration is clearly an excessive sanction for *any* juvenile offender, since no juvenile offender is sufficiently culpable to be punished in the same way as an adult capital murderer. If *Roper* stands for anything, it is that some punishments are acceptable for adults but not children. Surely, the sanction of choice for the worst adult offenders is, by definition, inappropriate for juveniles, regardless of the nature of their crimes. No Western society executes juveniles.⁷⁷ Furthermore, no society in the world—not merely in the West—subjects juveniles to sentences of death by incarceration.⁷⁸

V. CONCLUSION

The Court in *Roper* held that juveniles cannot and should not be subjected to death by execution because of their inherently immature and underdeveloped characters. Juveniles are less culpable for their crimes and more amenable to change under the appropriate

to-Holladay-You-get-to-come-out-of-prison-in-a-pine-box- (“I can impose death by incarceration in the sentence of life without the possibility of parole,” [Federal Judge Milligan] told [defendant] Holladay, as Holladay stood shackled and chained in an orange and white striped uniform from the Etowah County jail. “You get to come out of prison in a pine box.”). *Id.*

77. See HUMAN RIGHTS WATCH, ENFORCING THE INTERNATIONAL PROHIBITION ON THE JUVENILE DEATH PENALTY 1–2 (2008), http://www.hrw.org/sites/default/files/related_material/HRW.Juv.Death.Penalty.053008.pdf.

The prohibition on the death penalty for crimes committed by juvenile offenders—persons under age 18 at the time of the offence—is well established in international treaty and customary law. The overwhelming majority of states comply with this standard: only five states are known to have executed juvenile offenders since 2005...the five states known to have executed juvenile offenders since 2005: Iran (16 executions), Saudi Arabia (3 executions), Sudan (2 executions), Yemen (1 execution), and Pakistan (1 execution). *Id.*

78. See Letter to the Secretary of the Committee on the Elimination of Racial Discrimination (Feb. 26, 2008), <http://www.hrw.org/en/news/2008/02/26/united-states-was-not-forthcoming-and-accurate-its-presentation-cerd>. Human Rights Watch reports that “The United States is the only country in the world that sentences children (persons under the age of 18) to life in prison without possibility of parole or release (known as life without parole, or LWOP).” *Id.* See also Constance De la Vega & Michelle T. Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice* 42 U.S.F. L. REV. 983, 985 (2008).

circumstances.⁷⁹ According to the Court, evolving standards of decency, as evidenced by the behavior of state legislatures and international trends, suggest that the American people consider executing juveniles to be cruel and unusual punishment.⁸⁰ Under the logic of the *Roper* holding, and mindful of capital sentencing trends that lend insight into our current standards of decency, we suggest that death by incarceration, our other death penalty, is also cruel and unusual punishment when applied to juveniles. The Governor of Kentucky, quoted approvingly by the Court in *Roper*, made the simple and direct observation that “[w]e ought not be executing people who, legally, were children.”⁸¹ Neither should we lock up these children in adult prisons and throw away the key.

We have two death penalties in America: death by execution and death by incarceration. Death by incarceration, the sentence given when a jury or judge imposes a term of life without parole, condemns the person to die in prison. This is a death sentence, plain and simple. Like death by execution, death by incarceration is utterly unsuitable for children no matter how serious the crime. The crime in *Roper* was egregious by any standard, and yet the Court held that death by execution was an excessive punishment because the defendant was a juvenile.⁸² We extend the Court’s logic in *Roper* and argue that death by incarceration is always an excessive punishment for juveniles as well. Even the worst juvenile offender deserves a sentence that offers the possibility of release back into the free world and a second chance at life.

79. See *Roper*, 543 U.S. at 569–71. To recognize the immature and unformed character of juveniles, as the Court in *Roper* has done, is to implicitly acknowledge that juveniles have a claim to social conditions, such as nurturance and education, which foster their mature development. To sentence juveniles to death—by execution or incarceration—is to completely disown those children, and hence to abrogate the responsibility we as a society must bear in their development.

80. See *Roper*, *supra* note 7 and accompanying text.

81. *Roper*, 543 U.S. at 565.

82. *Id.* at 556–57.