

# The Injustice of Life Without Parole Sentences for Child Defendants

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*“[B]ecause ‘[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,’ the Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”<sup>1</sup>*

*“Each of us is more than the worst thing we’ve ever done.”<sup>2</sup>*

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1. *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O’Connor, J., dissenting) (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

2. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2014).

## Introduction

Over the past seventeen years, the Supreme Court issued a series of rulings addressing child-sentencing<sup>3</sup> under the Eighth Amendment’s prohibition of cruel and unusual punishment. The Court acknowledges that children do not have the same level of maturity or decision-making abilities as adults and should be punished differently.<sup>4</sup> Notably, the Court established and upheld the fact that “children are constitutionally different from adults in their level of culpability” when it comes to sentencing.<sup>5</sup> Moreover, these differences in maturity and accountability inform the Eighth Amendment’s prohibition on cruel and unusual punishment, which limits a court’s ability to sentence a child to die in prison.<sup>6</sup>

Furthermore, for decades the Court has recognized the “overwhelming weight of international opinion” against death-by-incarceration sentences for children.<sup>7</sup> While this international opinion is not binding, its influence has directed the Court to issue progressive precedent regarding child sentencing.<sup>8</sup> International human rights law flatly prohibits life without parole (LWOP) for children who commit crimes before the age of eighteen, a prohibition that is recognized and respected by almost every country in the world.<sup>9</sup> Yet, the Court still refuses to abolish the practice altogether, even going as far as penning an incorrect opinion to uphold this unconstitutional practice.<sup>10</sup>

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3. The authors decline to use the term “juveniles” to describe children who are defendants. “Juvenile” connotes a negative idea of immaturity, but does not take into account the actual nature of who these defendants are. The term “children,” on the other hand, properly describes these defendants as underdeveloped and capable of growth. The term “juvenile” is nearly universally used in a negative context. *See generally* KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021) (arguing that the American policing crisis begins with the criminal justice system’s treatment of Black children).

4. *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016) (holding that children whose crimes reflect “the transient immaturity of youth” cannot constitutionally be sentenced to death by incarceration).

5. *Id.* at 213.

6. *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (discussing rehabilitation theories of punishment as they apply to children and adults, holding that children cannot be sentenced to life without parole).

7. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

8. *Id.* at 575. (“[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”).

9. *See* Brief of Amici Curiae Amnesty Int’l, et. al. Supporting Petitioners at 2, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646, 10-9647) (“Treaties the United States is party to are relevant to this analysis. The United States is the only country in the world that does not comply with the norm against imposing life without possibility of parole sentences on offenders who are under the age of 18 at the time of the offense.”); *see also* International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (“In the case of juvenile persons, the procedure shall be used as will take account of their age and the desirability of promoting their rehabilitation.”).

10. *See generally* *Jones v. Mississippi*, 141 S.Ct. 1307 (2021).

Generally, courts impose death-by-incarceration sentences, which include LWOP sentences and death sentences, when a defendant is deemed “permanently incorrigible,” meaning that the court finds the defendant lacks the ability to reform or rehabilitate.<sup>11</sup> In addition to the phrase “permanently incorrigible,” courts use other phrases interchangeably, such as “irretrievable depravity,”<sup>12</sup> “irreparable corruption,”<sup>13</sup> “irredeemable,”<sup>14</sup> “danger to society,”<sup>15</sup> “no chance for reconciliation with society,”<sup>16</sup> and “never will be fit to reenter society.”<sup>17</sup> In imposing LWOP sentences, courts determine whether the sentence is appropriate considering (i) the child’s age and immaturity; (ii) the child’s family home environment; (iii) circumstances of the underlying offense, including influence of familial and peer pressure; (iv) incompetencies that disadvantage the child engaging with the criminal legal system, such as those when speaking with law enforcement and prosecutors; and (v) the child’s potential for rehabilitation.<sup>18</sup> The purpose of these factors is to reserve LWOP sentences for only those who are, in fact, permanently incorrigible. Recently, however, the Court selectively disregarded this standard to keep children imprisoned for life, even if they are not deemed permanently incorrigible.<sup>19</sup>

This Article argues that sentencing children to LWOP should be abolished in *all* cases for two reasons. First, children have the potential to rehabilitate. Second, courts violate the evolving standards of decency doctrine underpinning the Eighth Amendment and permit cruel and unusual punishment when they sentence children to LWOP on the basis of permanent incorrigibility. Although courts have agreed that LWOP sentences should not

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11. “Permanently incorrigible” is an inherently indefinite standard. This is partially because the determination of when someone is “permanently incorrigible” is left up to the jury at trial, and trial courts do not have to adhere to any formal fact-finding requirements in making the determination. Casey Matsumoto, “*Permanently Incorrigible*” Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole, 88 GEO. WASH. L. REV. 239, 239–40 (2020). The proclamation that someone is “permanently incorrigible,” leads to the lifelong branding of an individual as being beyond all hope of redemption. Kempis Songster, Rachel López, and Terrell Carter refute labeling people as “permanently incorrigible” and offer their own redemption experiences while serving life sentences as proof of the falsehood of the standard. See generally Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315 (2021) (arguing for a legal right of redemption based on personal experiences).

12. See, e.g., *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016); see also *Jones*, 141 S.Ct. at 1329, 1340 (Thomas J., concurring).

13. *Montgomery*, 577 U.S. at 209.

14. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

15. *Id.* at 72.

16. *Id.* at 79.

17. *Jones*, 141 S.Ct. at 1340 (Sotomayor, J., dissenting).

18. *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012).

19. See generally *Montgomery v. Louisiana*, 577 U.S. 190, 733 (2016).

be the norm,<sup>20</sup> they consistently uphold the practice at both the state and federal levels.<sup>21</sup> Evolving standards of decency doctrine requires courts to afford children the opportunity to reform. LWOP sentences provide no such opportunity.<sup>22</sup>

This Article consists of a two-part analysis of the death of children by incarceration. Part I discusses the evolution of child-death-by-incarceration (CDBI) sentences, including how a recent line of Supreme Court cases gravitates towards the conclusion that CDBI sentences are inconsistent with the Eighth Amendment’s prohibition on cruel and unusual punishment. Part III discusses final instances where CDBI is still permitted, the disproportionate racial disparities in CDBI sentences, how courts draw an arbitrary line when they permit death-by-incarceration sentences for children convicted of homicide crimes, and how the U.S.—in comparison to the rest of the world—is alone in perpetuating children’s death by incarceration. This Article demonstrates that CDBI sentences for children—even in cases involving homicide—are contrary to judicial precedent, violate civil and human rights standards, and infringe upon societal and cultural values.

#### I. The Court’s Shift Away from Death by Incarceration for Children

As noted above, the Supreme Court has addressed child sentencing in the context of the Eighth Amendment’s prohibition of cruel and unusual punishment. The following is a summary of those cases.

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20. Derek Gilna, *Supreme Court: Retroactivity Ends Mandatory Juvenile LWOP Sentences*, PRISON LEGAL NEWS (Mar. 1, 2016), <https://www.prisonlegalnews.org/news/2016/mar/1/supreme-court-retroactivity-ends-mandatory-juvenile-lwop-sentences/> [https://perma.cc/XEN2-PJLQ] (discussing how *Miller* prevents state courts from imposing mandatory LWOP sentences on children).

21. State courts have already recognized LWOP sentences and excessive sentences on children as interchangeable. See e.g., *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding that requiring children who are defendants to serve 110 years in prison before becoming eligible for parole is “the functional equivalent of a life without parole sentence”); *People v. Contreras*, 411 P.3d 445, 462 (Cal. 2018) (holding that sentences of fifty and fifty-eight years for children each violated the Eighth Amendment); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (holding that *Graham* and *Roper*’s “meaningful opportunity to obtain release” requirement in sentencing for children applies to lengthy term-of-years sentences, in this case a 52.5-year term before parole eligibility).

22. Within this Article, LWOP refers not only to sentences that are explicitly life sentences, but also to sentences that by application would lend to be a life sentence. The authors interpret “LWOP sentences” to include nominal life sentences and excessive sentences that effectively condemn individuals to death by incarceration. For example, a sentence to two hundred years in prison may not explicitly be called a “life sentence,” but it obviously extends beyond any possible human lifespan. See U.S. SENT’G COMM’N, LIFE SENTENCES IN THE FEDERAL SYSTEM 10 (2015), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) [https://perma.cc/PMG7-BYWY] (explaining that sentences greater than 470 months effectively function as de facto life sentences).

In 2005, the Court in *Roper v. Simmons* held that children should not—and cannot—be sentenced to death.<sup>23</sup> Simmons, who was only seventeen-years-old when he was convicted of murder, challenged his death sentence by arguing that children are not yet fully developed and, therefore, have a diminished capacity to judge and assess the risks and consequences of their actions.<sup>24</sup> The Court agreed.<sup>25</sup> The Court noted that “[w]hen a [child] 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.”<sup>26</sup> The Court utilized adolescent development research, finding that because of minors’ developmental status, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>27</sup> Thus, the Court concluded that the death penalty is a disproportionate punishment for youth; their immaturity diminishes culpability and they are much more susceptible to outside pressures and influences.<sup>28</sup> Importantly, the Court also noted the country’s “evolving standards of decency,” writing that disproportionate sentences, such as death sentences for children fully capable of reform and rehabilitation, are a cruel and unusual punishment, violating their Eighth Amendment rights.<sup>29</sup>

The *Roper* precedent left open the question of how evolving standards of decency apply to other forms of death by incarceration. In *Graham v. Florida*, the Court began the process of banning LWOP sentences for children, starting with children who were not convicted of homicide crimes.<sup>30</sup> Again, the Court noted that these sentences were disproportionate when sentencing youth.<sup>31</sup> “For [children], who are most in need of and receptive to rehabilitation . . . , the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.”<sup>32</sup> The Court declared that “the concept of proportionality is central to the Eighth Amendment,” and death-by-incarceration sentences—the harshest

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23. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

24. *Id.* at 556–58.

25. *Id.* at 578.

26. *Id.* at 573–74.

27. *Id.* at 570.

28. *Id.* at 569.

29. *Roper*, 543 U.S. at 570–71.

30. *Graham v. Florida*, 560 U.S. 48, 52 (2011).

31. *Id.* at 73 (“It is difficult even for expert psychologists to differentiate between the [child] whose crime reflects unfortunate yet transient immaturity, and the rare [child] whose crime reflects irreparable corruption.’ . . . A life without parole sentence improperly denies the [child] a chance to demonstrate growth and maturity.”).

32. *Id.* at 74.

punishment available to children—must be limited to the most serious offenses.<sup>33</sup>

Unlike *Roper* and *Graham*, other cases left the Court to wrestle with statutory, mandatory sentences for children.<sup>34</sup> Generally, the Court has deferred to the states to sentence criminal offenders, “even when such punishments are, by most accounts, excessive in light of the culpability of the offender and the harm caused.”<sup>35</sup> Precisely because of this excessive and disproportionate scheme of state-sentencing, the Court in *Miller v. Alabama*<sup>36</sup> knocked mandatory death by incarceration sentences out of contention, holding that these sentences violate the Eighth Amendment.<sup>37</sup> The Court noted that judges must consider the characteristics of children in order to issue a fair and individualized sentence.<sup>38</sup> Adolescence, the Court reasoned, is marked by “transient rashness, proclivity for risk, and inability to assess consequences.”<sup>39</sup> Thus, the Court concluded the Eighth Amendment would not allow courts to throw children away simply because the text of a state’s statute said so.<sup>40</sup> However, the Court stopped short of interpreting the precedent set forth in *Roper* and *Graham* to abolish children’s death-by-incarceration in its entirety.<sup>41</sup> In her majority opinion, Justice Kagan noted that requiring states to consider the inherent characteristics of children would render CDBI sentences “uncommon.”<sup>42</sup> However “uncommon” condemning a child to die behind bars may be, allowing this sentence to be considered at all is, in itself, a cruel and unusual punishment.<sup>43</sup> Justice Kagan makes

33. *Id.* at 59.

34. AM. BAR ASS’N GOV’T AFF.’S OFF., *Mandatory Life for Juvenile Offenders: Does Youth Matter?*, WASH. LETTER, Oct. 17, 2019, at 3 (discussing recent LWOP cases).

35. William W. Berry III, *Evolved Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 116 (2018).

36. 567 U.S. 460 (2012).

37. *Id.* at 470.

38. *Id.* at 476 (“Of special pertinence here, we insisted . . . that a sentencer have the ability to consider the ‘mitigating qualities of youth . . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weigh, so must the background and mental and emotional development of a youthful defendant be duly considered’ in assessing his culpability.”).

39. *Id.* at 472.

40. See Berry, *supra* note 35, at 116 (“The Eighth Amendment story is one of judicial deference to states and hesitancy to protect the individual rights of defendants.”).

41. See *Miller*, 567 U.S. at 479–80.

42. *Id.* at 479–80 (“But given all we have said in *Roper*, *Graham*, and [the *Miller*] decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing [children] to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”).

43. *Contra id.* at 480. (“Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases.”).

formidable arguments that, standing alone, create an excellent case for eliminating CDBI altogether, and in the face of a practice that allows such a deprivation of children's Eighth Amendment protections, the Court should not hesitate to end it.<sup>44</sup> Justice Kagan should not have left the door open to give courts the "ability to make" a life-or-death judgment in homicide cases if she truly believed children have a "heightened capacity for change."<sup>45</sup>

The *Miller* ruling required states to address their LWOP detainees who were previously sentenced as children under mandatory sentencing rules.<sup>46</sup> In *Montgomery v. Louisiana*, the Court required states to apply the *Miller* ruling retroactively.<sup>47</sup> Again, the Court noted that "children are constitutionally different from adults"<sup>48</sup> and LWOP punishments must be reserved "for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."<sup>49</sup> Despite categorizing certain children with the label of "permanently incorrigible," the *Montgomery* Court failed to define "permanently incorrigible" or even provide an example of such an offender.

Although the Court spent the past few decades chipping away at any legitimacy LWOP sentences had for children, the Court recently released a poorly-reasoned decision with enormous repercussions for children. In *Jones v. Mississippi*, the Court was asked to determine whether a child sentenced to a mandatory LWOP sentence for a homicide could apply for a new sentence based on the *Miller* and *Montgomery* holdings.<sup>50</sup> It is worth noting that the fifteen-year-old plaintiff Jones demonstrated significant progress while imprisoned.<sup>51</sup> After more than five years of incarceration, Jones received only two discipline infractions at the prison.<sup>52</sup> Jones had also earned his GED, took college courses, and was described by the prison unit manager as "almost like [a] son."<sup>53</sup> Even his grandmother, whose husband Jones killed, forgave him and filed an amicus brief on his behalf, arguing that Jones

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44. *See id.* at 483 ("[O]ur decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments.").

45. *Id.* at 479–80.

46. *Montgomery v. Louisiana*, 577 U.S. 190, 208–09 (2016).

47. *Id.*

48. *Id.* at 213.

49. *Id.* at 209.

50. *Jones v. Mississippi*, 141 S.Ct. 1307, 1313 (2021).

51. *Id.* at 1339 (Sotomayor, J., dissenting); Mark Joseph Stern, *Brett Kavanaugh's Opinion Restoring Juvenile Life Without Parole is Dishonest and Barbaric*, SLATE (Apr. 22, 2021, 12:35 PM), <https://slate.com/news-and-politics/2021/04/brett-kavanaugh-sonia-sotomayor-juvenile-life-without-parole.html> [<https://perma.cc/J4J3-QLA5>].

52. *Jones*, 141 S.Ct. at 1339 (Sotomayor, J., dissenting).

53. *Id.*

was *never* permanently incorrigible.<sup>54</sup> Yet, the Court upheld Jones’ LWOP sentence without finding him permanently incorrigible.<sup>55</sup>

The Court’s majority, written by Justice Kavanaugh, stated that “a sentencer [must] follow a certain process—considering an offender’s youth and attendant characteristics—before imposing” a LWOP sentence.<sup>56</sup> But in the same breath, he also wrote that “a finding of fact regarding a child’s incorrigibility . . . is not required.”<sup>57</sup> This ruling is inconsistent with decades of precedent where the Court reserved LWOP sentences for only those found permanently incorrigible as the *Miller* Court required.<sup>58</sup> Even though Kavanaugh cites *Montgomery* in *Jones*,<sup>59</sup> Kavanaugh’s decision directly contradicts *Montgomery*, in which Kennedy previously stated, “*Miller*’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.”<sup>60</sup> Kavanaugh ignored judicial precedent.

Justice Kavanaugh’s opinion effectively guts years of judicial precedent. Importantly, Justice Sotomayor noted in her dissent that the harms Kavanaugh created would not fall equally.<sup>61</sup> “The racial disparities in juvenile LWOP sentencing are stark.”<sup>62</sup> Sotomayor also emphasized how disproportionately CDBI sentences affect Black and Brown children.<sup>63</sup> She wrote, “70 percent of all youths sentenced to LWOP are children of color.”<sup>64</sup> Sotomayor cited an amici curiae brief explaining that “[i]n the years before *Graham* and *Miller*, courts sentenced Black [children] to life imprisonment without parole ten times more often than white offenders.”<sup>65</sup> Since *Miller*,

54. *Id.*

55. *Id.* at 1322 (majority opinion).

56. *Id.* at 1311 (quoting *Miller v. Alabama*, 567 U.S. 460, 483 (2012)).

57. *Id.* (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)).

58. If you are confused by the holding, how it lends to the trend of judicial precedent, and how it upholds the ideal of *stare decisis*, so are the authors of this paper. As Justice Sotomayor wrote in her dissenting opinion, “the Court attempts to circumvent *stare decisis* principles by claiming that ‘[t]he Court’s decision today carefully follows both *Miller* and *Montgomery*.’ . . . The Court is fooling no one.” *Jones v. Mississippi*, 141 S.Ct. 1307, 1328 (2021) (Sotomayor, J. dissenting).

59. *Id.* at 1317-1318 (majority opinion).

60. *Montgomery*, 577 U.S. at 212.

61. *See Jones*, 141 S.Ct. at 1334 n.2 (Sotomayor, J., dissenting) (discussing the disparate impact of *Miller*’s holding).

62. *Id.*

63. *Id.*

64. *Id.* (quoting Brief for Juvenile Law Center et al. as Amici Curiae in Support of Petitioner at 21, *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) (No. 18-1259)).

65. *Id.*; *see also* Brief for Juvenile Law Center et al. as Amici Curiae in Support of Petitioner at 22, *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) (No. 18-1259) (“The disparity was even more evident for Black [children] offenders convicted of killing white victims; courts sentenced those offenders to life imprisonment without parole more than 12 times more often than white offenders convicted of killing Black victims.”).



“72 percent of children sentenced to LWOP . . . were Black, compared to 61 percent of children sentenced before *Miller*.”<sup>66</sup> Despite reason to hope that the *Miller* ruling will reduce CDBI, as Sotomayor’s dissent demonstrates, the elimination of mandatory CDBI sentences has done practically nothing to eliminate the disparate impact regular CDBI sentences have on Black and Brown children.<sup>67</sup> We are “throwing our babies away.”<sup>68</sup>

## II. Restorative Justice for Incarcerated Children

“If we are throwing our babies away, we have no future,” warned Rukiye Abdul-Mutakallim, an advocate of eliminating CDBI.<sup>69</sup> Her son, Suliman, was murdered by three individuals while walking home in June of 2015.<sup>70</sup> Two of the individuals responsible were children, one of whom was only fourteen years old.<sup>71</sup> When she learned the fourteen-year-old received a twenty-year sentence, Rukiye neither rejoiced nor retaliated: she hugged him.<sup>72</sup> She realized that these were not terrible children who took her son’s life; rather, they are “children who made terrible, terrible mistakes.”<sup>73</sup>

Though Rukiye’s attitude may seem remarkable, it is actually reflective of a growing, societal trend. In the face of the injustice of CDBI, “there is a growing consensus . . . in favor of rehabilitation for justice-involved youth, hopefully foreclosing the misguided attitude of ‘adult time for adult crime.’”<sup>74</sup> Because courts are required to consider the societal consensus for evolving standards of decency,<sup>75</sup> courts should see children as redeemable and not just as their crime. It is readily apparent to the average person that children differ greatly from adults in their capacity to make decisions,

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66. *Jones*, 141 S.Ct. at 1334 n.2.

67. See generally *Jones v. Mississippi*, 141 S.Ct. 1307, 1334 n.2 (2021) (Sotomayor, J., dissenting) (comparing impacts of the *Miller* on racial minorities).

68. Evan Millward, *Mother of Murder Victim Advocated for New Parole Changes*, WCPO (Jan. 11, 2021, 5:01 PM), <https://www.wcpo.com/news/local-news/mother-of-murder-victim-advocated-new-for-parole-changes> [<https://perma.cc/HA86-X7RH>].

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See *id.* (quoting Kevin Werner of the Ohio Justice and Policy Center). In her own words, Abdul-Mutakallim remarked, “I found it unfathomable. These are human beings, aren’t they? . . . And then when I saw them in court and they were children? Ahh.” *Id.*

74. Cara H. Drinan, *The Miller Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1662–63 (2021).

75. See *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (discussing the standards of decency as applied to children).

change, and mature.<sup>76</sup> Yet, somehow sentencers lose sight of these different capacities. This calls for a new approach: restorative justice.

#### A. Restorative Justice

Restorative justice is a theory based on the principle that no person is irredeemable and that cooperative efforts are necessary to allow a community to completely heal.<sup>77</sup> The restorative justice movement focuses on repairing the harm caused by crime, which includes the harms done to the victim, to the victim's family, to the community, and also lingering physical and mental health harms for incarcerated people.<sup>78</sup> Importantly, restorative justice does not discount what a convicted person has done, as some critics claim.<sup>79</sup> While critics wrongfully assume this movement strays away from accountability, restorative justice explicitly requires people to "take responsibility for their wrong and want to make amends."<sup>80</sup>

Restorative justice is built upon three foundational principles: (1) crime causes harm, and justice should focus on repairing that harm; (2) the people most affected by the crime should be able to participate in its resolution; and (3) the government is responsible for maintaining order and helping the community build peace.<sup>81</sup> Through these principles, *all* parties are included in making amends in order to reintegrate offenders into their communities.<sup>82</sup>

While there are many positive implications of restorative justice, these implications are arguably even more impactful for children who face the

76. *Montgomery v. Louisiana*, 577 U.S. 190, 208 (2016) (holding that because children do not have the same decision-making capacity as adults, children whose crimes reflect "the transient immaturity of youth" cannot constitutionally be sentenced to death by incarceration).

77. See generally PAUL MCCOLD & TED WATCHEL, IN PURSUIT OF PARADIGM: A THEORY OF RESTORATIVE JUSTICE 1 (2003), <https://biblioteca.cejamerica.org/bitstream/handle/2015/2163/paradigm.pdf?sequence=1&isAllowed=1> [<https://perma.cc/D5QA-YHAQ>] (providing a theoretical overview of restorative justice).

78. See *id.* (explaining outlook of restorative justice); see also *Justice Reinvestment*, RESTORATIVE JUST. EXCH. (Dec. 7, 2015), <https://restorativejustice.org/trj-archive/justice-reinvestment-2/> [<https://perma.cc/X938-2CSJ>] (explaining that because "almost two-thirds of inmates have some kind of mental health problems," restorative justice can help address mental health and reduce the cost of services inside correctional facilities).

79. See Candace McCoy, Wolf Heydebrand & Rekha Mirchandani, *The Problem with Problem-Solving Justice: Coercion vs. Democratic Deliberation*, 3 RESTORATIVE JUST. 159, 170 (2015) (arguing that instead of individually deterring crime, restorative justice can be coercive because the community and the victim's family often attempt to reinforce social norms by making the convicted person take accountability).

80. *Three Core Elements of Restorative Justice*, RESTORATIVE JUST. EXCH., <https://restorativejustice.org/what-is-restorative-justice/three-core-elements-of-restorative-justice/> [<https://perma.cc/S5UD-TUY2>].

81. See MCCOLD & WATCHEL, *supra* note 77, at 2 (discussing the roles victims, offenders, and the government play in restorative justice).

82. *Id.*

possibility of incarceration.<sup>83</sup> Numerous studies indicate that children who commit crimes and are placed in restorative justice programs consistently have lower recidivism rates.<sup>84</sup> Upon completion of restorative justice programs, such as victim-offender dialogues,<sup>85</sup> children pose less of a safety risk to society, and these programs can give victims who participate in facilitated dialogues a sense of both empowerment and closure.<sup>86</sup> Frequently, restorative justice programs are also a more cost-effective alternative to traditional incarceration programs.<sup>87</sup> Restorative justice is a unique opportunity to promote accountability while also making the victim whole. This rehabilitative approach reflects that children who commit crimes are still just that—children. Accordingly, restorative justice recognizes that these children have the capacity to grow and change.

### *B. Injustices Against Children Sentenced to Death by Incarceration*

Unfortunately, several U.S. jurisdictions’ notion of “justice” for sentencing children is anything but restorative.<sup>88</sup> These states create a baseless distinction between LWOP sentences and death penalty sentences

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83. *See* RESTORATIVE JUST. CONSORTIUM, THE POSITIVE EFFECT OF RESTORATIVE JUSTICE ON RE-OFFENDING 10 (2006), [https://thl.fi/documents/10531/162021/the\\_positive\\_effec\\_of\\_rj.pdf](https://thl.fi/documents/10531/162021/the_positive_effec_of_rj.pdf) [<https://perma.cc/3ZAC-A3YX>] (explaining that in one study with children in the United Kingdom, restorative justice techniques reduced penalties by 59 percent, police calls by 40 percent, and offending levels by one-third). *e.g.*,

84. *See generally id.* (summarizing studies that examine the recidivism rate after restorative justice techniques are implemented).

85. Although these programs often take place within prisons, there are a multitude of services associated with restorative justice ideals. These programs include, but are not limited to: victim-offender mediations, victim panels, conferencing, ex-offender assistance, restitution programs, community service programs, as well as various educational programs. *See, e.g.*, JONATHAN DERBY, RESTORATIVE JUSTICE: PRINCIPLES AND PRACTICE 16 (2022), <https://cdn.restorativejustice.org/wp-content/uploads/2022/06/17163033/RJE-Resource-HANDBOOK-on-Restorative-Justice-Principles-and-Practice.pdf> [<https://perma.cc/V9CE-WHJK>] (explaining victim-offender mediations and other forms of meetings). A multitude of nonprofits work with prisons to provide these services. *See, e.g.*, *What We Do*, INSIGHT PRISON PROJECT, <http://www.insightprisonproject.org/what-we-do.html> [<https://perma.cc/S8X6-BUS6>] (explaining a nonprofit’s mission to incorporate restorative justice principles).

86. *See* *Benefits of Restorative Justice*, COMTY. JUST. NETWORK OF VT., <http://cjnvt.org/about-us/benefits-of-restorative-justice/#:~:text=1%20Reduced%20recidivism.%20Restorative%20justice%20has%20a%20high,centers%20help%20to%20establish%20a%20more%20active%20citizenship> [<https://perma.cc/J2TS-58CA>] (explaining the benefits of restorative justice to the community and victims).

87. *Id.*

88. *See* Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT’G PROJECT (Apr. 7, 2023), <https://www.sentencingproject.org/publications/juvenile-life-without-parole> [<https://perma.cc/RY6Z-3C6N>] (reporting that nineteen states currently have people serving LWOP sentences for crimes committed when they were children).

even though, in reality, there is no difference.<sup>89</sup> In either case, people sentenced to DBI as children will never live to experience their freedom again, making the length of time they spend behind bars a delay of an inevitable death while incarcerated. In other words, whether the child dies by lethal injection or waits eighty years serving their incarceration sentence, the result is the same—death. These states not only violate children’s constitutional and international rights by disproportionately sentencing children of color,<sup>90</sup> but CDBI sentences are also contrary to societal and cultural values such as the recognition of children as less culpable and more capable of reform than adults.<sup>91</sup>

It is important to understand who these children sentenced to unconstitutionally long, demeaning sentences are. At a fundamental level, incarceration and criminal prosecution of children is already skewed against Black youth.<sup>92</sup> Professor Kristin Henning writes that although Black youth accounted for only 15 percent of children of juvenile court age in 2018, they “also accounted for 35 percent of all juvenile arrests for any crime in 2018 and 40 percent of all cases of in which the youth was sent to a detention facility to await trial or sentencing.”<sup>93</sup> Further, 51 percent of children transferred from juvenile court to adult court so they can be tried as an adult are Black.<sup>94</sup> At later stages of the criminal process, this statistical gap

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89. See Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of Life at All?*, 43 VANDERBILT L. REV. 529, 559 (1990) (“Perhaps the most telling criticism of life-without-parole, especially in states that use LWOP as an alternative to the death penalty, is that LWOP simply is not used often enough to make any real difference . . . [There is] a reluctance on the part of juries and judges to impose the sanction in place of capital punishment in heinous cases.”).

90. See Carol Chodroff, *Human Rights Watch Supports the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008*, HUM. RTS. WATCH (July 3, 2008, 8:00 PM), <https://www.hrw.org/news/2008/07/02/human-rights-watch-supports-juvenile-justice-and-delinquency-prevention#> [<https://perma.cc/39PY-XMYN>] (discussing how youth of color are disproportionately subjected to more punitive sanctions).

91. See Rovner, *supra* note 88 (explaining that well-accepted and research-backed notion that children do not have the same capacities as adults, so they should not be sentenced like adults).

92. See HENNING, *supra* note 3, at 15–16 (highlighting the ways that white and Black teenagers are treated differently in the criminal justice system and by police officers).

93. *Id.* at 15.

94. *Id.*

grows.<sup>95</sup> Studies indicate that 62 percent of children sentenced to LWOP are Black,<sup>96</sup> despite only 13.6 percent of the American population being Black.<sup>97</sup>

Children sentenced to LWOP often face an array of disadvantages before their incarceration. Of the children sentenced to LWOP, 31.5 percent grew up in public housing.<sup>98</sup> Only 46.6 percent—less than half—were attending school at the time of their offense.<sup>99</sup> As much as 46.9 percent of the children were physically abused,<sup>100</sup> and 79.5 percent of those reporting abusive histories identified as female.<sup>101</sup> Another 77.3 percent of girls reported histories of sexual abuse.<sup>102</sup> There is a glaring disparity regarding who these sentences impact the most.

The Eighth Amendment requires courts to account for evolving standards of decency by comparing challenged punishments with the longstanding principles and precedents of the common law.<sup>103</sup> In other words, courts look at (1) societal consensus based on whether a majority of states' legislatures have adopted a practice, and (2) whether the purposes of punishment justify the implementation of a practice.<sup>104</sup> Admittedly, as seen in *Miller*, a large number of states still continue to have CDBI sentencing schemes which, as the majority wrote, qualify as “objective indicia of society’s standards.”<sup>105</sup> However, societal consensus based on states’ legislation alone does not automatically justify a practice nor does it always indicate societal standards.<sup>106</sup> For example, the United States is the only country to have CDBI sentences, which indicates the country runs counter to the objective societal standard.<sup>107</sup>

95. See Rovner, *supra* note 88 (explaining that over a majority of people sentenced to LWOP are not participating in prison programs).

96. *Id.*; see also ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 14–15 (2012), [https://www.jstor.org/stable/pdf/resrep27344.pdf?refreqid=excelsior%3A2e61cc481029307b0d6d6461ea025025&ab\\_segments=&origin=&initiator=&acceptTC=1](https://www.jstor.org/stable/pdf/resrep27344.pdf?refreqid=excelsior%3A2e61cc481029307b0d6d6461ea025025&ab_segments=&origin=&initiator=&acceptTC=1) [<https://perma.cc/8BP9-HEJA>] (discussing racial disparities for black children with LWOP sentences).

97. *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/6AEG-EUWM>].

98. NELLIS, *supra* note 96, at 2.

99. *Id.* at 3.

100. *Id.* at 2.

101. *Id.*

102. *Id.*

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

104. See Berry, *supra* note 35, at 117 (explaining that the two-step process of evaluating the evolving standards doctrine assessing a punishment).

105. *Miller v. Alabama*, 567 U.S. 460, 482 (2012).

106. *Id.* at 483 (“[Y]outh matters for the purposes of meting out the law’s most serious punishments.”).

107. See Chodroff, *supra* note 90 (indicating international standards through treaties which protect the human rights of incarcerated people); see also Saki Knafo, *Here Are All the Countries Where Children Are Sentenced to Die in Prison*, HUFF POST (Sept. 20, 2013, 3:41 PM),

Using this inquiry, the U.S. Supreme Court failed to prohibit states from condemning children to death by incarceration by finding no categorical violation of the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>108</sup> The Supreme Court recognized that CDBI sentences are both cruel and unusual in most circumstances, yet allowed lower courts to continue to implement them in limited cases.<sup>109</sup> Scholars argue that evolving standards of decency require courts to apply the Eighth Amendment in accordance with its moral aim or purpose to ban the infliction of unjust, oppressive, or disproportionate punishments by a state on its citizens.<sup>110</sup> As it stands, however, the Supreme Court has ruled that “permanently incorrigible” children will never be able to contribute to society no matter how reformed they become.<sup>111</sup>

As seen in *Jones*, children often go through great change during incarceration.<sup>112</sup> Again, Jones earned his GED, completed college courses, and reformed himself to the point that even those most directly affected by his crimes affirmed that he is rehabilitated.<sup>113</sup> Yet, the Supreme Court disregarded Jones’s transformation, upholding his LWOP sentence and finding him “incorrigible” and beyond hope.<sup>114</sup> This is not justice; this is cruel and unusual punishment. Incarceration is justified only to have offenders pay their debts to society, protect the community, and/or rehabilitate the offender. Individuals like Jones have clearly met their burden, yet they are punished anyway. That is cruel.

Opponents of the complete abolition of LWOP sentences for children argue that homicide is a serious crime and that children who commit homicide are therefore “more deserving” of harsher punishment.<sup>115</sup> Homicide is unquestionably a serious crime, but the severity of a crime should not

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[https://www.huffpost.com/entry/juvenile-life-without-parole\\_n\\_3962983](https://www.huffpost.com/entry/juvenile-life-without-parole_n_3962983) [<https://perma.cc/PM9Q-2VWA>] (identifying the United States as the only country to sentence children to life sentence without parole).

108. Morgan S. McGinnis, *Sentenced to Die in Prison: Life without Parole as an Eighth Amendment Violation for All Juveniles and Especially Those Who Have Not Killed*, 11 HASTINGS RACE & POVERTY L.J. 201, 221 (2014) (“[B]ecause society’s social mores have changed, sentencing juveniles to LWOP violates the Eighth Amendment and is thus unconstitutional.”).

109. *Id.*

110. See, e.g., Dennis J. Baker, *Constitutionalizing the Harm Principle*, 27 CRIM. JUST. ETHICS 3, 15 (2008) (“The Eighth Amendment should be interpreted in a way that accords with its overall moral aim or purpose. The Amendment’s overall moral aim is to ensure that the state does not inflict unjust, oppressive, or disproportional punishments on its citizens.”).

111. See generally *Jones v. Mississippi*, 141 S.Ct. 1307 (2020) (upholding a LWOP conviction for a child convicted of murder).

112. *Id.* at 1339 (Sotomayor, J., dissenting).

113. *Id.*

114. *Id.* at 1323.

115. See generally *id.* (upholding a LWOP conviction for a child convicted of murder).

immediately negate the possibility, let alone the need, for rehabilitation and redemption.<sup>116</sup> If anything, children who commit homicide have caused a harm that they can barely begin to atone for behind bars.<sup>117</sup> Sentencing kids to death by incarceration in prison does not administer justice for either party involved; it only attempts to hide deep societal issues in the hopes that no one notices. For decades, the Court has noted that “children are different,”<sup>118</sup> that courts must consider “a child’s lesser culpability,”<sup>119</sup> and that courts must determine the defendant’s potential for rehabilitation.<sup>120</sup> For decades, the courts demonstrated an agreement that children should be treated differently from adults and should have the opportunity to reform themselves—yet they still drew an arbitrary line.<sup>121</sup>

Furthermore, states’ practice of imposing LWOP sentences on children fails to conform with human rights standards.<sup>122</sup> In reports examining the sentencing laws of all the countries around the world, researchers found that the United States is the only country in the world to use life without parole sentences for children.<sup>123</sup> It is more than a little ironic that although the Supreme Court relies upon the doctrine of evolving standards of decency, the

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116. See generally Carter, López & Songster, *supra* note 11 (providing a more thorough analysis of the concept of redemption as a fundamental reason why life without parole can never be justified). Through personal anecdotes, as well as the legal ideals of restorative justice, the authors demonstrate there is *always* a possibility for rehabilitation and redemption. *Id.*

117. Even while incarcerated without any real means to make amends, Jones made an effort to educate himself and actively searched for work to do in the prison. *Jones*, 141 S.Ct. at 1339 (Sotomayor, J., dissenting). Jones’s unit manager revealed that Jones had spoken to him about regretting his actions. *Id.*

118. *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

119. *Montgomery v. Louisiana*, 577 U.S. 190, 207 (2016).

120. *Miller*, 567 U.S. at 465.

121. *Jones*, 141 S.Ct. at 1340 (Sotomayor, J., dissenting).

122. Condemning LWOP sentences for children, “[i]nternational human rights experts have found that such sentences violate the three core human rights treaties ratified by the U.S.: the International Covenant on Civil and Political Rights (the ‘ICCPR’); the Convention Against Torture (the ‘CAT’); and the Convention on the Elimination of All Forms of Racial Discrimination (the ‘CERD’).” COLUM. L. SCH. HUM. RTS. INST., CHALLENGING JUVENILE LIFE WITHOUT PAROLE: HOW HAS HUMAN RIGHTS MADE A DIFFERENCE? 2 (2014), [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/jlwop\\_case\\_study\\_hri\\_0.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/jlwop_case_study_hri_0.pdf) [<https://perma.cc/Z7K4-XDK4>] (“The Convention on the Rights of the Child (the ‘CRC’)—ratified by every country in the world, other than South Sudan, Somalia, and the United States—expressly prohibits [LWOP] [for children.] Demonstrating international opposition to [LWOP] [for children], the United Nations General Assembly has called for immediate abrogation of [LWOP] sentences [for children] every year since 2006. [LWOP] sentences [for children] have also been rejected by regional human rights bodies, which monitor human rights compliance in the Americas.”).

123. *Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR., <https://jlc.org/issues/juvenile-life-without-parole> [<https://perma.cc/5W9K-8T44>]; Brandon L. Garrett, *Life Without Parole for Kids Is Cruelty with No Benefit*, ATLANTIC (Oct. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/life-without-parole-kids-cruelty-no-benefit/616757/> [<https://perma.cc/S866-F9EN>].

U.S. is the last to decently evolve. The international community values rehabilitation and restorative justice as a means to redefine the concept of justice as one of “healing” rather than one of “punishment.”<sup>124</sup> The European Court for Human Rights, for instance, explicitly concluded that “all prisoners, including those serving life sentences, must be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”<sup>125</sup> The U.S. CBI sentences do not allow for that ideal. The U.S. fails to evolve and to progress each time its courts sentence children to death by incarceration.

Thus, this “permanently incorrigible” understanding for children involved in homicide cases is inherently flawed and contradictory. A mark of progress, reform, and growth shows an individual’s incapability to be permanently incorrigible. Especially considering children, who do not mentally fully develop until well into their twenties,<sup>126</sup> they should be afforded the opportunity to reform themselves. If a child is able to develop, reform, and rehabilitate, how can a court find “permanence” in their actions when the court itself proves that the child is still developing?<sup>127</sup>

We each have the innate ability to reform ourselves, no matter how old or how young we are.<sup>128</sup> The doctrine of evolving standards of decency requires the meaning of cruel and unusual punishment to align with current societal standards, because what was constitutionally permissible in the past is not necessarily constitutional now.<sup>129</sup> Essentially, the Court eventually determines that certain punishments, such as death by incarceration sentences

124. Daniel W. Van Ness, *Restorative Justice: International Trends 1* (Oct. 7, 1998) (unpublished manuscript), <https://biblioteca.cejamerica.org/bitstream/handle/2015/3328/van-ness-int-trends.pdf> [<https://perma.cc/3EW3-6V2K>]; see also Carter, López & Songster, *supra* note 11 at 332 (discussing a personal theory of redemption).

125. Cheri Brooks, *Lifers Speak Out on Right to Redemption*, DREXEL MAG. (2022), <https://drexelmagazine.org/2022/lifers-speak-out-on-right-to-redemption/> [<https://perma.cc/ZC3B-SYPQ>].

126. Sarah B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009); K. Kersting, *Brain Research Advances Help Elucidate Teen Behavior*, 35 MONITOR ON PSYCH. 80, 80 (2004).

127. Jones, for example, had shown great strides towards reform and clearly is not permanently incorrigible. *Jones v. Mississippi*, 141 S.Ct. 1307, 1339 (2021) (Sotomayor, J., dissenting). Again, LWOP sentences simply do not allow for a meaningful opportunity to reform. See generally Kerstin Conrad et al., *Brain Development During Adolescence: Neuroscience Insights into This Developmental Period*, 110 DEUTSCHES ARTZEBLATT INT. 425 (2013) (finding that fundamental reorganization in the brain takes place during adolescence, which accounts for many young people having risk-taking behavioral patterns).

128. Carter, López & Songster, *supra* note 11 at 332 (remarking that redemption is possible).

129. Courtney Amelung, *Responding to the Ambiguity of Miller v. Alabama: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 29 (2013) (discussing the Court’s decision in *Graham v. Florida*, 560 U.S. 48 (2010)).



for children, will become unconstitutional because society now finds these sentences indecent and excessive.<sup>130</sup> As in *Roper*, even when domestic jurisdictions uphold a particular practice like CDBI, “[i]t is proper that we acknowledge the overwhelming weight of international opinion” regarding a cruel and unusual punishment.<sup>131</sup>

### Conclusion

Recent Supreme Court decisions demonstrate that LWOP sentences should be abolished for all children, even in cases involving homicides. This practice runs contrary to judicial precedent, various civil and human rights, and even our societal and cultural values in restorative justice.

In cases involving children over the past seventeen years, the Supreme Court has abolished the death penalty, banned LWOP sentences for non-homicide crimes, struck down mandatory minimum LWOP sentences, and retroactively applied these new rulings to individuals who were sentenced to LWOP as children. Indeed, the past is marred by precedent upholding the constitutionality of death by incarceration sentences for children. Evolving standards of decency, however, do not rest on precedent; they rest on societal standards that mark the *progress* of a maturing society. If the Court affords itself the ability to mature and grow, courts should also allow children the ability to demonstrate they can reform and rehabilitate. Especially considering that children do not fully develop until almost a decade into adulthood, how can a sentencer find “permanent incorrigibility” in a child capable of maturing, growing, reforming, and rehabilitating? The logical progression of future cases should be the total abolition of LWOP sentences for children—not dangerous missteps that uphold this unconstitutional practice and allow the labels of “irreparable,” “permanently incorrigible,” and “dangerous” to follow a reformed child into adulthood. We should be trending towards restorative justice, not towards throwing more children away.

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130. See Berry, *supra* note 35, at 149 (discussing the evolving standards of decency doctrine).

131. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“[T]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).