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# Eliminating the Effective Death Sentence of Life Without Parole

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# ELIMINATING THE EFFECTIVE DEATH SENTENCE OF LIFE WITHOUT PAROLE

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## I. INTRODUCTION

There are only two criminal sentences available in the United States that ensure that a person convicted of a crime will never live outside of the prison walls during his or her natural life: the death penalty and life without

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parole.<sup>1</sup> Punishments, or sentences in the prison context, are meant to serve five purposes: “rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation.”<sup>2</sup> The death penalty and life without parole effectively place their emphasis on general deterrence and completely eliminate the goal of rehabilitation. The debate over the death penalty has raged for decades.<sup>3</sup> While this debate continues, there has been little debate on the topic of life without parole, even though the death penalty and life without parole have essentially the same effect. This paper will take no position on the death penalty and will only discuss the death penalty as it is relevant to the expansion or abolition of life without parole statutes.

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>4</sup> With this constitutional provision in mind, the Supreme Court of the United States has addressed the application of life without parole in limited situations.<sup>5</sup> International courts have also addressed the sentence of life without parole.<sup>6</sup> These various decisions have shown a movement toward the elimination of life without parole sentences.<sup>7</sup> The Supreme Court should continue this movement and eliminate the sentence completely, not just as a mandatory sentence in certain cases. Should the Supreme Court choose not to slowly expand its interpretation of the Eighth Amendment to include a ban on life without parole sentences, state legislatures and state courts should eliminate the sentence through legislation and state constitutional interpretation, respectively.

## II. HISTORY

Life without parole sentences seem to have emerged as a result of lobbying by death penalty abolitionists.<sup>8</sup> The argument is that if the

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<sup>1</sup> It is understood that sometimes prisoners are taken from prisons for medical services, but they are effectively kept in prison during this time by being watched by guards and are returned when they are healthy. See generally Martin F. McKneally & Robert M. Sade, *The Prisoner Dilemma: Should Convicted Felons Have the Same Access to Heart Transplantation as Ordinary Citizens? Opposing Views*, 125 J. OF THORACIC & CARDIOVASCULAR SURGERY 451, Mar. 2003, available at <http://www.musc.edu/humanvalues/pdf/prisonerdilema.pdf>.

<sup>2</sup> Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005).

<sup>3</sup> See Kira Zalan, *A Punishing Debate*, U.S. News, Oct. 3, 2013, available at <http://www.usnews.com/opinion/articles/2013/10/03/the-debate-over-the-death-penalty-hasnt-changed-in-decades>.

<sup>4</sup> U.S. CONST. amend. VIII.

<sup>5</sup> See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>6</sup> *Vinter v. United Kingdom*, EUR. CT. H.R. (July 9, 2013), [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{"itemid":\["001-122664"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664#{) [hereinafter *Vinter*].

<sup>7</sup> See *id.*; see also *Graham*, 560 U.S. 48; *Miller*, 132 S.Ct. 2455.

<sup>8</sup> Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1838 (2006) [hereinafter *Student Note*].

convicted person is imprisoned permanently, a jury would not feel the need to put the convicted person to death. After the Supreme Court struck down all death penalties currently in effect in the 1972 case of *Furman v. Georgia*,<sup>9</sup> prosecutors became advocates for the adoption of life without parole sentences.<sup>10</sup> However, when the Supreme Court approved new capital sentencing schemes in its decision in *Gregg v. Georgia*,<sup>11</sup> prosecutors reversed their position and advocated for the elimination of life without parole statutes because they feared that the alternative sentence provided by these statutes would hinder their ability to obtain death sentences.<sup>12</sup> By 2005, forty-eight states, the District of Columbia, and the federal government had enacted statutes that authorized a life without parole sentence.<sup>13</sup> The time that it took to pass these statutes varied from state to state. For example, two death penalty states, Kansas and Texas, did not adopt life without parole statutes until 2004 and 2005, respectively.<sup>14</sup>

While the death penalty may have been a driving factor behind the adoption of life without parole statutes, these statutes have often expanded in scope. Thirty-seven states allow for life without parole sentences for nonhomicide offenses.<sup>15</sup> These statutes led to over 41,000 people serving life without parole sentences by 2008.<sup>16</sup> Notably, just over 12,000 prisoners were serving life without parole sentences in 1992.<sup>17</sup> These numbers have increased due to legislatures expanding the crimes eligible for the sentence and because some states have chosen to enact mandatory life without parole statutes for convictions for certain types of murders and for serious habitual offenders.<sup>18</sup> The expansion of offenses that fall under life without parole and the institution of mandatory sentencing has caused the life without parole population to be tripled in just over sixteen years.<sup>19</sup> This ever-expanding population of prisoners will continue to cause economic problems because of prison costs and will also lead to substantial overcrowding of prisons. The issue is whether to continue to utilize life without parole statutes.

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<sup>9</sup> *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

<sup>10</sup> *Student Note, supra* note 8, at 1841.

<sup>11</sup> *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

<sup>12</sup> *Student Note, supra* note 8, at 1841.

<sup>13</sup> *Id.* at 1842.

<sup>14</sup> *See id.* Texas's prosecutors were more worried about having to instruct the jury about the ineligibility of parole, since the current life statute required forty years to be served before being parole eligible and did not require instructing about parole ineligibility. *See Simmons v. South Carolina*, 512 U.S. 154 (1994).

<sup>15</sup> Ashley Nellis, The Sentencing Project, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010), available at [http://sentencingproject.org/doc/publications/inc\\_federalsentencingreporter.pdf](http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

### III. CONSTITUTIONAL CHALLENGES TO LIFE WITHOUT PAROLE SENTENCES

While lawyers have attempted to challenge the death penalty on almost every ground,<sup>20</sup> very little argument has been put forth about eliminating life without parole sentences. One challenge to the life without parole sentence has been an Eighth Amendment challenge against the mandatory imposition of the sentence without regard to potential mitigating circumstances.<sup>21</sup> The Supreme Court held that death is different, that no proportionality review was required for life without parole sentences, and that individualized sentencing is not required outside of death sentencing.<sup>22</sup> The most recent challenges to the sentence have dealt with the application of life without parole to juveniles. The first challenge argued against the application of the sentence to juveniles who commit nonhomicide offenses.<sup>23</sup> The second challenge argued against the mandatory application of the sentence to juvenile homicide offenders.<sup>24</sup>

#### 1. *Graham v. Florida*

The challenge against the application of life without parole sentencing to nonhomicide juvenile offenders came in *Graham v. Florida*.<sup>25</sup> The Supreme Court ultimately held that the Eighth Amendment places a categorical bar on the imposition of life without parole for nonhomicide juvenile offenders because such punishment would be considered cruel and unusual.<sup>26</sup> In reaching this conclusion, the Court applied case law that it had previously for death penalty cases only.<sup>27</sup> The Court found the age of the offender to be a very important factor in its consideration of the sentence and that “[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”<sup>28</sup> The Court further noted that because of the younger age at the time of the conviction, the juvenile will have a diminished moral culpability and will end up serving a longer time in prison.<sup>29</sup> The Court reasserted its findings in *Roper v. Simmons*<sup>30</sup> that juveniles have a diminished moral culpability because of a lack of maturity, because of a vulnerability to peer pressure and similar influences, and because their “characters are ‘not as well

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<sup>20</sup> See, e.g., *Baze v. Rees*, 553 U.S. 35 (2008).

<sup>21</sup> *Harmelin*, 501 U.S. 957 at 994.

<sup>22</sup> *Id.* at 996.

<sup>23</sup> *Graham*, 560 U.S. 48.

<sup>24</sup> *Miller*, 132 S.Ct. 2455.

<sup>25</sup> *Graham*, 560 U.S. 48.

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

<sup>27</sup> *Id.* at 102 (Thomas, J., dissenting).

<sup>28</sup> *Id.* at 79.

<sup>29</sup> *Id.* at 69-70.

<sup>30</sup> 543 U.S. 551, 570 (2005).

formed.”<sup>31</sup> As a result, the Court created a categorical bar to the life without parole sentence for juvenile nonhomicide offenses as opposed to just requiring the introduction of age as a mitigating factor when determining the proper sentence.<sup>32</sup> Finally, the Court noted that its decision brings the United States in line with every other country in the world, with the sole exception of Israel, that does not give life without parole sentences to juvenile nonhomicide offenders.<sup>33</sup>

## 2. *Miller v. Alabama*

In *Miller v. Alabama*, the Supreme Court addressed the second challenge to life without parole sentences: a challenge against the imposition of mandatory life without parole sentences on juveniles who have committed homicide offenses.<sup>34</sup> In the consolidated appeal, two fourteen year olds, one from Arkansas and one from Alabama, were transferred to adult court, convicted of murder, and sentenced to life without parole due to a mandatory sentencing scheme.<sup>35</sup> The Court invalidated the sentences because of their mandatory nature and remanded the cases for individualized sentencing hearings.<sup>36</sup> The Court considered its reasoning from *Graham* regarding the diminished culpability of juveniles and held that the mandatory sentences violated the Eighth Amendment.<sup>37</sup>

However, the most notable part of the decision came in the majority’s pronouncement of *when* the life without parole sentence would be appropriate for a juvenile: “But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*.”<sup>38</sup> Each of the dissenting justices took issue with this one sentence.<sup>39</sup> Chief Justice Roberts even astutely pointed out that “[i]f . . . such sentences for juvenile offenders do in fact become ‘uncommon,’ the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.”<sup>40</sup> The punishment was considered “cruel” within the meaning of the Eighth Amendment when it was applied to juvenile nonhomicide offenses, as demonstrated by the decision in *Graham*.<sup>41</sup> But if

<sup>31</sup> *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

<sup>32</sup> *Id.* at 77-79.

<sup>33</sup> *Id.* at 80-81.

<sup>34</sup> *Miller*, 132 S.Ct. 2455.

<sup>35</sup> *Id.* at 2461-63.

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

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

<sup>38</sup> *Id.* at 2469 (emphasis added).

<sup>39</sup> *Id.* at 2481 (Roberts, J., dissenting); *id.* at 2486 (Thomas, J., dissenting); *id.* at 2489 (Alito, J., dissenting).

<sup>40</sup> *Id.* at 2481.

<sup>41</sup> *See Graham*, 560 U.S. 48.

the practice becomes “uncommon”— as suggested by the majority in *Miller*—a life without parole sentence for a homicide offense will become “unusual” and will then be violative of the Eighth Amendment’s proscription against cruel and unusual punishments.<sup>42</sup> This expansion—which is bound to happen if the lower courts follow the majority’s opinion and make the sentence uncommon—will completely eliminate life without parole sentences for all juveniles.

#### IV. SHOULD *GRAHAM* AND *MILLER* BE APPLIED TO ADULTS?

The decisions in *Graham* and *Miller* present multiple issues, especially with respect to the Court’s analysis regarding age in relation to the life without parole sentence. First, the age that the Court chose to define a juvenile—eighteen—is somewhat arbitrary. The Court then used this arbitrary age to say that those below that age have a diminished culpability. Second, the Court relied on three arguable characteristics to show that those under eighteen are less culpable. The remaining issues revolve around these two main issues.

##### 1. *Arbitrariness of the Age of Eighteen*

The age of eighteen, while not completely arbitrary, is sufficiently arbitrary to show that the Court should not limit its reasoning and decisions regarding life without parole sentences to just those offenders who are under the age of eighteen. A hypothetical should be illustrative as to the potential unreasonable results of such an age limitation. Imagine that a person decides to go out one night with friends to celebrate his eighteenth birthday, which occurs at midnight that night. They subsequently decide to rob the local corner store. The person takes a gun to commit the robbery. In one hypothetical, the person commits the aggravated robbery of the store at 11:59 P.M. In the second hypothetical, the person commits the aggravated robbery of the store at 12:01 A.M. In both hypotheticals, the person has a criminal history that requires him to be sentenced to a mandatory life without parole sentence. Thus, the person who committed the crime at 12:01 A.M. will spend the rest of his life in prison while the person who committed the robbery at 11:59 P.M. will at most receive a sentence of life with the possibility of parole.<sup>43</sup> While this situation is extremely unlikely, it

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<sup>42</sup> In *Graham*, 39 states had life without parole for juvenile nonhomicide offenses. While the statutes allowed for the sentence, only 123 prisoners were given that sentence, with over half in one state. This showing of a lack of usage shows that the punishment is unusual. *Graham*, 560 U.S. at 64.

<sup>43</sup> See *Graham*, 560 U.S. at 74-75 (“Because the age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.”) (internal quotations omitted).

highlights the Supreme Court's lack of justification as to why the age of eighteen should be determinative of the differing outcomes exemplified above.

The only possible explanation given is that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood."<sup>44</sup> This reasoning does little to explain why eighteen is the arbitrary age chosen for such distinctions. Because the age is arbitrary, it is difficult to understand why the Court decided to apply this categorical bar to life without parole sentences only to those under eighteen except that society generally believes this to be the age of adulthood. But this simple reason should not serve as a basis to exclusively limit the Court's ban on these sentences to those under the age of eighteen.

In his dissent in *Miller*, Justice Alito gives a slightly different example of the arbitrary nature of the age limit: "Even a 17 1/2-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society."<sup>45</sup> Justice Alito is arguing that the criminal in that case should be sentenced to mandatory life without parole despite being below the age of eighteen. The arbitrariness of selecting one age at which the sentence transforms from unacceptable to acceptable is evident and merits further examination.

2. *Should The Lack of Maturity Factor Used to Demonstrate Lower Culpability in Those Under Eighteen Be Given Broader Scope?*

The Supreme Court has said that those convicted of crimes under the age of eighteen have diminished culpability. This diminished culpability is said to be due to a lack of maturity, vulnerability to peer pressure and similar influences, and because the "characters [of juveniles] are 'not as well formed.'"<sup>46</sup> The Court points to scientific studies to support these claims.<sup>47</sup> However, other well-settled scientific studies have demonstrated that brain maturity is not complete until the age of twenty-five.<sup>48</sup> This information begs the question of whether the Supreme Court should at least expand its reasoning in *Graham* and *Miller* to criminals that are under the age of twenty-five.

This question creates new and potentially unforeseen problems. First, attempting to apply the reasoning from the *Graham* and *Miller* opinions to those that are between the ages of eighteen and twenty-five creates a critical problem with the cruel and unusual analysis under the

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<sup>44</sup> *Id.*

<sup>45</sup> *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting).

<sup>46</sup> *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

<sup>47</sup> *Roper*, 543 U.S. at 569-70.

<sup>48</sup> *Brain Maturity Extends Well Beyond Teen Years*, NPR, Oct. 10, 2011, available at <http://www.npr.org/templates/story/story.php?storyId=141164708>.



Eighth Amendment. Expanding the age limit to twenty-five would severely undercut the “unusual” analysis used by the Court in *Graham*, as it has not been historically unusual to subject those over eighteen to life without parole sentences. However, in its decision in *Miller*, the Court found the sentence to be “unusual,” even though, as noted by Chief Justice Roberts in his dissent, “most States formally require and frequently impose [life without parole for juvenile homicide offenders.]”<sup>49</sup> Thus, while essentially finding that the disputed sentence in *Miller* was not “unusual” in exactly the same sense as it was in *Graham*, the Court still found other reasons to justify the sentence as being unusual. However, it would be much more difficult for the Court to find the sentence “unusual” when applied to criminals between eighteen and twenty-five because forty-nine states and the federal government have statutory provisions for life without parole.<sup>50</sup> Thus, the reasoning from *Miller* and *Graham* would most likely fail when applied to criminals between the ages of eighteen and twenty-five.

### 3. *Applicability to Adults*

As stated, while problems exist with limiting the age to eighteen, attempting to expand the current reasoning for elimination of the life without parole sentence outside of its current scope would create problems that almost certainly could not be overcome. Because the sentences are reviewed under the Eighth Amendment, the “unusual” part of the analysis will always become a problem when trying to expand the pool of criminals to whom the sentence should not apply.

This problem demonstrates that, at this time, it is better to focus on eliminating the sentence for a limited group, and the reasoning should not be expanded to those above eighteen. To that end, it is likely that the sentence may become even more limited in its application to juveniles if the state courts follow the pronouncement of the majority in *Miller* that any imposition of the sentence should be “uncommon.” This additional limitation may help inevitably lead to the elimination of the juvenile life without parole sentencing completely.

## V. INTERNATIONAL VIEWS ON THE LIFE WITHOUT PAROLE SENTENCE

The United States stands at odds with many industrialized nations with respect to its sentencing for both life without parole and the death penalty.<sup>51</sup> Many nations have used internal methods to invalidate life without parole sentences.<sup>52</sup> The European Court of Human Rights has also

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<sup>49</sup> *Miller*, 132 S.Ct. at 2478 (Roberts, J., dissenting).

<sup>50</sup> Nellis, *supra* note 15, at 28.

<sup>51</sup> *Id.* at 30.

<sup>52</sup> *Id.*

eliminated the use of the life without parole sentencing for the countries under its jurisdiction.<sup>53</sup>

1. *Nations Using Internal Methods to Invalidate Life Without Parole*

Many countries have undertaken the monumental step of eliminating life without parole. The most common method used by these countries has been to determine that the sentence is unconstitutional. Three countries have taken this step: Germany, Italy, and France.<sup>54</sup> Spain and Canada only allow for a maximum sentence of twenty-five or thirty years.<sup>55</sup> Other countries, such as the United Kingdom and Sweden had permitted the sentence in the past, but used it sparingly and never used it as a mandatory sentence for particular crimes.<sup>56</sup> However, the discretion of the United Kingdom and Sweden to permit the life without parole sentence has since been overruled, as will be shown below. Ultimately, the United States remains one of a limited number of industrialized states that permits and consistently uses the life without parole sentence.

2. *International Court Decisions*

Notably, the European Court of Human Rights has struck down the sentence of life without parole in its entirety.<sup>57</sup> In its decision, the tribunal was interpreting a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”).<sup>58</sup> The provision at issue reads as follows: “No one shall be subjected to torture or to inhuman [sic] or degrading treatment or punishment.”<sup>59</sup> The tribunal reasoned as follows:

111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. . . . [T]hese grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. . . . It is only by carrying out a review of the justification for continued detention at

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<sup>53</sup> See, e.g., *Vinter*, *supra* note 6.

<sup>54</sup> Nellis, *supra* note 15, at 30.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Vinter*, *supra* note 6.

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

<sup>59</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter *Convention*].

an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. . . .

113. Furthermore, as the German Federal Constitutional Court recognised in the *Life Imprisonment* case, it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece.<sup>60</sup>

By so reasoning, the tribunal struck down any possibility of using the sentence by countries that were signatories to the Convention.<sup>61</sup> Even though the United States is not a signatory to the Convention, the reasoning used in this decision should be instructive. However, the United States faces an obstacle that is not an issue for the signatories to the Convention: signatories to the Convention are also required to eliminate the death penalty, which the United States has not. This is of significant importance because one of the main arguments for the continuance of the life without parole sentence is that it is an alternative to the death penalty.

## VI. REASONS TO ELIMINATE LIFE WITHOUT PAROLE STATUTES

The United States should abolish the life without parole sentence. First, using life without parole as an alternative to the death penalty is not a strong enough argument to insist upon keeping the sentence. Second, the abolition of the punishment would allow the United States to conform to international norms, as demonstrated by the abolition set out by the European Court of Human Rights. Third, eliminating the sentence would be a step toward reducing certain problems within the prison system, including

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<sup>60</sup> *Vinter*, *supra* note 6.

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

overcrowding and the rising costs associated with imprisonment. Fourth, citizens need to rely on parole boards to make determinations as to whether criminals are fit to reenter society and whether they are likely to commit further crimes. Fifth, the elimination of life without parole sentences would place the emphasis of sentencing back on rehabilitation of criminals, which is where the emphasis should be.

1. *Life Without Parole as an Alternative to Death Penalty Argument*

A suggested purpose of introducing the life without parole statutes was to limit the application of the death penalty.<sup>62</sup> However, this argument for keeping the sentence of life without parole is unpersuasive. As an initial matter, life without parole not only applies to murder cases, to which the death penalty is exclusively reserved,<sup>63</sup> but also applies to other offenses and to habitual offenders.<sup>64</sup> The expansion of imposing the sentence to nonhomicide offenses completely undermines the argument that it is meant as an alternative to the death penalty because that argument does not apply to cases involving nonhomicide offenses.

Even when applied to homicide offenses, the argument is still not persuasive. The argument is that it is not acceptable to kill someone in prison as punishment for a crime, but it is acceptable to let that same person die in prison. However, the implication and effective result of both the death penalty and the life without parole sentence is that the convict will spend the rest of his or her life in prison. This implication serves to undermine the argument that the life without parole sentence is an alternative to the death penalty.

Another contradiction in using life without parole as an alternative to the death penalty is the limited amount of procedural securities given to those convicted of life without parole as compared to those given to criminals who are sentenced to death. For example, those sentenced to death can raise actual innocence in a federal habeas corpus petition if supported by constitutional issues.<sup>65</sup> At least one federal court has severely limited the ability of those sentenced to life without parole to assert actual innocence claims.<sup>66</sup> Thus, while those who receive the death penalty are afforded certain procedural and appellate protections, those sentenced to life without parole are not given the same protections. As a result, after being sentenced to life without parole, those convicted have a potentially higher chance of dying in prison than those sentenced to death. This again

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<sup>62</sup> *Student Note, supra* note 8, at 1838.

<sup>63</sup> *See Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>64</sup> *Nellis, supra* note 15, at 27.

<sup>65</sup> *Schlup v. Delo*, 513 U.S. 298 (1995).

<sup>66</sup> *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999) (“[W]e conclude that . . . actual innocence applies in non-capital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision.”)

undermines the beneficial alternative argument, as the lack of protections will hurt those sentenced to life without parole. Thus, the alternative of receiving life without parole, as opposed to the death sentence, may actually be worse since it provides fewer procedural protections, and the person will die in prison under either sentence.

## 2. *Conforming to International Norms*

As previously mentioned, the European Court of Human Rights has struck down life without parole sentences.<sup>67</sup> Prior to this decision, many nations had also stopped this method of sentencing.<sup>68</sup> The United States should conform to the decisions of other industrialized nations and abolish life without parole sentences. When considering life without parole issues under American laws, should American courts consider such international decisions, and, if so, should the courts find those other decisions as persuasive? The United States has had no problem ignoring the decision of an international tribunal before, even when that decision directly addressed the United States.<sup>69</sup> However, the Supreme Court has also cautioned that “[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment[, b]ut the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant.”<sup>70</sup> This emphasis shows that the Court is willing to consider the decisions made by other countries and by international courts when making its decisions.

While the European Court of Human Rights was interpreting a provision of the Convention that does not match the language of the United States Constitution, the reasoning used in its decision is still persuasive for abolishing the life without parole sentence. As previously argued, a life without parole sentence removes any emphasis on rehabilitation.<sup>71</sup> Even if the prisoner is perfectly behaved and shows no signs of being a future danger to society, the sentence is “fixed and unreviewable.”<sup>72</sup> Also, the European Court of Human Rights decision correctly points out that the goals of sentencing should not be static but continually shifting.<sup>73</sup> A prisoner who is well behaved and has been for a long period of time deserves the chance to have his or her incapacitation reevaluated. Unfortunately, however, a life without parole sentence does not allow for such progress and subsequent reconsideration. Therefore, while the decision of the European Court of Human Rights is not precisely on point, the

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<sup>67</sup> *Vinter*, *supra* note 6.

<sup>68</sup> *Nellis*, *supra* note 15, at 30.

<sup>69</sup> *See Medellin v. Texas*, 552 U.S. 491, 498-99 (2008).

<sup>70</sup> *Graham*, 560 U.S. at 80 (internal quotations omitted).

<sup>71</sup> *Vinter*, *supra* note 6.

<sup>72</sup> *Id.* at 90 art. 112.

<sup>73</sup> *Id.* at 90 art. 113.

persuasive reasoning should be used to call for an abolition of life without parole sentences within the United States.

### 3. *The Rising Costs of Imprisoning for Life Without Parole*

One of the most important drawbacks to consider with the life without parole sentence is the cost associated with sentencing more and more people in this manner. As of 2008, over 41,000 prisoners were incarcerated under a sentence of life without parole.<sup>74</sup> Incarcerating a prisoner for forty years costs a state over \$1 million dollars.<sup>75</sup> That averages out to over \$25,000 per year for each prisoner. These costs include housing and food costs. One cost that is not often considered is the healthcare costs of older inmates. This cost has started to rise as the rising prison population reaches older age.<sup>76</sup> The sheer amount of cost in housing and taking care of these inmates for their respective lifetimes will be unsustainable. Therefore, the cost of life without parole sentences calls for abolition of the punishment.

Another cost of life without parole sentencing is the cost associated with the overcrowding of prisons.<sup>77</sup> The longer the sentences, the longer each prisoner adds to the problem of overcrowding. The obvious solution would be to build more prisons, but the cost associated with housing an individual prisoner is significant, as shown above. Further, the economic strain on the state by building new prisons would be great. Finally, the construction of a new prison building would only be the first step. The state would be required to furnish and staff that prison, which would be an even greater cost. Therefore, what seems to be the obvious solution would in fact be difficult and impracticable. Eliminating life without parole will help address the problem of overcrowding. Thus, life without parole should be eliminated to help cut down on the costs paid by the state associated with building and maintaining prisons.

### 4. *Parole Boards*

Life in prison without parole is meant to house the most dangerous criminals. However, the potential danger of a prisoner is not a static characteristic, but one that is continually changing and one that should be available for reevaluation. If rehabilitation is successful, the prisoner may no longer need to be incapacitated, and the parole boards were established to make this exact determination.

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<sup>74</sup> Nellis, *supra* note 15, at 27.

<sup>75</sup> *Id.* at 30.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> See Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What are Constitutional Conditions and What Can be Done?*, 8 N.Y.L. Sch. J. Hum. Rts. 489 (1991).

By having life without parole statutes, we, as a society, are expressing our distrust in the parole board system. Yet, in some cases, we are willing to trust that same parole board when a person is given a life with the possibility of parole sentence. The parole board is established to make determinations about whether a prisoner has been rehabilitated, and we should trust them. When a criminal is sentenced to life without parole, the judge or jury is making a present determination that the criminal will perpetually be a danger to society. However, this determination should not solely be in the hands of judges and juries. If the criminal is truly a continuing danger to society, the parole board should be allowed to make that determination.

An example of the successful exercise of a parole board is demonstrated by the case of the convict Charles Manson. Manson was sentenced to life with the possibility of parole.<sup>78</sup> He has been in front of the parole board at least twelve times during his incarceration, each time being denied such parole.<sup>79</sup> This example shows the capability of parole boards to make the determination as to whether a prisoner poses a continuing danger to society. Parole boards do not get this chance when a life without parole sentence is given, thereby limiting the determination of a criminal's future potential danger to society to one point in time. Therefore, another reason life without parole sentences should be abolished is so that parole boards may have the opportunity to exercise their inherent discretion to determine if a prisoner has been rehabilitated.

### 5. *Rehabilitation*

In eliminating the life without parole sentence, the European Court of Human Rights placed the most emphasis on the goal of rehabilitation.<sup>80</sup> The absence of rehabilitative value has been an overarching theme behind every argument to eliminate life without parole sentences. Rehabilitation should be the main goal of the prison system.

The United States, even without this emphasis, has been fairly successful in rehabilitating prisoners. Older prisoners who are released have a low recidivism rate.<sup>81</sup> This low recidivism is especially true for people who serve sentences of only life with the possibility of parole.<sup>82</sup> Murderers are serving a portion of these life imprisonments. Studies have shown that less than one percent of those who were released after committing murders

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<sup>78</sup> See Michael Martinez, *Charles Manson Denied Parole, with Next Parole Hearing Set for 2027*, CNN, (Apr. 12, 2012, 5:41 AM), available at <http://www.cnn.com/2012/04/11/justice/california-charles-manson/index.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *Vinter*, *supra* note 6.

<sup>81</sup> See Nellis, *supra* note 15, at 28.

<sup>82</sup> *Id.*

committed a subsequent homicide.<sup>83</sup> Because there is such a low recidivism rate, the sentencing of a person to life without parole has lost its appeal. Rehabilitation has been successful, and the focus should remain on furthering that goal. Therefore, life without parole sentences should be abolished so that the focus can remain on the rehabilitative value of sentencing.

## VII. POTENTIAL SOLUTIONS

The first way life without parole sentences could be eliminated is through a string of decisions by the Supreme Court of the United States. The sentence could potentially be eliminated under an Eighth Amendment “cruel and unusual punishment” analysis. The Court could attempt to broaden its holdings in the recent cases of *Graham* and *Miller*. The main obstacle to this approach is whether the punishment can be considered “unusual.” Because the punishment is widely used and has in fact been expanded in use over the past two decades, the Court will most likely continue to run into this issue. Even though the Supreme Court has stated that it finds the decisions of various international courts instructive, the Court will most likely not be able to overcome the inevitable fact that this punishment is not “unusual” in the American legal system.

The second way the Supreme Court could potentially eliminate the penalty is under the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment states in pertinent part that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>84</sup> The Due Process clause “confers both substantive and procedural rights.”<sup>85</sup> As a starting point, convicted criminals have no liberty interest in their freedom:

Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual and

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<sup>83</sup> James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 24 (1989).

<sup>84</sup> U.S. CONST. amend. XIV, § 1.

<sup>85</sup> *Albright v. Oliver*, 510 U.S. 266, 272 (1994).



so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause . . .<sup>86</sup>

Because convicted criminals have no liberty interest, the Court would have to find that a convicted criminal has a fundamental right to a parole hearing. One obstacle to finding such a right lies within the death penalty. Because those sentenced to death implicitly cannot receive parole, the fundamental right would necessarily imply an elimination of the death penalty. The elimination of the death penalty would potentially create a tension with the text of the Fourteenth Amendment. The Fourteenth Amendment says that a person cannot be deprived of life without due process. This statement necessarily implies that a state *can* deprive a person of life, e.g. the death penalty, as long as due process standards are met. Thus, because convicted criminals have no liberty interest in their freedom and creating a fundamental right to a parole hearing would create a tension with regard to the constitutionality of the death penalty, the Court would struggle to eliminate life without parole under the Fourteenth Amendment.

Absent a decision by the Supreme Court, what other options are available? The first option would be for state legislatures to abolish life without parole statutes. The onus should be on the state legislatures to start eliminating the sentence. The only obstacle in this approach is the politics behind state legislatures. The members of the legislature may no longer receive the support of their constituents if they choose to eliminate these statutes. Anti-death penalty supporters may fund campaigns against those members. Thus, while the right thing to do would be to eliminate the statute, the politics behind state legislatures may never allow it to happen.

The second option would be for the state courts to eliminate the punishment as invalid under their respective state constitutions. For example, Florida's state constitution creates a prohibition on "cruel *or* unusual punishment."<sup>87</sup> Other state constitutions provide similar provisions.<sup>88</sup> As implied by the Supreme Court in *Graham* and *Miller*, life

<sup>86</sup> *Chapman v. United States*, 500 U.S. 453, 465 (1991) (emphasis in original) (internal citations omitted).

<sup>87</sup> FLA. CONST. art. I, § 17 (emphasis added).

<sup>88</sup> See ALA. CONST. § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; DEL. CONST. art. I, § 11 ("nor cruel punishments inflicted"); HAW. CONST. art I, § 12; KAN. CONST. bill of rights, § 9; KY. CONST. § 17 ("nor cruel punishment inflicted"); LA. CONST. art. I, § 20 ("No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment"); ME. CONST. art. I, § 9 ("nor cruel nor unusual punishments"); MASS. CONST. Part the First, Article XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; NEV. CONST. art. I, § 6; N.H. CONST. Part First, art. XXXII; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art II, § 9; PA. CONST. art. I, § 12 ("cruel punishments" shall not be inflicted); R.I. CONST. art. I, § 8 ("nor cruel punishments inflicted"); S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23 ("nor cruel punishments inflicted"); TEX. CONST. art I, § 13; WASH. CONST. art. I, § 14 ("nor cruel punishment inflicted"); WYO. CONST. art. I, § 14.

without parole sentences are cruel.<sup>89</sup> Thus, these state courts can address the issue and strike down the laws under state constitutional law simply by finding a life without parole sentence to be cruel. Unfortunately, members of most state courts are also elected, and therefore pose the same political problem as the legislature. However, these courts do have the ability to strike down the sentences because their constitutions do not *require* that the punishment be cruel *and* unusual.

Aside from political issues inherent in state courts, the other problem is that defining life without parole as cruel enough to be contrary to the state constitution leaves open the possibility that this analysis might also be used to imply that the death penalty is unconstitutional. In distinguishing a life without parole sentence from a death penalty sentence, it can be argued that life without parole is crueler because those sentenced to life without parole potentially have to spend a longer time in prison without the chance of ever being released. However, the possibility that the elimination of the life without parole sentence could result in an elimination of the death penalty could cause state courts to hesitate.

The final option is a combination of state and federal court rulings and legislative action. If most of the state courts and legislatures begin to remove the sentence, the Supreme Court of the United States can then look at the issue again. As the states eliminate the sentence, the sentence will become unusual, and the Supreme Court could eliminate the penalty. But ultimately, the decision will come down to state courts and legislatures. The judges and the members of the legislatures must make the decision to eliminate the sentence, despite any potential political blowback.

### VIII. CONCLUSION

The Supreme Court of the United States and various international tribunals have made progress toward the elimination of the life without parole sentence. These instructive decisions should be followed to *completely* eliminate the sentence of life without parole in the United States. There are many justifications for the elimination of the sentence, but the most important justification is that the sentence completely eliminates rehabilitation as a goal of sentencing. While there may be obstacles in the attempt to eliminate the sentence, it is possible. The elimination of the sentence should be a goal of state legislatures and state courts. As these parties take the necessary action to eliminate the penalty at the state level, the Supreme Court may then be able to eliminate the sentence under the cruel and unusual punishment clause of the Eighth Amendment to the

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<sup>89</sup> The decisions turned on whether the punishment was unusual and, therefore, found that the punishment was cruel implicitly.

United States Constitution. At that point, this unjust penalty could finally end.