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CONGRESSIONAL TESTIMONY

Ohio Senate Bill 256

**Testimony before
The Ohio House Criminal Justice Committee**

November 30, 2020

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Introduction

My name is Charles Stimson, and I am the Manager of the National Security Law Program and a Senior Legal Fellow at the Heritage Foundation. By way of background, I am a former local, state, and federal prosecutor, military defense counsel and military trial judge. I served as Deputy Assistant Secretary of Defense for Detainee Affairs during the George W. Bush administration. I am also a Captain in the United States Navy JAG Corps (reserve component), a two-time Commanding Officer (CO), and am currently the CO of the Preliminary Hearing Unit. I was also an Adjunct Professor of Law at George Mason University School of Law, the Naval Justice School, and have taught for the National District Attorney's Association and other law enforcement organizations. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation, the Department of the Navy, or any other organization.

I am the co-author of a book entitled *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*,¹ which is attached to my formal written statement. My book has been cited in Supreme Court briefs, including this term in the case of *Jones v. Mississippi*.

I am providing this written testimony to clarify the Supreme Court's actual holdings and jurisprudence regarding life-without-parole (LWOP) sentences for juvenile killers, and how some proponents of S.B. 256 have misstated the law in this area to this distinguished committee. Furthermore, some proponents of S.B. 256 have provided misleading information regarding other aspects of LWOP, which should not go un rebutted.

Opponents of juvenile LWOP have tried unsuccessfully for years to convince the Supreme Court of the United States that the sentence is unconstitutional. It isn't.

Having failed at the Supreme Court, opponents of the sentence have been attempting to convince state legislatures that the sentence is unconstitutional, that we are in violation of international law for providing such sentences for a select few murderers, and that the murderers are themselves victims.

Each claim is false.

For the reasons explained in my testimony, as a legal matter, S.B. 256 goes well beyond what the Supreme Court requires, and the Committee should have the benefit of accurate information before considering this dramatic policy change.

¹ See Charles D. Stimson and Andrew Grossman, *Life Without Parole for Juvenile Killers and Violent Teens*, The Heritage Foundation, Special Report, August 17, 2009, linked here: <https://www.heritage.org/crime-and-justice/report/adult-time-adult-crimes-life-without-parole-juvenile-killers-and-violent>

Life without Parole for Juvenile Killers Is Constitutional

Senator Nathan Manning, a co-sponsor of the bill, wrote in his press statement announcing S.B. 256, that his legislation would “bring Ohio in line with a number of... Supreme Court rulings...that declared it unconstitutional for a child be given a sentence of life without parole.”

The Supreme Court did no such thing.

Life without parole for juvenile killers is reasonable, constitutional, and (appropriately) rare. In response to the Western world’s worst juvenile crime problem, U.S. legislators have enacted commonsense measures to protect their citizens and hold these dangerous criminals accountable. Twenty-nine states and the federal government have set the maximum punishment for juvenile killers at life without the possibility of parole. By the numbers, support for its use is clear. Nonetheless, its continued viability is at risk from slick lobbying efforts in many states and court cases that seek to substitute feel-good policies for appropriate and reasonable sentences.

Emboldened by the Supreme Court’s *Roper v. Simmons*² decision, which relied on the Eighth Amendment’s “cruel and unusual punishments” language to prohibit capital sentences for juveniles, anti-incarceration activists have set about extending the result of *Roper* to life without parole for juvenile killers. If they succeed, an important tool of criminal punishment will be eliminated, and all criminal sentences could be subjected to second-guessing by judges, just as they are in capital punishment cases today.

The most visible aspects of this campaign are a number of self-published reports and studies featuring photographs of young children and litigation attacking the constitutionality of life without parole for juvenile offenders—including cases heard by the Supreme Court in its 2009, 2011, 2016, and this term.

Because these activists have attempted to monopolize the debate over life without parole, legislatures, courts, the media, and the public have been misled on crucial points.

Activists argue that the Constitution forbids life without parole sentences for juvenile offenders, but the Supreme Court declined to hold life without parole for juvenile killers unconstitutional in *Graham v. Florida*³ in 2009, in *Miller v. Alabama*⁴ in 2012, or in *Montgomery v. Louisiana*⁵ in 2016.

The Eighth Amendment’s prohibition on “cruel and unusual punishments” was intended to bar only the most “inhuman and barbarous” punishments, like torture. Though the Supreme Court has departed from this original meaning, it has honored the

² 543 U.S. 551 (2005).

³ 560 U.S. 48 (2010).

⁴ 567 U.S. 460 (2012).

⁵ 136 S.Ct. 718 (2016).

principle that courts should defer to lawmakers in setting sentences in almost every instance. One exception applies to punishments that are “grossly disproportionate to the crime,” something that the Court has found only in a handful of cases. Otherwise, the Court has approved harsh punishments for a variety of offenses, so long as legislatures have a “reasonable basis” for believing that the punishment advances the criminal-justice system’s goals. Because no state imposes life without parole for minor crimes, the punishment is not, and likely never will be, constitutionally disproportionate. The other exception applies only in death-penalty cases like *Roper*, and the Court has long refused to subject lesser punishments to the deep scrutiny that it reserves for capital cases.

Even ignoring that distinction, the argument that *Roper* or *Graham* could be extended to life without parole sentences comes up short. Indeed, the *Roper and Graham* Court decisions actually relied on the availability of a life-without-parole sentence to justify prohibiting the death penalty for juvenile killers. In fact, the Supreme Court has upheld LWOP sentences for juvenile murderers. In *Graham v. Florida*, while holding that it was unconstitutional to impose an LWOP sentence for juveniles who commit lesser offenses, the Supreme Court stated that, under the Constitution, juveniles who commit murder can be sentenced to life without parole.

Most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system. Every state has a juvenile justice system, and those courts handle the vast majority of crimes committed by juveniles. We believe, as a society, that most juveniles are immature, and capable of rehabilitation.

As others have testified before this Committee, the adolescent brain is not fully developed until the early 20s. But as a society, we draw legal lines; 18 being the typical line between those who are tried as adults and those who are tried as juveniles.

The vast majority of murderers under the age of 18 were 17 or 16 years old when they killed their victims. They are not “children,” as opponents of juvenile LWOP refer to them. They can drive cars, go to college, get married, join the military, and in some states, terminate a pregnancy without their parent’s permission. We don’t call high school juniors and seniors “children,” yet these are the very same people who make up the bulk of juvenile killers sentenced to LWOP.

As a former high school teacher, and parent to three teenagers, including two 17 year olds, I know full well how impulsive and immature some teenagers are. But as adults, we also know that by the time they reach the age or 16 or 17, they know right from wrong, and certainly know that you should not kill another human being.

A small number of murderers evince characteristics that make them unworthy of the leniency we otherwise afford to most juvenile offenders: cruelty, wantonness, and a complete disregard for the lives of others.

Some of these juvenile offenders are tried as adults, and a small proportion of them are sentenced to life without parole—the strongest sentence available to express society’s disapproval, incapacitate the criminal, and deter the most serious offenses.

Used sparingly, as it is, life without parole for the few murderers that a judge finds “permanently incorrigible”---as required by *Miller*---is an effective and lawful sentence for the worst juvenile offenders. On the merits, it has a place in our laws.

Mandatory Life without Parole for Juvenile Killers Is Unconstitutional

In its 2011-2012 term, the Supreme Court considered two challenges to juvenile life without parole sentences. Both cases, which were consolidated, involved mandatory sentencing schemes that included life without parole for juvenile homicide offenders.

The facts of both cases are gruesome, but they demonstrate why life without parole sentences can be appropriate and reasonable. In *Miller v. Alabama*⁶, Evan Miller was 14 years old when he robbed and repeatedly beat an intoxicated neighbor with a baseball bat and then set the man’s trailer on fire, leaving him to die. The juvenile court transferred Miller to adult court based on the nature of the crime, his previous delinquency history, and the fact that he was deemed competent to stand trial. Miller was found guilty of capital murder. Since he was 14 at the time of the crime, Miller was not eligible for capital punishment but received the state’s mandatory minimum sentence of life without parole.

In *Jackson v. Hobbs*⁷, Kuntrell Jackson was also 14 when he and two other teenagers attempted to rob a video store. Jackson knew one of his accomplices had a sawed-off shotgun and threatened the female store clerk before one of the other teenagers shot her in the face and killed her. Jackson was tried in adult court, where he was found guilty of capital murder and aggravated robbery and sentenced to life without parole.

In its decision, the Supreme Court found that the Eighth Amendment prohibits sentencing schemes that mandate sentences of life without the possibility of parole for juvenile murderers, but declined to consider whether it bars juvenile life without parole entirely.

In other words, the Court, once again, declined to hold that life without parole sentences for juvenile killers was unconstitutional. Thus, life without parole for juvenile killers, as long the sentence is not mandatory, is available for state legislatures. Significantly, not a single Justice even suggested that imposing life without parole sentences for teenage murderers would violate the Constitution.

⁶ 567 U.S. 460 (2012).

⁷ Id.

However, before such a sentence can be imposed by the sentencing judge on a teenage murderer, the judge must consider the offender's youth and other attendant characteristics. The Court stated that its precedents had established that teenage offenders are constitutionally different from adults for sentencing purposes because their "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking, and that these distinctive attributes diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even those who commit the worst crimes.

Miller did not foreclose the possibility of life without parole sentences for juvenile killers, provided the sentencing scheme is not mandatory and allows for an individualized determination.

If the legislature decides, as a matter of policy, to abolish juvenile LWOP, that is entirely within its discretion; however, it is not required to do so under existing Supreme Court precedent.

Consequently, if the legislature decides, as a matter of policy, to keep juvenile LWOP sentences, that is also entirely within its discretion. One option here that would be helpful is to craft legislation that details the factors---consistent with the holding in *Miller*---that a sentencing judge must weigh when considering the offender's youth and other attendant characteristics. The factors announced in *Miller* can act as a constitutional floor, and state legislatures are free to add elements that a sentencing judge must find before imposing life without parole on a juvenile killer.

Furthermore, such legislation could cabin such sentences to 17 year olds, or provide other guardrails to limit the availability of the LWOP sentence to the worst-of-the-worst.

Setting the Record Straight

Unfortunately, some witnesses who support S.B. 256 have provided testimony that is troublesome, if not outright misleading.

For example, Preston Shipp of the Campaign for the Fair Sentencing of Youth wrote, "By preserving life-without-parole sentences for children, states expose themselves to Miller and Montgomery violations each time a child is charged with murder. Based on juvenile brain science and the demonstrated potential all children have for rehabilitation, the Campaign believes it is impossible for courts to accurately predict which children are 'irreparably corrupt.'"

States do not "expose themselves to Miller and Montgomery violations" each time a juvenile is charged with murder. Most of these cases are adjudicated in juvenile court. *Miller* and *Montgomery* don't apply in juvenile court, because juvenile courts do not

sentence those found responsible to long sentences, and can't sentence juveniles to LWOP.

Furthermore, most juvenile killers tried in adult court aren't sentenced to LWOP, so *Miller* and *Montgomery* don't apply there either.

For those select juvenile murderers who are tried in adult court, and sentenced to LWOP, there is also no danger of "Miller violations" if the sentencing judge develops a thorough record of the offenders youthful characteristics, and makes a finding that he is "permanently incorrigible." How a judge must do that, and what passes muster as a proper application of the *Miller* factors, is the issue before the Court this term in *Jones v. Mississippi*⁸.

Mr. Shipp also testified that. "SB 256 takes an important step toward constitutional compliance for youth convicted of serious crimes by abolishing life without parole, providing meaningful opportunities for parole review after serving a term of years, and setting forth the factors particular to youth to be considered at the time of original sentencing and at the parole review."

There are a number of problems with this statement.

First, as mentioned throughout my testimony, the Supreme Court has never held that life without parole sentences for juvenile killers is unconstitutional. Thus, Shipp's "step toward constitutional compliance for youth convicted of serious crimes by abolishing life without parole" is confusing at the least, and misleading at best.

There is no step to take, as no state legislature is required to abolish juvenile LWOP sentences. As a matter of policy, state legislatures can keep the sentence for juvenile killers, or abolish it.

Second, legislatures are not required to set forth "factors particular to youth to be considered at the time of original sentencing." Rather, sentencing judges are required to apply the *Miller* factors to any juvenile killer who is facing a possible LWOP sentence. And since the Court in *Montgomery v. Alabama* held that *Miller* was to be applied retroactively, all juveniles serving LWOP sentences must get a new sentencing hearing, and if the government seeks a sentence of LWOP, the sentencing judge must apply the *Miller* factors. How this is done is up to the discretion of the judge, as informed by the Supreme Court's decision in *Miller*.

State legislatures can pass legislation, as suggested herein, detailing the factors a sentencing judge must consider, so long as they are not inconsistent with *Miller*. That is their choice. Absent such legislation, sentencing judges will apply the factors announced in *Miller* in individual cases.

⁸ *Jones v. Mississippi*, No. 18-1259, argued in the Supreme Court on November 3, 2020.

Mr. Shipp is correct that S.B. 256 addresses parole eligibility considerations for juvenile killers, but that is also a policy matter left to the discretion of the legislature, not a requirement by any Supreme Court case.

The United States Is Not Party To a Treaty That Forbids Juvenile LWOP Sentences, nor Is the United States Required Under International Law to Forbid Juvenile LWOP Sentences

Mr. Shipp also provided misleading testimony about our treaty obligations and international law. He testified as follows: “Sentencing children to die in prison directly violates Article 37 of the United Nations Convention on the Rights of the Child, which prohibits the use of ‘capital punishment and life without the possibility of release’ as sentencing options for people younger than 18.”

The United States is not a party to the controversial U.N. Convention on the Rights of the Child, and for good reason. The Senate has refused to ratify that treaty, as it undermines the family, freedom of religion, and our sovereignty.⁹ Shipp misleads this committee when he claims that the main reason why Senators from both parties have refused to ratify this controversial treaty is over the juvenile LWOP issue.

The suggestion that international law and our treaty obligations require state legislatures to abolish juvenile LWOP sentences has been trotted out by opponents of such sentences for years, and been repeatedly rejected by the Supreme Court.

As we detailed at length in our book, *Adult Time for Adult Crimes*¹⁰, the continued use of this sentence does not put the United States in breach of its obligations under international law.

Convention on the Rights of the Child

Article 37(a) of the Convention on the Rights of the Child (CRC) states, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age.” According to opponents of life-without-parole sentences for juvenile offenders, this language unambiguously prohibits the imposition of life without parole on juvenile offenders.¹¹

⁹ See Patrick F. Fagan, How U.N. Conventions on Women’s and Children’s Rights Undermine Families, Religion and Sovereignty, The Heritage Foundation Backgrounder No. 1407, Feb 5, 2001 linked here: http://thf_media.s3.amazonaws.com/2001/pdf/bg1407.pdf. See also Jeremy Rabkin, Human Rights: In Our Own Hands, The Heritage Foundation Special Report No. 231, June 25, 2020, linked here: <https://www.heritage.org/sites/default/files/2020-06/SR231.pdf>.

¹⁰ See Stimson & Grossman, *supra*. note 1.

¹¹ Convention on the Rights of the Child, Nov. 20, 1989, <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

The United States, however, has not ratified the CRC. Although President Clinton signed the treaty in 1995, the Senate has never consented to ratification.¹² Since the United States is not a party to this treaty, it is therefore not bound by Article 37 or any other provision of that treaty.

Nonetheless, some claim that the CRC is binding on the United States even though it has never been ratified. They make two arguments. The first is that, because the U.S. signed the treaty, it is prohibited from taking actions that would defeat its “object and purpose” and that continuing to allow life-without-parole sentences for juvenile offenders is such an action.¹³ The second is that, because the CRC has been ratified by nearly every other country in the world, it constitutes customary international law that is binding on the United States.¹⁴

Neither of these arguments is valid.

The “object and purpose” argument goes as follows: (1) Article 18 of the Vienna Convention on the Law of Treaties—a treaty that the U.S. has only signed but some provisions of which have been accorded the status of customary international law—states that if a nation has signed a treaty but has not ratified it, the nation is still “obliged to refrain from acts which would defeat the object and purpose of [the] treaty”; (2) allowing practices contrary to the treaty would defeat its object and purpose; (3) thus, because sentencing juveniles to life without parole is forbidden by the CRC, Article 18 requires that the United States, as a CRC signatory, desist from this practice.

This argument contains two fundamental and fatal errors. The first is that the class of “acts which would defeat the object and purpose of a treaty” does not include all acts that are prohibited under the treaty. The very use of the phrase “object and purpose” rather than “terms” or “provisions” indicates that the two classes are not equivalent. Article 18 is, in both practice and custom, far narrower, forbidding “only actions deliberately calculated to undermine a state’s ability eventually to comply, including and especially any uniquely irreversible action.”¹⁵

Allowing states to impose sentences forbidden by the CRC (on the questionable assumption that Congress even has the power to forbid such sentences at all) would in no way prevent eventual compliance in the unlikely event that the treaty should ever be ratified; indeed, it is a position that, following ratification, could be reversed immediately

¹² OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS FOR THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (2004), *available at* <http://www.unhchr.ch/pdf/report.pdf>.

¹³ AI/HRW REPORT, *supra* note 9, at 99.

¹⁴ AI/HRW REPORT, *supra* note 9, at 98–108; USF REPORT, *supra* note 9, at 16–18.

¹⁵ Lee A. Casey & David B. Rivkin, Jr., *International Law and the Nation–State at the U.N.: A Guide for U.S. Policymakers*, Heritage Foundation BACKGROUNDER No. 1961, August 18, 2006, *available at* <http://www.heritage.org/Research/WorldwideFreedom/bg1961.cfm>; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i (explaining that the obligation “to refrain from acts that would defeat the object and purpose” of a treaty prohibits acts with consequences that “might be irreversible” but not those that allow compliance to “be effected later”).

by Congress, relying on its treaty power and the Supremacy Clause in the Constitution.¹⁶ It is far more likely, though, that if the CRC were ever to be resubmitted to the Senate and ratified, such ratification would be accompanied by a reservation rejecting the prohibition on life-without-parole sentences for juvenile offenders.

The second error is the assertion that Article 18 requires signatory nations to *change* their laws to comply with unratified treaties. Quite the opposite: Article 18 does not create an obligation on signatory nations to undertake specific actions, such as passing new laws or repealing existing laws, but only an obligation to *refrain* from undertaking certain types of new, irreversible actions. A nation is therefore under no obligation to change its laws to match a treaty's terms upon becoming a signatory; it merely must "refrain" from changes that would prevent eventual implementation of the treaty if it were ratified.

Thus, having signed but not ratified the CRC, the United States is under no obligation whatsoever to change its laws to prohibit life-without-parole sentences for juvenile offenders. Further, absent ratification, Congress lacks the constitutional authority to require states to prohibit such sentences as well.¹⁷

Moreover, adopting the absurdly broad construction of Article 18 that juvenile LWOP opponents endorse would render the Constitution's ratification requirement a nullity, because, were they correct, our nation would be completely bound by the terms of any treaty that was merely signed by a president, but never ratified by the Senate. Even if Article 18 were considered customary international law (which it is not¹⁸), for the reasons set forth herein, customary international law simply cannot overrule the clear text and requirements of the U.S. Constitution, which requires both a signature and subsequent ratification by the Senate before a treaty is binding on the United States.

Likewise, the CRC itself has not attained the status of binding customary international law such that it imposes international expectations upon non-parties. Customary international law "is the law of the international community that 'results from a general and consistent practice of states followed by them from a sense of legal

¹⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1), 111 cmt. a, j (1987).

¹⁷ U.S. v. Morrison, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); *id.* at 619 n.8 ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.") (internal quotation marks omitted). However, the federal government probably could condition receipt of federal funds on a state's prohibiting the sentencing of juvenile offenders to life without parole. *South Dakota v. Dole*, 483 U.S. 203, 207 (upholding a federal statute conditioning receipt of federal funds on adoption of a minimum drinking age of 21 on the grounds that "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (internal citation omitted).

¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 n.6 (discussing the Article's origins in European civil law).

obligation.”¹⁹ This standard demands far more than even widespread ratification. The fact, then, that the CRC has been ratified by many nation states does not render it binding on a non-party nation.

Moreover, the ongoing practices of many of the nations that are party to the CRC, such as France, Brazil, and Venezuela, are not at all consistent with many of the convention’s provisions.²⁰ By their own admission, several nations that are a party to the CRC currently sentence juveniles to life without parole or have reserved the right to do so.²¹ Finally, even if the CRC were customary international law, that fact alone would merely render the United States out of compliance with international norms, and would not, without more, automatically invalidate contrary domestic law.²²

¹⁹ Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817–18 (1997) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(2), 102 n.4 (1987)).

²⁰ See, e.g., U.N. Comm. on the Rights of the Child [UNCAT], *Report on the Forty-Sixth Session*, ¶ 33(35), U.N. Doc. CRC/C/46/3 (April 22, 2008) (faulting Venezuela for “extrajudicial killings of children at the hands of law enforcement officials and deaths of children in police custody”); UNCAT, *Report on the Forty-Fourth Session*, ¶¶ 257, 265, U.N. Doc. CRC/C/44/3 (Mar. 13, 2008) (faulting Honduras for its “very high number of disappearances and extrajudicial killings of children, including at hands of members of the police force,” regular “beatings during and after apprehension of persons below 18” by police, and torture of children); UNCAT, *Report on the Forty-Fifth Session*, ¶ 236, U.N. Doc. CRC/C/45/3 (Mar. 12, 2007) (faulting Uruguay for “torture and degrading treatment by law enforcement officials of children while held in detention”); UNCAT, *Report of the Forty-Third Session*, ¶¶ 160, 204, U.N. Doc. CRC/C/43/3 (Mar. 9, 2007) (faulting Ethiopia for sexual violence against children by the police and military and for the torture, rape, and killing of minority children by the military); UNCAT, *Report on the Forty-Second Session*, ¶¶ 67, 73, U.N. Doc. CRC/C/42/3 (March 11, 2006) (faulting Colombia for “numerous instances of violence by the regular military forces whereby children have been killed,” “the unbroken pattern of impunity [for such killings] and the continuous tendency to refer serious violation [sic] of human rights to the military justice system,” and torture by “State agents, including members of the military”); UNCAT, *Report on the Forty-First Session*, ¶ 477, U.N. Doc. CRC/C/41/3 (May 12, 2006) (faulting Hungary for “arbitrary detentions, police brutality and ill-treatment in detention facilities”); UNCAT, *Report on the Fortieth Session*, ¶ 146, U.N. Doc. CRC/C/153 (Mar. 17, 2006) (faulting Algeria for “a number of cases of torture or inhuman and degrading treatment of children”); UNCAT, *Report on the Thirty-Ninth Session*, ¶¶ 126, 141, 192, 193 U.N. Doc. CRC/C/150 (Dec. 21, 2005) (faulting the Philippines for “extrajudicial killings of children by military soldiers...and by so-called death squads,” “a number of reported cases of torture, inhuman and degrading treatment of children, particularly for children in detention,” and its “very low” minimum age of criminal responsibility (9 years)”); UNCAT, *Report on the Thirty-Eighth Session*, ¶¶ 480, 507, U.N. Doc. CRC/C/146 (July 19, 2005) (faulting Iran for sentencing children “to various types of torture or other cruel, inhuman or degrading treatment or punishment, such as amputation, flogging or stoning,” and executing juveniles); UNCAT, *Report on the Thirty-Seventh Session*, ¶ 59, U.N. Doc. CRC/C/143 (Jan. 12, 2005) (faulting Brazil for “summary or arbitrary executions” of children by “military policemen or former policemen”); UNCAT, *Report on the Thirty-Sixth Session*, ¶ 631, U.N. Doc. CRC/C/140 (Sep. 27, 2004) (faulting France for “illegal networks of forced [child] labour”).

²¹ AI/HRW REPORT, *supra* note 9, at 104–107.

²² This type of conflict actually has not arisen in the United States. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n.4 (1987). “But customary law is made by practice, consent, or acquiescence of the United States, often acting through the President, and it has been argued that the sole act of the President ought not to prevail over a law of the United States.” *Id.*

International Covenant on Civil and Political Rights

A second international treaty that some argue forbids sentencing juveniles to life without parole is the International Covenant on Civil and Political Rights (ICCPR), the primary human rights treaty for the protection of civil and political rights, which, unlike the CRC, was ratified by the United States in 1992. Specifically, activists claim that such sentences are a prohibited form of punishment for juveniles under Articles 7, 10, and 14 of the treaty.²³

This, too, is unavailing.

The Senate made quite clear when ratifying the treaty that it is not self-executing—that is, it does not preempt existing U.S. law and is not directly enforceable except to the extent that it has been implemented in legislation by the states and Congress.²⁴ Without this limitation, which was undertaken specifically to preclude courts from relying on the treaty’s broad provisions to rewrite domestic law, the Senate would not have ratified it.²⁵

Further, the ICCPR is silent regarding the sentence of life without the possibility of parole, much less under what circumstances that sentence may be imposed on juveniles. Instead, Article 7 contains a general prohibition on “cruel, inhuman or degrading treatment or punishment” without defining or further elaborating upon the meaning of those words.²⁶

Moreover, the U.S. entered a reservation to Article 7 to protect its laws against that potentially capacious language. This reservation specified that the United States will consider itself bound by that provision only “to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”²⁷ As a result, Article 7 (to the extent executed) cannot impose any additional obligations on the United States beyond those already required by the Fifth, Eighth, and Fourteenth Amendments, none of which prohibits sentencing juveniles to life without parole.

Whether Article 7’s prohibition on “cruel, inhuman or degrading treatment or punishment” would otherwise encompass such sentences remains an open question—one that is debated every four years when the U.S. submits its report to the United Nations

²³ AI/HRW REPORT, *supra* note 9, at 95–98.

²⁴ U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, 4783–84 (1992).

²⁵ The Senate stated that its advice and consent was subject to several declarations, the first of which states, “That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” *Id.* at 4784.

²⁶ International Covenant on Civil and Political Rights, art. 7, December 16, 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. The Convention Against Torture, to which the U.S. is a party, contains a similar prohibition. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 16, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

²⁷ United Nations Treaty Collection, International Covenant on Civil and Political Rights 14, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (Reservation 3 of the United States of America).

Human Rights Committee.²⁸ As concerns the domestic law of the United States, however, the question is moot because of the rider and the treaty's non-self-executing status.

Claims that Articles 10 and 14 of the ICCPR prohibit such sentences are likewise unsupported. Article 10(3), which addresses permissible conditions of confinement, declares, "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."²⁹ Article 14 does not deal with conditions of confinement, but rather addresses criminal procedure. Specifically, regarding juveniles, it states, "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."³⁰

As with Article 7, the U.S. entered a specific reservation regarding Articles 10 and 14, expressly reserving "the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14."³¹ Moreover, to make clear to the Human Rights Committee and the other ICCPR states parties regarding U.S.'s views concerning incarceration, the U.S. entered a separate understanding that states: "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system."³²

Read together, these reservations and understandings eviscerate the argument that Article 10 or Article 14 obliges the United States to cease sentencing juveniles to life imprisonment without parole. Notwithstanding any plausible broad interpretation of the text of these articles, the U.S. reservation specifically contemplates that juveniles may be tried and sentenced the same as adults under "exceptional circumstances," such as murder and other violent felonies, and that they may be imprisoned for the purposes of "punishment, deterrence, and incapacitation," all of which are significantly furthered by the sentence of life without parole.³³

In sum, these articles, through the lens of the United States' reservations and understanding, do not alter U.S. law, and they certainly do not cast doubt on the legality of sentencing juveniles to life without parole.

Convention Against Torture

Some argue that the sentencing of juveniles to life without parole violates the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the United States ratified in 1994.³⁴ Article 16 of the CAT requires that a party to the treaty "shall undertake to prevent in any territory under its

²⁸ See International Covenant on Civil and Political Rights, art. 40, December 16, 1966, http://www.unhcr.ch/html/menu3/b/a_ccpr.htm.

²⁹ *Id.* at art. 10(3).

³⁰ *Id.* at art. 14(4).

³¹ United Nations Treaty Collection, International Covenant on Civil and Political Rights 14, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (Reservation 5 of the United States of America).

³² *Id.* (Understanding 3 of the United States of America).

³³ *Id.* See *Roper*, 543 U.S. at 571–72 (stating that the sentence of life without parole has a strong deterrent effect for a juvenile offender).

³⁴ EJI REPORT, *supra* note 9, at 13; USF REPORT, *supra* note 9, at 15.

jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture...when such acts are committed by...a public official or other person acting in an official capacity.”³⁵

The argument, then, is that such sentences amount to “cruel, inhuman or degrading treatment or punishment” under the treaty. Yet, contrary to that argument, the official monitor of CAT implementation does not agree that the text of Article 16 prohibits such sentences.

The Committee Against Torture considered the issue directly in its most recent report on the United States, as it had in previous reports.³⁶ But unlike in other areas, where the committee specifically contested U.S. interpretations of the CAT and stated that the U.S. “should adopt” specific measures to be in full compliance, it could state only that sentencing juveniles to life without parole “could constitute cruel, inhuman or degrading treatment or punishment” and that the U.S. should therefore “address the question” of its propriety.³⁷ In other words, while the committee seems to disapprove of such sentences, it did not and could not say that they actually violate the treaty.

Additionally, just as it did with the ICCPR, the United States entered a reservation to Article 16, agreeing to be “bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term...means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”³⁸ Thus, even were life-without-parole sentences for juvenile offenders ordinarily prohibited by Article 16 (which they are not), that prohibition would not be a part of U.S. law and would not be enforceable against the states.

Finally, it is noteworthy that opponents of juvenile LWOP sentences who argue these cases before the Supreme Court have stopped arguing that they violate our treaty or international law obligations because the Court rejected that argument years ago.³⁹ Opponents of juvenile LWOP sentences hope that your lack of familiarity with treaties and international law might help them pull the wool over your eyes.

³⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 16, http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

³⁶ Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

³⁷ *Id.* One of the authors of this report led the delegation from the Department of Defense that presented the United States’ Second Periodic Report to the CAT in Geneva in May 2006 and testified on May 5 and 8 before the committee. The committee did not raise the issue of life-without-parole sentences for juvenile offenders on either day.

³⁸ United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 6, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (Reservation I(1) of the United States of America).

³⁹ See Graham, *supra* note 3.

Facts Matter

The opponents of juvenile life-without-parole sentences go to great lengths to hide the terrible nature of the crimes committed by those juveniles serving such sentences. By calling juvenile killers “children” and “kids,” they seek to divert attention away from the cruel, callous, horrifying nature of their crimes, and would have you believe that seven and eight year old actual kids are the ones who are sentenced to LWOP, instead of six foot tall, 175 pound, 17 year old football players.

I encourage members of this Committee to read the testimony of James Flaiz from November 30, 2016 to this Committee about the facts in the Thomas Lane murders at Chardon High School in 2012.

Or read any of the 16 case digests we highlighted in our *Adult Time for Adult Crimes* book, taken from court records. Each of those murderers was sentenced to LWOP. The murders they committed were typical of the types of crimes 16 and 17 year olds commit across the country.

Lastly, finality is essential, not only for the effective operation of a criminal justice system, but also for the victims’ families. Radical public policy changes, especially those related to justly convicted juvenile killers, should not be taken lightly. The best policies are based on real facts, and should not be crafted on a campaign of manipulated facts, manufactured statistics.

Because of the ruling in *Montgomery*, all juveniles currently serving LWOP sentences will receive a new sentencing hearing. If the government seeks a sentence of LWOP again—which is not automatic---the sentencing judge is required to apply the *Miller* factors. The judge may or may not find the convicted murderer permanently incorrigible.

In any event, the victim’s families will once again have to relive the nightmare of the death of their family member. Knowing that your family members’ killer may get out of prison, after being sentenced to LWOP, is horrifying to most people.

Conclusion

Contrary to the arguments of the opponents of juvenile LWOP sentences, neither Supreme Court precedent nor international law requires the legislature to make any changes to its current law in this area, and any decision to make any changes as a matter of policy should not be undertaken lightly. Before enacting this or any policy change, it is necessary for this body to know what the Supreme Court has held in this area, and what is required of state legislatures. The law allows for a sentence of LWOP for juvenile killers, as long as the sentencing judge finds the murderer permanently incorrigible.

Thank you for the privilege of providing this written testimony before the Committee.

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