

JUVENILE LIFE WITHOUT PAROLE: AN ANTIDOTE TO CONGRESS'S ONE-WAY CRIMINAL LAW RATCHET?

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I. INTRODUCTION

In *Graham v. Florida*, the Supreme Court barred the imposition of life without parole sentences on individuals convicted of nonhomicide offenses committed before the age of eighteen.¹ The decision is unquestionably

1. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

landmark, representing the first time the Court ever applied its more searching “categorical” Eighth Amendment analysis—heretofore reserved solely for capital sentences—to a term-of-years sentence.² In striking down life without parole for an entire class of offenders, the Court ruptured the longstanding jurisprudential barrier between capital and non-capital sentences, prompting even the normally reserved Justice Clarence Thomas to declare dramatically in dissent that “‘death is different’ no longer.”³

Graham is most notable, however, for what it does *not* do.

Despite language theoretically broad enough to encompass *all* juveniles sentenced to life without parole, *Graham*’s holding is explicitly limited only to individuals convicted of nonhomicide crimes. By limiting its holding in this way, the Court declined to address the fates of the vast majority of individuals—ninety-three percent, or more than 2,300 persons—who are serving life-without-parole sentences for homicide crimes committed as juveniles, including attempted and accomplice murder.⁴

Far from ending the debate about the propriety and constitutionality of juvenile life without parole (“JLWOP”), *Graham* only intensified it. For JLWOP abolitionists, therefore, the critical question in the post-*Graham* legal landscape is how to extend *Graham* beyond the relatively limited context of nonhomicide crimes. In other words, what happens next? This Article will seek to provide an answer.

Advocates for juvenile justice have worked for years to enact legislative change at the state level and there are promising signals that some states are reassessing juvenile justice.⁵ Texas passed a law in 2009

2. See Adam Liptak, *Justices Limit Life Sentences for Juveniles*, N.Y. TIMES, May 18, 2010, at A1 (“The ruling marked the first time that the court excluded an entire class of offenders from a given form of punishment outside the context of the death penalty.”). For a broader discussion of the distinction between the two lines of Eighth Amendment jurisprudence dealing, respectively, with capital and non-capital sentences, see generally Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) [hereinafter Barkow, *Two Tracks*]; Carol S. Steiker & Jordan M. Steiker, *Opening A Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155 (2008).

3. *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting).

4. See *Juvenile Justice Accountability and Improvement Act of 2009: Hearing on H.R. 2289 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. 111–47, 12 (2009) [hereinafter *2009 Hearing*] (statement of Rep. Louie Gohmert, Ranking Member, Subcomm. on Crime, Terrorism, and Homeland Security) (“[In *Sullivan* and *Graham*, the Court will consider two cases involving offenders who committed crimes that did not result in the death of a victim. This is a slightly peculiar choice of cases, considering that . . . almost 93 percent of juveniles serving life without parole were convicted of homicide.”) (emphasis added).

5. See, e.g., Tresa Baldas, *More States Rethinking Life Sentences for Teens*, NAT’L L. J., Mar. 15, 2010, at 1, 4, available at http://www.law.com/jsp/article.jsp?id=1202446216111&More_States_Rethinking_Life_Sentences_for_Teens (describing recent developments in

eliminating JLWOP;⁶ Michigan,⁷ California,⁸ and Iowa⁹ are now considering similar legislation; and other states are also reassessing laws allowing for the transfer of juveniles to adult courts.¹⁰ However, state legislatures generally remain supportive of JLWOP: forty-four states and the federal government¹¹ still allow JLWOP for homicide.¹² This is striking given that there are no youth prisoners outside of the United States serving the sentence.¹³ Even the most promising legislation, such as that in

eleven states that are considering legislation to restrict the government's ability to charge children as adults or, alternatively, to end JLWOP).

6. TEX. PENAL CODE ANN. § 12.31(a)(1) (Vernon 2009) (amending TEX PENAL CODE ANN. § 12.31(a) (Vernon 2005) to allow for only a sentence of life *with* parole, "if the individual's case was transferred to . . . [adult] court" under Texas's juvenile transfer provision, TEX FAM. CODE ANN. § 54.02 (Vernon 2009)).

7. There are four interrelated senate bills in Michigan that would prohibit JLWOP, all originally introduced in January 2009. S.B. 173-176, 2009 Leg., 2009-10 Sess. (Mich. 2009).

8. S.B. 9, 2010 Leg., 2010-11 Sess. (Cal. 2011) (permitting those serving JLWOP to petition, after serving ten years in prison, for a sentence reduction to twenty-five years to life). The bill's sponsor, California State Senator, Leland Yee, has introduced the legislation to no avail several times, but is more hopeful that it will be passed this year after Governor Schwarzenegger's "last-minute sentence commutation of a woman serving life without parole for killing her pimp at age 16" in December, 2010. *See* Michelle Durand, *Clemency of Juvenile Killer Gives Yee Hope*, DAILY JOURNAL (San Mateo County), Jan. 4, 2011, <http://www.smdailyjournal.com/>

[article_preview.php?id=149598&title=Clemency%20of%20juvenile%20killer%20gives%20Yee%20hope](http://www.smdailyjournal.com/article_preview.php?id=149598&title=Clemency%20of%20juvenile%20killer%20gives%20Yee%20hope). *See e.g.*, Tresa Baldas, *More States Rethinking Life Sentences for Teens*, NAT'L L. J., Mar. 15, 2010, at 1, 4, *available at* http://www.law.com/jsp/article.jsp?id=1202446216111&More_States_Rethinking_Life_Sentences_for_Teens (describing recent developments in eleven states that are considering legislation to restrict the government's ability to charge children as adults or, alternatively, to end JLWOP).

9. S.B. 1058, Gen. Assemb., Reg. Sess. (Iowa 2001) (converting mandatory JLWOP sentences for nonhomicide Class A felonies to parole-eligible after twenty-five years).

10. For example, Connecticut passed legislation in January 2010 to end the *automatic* prosecution of sixteen- and seventeen-year-olds as adults. Colorado's legislature has proposed legislation that would cut back on prosecutorial discretion to try juveniles as adults absent judicial oversight. And in North Carolina, a task force has been created to explore the possibility of raising the age threshold for trying juveniles in adult court. Baldas, *supra* note 5, at 4.

11. 18 U.S.C. § 2241 (2006 & Supp. II 2006).

12. The only six states that explicitly forbid life without parole for all juvenile offenders are Alaska, ALASKA STAT. § 12.55.015(g) (2008); Colorado, COLO. REV. STAT. § 18-1.3-401(4)(b) (2009); Kansas, KAN. STAT. ANN. § 21-4622 (2007); Kentucky, KY. REV. STAT. ANN. § 640.040(1) (West 2008); Montana, MONT. CODE ANN. § 46-18-222(1) (2009); and Texas, TEX. PENAL CODE ANN. § 12.31(a)(1) (Vernon 2009). For an interactive map of state-by state JLWOP statistics, current through May 2009, *see Juveniles Serving Life Without Parole in the U.S.*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html> (last visited July 3, 2011).

13. *See, e.g.*, HUMAN RIGHTS WATCH/AMNESTY INTERNATIONAL, *REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008 1* (2008) [hereinafter HRW 2008 REPORT] ("There are no youth serving JLWOP anywhere else in the world."); Connie De La Vega & Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008) (noting that no juveniles "in the rest of the world" are serving JLWOP).

Texas, still only mandates parole review after forty years¹⁴ and does not even take retroactive effect.¹⁵ This kind of limited legislation may be the best that advocates can hope for from the states.

Litigation strategies to extend *Graham* to JLWOP for homicide are similarly unlikely to gain significant traction in lower federal or state courts due to the explicitly limited, and already unprecedented, nature of *Graham*.¹⁶ And it is even more unlikely that the Supreme Court will readdress the issue any time soon given *Graham's* recency and the historically constrained Eighth Amendment review of sentences outside of the death penalty.¹⁷ Put simply, *Graham* is as far as the Court will likely go in the foreseeable future. What is more, JLWOP litigation efforts are in some ways in tension with state legislative advocacy strategies. If courts see that legislatures are considering reforms—whether or not those reforms are sufficient or likely to pass—the courts may defer constitutional decisions to the political process, which will take far longer to have an impact than a judicial opinion.

Thus neither the states nor the courts seem likely to, or capable of, extending *Graham* beyond its limited scope. This leaves Congress. Scant advocacy and scholarly attention has focused on the potential for *Congressional action* on the issue of JLWOP. Given Congress's virtually non-existent history of "leniency legislation,"¹⁸ this is not at all surprising. Those familiar with the process and politics of federal criminal lawmaking have serious and legitimate cause to doubt the likelihood that federal legislation will be able to address the JLWOP problem. This Article, however, will argue there are significant reasons to believe that the issue of JLWOP *could* buck the timeless "one-way ratchet"¹⁹ that has traditionally

14. TEX. GOV'T CODE ANN. § 508.145(b) (Vernon 2009) ("An inmate serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years.").

15. S.B. 839 § 3, 2009 Leg., 81(R) Sess. (Tex. 2009) ("The change in law made by this Act applies only to an offense committed on or after the effective date of this Act.").

16. For a discussion of lower federal and state courts' treatment of attempts to broaden *Graham's* holding to encompass juvenile homicide or term-of-years sentences *with* the possibility of parole, see *infra* Part II(C).

17. See *generally* Steiker & Steiker, *supra* note 2 (examining the interplay between death penalty and non-death penalty cases in Eighth Amendment jurisprudence); Barkow, *Two Tracks*, *supra* note 2 (arguing the two-track approach should be abandoned).

18. I will use the term "leniency legislation" throughout this Article to refer to legislation that would benefit defendants through measures such as reduction in sentences, increased opportunities for parole, alternatives to sentencing, reduction in substantive criminal laws, or other progressive criminal justice reforms.

19. For descriptions of criminal law as a "one-way ratchet," see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509, 547–49 (2001). See also Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005) [hereinafter Beale, *Many Faces*]

characterized federal criminal lawmaking.

Congress has already entered the JLWOP fray. The Juvenile Justice Accountability and Improvement Act (“JJAIA”)—introduced in the House of Representatives in 2007 and again in 2009—proposes to use Congress’s Spending Power to condition federal funds allocated for crime control on states’ creation of meaningful parole or supervised release opportunities for individuals convicted of crimes they committed before the age of eighteen.²⁰ While the legislation has yielded two substantively rich hearings,²¹ and some advocacy attention,²² neither bill has made it out of committee, though the sponsors plan to reintroduce until it passes.²³

The quicksand in which the JJAIA is currently mired consists of the same, considerable obstacles facing *any* Congressional attempt at leniency legislation. First, there is an entrenched *political process bias* against leniency legislation in Congress. This bias is grounded in the fear of appearing “soft on crime,” the notion, both real and perceived, that public opinion opposes leniency, and the vast inequalities in interest group power.²⁴ Second, whether for political cover²⁵ or out of legitimate

(explaining the factors that lead to a “one way ratchet toward the enactment of additional crimes and harsher penalties”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719-20 (2005) (“[T]he escalation of ‘law and order’ politics in recent years has created a one-way ratchet in U.S. governance.”).

20. Juvenile Justice Accountability and Improvement Act, H.R. 4300, 110th Cong. (2007); Juvenile Justice Accountability and Improvement Act, H.R. 2289, 111th Cong. (2009).

21. Juvenile Justice Accountability and Improvement Act: Hearing on H.R. 4300 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 110th Cong. 110-205 (2008) [hereinafter *2008 Hearing*]; *2009 Hearing*, *supra* note 4.

22. Letter from David C. Fathi, Director, U.S. Program, Human Rights Watch, to Members of the Committee on the Judiciary (May 7, 2009), *available at* http://www.hrw.org/sites/default/files/related_material/Letter_to_House_Judiciary_on_HR2289_May_7_2009.pdf; Letter from Caroline Fredrickson, Director, Washington Legislative Office, ACLU, to Rep. Bobby Scott, Chairman, H. Subcomm. on Crime, Terrorism, and Homeland Security, and Rep. Louie Gohmert, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Sec. (June 18, 2009), *available at* http://www.aclu.org/files/images/asset_upload_file942_39941.pdf.

23. Telephone Interview with Karen M. Wilkinson, Counsel, H. Subcomm. on Crime, Terrorism, and Homeland Security, and Bobby N. Vassar, Democratic Counsel, H. Subcomm. on Crime, Terrorism, and Homeland Security (Nov. 24, 2009). Mr. Vassar also discussed the value of continuing to introduce the legislation, even without ultimate passage, in order to keep the issue on Congress’s radar, advance advocacy and research, and possibly pressure the states to act. *Id.* For a similar concept, see Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 286 (1990) (“Another strategy for garnering political support on matters traditionally relegated to state law is for federal regulators occasionally to threaten to regulate in these areas.”).

24. See discussion *infra* Part III.

25. See, e.g., Macey, *supra* note 23, at 265 (“Conservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment. Yet both groups are also quick to wield the power of the supremacy clause, while citing vague platitudes about the need for uniformity among the

constitutional concern, *federalism costs* associated with federal intrusion into the states' traditional control over crime and punishment disincentivize Congressional action.²⁶

This Article will use the JJAIA and the issue of JLWOP generally to evaluate and respond to these classic obstacles to federal leniency legislation. While the passage of the JJAIA through Congress's Spending Power is but one of the ways that Congress could potentially act to abolish JLWOP,²⁷ the fact that the legislation has already been introduced makes it a useful and appropriate case study.

Whether or not Congress will actually act to pass the JJAIA—or whether the sponsors will continue to introduce it in its current form, or at all, especially in light of the shift in political power after the 2010 midterm elections—is not a question I can possibly answer, nor one on which I will focus in this Article. Assuming the status quo of Congressional reluctance paired with the skepticism of sentencing advocates it seems likely that Congress will *not* pass this legislation. This Article will also not advocate for the abolition of JLWOP. Its goal is far more modest. The aim is to highlight for criminal justice reformists the potential for Congress to pass leniency legislation and to illustrate to members of Congress that ending JLWOP will neither be political suicide nor sound the death knell of federalism as we know it. Such legislation, I argue, is what could come next, after *Graham*.

The Article proceeds in three parts. Part II summarizes the history and current state of JLWOP advocacy, describes the JJAIA, and discusses *Graham* and the legal landscape post-*Graham*. Part III explains the roots of the political process bias of criminal law in Congress and develops a framework for assessing whether JLWOP could buck the traditional trend toward harsher sentencing laws. I argue that the political process bias that has doomed leniency legislation in the past is actually far weaker in the

states, whenever a single national rule in a particular area furthers their political interests.”).

26. These federalism concerns have gained more traction in the context of the resurgence of judicial scrutiny of the bounds of the Tenth Amendment, the breadth of the Commerce Clause, and the power of the enforcement clause of the Fourteenth Amendment. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that neither the Commerce Clause nor the Fourteenth Amendment's enforcement clause gives Congress authority to enact the civil remedy provision of the Violence Against Women Act); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that, due to federalism constraints, “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs”); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeded Congress' Commerce Clause authority); *New York v. United States*, 505 U.S. 144, 175–77 (1992) (holding a statute unconstitutionally coerced states into compliance with federal program, which was beyond Congress' enumerated powers and in violation of the Tenth Amendment).

27. See discussion *infra* Part IV(B), (E)(2)(b)-(c).

context of JLWOP. This is because of current political tides in favor of criminal justice reform, the uniquely sympathetic nature of juveniles, the strong interest groups aligned in favor of juveniles, the media's attention to the powerful emotional image of juveniles sentenced to life in prison without hope of release, and public opinion that tends to support rehabilitation and differential penal treatment for juveniles.

Part IV describes the role and import of federalism in this debate and develops a framework for assessing whether the JJAIA properly respects federalism values. I ultimately conclude that the passage of the JJAIA is both necessary and proper and that Congress's federalism concerns are overstated. Federalism costs are diminished in the context of JLWOP because the slight incursions into state sentencing prerogatives are vastly outweighed by Congress's necessary role in protecting our nation's position and reputation in foreign affairs and human rights, as well as Congress's historical concern with reducing racial discrimination of U.S. citizens.

II.

THE CURRENT LANDSCAPE OF JLWOP ADVOCACY: *ROPER*, *GRAHAM*, AND THE JJAIA

A. *Roper v. Simmons* and the Evolution of JLWOP Advocacy

In *Roper v. Simmons*, the Supreme Court held that the death penalty for individuals convicted of crimes committed before the age of eighteen constitutes cruel and unusual punishment under the Eighth Amendment.²⁸ Justice Kennedy's majority opinion, however, did far more than simply validate what "any parent knows" about the inherent differences between children and adults.²⁹ Justice Kennedy's recognition of the lesser culpability of juveniles and their greater capacity for rehabilitation mobilized advocacy efforts to abolish the "penultimate punishment" for kids: JLWOP.³⁰

Despite Justice Kennedy's implicit approval of JLWOP in *Roper*,³¹ the

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

29. *Id.* at 569.

30. Justice Scalia, for his part, foresaw that the majority's decision would likely lead to this increased wave of advocacy. *See id.* at 623 (Scalia, J., dissenting) ("It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since 'the punishment of life imprisonment without the possibility of parole is itself a severe sanction' . . . gives little comfort.") (internal cross-references omitted).

31. *Id.* at 572 (majority opinion) ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young

holding generated a wave of attention and advocacy concerning JLWOP from scholars, bloggers, journalists, human rights organizations, state legislatures, international bodies, victims and children's rights groups, and federal and state courts. Scholarship and advocacy focused primarily on the intuitive potential of extending *Roper's* Eighth Amendment analysis to sentencing children to "die in prison"³² or emphasized the international implications of America's pariah status as the only country in the world to impose JLWOP.³³ Yet by the time *Graham* was decided in May 2010, no federal court had been willing to hold JLWOP unconstitutional.³⁴ Only four state courts had ruled that the sentence constituted cruel and unusual punishment as applied to the *particular* circumstances of the case—and those cases were limited to nonhomicide crimes (or in one case, a non-triggerman accomplice to murder) committed by the very young (fifteen years of age and under).³⁵

person.”).

32. Advocates have adopted a strategy equating JLWOP with sentencing a child to “die in prison” to draw clearer parallels between the death penalty and the penultimate sentence and to emphasize how JLWOP “gives up” on children to the same degree. *See, e.g.,* MICHELLE LEIGHTON & CONNIE DE LA VEGA, CTR. FOR LAW AND GLOBAL JUSTICE, SENTENCING OUR CHILDREN TO DIE IN PRISON (2007) [hereinafter GLOBAL JUSTICE REPORT], <http://ctjja.org/resources/pdf/reform-sentencingourchildren.pdf>; EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13-AND-14-YEAR-OLD CHILDREN TO DIE IN PRISON ii (2008) [hereinafter EJI REPORT], <http://www.eji.org/eji/files/20071017cruelandunusual.pdf>.

33. *See generally* Molly C. Quinn, Comment, *Life Without Parole for Juvenile Offenders: A Violation of Customary International Law*, 52 ST. LOUIS U. L.J. 283 (2007); Andrea Templeton, *Lost Potential: International Treaty Obligations and Juvenile Life Without Parole in Edmonds v. State of Miss.*, 26 LAW & INEQ. 233 (2008).

34. *See, e.g.,* Harris v. Wright, 93 F.3d 581, 585 (9th Cir. 1995) (“Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.”) (internal quotations omitted). *See also* Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9, 47 (2008) (describing the refusal of lower federal courts to “conduct proportionality reviews of [juvenile] LWOP sentences”); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. Rev. 1083, 1104–05 (2006) (describing the rejection by federal appellate courts of constitutional challenges to JLWOP).

35. *In re Nunez*, 93 Cal. Rptr. 3d 242, 247 (Cal. Ct. App. 2009) (citing *Roper's* examination of the basic differences between youth and adults in striking down the life sentence of a fourteen-year-old child convicted of aggravated kidnapping, but limiting the decision to the “freakishly rare” sentencing circumstances that resulted in a more severe sentence for kidnapping, than for murder); *People v. Miller*, 781 N.E.2d 300, 308 (Ill. 2002) (affirming the rejection as disproportionate of a life without parole sentence imposed on a fifteen-year-old lookout where the defendant had “one minute to contemplate his decision to participate in the incident and . . . never handled a gun”); *Workman v. State*, 429 S.W.2d 374, 378 (Ky. 1968) (finding that the imposition of life without parole sentences on two fourteen-year-old defendants convicted of forcible rape was cruel and unusual punishment

While the movement to abolish JLWOP in America gained traction after *Roper*, it began as part of a pre-*Roper* effort to focus the lens of international human rights on a range of stalled domestic issues.³⁶ Advocates for causes including economic justice, LGBT rights, and death penalty abolition realized that rights articulated in treaties like the International Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the Convention on the Rights of the Child were far broader than those in the U.S. Constitution.³⁷ As the momentum to end JLWOP picked up, there was at least some awareness that these international laws also prohibited JLWOP. When, shortly before the Supreme Court decision in *Roper* was handed down, Human Rights Watch (“HRW”) published a report on JLWOP with Amnesty International (“AI”), entitled *The Rest of Their Lives*, it was the first time any advocates in the United States formally analyzed JLWOP as a viable human rights issue.³⁸

Still, ending JLWOP was little more than a pipe dream before *Roper*. The primary battle for juvenile justice advocates at the time was ending the juvenile death penalty and it was a steep, uphill battle at that. In fact, many death penalty abolitionists treated life without parole as a fig leaf for their own cause: they strategically promoted life without parole as a viable alternative to capital punishment, a tactic they still utilize.³⁹ *Roper* and his amici employed this strategy, by pointing to states that allowed JLWOP but prohibited the juvenile death penalty “as evidence that the Court could safely restrict capital punishment to individuals eighteen years and older.”⁴⁰

As Carol and Jordan Steiker observed, the alliance of the “abolitionist left and tough-on-crime right” thus may have increased the sentences of many “in order to make less likely the already unlikely execution of the few.”⁴¹ Recently, thousands of prisoners serving life without parole

in violation of the state constitution, without reaching the Eighth Amendment question); *Naovarath v. State*, 779 P.2d 944, 948–49, 949 n.6 (Nev. 1999) (reversing a life without parole sentence against a thirteen-year-old convicted of murder).

36. Telephone Interview with Bryan Stevenson, Founder and Director, Equal Justice Initiative (Mar. 29, 2010).

37. See Part IV(E)(2)(a), for a detailed discussion of these treaties and the United States’ obligations under them.

38. HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES 1* (2005) [hereinafter HRW 2005 REPORT], available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>.

39. See, e.g., Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1 (“Opponents of the death penalty have embraced and promoted [life without parole], pointing to studies that show that support for the death penalty dropped drastically among jurors and the public when life without parole, or LWOP, was an alternative.”).

40. Barkow, *Two Tracks*, *supra* note 2, at 1190–91.

41. Steiker & Steiker, *supra* note 2, at 158.

sentences created an organization called “The Other Death Penalty Project” and in February 2010 sent a mass mailing to death penalty abolitionists “asking them to stop advocating for life without the possibility of parole as a supposedly humane alternative to lethal injection.”⁴²

The *Roper* decision thus reflects the longstanding tension between death penalty abolition and efforts to limit the length and severity of prison sentencing. However, the explicit references in Justice Kennedy’s *Roper* opinion to international law and norms as a justification for ending the juvenile death penalty and the Court’s broad statements about the reduced culpability of juveniles also made it a source of inspiration and energy for a handful of advocates who, after the decision, began to start taking JLWOP abolition more seriously.⁴³

It was only, for example, after *Roper*, that the issue of JLWOP began to bite into the docket of the Equal Justice Initiative of Alabama (“EJI”), an organization founded and directed by Bryan Stevenson in part to litigate actively on behalf of children in the adult criminal justice system.⁴⁴ Long before *Roper*, EJI had made it a priority to focus on juveniles on death row, given the high proportion of juveniles facing execution in Alabama.⁴⁵ Yet it was only after the decision in *Roper* in 2005 that EJI began to challenge the life without parole sentences of juveniles, starting with Ashley Jones, a fourteen-year-old girl sentenced to the penultimate sentence in Alabama.⁴⁶ In preparation for Ashley’s case, EJI spent thousands of hours developing research that ultimately led to a report, published in 2007 and entitled *Cruel and Unusual Punishment: Sentencing 13- and 14-Year-Old Children to Die in Prison*, and to the launch of a national campaign.⁴⁷ By March of 2008, EJI had JLWOP dockets in fourteen states. It soon became EJI’s second largest issue and the organization’s first national litigation program.⁴⁸

B. Congress Takes Notice: The Juvenile Justice Accountability and Improvement Act

The increase in EJI’s JLWOP docket paralleled the rise of JLWOP as

42. See *The Other Death Penalty Project Announces Letter-Writing Campaign to Anti-Death Penalty Groups*, PR NEWSWIRE Feb. 22, 2010, <http://www.prnewswire.com/news-releases/the-other-death-penalty-project-announces-letter-writing-campaign-to-anti-death-penalty-groups-84945657.html>. See also *Our Mission*, THE OTHER DEATH PENALTY PROJECT, <http://www.theotherdeathpenalty.org/> (last visited July 3, 2011).

43. Stevenson interview, *supra* note 36.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*; EJI REPORT, *supra* note 32.

48. Stevenson Interview, *supra* note 36.

a significant issue in the national sentencing debate. In reaction to the growing prominence of the issue, then-Chairman of the House Subcommittee on Crime, Terror, and Homeland Security, Representative Bobby Scott (D-Va.), who had long been broadly interested in juvenile justice issues, introduced the JJAIA in 2007 and held the first Congressional hearing on the bill.

Scott introduced the JJAIA in part as a response to the Court's recognition in *Roper* that the differences between youths and adults are "marked and well understood."⁴⁹ But the JJAIA also responds to other concerns, including the facts that there are no youth serving such sentences in the rest of the world,⁵⁰ the majority of those serving JLWOP sentences are first time offenders,⁵¹ and sixteen percent of these individuals were age fifteen or younger when they committed their crimes.⁵²

The bill requires states to grant "meaningful parole review" to individuals sentenced to life without parole for crimes they committed prior to the age of eighteen, at least once within the first fifteen years of imprisonment, and every three years thereafter. If they do not, they lose ten percent of the federal funds allocated to them under the Edward Byrne Grant Program, which gives states federal funds to use to improve the functioning of their criminal justice systems.⁵³ The JJAIA also imposes a similar ban on unreviewable JLWOP sentences in the federal system,⁵⁴ requires the creation of victim notification programs,⁵⁵ and develops a grant program to improve legal representation to children facing or serving JLWOP.⁵⁶ Importantly, especially in the wake of *Graham*, the JJAIA applies *both* to individuals who committed nonhomicide *and* homicide crimes. The JJAIA thus maintains the possibility of parole for *all* juveniles.

In 2009, the JJAIA was reintroduced and the House Subcommittee held a more robust hearing on the issue.⁵⁷ Since the 2009 hearing, there has

49. H.R. 4300, 110th Cong. § 2(2) (2007) (citing *Roper*, 543 U.S. at 572 (2005)).

50. H.R. 2289, 111th Cong. § 2(5) (2009).

51. *Id.* § 2(7).

52. *Id.* § 2(8).

53. *Id.* §3(a)(1) (requiring meaningful parole review); *id.* §3(d)(2) (conditioning funding on compliance). The Edward Byrne Grant Program was created by the Anti-Drug Abuse Act of 1988, Public Law 100-690 102 Stat. 4181 (1988). It authorizes the Bureau of Justice Assistance to "award grants to states for use by states and units of local government to improve the functioning of the criminal justice system—with emphasis on violent crime and serious offenders—and enforce state and local laws that establish offenses similar to those in the federal Controlled Substances Act (21 U.S.C. 802(6) *et seq.* [(2009)])." *Edward Byrne Memorial State and Local Law Enforcement Assistance Grant Program*, BUREAU OF JUSTICE ASSISTANCE, <http://www.ojp.usdoj.gov/BJA/grant/byrne.html> (last visited July 3, 2011).

54. *Id.* § 5.

55. *Id.* § 4.

56. *Id.* § 6.

57. *Id.*; 2009 Hearing, *supra* note 4. The 2009 hearing included live testimony from a

been no further *public* legislative movement on the JJAIA, although Scott and his staff have been working behind the scenes to take stock of what effect both the *Graham* decision and the Democratic losses in the House will have on the JJAIA.⁵⁸ According to Liliana Coronado, Counsel for the Subcommittee on Crime, Terror, and Homeland Security, the JJAIA continues to be a priority area for the Subcommittee and for Congressman Scott.⁵⁹ Scott will attempt to reintroduce the legislation despite the fact that he has ceded his Chairmanship to a Republican. “On the one hand, there will be a different leadership and all we may be able to do is ask, make noise, and hope they listen,” said Coronado. “On the other hand, we had to be bipartisan to get the bill introduced when the Democrats were in power. The election doesn’t change the difficulty of pushing this legislation forward.”⁶⁰

C. The Supreme Court Takes Notice: The Double Grant of Cert in Sullivan v. Florida and Graham v. Florida

On May 5, 2009, the Supreme Court granted certiorari in *Sullivan v. Florida* and *Graham v. Florida* to review the constitutionality of JLWOP for nonhomicide offenses.⁶¹ The grant was symbolic of, and perhaps in reaction to, the increased momentum of JLWOP advocacy after *Roper*. It also came just one month prior to the 2009 hearing on the JJAIA. After the certiorari grant, and with the hearing around the corner, JLWOP abolitionists, sentencing advocates, and the media tuned in to the growing JLWOP debate. No one expected the Court to review any cases on this issue so soon after *Roper*, let alone two.

Bryan Stevenson represented Joe Sullivan, who was convicted of aggravated rape at age thirteen. Stevenson wanted to focus the Court’s attention on the cruel and unusual application of JLWOP to the very young—fourteen years of age and under—for many types of offenses.⁶² The petition on behalf of Terrance Graham, who was sentenced to life without parole for armed robbery, took a different strategy. It argued for a bright-line prohibition on the application of life without parole on those

sentencing law professor, victim’s rights organizations on both sides of the debate, and heads of sentencing policy organizations. It also included more than 270 pages of written testimony from interested organizations, victims, prisoners, citizens, practitioners, and other experts.

58. Telephone interview with Liliana Coronado, Counsel, H. Subcomm. on Crime, Terrorism, and Homeland Sec. (Nov. 8, 2010).

59. *Id.*

60. *Id.*

61. *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (2009) (No. 08-7412); *Sullivan v. State*, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008), *cert. granted*, 129 S. Ct. 2157 (2009) (No. 08-7621).

62. See Brief of Petitioner-Appellant, *Sullivan v. Florida*, No. 08-7621 at 5-8 (2009) (summarizing argument), available at http://eji.org/eji/files/Sullivan_Petitioners_Brief.pdf.

convicted of nonhomicide crimes committed when younger than eighteen.⁶³ Despite the surprise double grant of certiorari and the potential for conflicting strategies, the two advocacy teams coordinated efforts leading up to the oral argument on November 9, 2009. All amicus briefs were filed on behalf of both petitioners.

At oral argument, however, Stevenson and Bryan Gowdy, counsel for Terrance Graham, pushed the court for different categorical bars. Gowdy stepped up to the lectern first to argue *Graham*. In response to an immediate question from Chief Justice Roberts about the line he wished to draw, Gowdy made clear that he wanted a categorical bar at eighteen, but *only for* non-homicide crimes.⁶⁴ In the same breath, Gowdy conceded that JLWOP for homicide was constitutional.⁶⁵ Conversely, when Justice Alito later asked Stevenson in *Sullivan* what categorical rule he wished the Court to adopt, he answered: “[A] rule that bans life without parole for *any* child under the age of 14,” regardless of whether the crime was a nonhomicide or homicide.⁶⁶ When pushed by Justice Ginsburg—“But that would leave out Graham, then?”—Stevenson made clear he wanted JLWOP abolished for the very young, no matter the crime.⁶⁷ Stevenson would not concede that JLWOP for homicide was constitutional, no matter the age of the defendant.⁶⁸ On May 17, 2010, the Supreme Court rendered its decision in *Graham* and dismissed the writ of certiorari as improvidently granted in *Sullivan*.⁶⁹

In holding JLWOP for nonhomicides unconstitutional in *Graham*, Justice Kennedy relied heavily on the *Roper* majority opinion he wrote just five years earlier. He reasoned that JLWOP, like the death penalty, “alters the offender’s life by a forfeiture that is irrevocable”⁷⁰ and “is an

63. See Brief of Petitioner-Appellant, *Graham v. Florida*, No. 08-7412 at 24-29 (2009) (summarizing argument), available at http://eji.org/eji/files/Graham_Petitioners_Brief.pdf.

64. Transcript of Oral Argument at 3, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412). Note: the author attended the oral argument for both *Graham* and *Sullivan*.

65. *Id.*

66. Transcript of Oral Argument at 20–21, *Sullivan*, 130 S. Ct. 2059 (2009) (No. 08-7621) (emphasis added).

67. *Id.* at 20

68. See generally Transcript of Oral Argument at 20–21, *Sullivan*, 130 S. Ct. 2059 (2009) (No. 08-7621) (emphasis added).

69. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010); *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam). The Court’s per curiam decision in *Sullivan* offers no explanation for the dismissal of the writ of certiorari. However, the first several minutes of oral argument in that case focused on whether the Florida court’s decision, affirming Joe Sullivan’s conviction, rested on an independent and adequate state ground. See Transcript of Oral Argument at 3–14, *Sullivan v. Florida*, 130 S. Ct. 2059 (2009) (No. 08-7621). While the Court therefore most likely rejected certiorari on the grounds that Sullivan’s claim was procedurally barred, Sullivan will still be entitled to a resentencing hearing under *Graham*.

70. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

especially harsh punishment for a juvenile.”⁷¹ Citing the scientific studies *Roper* discussed, concerning the psychological and neurological differences between children and adults, Kennedy reaffirmed his claim from *Roper* regarding the reduced culpability of juveniles.⁷² Kennedy also cited *Roper* to support his conclusion that JLWOP was not justified by any of the “goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation.”⁷³ Finally, Kennedy noted that “the overwhelming weight of international opinion against life without parole for nonhomicide offenses committed by juveniles provides respected and significant confirmation for our own conclusions”—again, citing *Roper*.⁷⁴

For many, this *Roper*-to-*Graham* analytical progression was intuitive, if not obvious. For Justice Kennedy, however, this conversion was no small feat: he had to contend both with the fact that he had recently condoned JLWOP for all crimes in *Roper*,⁷⁵ as well as the sharp jurisprudential divide between capital and non-capital sentences under the Eighth Amendment. He did so by ignoring the first problem and glossing over the second.⁷⁶ He needed just six short paragraphs to graft *Roper* onto *Graham* and pave the way for the ultimate holding.⁷⁷

To overcome the death-is-different Eighth Amendment problem and reach JLWOP, however, Justice Kennedy ended up reinforcing another life and death partition: the line between homicide and nonhomicide offences. Throughout the opinion, Kennedy went out of his way to make absolutely clear that the holding only applied to nonhomicide offenders. He employed the word “nonhomicide” no less than forty-eight times in his

71. *Id.* at 2028.

72. *Id.* at 2026 (“No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”)

73. *Id.* at 2028.

74. *Id.* at 2034 (internal citations and brackets omitted).

75. This point was not lost on Justice Roberts, who concurred in the result as to Terrance Graham, but argued forcefully against the bright line drawn by the majority. Instead, Roberts advocated for a case-by-case approach, which would require sentencing judges to take the defendant’s youth into account. *See Graham*, 130 S. Ct. at 2039 (Roberts, J., concurring) (“Treating juvenile life sentences as analogous to capital punishment is . . . at odds with *Roper* itself . . .”) (internal citation omitted).

76. As to the jurisprudential divide, Justice Kennedy compared the two lines of Eighth Amendment precedent and noted that Court had never before considered “a categorical challenge to a term-of-years sentence.” *Graham*, 130 S. Ct. at 2022 (majority opinion). In all previous term-of-years cases, the Court had considered whether a “particular defendant’s sentence” was grossly disproportionate by comparing the “severity of the penalty and the gravity of the crime.” *Id.* at 2022–23. Since in this case a “sentencing practice itself [was] in question . . . as it applie[d] to an entire class of offenders who have committed a range of crimes,” Justice Kennedy reasoned that the standard inquiry for non-capital cases “does not advance the analysis.” *Id.* at 2023. He concluded that “the appropriate analysis is the one used in cases that involved the categorical approach,”—namely, in *capital cases*. *Id.*

77. *Graham*, 130 S. Ct. at 2021–22.

opinion. Borrowing the lessons of *Coker v. Georgia*,⁷⁸ barring the imposition of the death penalty for rape, *Enmund v. Florida*,⁷⁹ barring the imposition of the death penalty for non-triggerman felony murderers, and most recently *Kennedy v. Louisiana*,⁸⁰ barring the imposition of the death penalty for child rapists, the Court unequivocally recognized that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”⁸¹ Applying this principle to those serving JLWOP for nonhomicide crimes, the Court found that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁸² This acknowledgment was, of course, welcome news for Terrance Graham and the 128 other prisoners serving JLWOP for nonhomicide offenses.⁸³ But the remaining 2,300-plus

78. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

79. *Enmund v. Florida*, 458 U.S. 782, 788 (1982).

80. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

81. *Graham*, 130 S. Ct. at 2016.

82. *Id.*

83. Welcomed news, yes, but *Graham's* categorical ban stops short of fashioning a definitive remedy for even those 129 prisoners, whose sentences fall within the Court's holding. The Court instead opted to leave it to the states to design a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 130 S. Ct. at 2016 (“A State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance.”). Under *Graham*, prisoners are thus entitled to a new sentencing hearing, not automatic release. It remains to be seen, whether and how these individuals, including even Terrance Graham himself, will get relief. See David Ovalle, *Ruling on Young, Violent Lifers Puts Florida Justice on the Spot*, MIAMI HERALD, Sept. 26, 2010, http://www.miamiherald.com/2010/09/25/1842695_p3/ruling-on-young-violent-lifers.html (discussing the complex politics surrounding the aftermath of *Graham*, competing proposals from lawmakers, prosecutors, and public defenders for what to do with individuals sentenced to JLWOP for nonhomicide crimes in Florida, and the reactions of victims' families to *Graham*). An additional “daunting task” is enforcing these prisoners' right to counsel in new sentencing hearings. Liliana Segura, *Major Supreme Court Ruling: Kids Who Didn't Kill Anyone Should Not Have to Die in Prison*, ALTERNET.ORG, May 18, 2010, <http://www.alternet.org/story/146899> (“[M]ost of the kids who've been sentenced to life without parole have no legal representation, an egregious failing of the criminal justice system if there ever was one”) (quoting Bryan Stevenson). Additionally, the decision still permits states, and the federal government, to sentence juveniles to decades-long sentences, with or without the possibility of parole, as well as to life terms, as long as there is the possibility of parole. *Graham*, at 2030 (“A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. . . . [W]hile the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.”). See also *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Alito J., dissenting) (“Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole “probably” would be constitutional.”). While prohibiting a state from “making the judgment at the outset that [persons convicted of nonhomicide crimes committed before

prisoners serving JLWOP for homicide were left to wonder why Justice Kennedy's sweeping statements about the similarities between the death penalty and JLWOP, the differences between kids and adults, the importance of redemption and hope, and the existence of an international consensus against *all* forms of JLWOP did not apply equally to them.

In the year since *Graham* was decided,⁸⁴ lower federal courts and state courts have taken the Supreme Court at its word and unanimously rejected attempts to extend *Graham* to either homicide offenses⁸⁵ or non-LWOP sentences.⁸⁶ Citing the *Graham* Court's unambiguous homicide/nonhomicide distinction, ten courts have declined to extend *Graham* to fourteen- to seventeen-year-olds convicted of murder.⁸⁷ Seven other courts have denied relief to prisoners serving JLWOP for murder as a non-triggerman accomplice.⁸⁸ But the definition of what qualifies as a

adulthood] never will be fit to reenter society," *Graham*, 130 S. Ct. at 2030. *Graham* still does "not require a State to release that offender during his natural life." *Id.*

84. Due to the publication schedule of this Article, lower federal and state court case review is current through April 13, 2011.

85. See, e.g., *Espie v. Birkett*, No. 07-12506-BC, 2010 WL 2994010, at *15 n.5 (E.D. Mich. July 28, 2010) ("*Graham* . . . placed no Eighth Amendment limits on prison terms resulting from homicide convictions.>").

86. See, e.g., *Bell v. Haws*, No. CV09-3346-JFW (MLG), 2010 WL 3447218, at *10 (C.D. Cal. July 14, 2010) ("[T]he Supreme Court made clear, both explicitly and by its reasoning, that its holding was limited.") (quoting *Graham*, 130 S. Ct. at 2023 (2010)).

87. *Lotts v. Purkett*, No. 4:07CV610 RWS, 2010 WL 2653636, at *1 (E.D. Mo. June 29, 2010) (denying a motion to alter or amend the previous denial of habeas corpus to a fourteen-year-old convicted of murder because *Graham* does not "prohibit imposition of a life without parole sentence for a juvenile offender who commits homicide."); *Miller v. Alabama*, No. CR-06-0741, 2010 WL 3377692, at *9 (Ala. Crim. App. Aug. 27, 2010) (rejecting the application of *Graham* to a fourteen-year-old convicted of capital murder); *People v. Perez*, No. G042811, 2011 WL 521319, at *6-7 (Cal. App. Feb. 15, 2011) (rejecting the application of *Graham* to a fourteen-year-old convicted of first degree murder); *State v. Twyman*, No. 9707012195, 2010 WL 4261921, at *2 (Del. Super. Ct. Oct. 19, 2010) (holding that "[t]he *Graham* case has no applicability" in case reviewing the constitutionality of JLWOP for a fifteen-year-old convicted of first degree murder); *Gonzalez v. State*, 50 So.3d 633, 634-35 (Fla. Dist. Ct. App. 2010) (invoking *Graham* to uphold JLWOP for a sixteen-year-old convicted of first degree pre-meditated murder); *State v. Andrews*, 329 S.W.3d 369, 377-78 (Mo. 2010) (citing *Graham's* homicide/nonhomicide divide in upholding mandatory JLWOP for a fifteen-year-old convicted of first degree murder); *Commonwealth v. Ortiz*, No. 1369 MDA 2010, 2011 WL 940769, at *3 (Pa. Super. Mar. 18, 2011) (rejecting application of *Graham* to a sixteen-year-old convicted of second-degree murder); *Wilson v. State*, No. 14-09-01040-CR, 2011 WL 1364972, at *7 (Tex. App. Apr. 12, 2011) (declining to extend *Graham* to a mandatory JLWOP sentence imposed on a seventeen-year-old convicted of capital murder); *Paolilla v. State*, No. 14-08-00963-CR, 2011 WL 723489, at *6 (Tex. App. Mar. 3, 2011) (upholding JLWOP for a seventeen-year-old convicted of capital murder); *Meadoux v. State*, 325 S.W.3d 189, 195 (Tex. Crim. App. 2010) (upholding JLWOP imposed on a sixteen-year-old convicted of capital murder and citing *Graham's* "moral line between murder . . . and other serious violent offenses against the individual").

88. *Brown v. Horel*, No. C 08-4673 LHK (PR), 2011 WL 900547, at *12-13 (N.D. Cal. Mar. 15, 2011) (denying the habeas corpus petition of teenager convicted of first-degree murder as a non-triggerman accomplice because the sentence was not "contrary to, or

nonhomicide offense is not yet clear. Two state courts have reviewed the constitutionality of JLWOP for attempted murder, with one court upholding the sentence, ruling that the dispositive issue was the “intent to kill,”⁸⁹ and the other court ordering resentencing because the conduct did not “result in death.”⁹⁰ Arguments to extend *Graham* to life sentences *with* the possibility of parole have not encountered such helpful ambiguity: they have generally been unavailing.⁹¹ Of course, it is conceivable that *Graham*

involved an unreasonable application of” *Graham*); *Jenson v. Zavaras*, Civil Action NO. 08-cv-01670-RPM, 2010 WL 2825666, at *1 (D. Colo. July 16, 2010) (denying a motion to amend a habeas petition to extend *Graham*’s holding to a juvenile accomplice convicted of first degree murder.); *Cox v. State*, No. CR 00-345, 2011 WL 737307, at *2 (Ark. Mar. 3, 2011) (“While [the defendant] was an accomplice to homicide, there is no distinction between the criminal liability of a principal and an accomplice.”); *Jackson v. Norris*, No. 09-145, 2011 WL 478600, at *1 (Ark. Feb. 9, 2011) (declining to extend *Graham* to a fourteen-year-old convicted of capital murder and sentenced to mandatory life without parole for acting as an accomplice to felony murder); *People v. Adderley*, No. B217620, 2011 WL 817751, at *12 (Cal. App. Mar. 10, 2011) (holding *Graham* inapplicable for a non-triggerman accomplice to first degree murder because the defendant “was a major participant in the crime who acted with reckless indifference to human life”); *People v. Hernandez*, No. B223310, 2011 WL 539448, at *7 (Cal. App. 2 Dist. Feb. 17, 2011) (holding *Graham* inapplicable because special circumstances felony murder was a “homicide offense”); *People v. Donald*, 2010 WL 2594940 (Cal. App. 2010) (denying relief to a seventeen-year-old “aider and abettor” convicted of four first degree murders). Note however that, in *Jackson v. Norris*, two state supreme court justices filed a dissent arguing that *Graham* should be extended to cover non-trigger man accomplices as the defendant “did not kill and any evidence of intent to kill was severely lacking.” *Jackson*, 2011 WL 478600, at *13 (Danielson, J., dissenting). One other justice concurred in the judgment, but wrote separately to voice his dissatisfaction with the mandatory nature of the sentence imposed. *Id.* at *6 (Brown, J., concurring).

89. *Twyman*, 2010 WL 4261921, at *2 (“It is the intent to kill that elevates homicides above other crimes and makes the Defendant more deserving of the most serious forms of punishment.”).

90. *Manuel v. State*, 48 So.3d 94, 97 (Fla. Dist. Ct. App. 2010) (vacating JLWOP sentence for attempted murder and remanding for resentencing under *Graham* because attempted murder does not “result in the death of a human being” and thus “is a ‘nonhomicide’ offense.”) (internal citations omitted).

91. *See, e.g.*, *Hall v. Thomas*, 611 F.3d 1259, 1294 (11th Cir. 2010) (Wilson, J., concurring) (“[B]ecause it appears from the record that Hall is eligible for parole under Alabama law after ten years, he is unable to make an effort to avail himself of *Graham v. Florida*.”); *Warren v. Smith*, No. 1:09 CV 1064, 2010 WL 2837002, at *5 (N.D. Ohio July 19, 2010) (“[T]he *Graham* Court did not foreclose the constitutionality of imposing a life sentence on juvenile offenders.”); *Bell*, 2010 WL 344721, at *9–10 (finding *Graham* inapplicable in the case of a fourteen-year-old sentenced to a term of fifty-three years to life and another life term); *People v. Hernandez*, No. B218507, 2010 WL 2598265, at *4 (Cal. App. June 30, 2010) (rejecting *Graham*’s application to a sixteen-year-old aider-and-abetter sentenced to sixteen years to life *with* the possibility of parole); *Cunningham v. State*, 54 So.3d 1045, 1045 (Fla. App. 3 Dist. 2011) (upholding four concurrent life sentences for four nonhomicide “life felonies”); *Adams v. State*, No. S10A1563, 2011 WL 350293, at *6 (Ga. Feb. 7, 2011) (rejecting Eighth Amendment challenge under *Graham* to a twenty-five year sentence without the possibility of parole imposed on a young juvenile convicted of child molestation and aggravated child molestation); *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011) (holding *Graham* inapplicable to a sixteen-year-old sentenced to three life terms for sex-based nonhomicides when the state statute allowed for conditional release

could ultimately evolve to encompass homicide offenders or non-LWOP sentences. A court here or there may attempt some analytical theatrics to whiteout *Graham's* clear mandate. Advocates, no doubt, will encourage such a progression.⁹²

As I stated in the Introduction, however, this Article is not about soothsaying. Likewise, it is not about *Graham*. It is about the policy opportunities left by *Graham*.⁹³ Therefore, this Article now turns to a

upon the age of sixty). Five California state courts have already weighed in on the issue of whether *Graham* applies to so-called “de facto” JLWOP (i.e. very long determinate sentences), with all courts declining to extend *Graham*, but one court finding an Eighth Amendment violation separate and apart from *Graham*. Compare *People v. Mendez*, 114 Cal. Rptr. 3d. 870, 883–84 (Cal. Ct. App. Sept. 1, 2010) (holding that sixteen-year-old’s sentence of eighty-four years to life for a violent nonhomicide offence violated the Eighth Amendment but noting that *Graham* did not control the outcome of the case because “*Graham* expressly limited its holding to juveniles actually sentenced to LWOP.”), with *People v. Caballero*, 119 Cal. Rptr. 3d 920, 924-926 (Cal. App. 2011) (explicitly disagreeing with the *Mendez* court to bar the application of *Graham* to the imposition of a term of years sentence of 110 years to life on a fourteen-year-old for attempted murder); *People v. Soto*, No. C060566, 2011 WL 1303400, at *22 (Cal. App. 3 Dist. Apr. 6, 2011) (declining to extend *Graham* to indeterminate sentence of ninety-five years to life and determinate sentence of forty years imposed on fourteen-year-old for first-degree murder); *People v. Cabanillas*, No. F058890, 2011 WL 11433230, at *28 (Cal. App. Mar. 30, 2011) (rejecting the application of *Graham* to a fourteen-year-old sentenced to an aggregate term of 132 years to life for convicted crimes including second degree murder); *People v. Ramirez*, No. B220528, 2011 WL 893235, at *7 (Cal. App. 2 Dist. Mar. 16, 2011) (citing *Caballero* to reject challenge to a sentence of 120 years to life imposed on sixteen-year-old convicted of three attempted murders).

92. For example, the Wisconsin Supreme Court heard oral arguments on January 5, 2011 to review the constitutionality of JLWOP for *very young* defendants (i.e., fourteen years or younger) convicted of homicide. *EJI Asks Wisconsin Supreme Court to Ban Life-Without-Parole Sentences for Young Kids Convicted of Homicide*, EQUAL JUSTICE INITIATIVE (Jan. 7, 2011), <http://www.eji.org/eji/node/495>. See also Brief for Petitioner, *State v. Ninham* No. 99-CF-523 (Wisc. Oct. 13, 2010) (petitioning court to decide whether JLWOP is “unduly harsh and excessive given [the defendant’s] age and status as a young adolescent and his level of development at the time of the offense”) (emphasis added), available at <http://eji.org/eji/files/WSC%20Brief%20Filed.pdf>. Seven days later, on January 12, 2011, Bryan Stevenson also argued in front of the Mississippi Court of Appeals on behalf of a fourteen-year-old convicted of murdering his abusive father who was automatically tried as an adult and sentenced to mandatory life without parole. *EJI Argues In Mississippi Court of Appeals on Behalf of 14-Year-Old Child Sentenced to Die in Prison*, EQUAL JUSTICE INITIATIVE (Jan. 18, 2011), <http://www.eji.org/eji/node/499>.

93. *Graham* is fascinating on numerous levels and fortunately for those interested in the issue, Court watchers, scholars, and journalists have already dissected the decision thoroughly. No doubt more attention, criticism, and scholarship will be forthcoming. For in-depth scholarship on the decision, see Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 134–152 (2010) (arguing that the holding and reasoning of *Graham* can and should be used by lawyers to challenge juvenile transfer provisions on an as-applied and facial basis); *The Supreme Court 2009 Term—Leading Cases, Eighth Amendment—Juvenile Life Without Parole Sentences*, 124 HARV. L. REV. 209, 209 (2010) (summarizing *Graham* and arguing that its logic should intuitively extend to encompass JLWOP for homicide); Robert Smith & G. Ben Cohen, Commentary, *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86 (2010) (dissecting the decision and explaining why

discussion of JLWOP as the potential foil for the political process bias in criminal law—the first of the two classic obstacles to leniency legislation—and the JJAIA as a more efficient and realistic option for JLWOP abolitionists.

III.

THE POLITICAL PROCESS BIAS AGAINST LENIENCY LEGISLATION AND THE JLWOP FOIL

In an address to the Vera Institute of Justice just seven months after President Barack Obama took office, Attorney General Eric Holder stated, “Getting smart on crime requires talking honestly about which policies have worked and which have not, without fear of being labeled as too hard or, more likely, as too soft on crime.”⁹⁴ Holder’s statement is equally realistic and idealistic (some would argue hopelessly so). It is realistic insofar as it admits that change in criminal policy will require honesty and openness. It is idealistic because historically, in criminal justice reform, few legislators have been willing to risk their political standing to pass leniency legislation.

The political process bias of criminal law is a well-known “pathology,” affecting elected officials.⁹⁵ Its causes are rooted in fear, self-interest, imbalanced interest-group pressures, public perceptions of crime—both real and mistaken—and the nature of media in the American market-driven society. Few lawmakers are immune to this bias. It affects Democrats and Republicans alike and no universal panacea has yet been found to stymie it. Its symptoms are considerable though for criminal justice policy: lengthier sentences, abandonment of otherwise sound and rational policies, infliction of federalism costs on states, and a circular reinforcement of the public’s mistaken perception of crime’s appropriate solutions. The end result is a general anti-leniency one-way ratchet in criminal justice policy.

the case has “transformative significance” to the Court’s Eighth Amendment jurisprudence); Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT’G REP. 49 (2010) (summarizing decision and exploring the possible future of Eighth Amendment jurisprudence through the lens of not only the majority opinion, but Chief Justice Robert’s concurring opinion and Justice Thomas’s dissent); William W. Berry III, *More Different Than Life, Less Different Than Death*, 71 OHIO ST. L.J. 1109, 1112 (2010) (arguing that *Graham* did not “eviscerate” the dual-track Eighth Amendment jurisprudence, but in fact created a third category for life without parole); Tamar R. Birckhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL’Y 66, 79 (2010) (discussing *Graham* within the context of Justice Kennedy’s other decisions bearing on children and arguing that Kennedy views offenders’ youth as a “mitigating and not aggravating” factor).

94. Attorney General Eric Holder, Address at the Vera Institute of Justice’s Third Annual Justice Address (July 9, 2009).

95. See Stuntz, *supra* note 19, at 511–12 (referring to the “pathologies” of criminal lawmaking).

In order to evaluate JLWOP as an antidote for this political condition, it is essential to look in some depth at how and why leniency legislation usually dies, particularly at the federal level. The following discussion provides such a framework.

A. Overview—Public Choice Theory and the Politics of Punishment

The political process bias in criminal law causes sounder⁹⁶ criminal justice reforms to lose out to tougher criminal justice policies through a confluence of self-interest, misinformation, and lopsided interest group pressures. While not unique to the United States, the dynamic has been particularly manifest in American politics⁹⁷ and particularly acute since the late 1960's.⁹⁸ Driven by an actual increase in violence, the extent of which was amplified by the media and by politicians, crime “assumed the spotlight as a national political issue” and the public began to demand tougher sentences and more expansive criminal laws.⁹⁹ Political aspirations, careers, elections, and reelections hinged on appearing tough on crime, regardless of the soundness of the policies they advanced. As Rachel Barkow observed: “Candidates for office at all levels of government . . . learned that an opponent’s charge that they are soft on crime can be devastating to their political futures because it resonates with voters.”¹⁰⁰ The Democrats learned this lesson the hard way, with Michael Dukakis famously losing the Presidential election in part because as Governor of

96. I will use terms “sound” or “sounder” and “smart” or “smarter” throughout this Article to describe criminal justice policies that are more comprehensive and/or the product of more reasoned deliberation, as opposed to criminal justice legislation, more often than not in the form of tougher criminal sanctions, that result from the political process bias that this Part will describe. The terms do not necessarily refer to “softer” sentencing policies; tough criminal sanctions can of course also be the product of reasoned deliberation.

97. Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 400, 474 (2006) [hereinafter Beale, *Media’s Influence*] (noting a comparative study of other legislatures that shows “the U.S. system produces extreme electoral vulnerability, creating especially strong incentives for symbolic politics—such as ‘get tough on crime’ initiatives—that play on voters’ anxieties.”).

98. See Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40 (1997) [hereinafter, Beale, *What’s Law Got to Do*]; Harry A. Chernoff, Christopher M. Kelly, & John R. Kroger, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 577 (1996).

99. Kathleen F. Brickley, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L. J. 1135, 1145 (1995).

100. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1280-81 (2005) [hereinafter Barkow, *Politics of Sentencing*]. See also Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENT’G REP. 196, 198 (1998) (“The importance of appearing harsh on crime cannot be over-estimated in a tough race for an upcoming election.”) Chernoff, Kelly & Kroger, *supra* note 98, at 577 (“[C]ontrol of the crime issue is a necessary, though perhaps not sufficient, requirement for political victory in America.”).

Massachusetts he supported a weekend furlough program for convicts serving life without parole sentences, during which time Willie Horton escaped and committed assault, armed robbery and rape.¹⁰¹ As a result of these pressures, in recent decades there has been a “bidding war to see who can appropriate the label ‘tough on crime.’”¹⁰²

Criminal policy, therefore, generally “does not depend on the partisan tilt of the relevant actors,” because the shared need for political survival makes Democrats and Republicans united on criminal law issues.¹⁰³ Unfortunately, this focus on gaining reelection often prevails over the *actual* opinions of individual politicians, even if the individual opinions in some cases are better supported by empirical evidence and/or are more workable.¹⁰⁴ Reasoned arguments typically do not seem to work in the criminal justice context. The public wants harsher sentences and legislatures are more than obliged to provide them.

The direct correlation between get-tough legislation and election cycles is thus no coincidence. As the Director of Legislative Affairs for drug policy in the Clinton White House observed: “[A]most every omnibus crime control bill passed in the past two decades became law during an election year—usually within months, or weeks, of that year’s

101. See Ben Smith, *A Huckabee Clemency Gone Awry?*, POLITICO (Nov. 29, 2009), http://www.politico.com/blogs/bensmith/1109/Another_Huckabee_pardon_gone_away.html (explaining the potential negative impact of a clemency-turned-murder on Mike Huckabee’s 2008 Presidential hopes, stating “it’s a tragic, and politically damaging story of the kind that, with the name Willie Horton attached, helped derail Mike Dukakis’s bid for the White House.”); Roger Simon, *The Killer and the Candidate: How Willie Horton and George Bush Rewrote the Rules of Political Advertising*, REGARDIE’S MAG., Oct. 1, 1990 (describing the “very potent force” of political advertising and how the image of Willie Horton and his crimes entered the public consciousness in the Dukakis-Bush Presidential race). See also *Willie Horton Political Ad 1988*, YOUTUBE (Oct. 27, 2006), <http://www.youtube.com/watch?v=EC9j6Wfdq3o> (last visited July 6, 2011).

102. Stuntz, *supra* note 19, at 509. See also Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 99 (1999) [hereinafter Berman, *Common Law*] (“One participant described the legislative process surrounding the enactment of the drug sentencing laws as ‘like an auction house [or] the crassest political poker game’ in which Congress members sought to outbid each other with ever longer sentences to prove their toughness.”).

103. Stuntz, *supra* note 19, at 510. See also Beale, *What’s Law Got To Do*, *supra* note 98, at 43 (“By 1996, it was hard to find a difference between the positions of the Republicans and Democrats on crime issues.”).

104. See Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 431 (2003) [hereinafter Beale, *Restorative Justice*] (“Given the recent political history, it is difficult to imagine a majority of an American legislature taking such a position based upon conscience, in the face of strong public opposition. Moreover, it is by no means clear that the personal views of legislators would lead them away from punitive policies and toward restorative justice.”); Stuntz, *supra* note 19, at 508 (“Normative legal argument makes sense on the assumption that lawmakers care about the merits, that the side with the better policy position has a better chance of getting its preferred rule adopted. But the legislators who vote on criminal statutes appear to be uninterested in normative arguments.”).

election.”¹⁰⁵ Despite drops in crime, new administrations, and changes in political control, the one-way ratchet has continued unabated.¹⁰⁶ It is not mere hyperbole, therefore, to claim that “[i]f there is any sphere in which politicians would have an incentive simply to please the majority of voters, it’s criminal law.”¹⁰⁷

Although this pathology affects both state legislatures and Congress—not to mention elected judges and district attorneys—the symbolic use of criminal laws in gaining reelection has been particularly evident at the federal level. First, Congress’s superior ability to generate media interest has led to the “odd phenomenon” that “[c]rime’s politics have become increasingly nationalized, with an ever greater focus on federal lawmaking.”¹⁰⁸ Second, “the federal political process does not experience the [same] disciplining process” as in the states because Congress has only limited criminal jurisdiction and is not on the front lines of everyday policing.¹⁰⁹

But what is really driving all of this? Even if we accept the cynical view that “[t]he first duty of a politician is to get elected, and the second is to get re-elected,”¹¹⁰ why have “tough on crime” pitches—with their attendant harsher sentences and more expansive criminal laws—become the preferred policy choice? Why not “smart on crime?” More to the point: Why does leniency legislation, even if sounder in some cases than the alternative, so commonly fail? The answer lies in the interplay between the *institutional deficits* of Congress and the *informational deficits* of the public.

105. Bergman, *supra* note 100, at 196. *See also* Berman, *Common Law*, *supra* note 102, at 99 (“Additional sentencing mandates followed nearly every two years—synchronized, not coincidentally, with federal election cycles.”).

106. *See, e.g.*, Berman, *Common Law*, *supra* note 102, at 107 (“[W]hile perceived ‘crime problems’ will spur the enactment of severe sentences, *any subsequent dips in crime concerns will reinforce legislators’ beliefs that severe sentences ‘work,’* thereby prompting ever wider use of ever tougher criminal sanctions.”) (emphasis added). *But see* Brown, *supra* note 19, at 244–45 (arguing that the decriminalization of certain types of behavior has been overlooked by scholars, and that “[c]riminal law has substantially contracted in . . . realms of private, social, and morals-related conduct, even as it has expanded in other dimensions, such as regulatory crimes.”)

107. Stuntz, *supra* note 19, at 529–30.

108. *Id.* at 532.

109. Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1722 (2006) [hereinafter Barkow, *Political Market*] (noting that intervention by Congress will normally yield even harsher sentences than otherwise in the states because, unlike states, Congress considers most crimes in isolation rather than as part of a comprehensive criminal code).

110. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1080 (1993) [hereinafter Dripps, *Criminal Procedure*].

B. Institutional Deficits of Congress: Of Cycles, Fear, and Blindness

In this section I discuss how the nature of electoral politics, interest group dynamics, and the process of federal lawmaking all combine to create harsher national sentencing laws.

1. Election Cycles and Short Attention Spans

Since election cycles occur relatively frequently, members of Congress have a limited amount of time to explain their policy choices to constituents. The fast pace of bids for reelection thus favors simple, direct, and symbolic policies.¹¹¹ Criminal law reform models, which may lead to more proportionate sentences and “smarter” criminal law, are too politically risky to support and complex to communicate in a campaign slogan.¹¹² While “harsh sentencing creates the appearance of an immediate response”¹¹³ that can be explained in a headline, it is far more complicated to convey why more robust prisoner reentry programs or initiatives to reduce legal fines and fees imposed on criminal defendants make economic sense and can lead to safer streets.¹¹⁴

In addition, since criminal law reforms are naturally long-term, politicians have little incentive to spend their limited political capital on such projects, for which they may never be credited.¹¹⁵ Policies like mandatory sentences, truth-in-sentencing requirements, and 100:1 crack to powder cocaine sentencing ratios, on the other hand, are easy to communicate and comprehend, and their effects—once passed—can be seen almost immediately. Because “there is little in the way of legislative action that would be productive in the near term,” symbolic criminalization “is an obvious, and cheap, political response.”¹¹⁶

111. See Stuntz, *supra* note 19, at 530 (noting that, to create rules voters favor, the rules must be “simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements.”).

112. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751–52 (2005) [hereinafter Barkow, *Administering Crime*] (arguing that it is difficult for legislators “to discuss strategies for getting to the root cause of crimes, or to explain the more nuanced issue of proportionality in sentencing and the need to lower sentences for some offenders”).

113. *Id.* at 751.

114. See, e.g., RICHARD GREENWALD & HOWARD HUSOCK, CITES ON A HILL, PRISONER REENTRYSTAT: CREATING A SYSTEM THAT WORKS (2009) (describing the importance of focusing on employment as a necessary corollary to any successful prisoner reentry program), http://www.citiesonahill.org/pdf/coh_prisoner_reentry.pdf; REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES (2010) (explaining why it does not make economic sense to attempt to collect hundreds of dollars from indigent defendants who have no money), http://www.brennancenter.org/content/resource/FL_Fees_report/.

115. Barkow, *Administering Crime*, *supra* note 112, at 751.

116. Stuntz, *supra* note 19, at 532.

2. *The Willie Horton Effect: Fear of Unintended Consequences*

Congressional fear of unintended consequences can also kill leniency legislation. Politicians' fear of supporting a law that reduces sentences, promotes more progressive early release programs or reasonable parole conditions, or that proposes alternatives to sentences altogether is that an individual who otherwise would be behind bars will reoffend. Every politician's worst nightmare is being held responsible for another Willie Horton.¹¹⁷ While many ex-convicts can go on to lead productive lives, despite the serious barriers to reintegration with a criminal record, the fear that *one* recidivist will commit a serious crime limits the rights of *many*.¹¹⁸

But the fear of such unintended consequences theoretically should also work in the opposite direction. It is not too much of a stretch to imagine that politicians would (or at least, should) be equally concerned about the opposite unintended consequence: that overbroad sentencing legislation would cover "a lot of only marginally bad actors whom neither the legislature nor the public would wish to see punished," in addition to especially sympathetic defendants, like juveniles, women or the mentally ill.¹¹⁹ Prosecutorial discretion, however, often lets legislators rest easy.

Legislators erroneously perceive that the unintended consequences of overbroad legislation "can materialize only if the prosecutor decides to file charges, which, if the defendant is sympathetic (or is likely to become so), the prosecutor has every incentive not to do."¹²⁰ This blind trust in enforcement discretion "eliminates trade-offs"¹²¹ and allows politicians to pass broad get-tough criminal sanctions without any attendant need for a morality check.

The result is that potentially sound, yet risky progressive criminal law policies frequently die or are deferred to the states. When "the political support [Congress] obtains from deferring to the states is greater than the

117. See, e.g., Smith & Cohen, *supra* note 93 (describing Mitt Romney's use of Mike Huckabee's prior clemency of a convicted rapist who then went on to rape and murder another woman as "a centerpiece of [Romney's] campaign").

118. Of course, there are no statistics on how many ex-convicts actually go on to lead "productive lives." We do know that recidivism rates are high. See, e.g., JOHN J. GIBBONS, & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 106 (2006), http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf ("Our soaring prison costs coupled with a national rearrest rate of 67 percent and a re-incarceration rate of 52 percent three years after release is an indication of how far wrong we have gone."). Yet recidivism rates are high, not because individuals are incapable of change, but more likely because of a confluence of factors including the lack of adequate reentry programs, socioeconomic disparities, and the dramatic policy shift in prison goals away from rehabilitation to incapacitation. *Id.*

119. Stuntz, *supra* note 19, at 547.

120. *Id.* at 548.

121. See *id.* at 547-48 (concluding that "[w]here prosecutors can be selective, legislators will tend to see criminal law as a one-way ratchet").

political support it obtains from regulating itself,” national legislators are likely to defer the dirty job of passing controversial and politically-dangerous legislation to the state legislators.¹²² Jonathan Macey’s observations of this relationship in the context of abortion are equally germane to leniency legislation:

Unlike a complicated issue such as the environment, Congress cannot avoid the political fallout associated with abortion by [proposing an administrative federal solution]. The issue is too straightforward. As one political commentator has observed, “[a]bortion is . . . a question of conscience with two clear, opposing positions, there’s hardly a hedge to hide behind. Basically, you’re on one side or the other.” . . . Thus, for Congress, the political-support-maximizing solution to the abortion issue is to shift the risk of error to the states.¹²³

Likewise, despite the intricacies of criminal justice reform proposals, criminal justice policy has been reduced to similarly straightforward extremes: you’re either soft on crime or tough on crime; for victims or for criminals; pro-public safety or pro-civil liberties; conservative or liberal. There is rarely any perceived middle ground when it comes to criminal justice and national legislators therefore focus on the safer of the two poles.

3. *Perspective Deficits: The Blinding Effect on Congressional Criminal Justice Decision-Making*

Congress additionally suffers from institutional perspective deficits that limit their ability to consider alternatives to get-tough legislation. I focus on the two primary sources of this condition: (a) imbalanced interests groups and (b) overgeneralization.

a. *Imbalanced Interest Groups and the Information Filter*

Lawmakers in Washington are removed from local criminal law realities and naturally look to interest groups for indications of politically salient and safe policy choices.¹²⁴ This responsiveness to lobbyists is not unique to criminal law. What is unique, however, is the degree of imbalance in criminal law lobbying.¹²⁵ Interest groups that favor more lenient and progressive criminal law reforms are no match for the powerful

122. Macey, *supra* note 23, at 267–68.

123. *Id.* at 288–90.

124. *Id.* at 286 (“Congress always can decide to regulate when and if interest-group political support galvanizes around a particular regulatory solution, thereby signaling Congress that it can intervene safely.”).

125. See Stuntz, *supra* note 19, at 552–53.

and expansive alliance of interest groups in favor of tougher sentences and broader criminal laws. That get-tough alliance includes, among others, prosecutors,¹²⁶ victim's rights groups,¹²⁷ prison companies, and correction officers unions.

This get-tough alliance is disproportionately influential in large part because its interests are aligned before a crime is committed. Prosecutors know they want broader substantive criminal laws and tougher sentences to gain greater leverage in plea-bargaining.¹²⁸ Victim's rights organizations want sufficient retribution for their losses. And private prison companies depend on a steady market of incarcerated persons.¹²⁹

In contrast, it is less practical for counter interest groups to self-identify *ex ante*; few people expect to get arrested, convicted, and incarcerated.¹³⁰ Those who may be able to self-identify in advance are either deterred by fear of further stigmatization¹³¹ or have no political influence because of felon disenfranchisement laws.¹³² Additionally, the majority of communities most affected by tougher criminal laws comprise minority groups, who typically have weaker political influence.¹³³ As William Stuntz observed, "[I]n criminal law interest groups tend to operate only on one side."¹³⁴

126. Barkow, *Administering Crime*, *supra* note 112, at 728.

127. Beale, *Restorative Justice*, *supra* note 104, at 430.

128. Barkow, *Administering Crime*, *supra* note 112, at 728.

129. Beale, *Restorative Justice*, *supra* note 104, at 429-30.

130. See Dripps, *Criminal Procedure*, *supra* note 110, at 1090 ("[V]ery few people expect to commit crimes that come to the attention of the police."); Barkow, *Administering Crime*, *supra* note 112, at 726 ("It is difficult to know *ex ante* who falls into the class of criminals.").

131. See Stuntz, *supra* note 19, at 555 ("[B]eing charged with crime will tend to be stigmatizing. But if being charged with crime is stigmatizing, it is difficult for interest groups opposed to criminal statutes to organize. Their very existence harms their members' reputations.").

132. See Barkow, *Administering Crime*, *supra* note 112, at 726 ("Those most sensitive to issues of sentencing—those who have served or are serving sentences—have little influence. Prisoners are disenfranchised in forty-six states and the District of Columbia.").

133. See Berman, *Common Law*, *supra* note 102, at 108 ("[B]ecause these harms have been visited disproportionately on minorities and politically disfavored groups, legislators have little practical reason to be especially attentive to or concerned about these costs."). See also *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (raising the possibility that, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

134. Stuntz, *supra* note 19, at 553. Of course, organizations like the ACLU and EJI do frequently represent the "other side," but their efforts often get drowned out by the broader and stronger opposition.

b. Overgeneralization and Selective Hearing

Driven in large part by the informational disparity in Congress just described and without any real “context for assessing and passing judgments on the actual persons who will come to violate various criminal prohibitions,” members of Congress generally consider the population most sensitive to harsher criminal laws as “abstract and nefarious characters—the threatening figure of a killer or a rapist or a drug dealer.”¹³⁵ Of course, people are not identical. Drug offenders come in all shapes and sizes. The convicted have varying histories of abuse, mental health issues, and family contingencies.¹³⁶ Not all ex-convicts will become recidivists.¹³⁷ Even the “worst of the worst” may be capable of rehabilitation.

Yet bolstered by disproportionate media coverage of the worst of the worst, members of Congress make policy in an atmosphere of crisis.¹³⁸ A single widely publicized episode, “such as a child’s kidnapping, a sports figure’s death from crack cocaine, a murder by a sex offender, or a mass shooting in a public high school” can be the catalyst for a law that affects countless others.¹³⁹ This homogenizes the widely divergent stories of individual offenders, and masks the unintended effects of the resulting legislation on them, their communities and their families.

An extreme case of how one recidivist can trigger a significant political backlash that leads to harsher policies is the murder of Chelsea King in early 2010. John Albert Gardner, a convicted sex offender, was suspected of committing the murder. He had apparently violated several conditions of his parole, all of them minor. He stayed out of prison because the California Department of Corrections and Rehabilitation’s policy was not to re-incarcerate individuals for minor parole infractions. King’s death, however, generated a national media frenzy over California’s policy, which fueled a movement for stricter parole enforcement.¹⁴⁰ California politicians

135. Berman, *Common Law*, *supra* note 102, at 107.

136. Wendy Kaminer, *Federal Offense*, ATLANTIC MONTHLY, June 1994, <http://www.theatlantic.com/past/politics/crime/kaminer2.html> (quoting a speech given to the American Bar Association by then-appellate judge Stephen Breyer: “‘Pathetic cases come along,’ Breyer said. ‘No one will ever formulate a system of law for which you don’t have exceptions.’” He told a story of a bank robbery, involving ‘a man with the IQ of a seven-year-old who got a toy gun, went to a bank, got seventy dollars to get an operation for his dog, his best friend in the world, turned himself into the FBI, and the dog died anyway. What should we do? Give him Life?’”).

137. *See supra* note 118, and accompanying discussion.

138. Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV 759, 760 (2002).

139. *Id.*

140. *See, e.g., Thousands Expected to Mourn Death of Calif. Teen Chelsea King*, FOXNEWS.COM, Mar 13, 2010, <http://www.foxnews.com/us/2010/03/13/thousands-expected-mourn-death-calif-teen-chelsea-king>; Richard Marosi, *Sex Offender Wasn’t Sent Back to*

took the offensive, criticizing the department's policy and pledging to enact tougher rules.¹⁴¹ Then-Governor Arnold Schwarzenegger ordered authorities to retain all parole records of sex offenders.¹⁴² Soon after, Republican California Assemblyman Nathan Fletcher introduced, and Schwarzenegger signed, legislation entitled "Chelsea's Law," which builds on California's three-strikes concept to impose a virtual one-strike policy for sex offenders.¹⁴³ The law creates automatic "life without parole sentences for adult predators who kidnap, drug, bind, torture or use a weapon while committing a sex crime against a child."¹⁴⁴ Others will receive automatic "lifetime parole with GPS tracking for . . . forcible sex crimes against children under 14."¹⁴⁵ Such laws might not be limited to California. King's parents "plan to promote similar legislation in other states and have tentatively targeted Texas, Florida, Colorado and Ohio, the scenes of high-profile child abductions."¹⁴⁶

This is all not to suggest that Garner should not be locked away forever, or that other individuals—based on the particular facts of the crime—should not be too. Chelsea's Law, however, is an example of gut reaction legislation, "buoyed by a groundswell of public support" and passed without necessarily considering the range of potential consequences.¹⁴⁷ For example, there are serious concerns about the allocation of criminal justice resources, as well as the fiscal propriety of the law, especially given California's current budget woes.¹⁴⁸

This same effect plays out repeatedly in Congress, particularly after such highly publicized crimes. As members of Congress focus on "anecdotal horrific state crimes to justify enactment of federal law,"¹⁴⁹ all

Prison; Gardner Violated Parole but Remained Free After Complying with Relocation Order, L.A. TIMES, Mar. 12, 2010, at A6; Ruben Navarrette Jr., *Fury Over Sex Offender's Freedom*, CNN.COM (Mar. 12, 2010), http://articles.cnn.com/2010-03-12/opinion/navarrette.sex.offender_1_offender-san-diego-county-criminal-justice-system?_s=PM:OPINION.

141. Don Thompson, *Governor: Retain Parole Records on Sex Offenders*, ASSOCIATED PRESS, Mar. 10, 2010, http://www.huffingtonpost.com/2010/03/10/schwarzenegger-orders-sex_n_493342.html.

142. *Id.*

143. Elliot Spagat, *Governor Signs 'Chelsea's Law' on Sex Offenders*, ASSOCIATED PRESS, Sept. 9, 2010, http://www.google.com/hostednews/ap/article/ALeqM5gv2-aLGk1ptsY_bvdb5MKj5ZkEQD9I4LE8O4.

144. *Id.*

145. *Id.*

146. *Id.*

147. Mike Cruz, *Chelsea's Laws Costs Questioned*, THE SUN (San Bernadino County), Sept. 18, 2010 ("[A critic] said he doesn't want to see dangerous people on the streets, but the legislation reminds him of the state's three-strikes law. The legislation comes on the heels of a horrible, very emotional crime.").

148. *Id.*

149. Bergman, *supra* note 100, at 196.

potential offenders may become Willie Hortons, John Albert Gardners, or other caricatures of scary criminals depicted in movies, the evening news, and “Law & Order” style television shows.

But the *elected* are only a fraction of the criminal political process bias: the *electorate* are those who ultimately move the one-way ratchet. Unfortunately, when it comes to criminal justice policy, the American public is generally highly misinformed. With a sensationalist media to reinforce and inflate their pre-existing and flawed conceptions of crime and criminals, the public consistently requests harsher sentences and tougher criminal laws.

C. *Public Informational Deficit: Of Media and Cognitive Errors*

In the following section, I examine the causes and effects of the public informational deficit in American criminal justice policy. I first describe the critical role of the media in shaping criminal justice public opinion. Building on this discussion, I then summarize the psychology of the public’s support for tougher criminal laws, focusing on cognitive errors and the opinion-skewing effect of thinking of past, present, and future criminals as “the other.”

1. *Scary Symbiosis: The News Media and Public Opinion on Criminal Law*

Despite the positive sign of major drops in crime since the advent of the get-tough era, the public still seems overwhelmingly to support punitive criminal policies. This disparity might be surprising if the public based their opinions on their own personal experience of crime. With less crime disrupting individual lives, there ought to be less demand for harsh responses. However, public opinion on crime is generally not driven by individual experience or personal insight. Rather, the vast majority of the voting public gets *all* of their information about crime from the media: “Amy Fisher docudramas, TV cop shows and crime stories, and talk-show palaver about sensational cases seem to be primary sources of ‘information’ for people who are spared firsthand experience with corrections and courts.”¹⁵⁰

150. Kaminer, *supra* note 136. See also Beale, *Media’s Influence*, *supra* note 97, at 441 (“[I]n one national survey, 81% of respondents said that they based their view of how bad the crime problem is on what they have read or seen in the news, rather than on their personal experience.”); Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, 10 J. CRIM. JUST. & POPULAR CULTURE 109, 109 (2003) (“The public’s perception of victims, criminals, deviants, and law enforcement officials is largely determined by their portrayal in the mass media.”); Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 753 (2009) (“[M]ost people have not been the victims of

Crime is thus unlike other policy areas such as health care, social security, taxation, or education where the public looks to the media to *supplement* their first-hand knowledge. Since most of the voting public have not been and will never be the victims or perpetrators of crime, the media become their eyes and ears.¹⁵¹ “Television, with some help from other media, has become our culture’s principal storyteller, educator, and shaper of the popular imagination.”¹⁵² Yet the crime that the media sees (and shows us) is not reflective of reality.¹⁵³ Rather, the news media disproportionately emphasizes sensational and heinous crimes. This gives the public the understandable impression that crime—despite evidence to the contrary—is a deeply personal, serious, and intractable problem that requires an immediate and harsh response.¹⁵⁴ “Netizens”¹⁵⁵ then share, spread, and comment on these skewed versions of crime and criminals on blogs, Facebook posts, and Tweets, in comment areas of online news outlets, and through discussion boards, thrusting crime and punishment into what one scholar has termed “the vast boutiques of social network interpretations.”¹⁵⁶ This public opinion then circles back to exert “a significant frame-building impact on subsequent media reports.”¹⁵⁷ Congress, in turn, responds to these “fears and passions” by enacting “solutions poorly tailored to address the most pressing challenges of crime control and adjudication.”¹⁵⁸

But why do the media overvalue fear and devalue the plight of criminal defendants and the possibility for sound criminal justice reforms?

violent crime, and they do not have contact with people who have arrest records, much less a history of violent crime. But a steady stream of mass media information bombards them.”).

151. See Lyon, *supra* note 150, at 742 (“[The] media function as mediators of meanings, powerfully shaping the ways in which people understand our world by organizing information in such a way that the viewer/media participant forms perceptions about good and bad over time.”).

152. Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 585 (2004).

153. Beale, *Media’s Influence*, *supra* note 97, at 401.

154. *Id.* at 442 (“[T]he media’s emphasis on crime makes the issue more salient in the minds of viewers and readers, which causes the public to perceive crime as a more severe problem than real world figures indicate.”). See also Lyon, *supra* note 150, at 742 (describing the “media cultivation effect” whereby “viewers are taught to believe that their world is like the television world.”).

155. Lyon, *supra* note 150, at 744 (describing “Netizens” as “media users and participants on the Internet who are extremely active in a broad range of virtual communities”).

156. *Id.* at 754.

157. Yuqiong Zhou & Patricia Moy, *Parsing Framing Processes: The Interplay Between Online Public Opinion and Media Coverage*, 57 J. COMM. 79, 79 (2007) (making this observation in the context of online public opinion, but noting that the frame-building effect of such public opinion is limited to the early stages of coverage).

158. Bandes, *supra* note 152, at 587.

The first answer is simple economics: crime really does sell.¹⁵⁹ Starting in the 1990s “economic pressures facing the networks changed, and a drive for profits in this new environment pushed the networks away from hard news and toward a greater emphasis on tabloid-style crime stories.”¹⁶⁰ Sensational crime stories were, and still are, an efficient, cost-effective, and provocative way to grab viewers’ and readers’ attention and keep them coming back for more. As Sara Sun Beale notes:

Focusing on the investigation and trial of a single criminal case gives the networks the opportunity to provide prolonged, detailed, and relatively inexpensive coverage. As cases drag on for weeks, months, or even years, they become national melodramas, and the networks and other media try to develop suspense and interest in [these] cases¹⁶¹

Given these economic incentives, it is no wonder that even in the face of falling crime rates in the early 1990s, “the networks dramatically increased the coverage of crime in their dinner-hour newscasts” reaching a peak in 1995 of 2,574 total crimes stories.¹⁶² It is also no wonder that today, despite even more significant reductions in crime,¹⁶³ the issue continues to drive the news market and provoke our imaginations.¹⁶⁴

159. See Beale, *Media's Influence*, *supra* note 97, at 421–40; Lyon, *supra* note 150, at 742 (“Media companies may not intentionally encourage fear in their viewers, but, in fact, fear sells.”).

160. *Id.* at 424–27.

161. *Id.* at 426–27.

162. *Id.* at 422–23.

163. Press Release, Federal Bureau of Investigation, FBI Releases 2009 Crime Statistics, Sept. 13, 2010, http://www.fbi.gov/pressrel/pressrel10/ucr2009_091310.htm (“[T]he estimated number of violent crimes in the nation declined in 2009 for the third consecutive year.”).

164. See, e.g., JOHN JAY COLLEGE CENTER ON MEDIA, CRIME, AND JUSTICE, COVERING CRIME: US NEWS MEDIA CRIME AND JUSTICE COVERAGE: 2010 AND ROUNDTABLE DISCUSSION 11 (2011) (“Local television news broadcasts have been dominated by daily crime reports for many years. That phenomenon, characterized by the cliché ‘if it bleeds, it leads,’ continued in 2010”); *id.* at 15 (“There is a total disconnect between crime rates and coverage of events. We have plenty of crime stories to lead the news at 11 even if there are 50 percent fewer homicides overall. We still have an ample supply of grisly, bizarre murder cases.”) (quoting James Alan Fox, Department of Criminology, Northeastern University); MARTIN KAPLAN & MATTHEW HALE, NORMAN LEAR CTR., LOCAL TV NEWS IN THE LOS ANGELES MEDIA MARKET: ARE STATIONS SERVING THE PUBLIC INTEREST? 3, 14 (2010) (detailing an ongoing study of all Los Angeles TV news broadcasts that found that “[t]he most common topic by far was crime” with “[o]ne out of three broadcasts” leading with a crime-related story and that, in a fourteen-day sample of *The L.A. Times*, fourteen percent of the topics on the front page were “crime” related); *Top General Topic Categories: 2010 v. 2009*, PEW RESEARCH CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA REPORT 2011 (2011), <http://www.stateofthemediamedia.org/files/2011/03/13-year-top-general-topics-2010-v-20091.png> [hereinafter 2011 PEW REPORT] (showing that stories about “crime” still made up four percent of the national “newshole” in 2010, seventh overall only behind such expected topics as “campaigns/elections” (which made up twelve percent of the news in

The second answer is that the episodic and fast-paced nature of television news programming favors sensationalized crime and “is less well-suited to covering procedural failures in individual cases or the system as a whole.”¹⁶⁵ As Susan Bandes notes: “[Television] prefers simple, dramatic messages that resonate with what we already know—heroes, villains and other familiar stock figures . . . easily identifiable problems with simple solutions. It is better at showing the status quo than the need for change, better at the concrete than the abstract or nuanced.”¹⁶⁶ The same is true for non-TV media, including newspapers, radio, and Internet news.¹⁶⁷ Because of this “filmic” nature of news,¹⁶⁸ the media rarely address “systemic problems” or the necessity of reform.¹⁶⁹

The third and final answer is that outside of the death penalty context, the media and the public are generally not interested in the injustices associated with excessive punishments. Whereas the death penalty is imposed and carried out so infrequently, “[i]t is not news that someone gets a life sentence or a long term of incarceration. With a prison population of over two million, long sentences have become a dog-bites-man storyline.”¹⁷⁰ But it is not only the *frequency* that produces the differential treatment by the media and the public of capital and non-

that election year), the “economy” (which comprised eight percent of the news during the economic downturn and recovery effort), and “disasters/accidents” (which comprised eight percent of the news, given the BP oil spill in the Gulf of Mexico and the earthquake in Haiti)). For a recent example of this phenomenon, see the discussion of the Chelsea King saga and accompanying notes, *supra* notes 140–148. See also Adam Northam, *Crime Tops News Stories of 2010*, DAILY LEADER (Southwest Miss.), Jan. 2, 2011, http://www.dailyleader.com/topstories/article_e94e3020-1689-11e0-9efe001cc4c002e0.html (“[N]othing caused more soul-searching, more worry or concern than The Daily Leaders top news story of 2010—crime.”); Levi Pulkkinen & Casey McNerthney, *Crime and Justice in 2010*, SEATTLE POST-INTELLIGENCER, Dec. 30, 2010, http://www.seattlepi.com/local/413692_CRIME29.html (“In crime and justice, the Year of the Ox [2010] didn’t bore.”).

165. Beale, *Media’s Influence*, *supra* note 97, at 429.

166. Bandes, *supra* note 152, at 586.

167. See Beale, *Media’s Influence*, *supra* note 97, at 401 (“Newspapers also reflect a market-driven reshaping of style and content, . . . [which] shape the public’s exposure to crime in the news media.”); *id.* at 463–64 (“[S]imple news content—such as local news, reality television, and talk radio—was found to limit complex thinking and encourage affective responses.”); Lyon, *supra* note 150, at 742 (“Dramatizing the villains, who must then be prosecuted and punished, has been a big business for print, television, and broadcast news, as well as the newer media of Internet entertainment.”).

168. Beale, *Media’s Influence*, *supra* note 97, at 429 (citing Bandes, *supra* note 152, at 588).

169. Bandes, *supra* note 152, at 591 (“[T]he media rarely address systemic problems like the exclusion of black jurors, the reliance on jailhouse informants, the coercion of confessions, the ineffectiveness of counsel, or even more abstractly, issues of skewed resources, wholesale system breakdown, disproportionate sentencing, or deeply imbedded racial inequality.”). Beale argues that the “proliferation of rules punishing both prisoners and journalists for coverage” also impairs reporting about systemic problems of this kind. *Id.* at 590.

170. Barkow, *Two Tracks*, *supra* note 2, at 1195–96.

capital sentences: the death penalty also carries with it greater emotional impact due to its finality, its moral baggage, and fears of executing innocents.¹⁷¹

Unfortunately, the disproportionate focus on the death penalty as the primary injustice in American criminal law has undermined the potential for public support for other important sentencing causes and injustices. Douglas Berman, for example, expressed concern that “progressive criminal justice reform efforts concerning innocence issues, abolition of the death penalty, and sentencing disparities may contribute to, and even exacerbate, the forces that have helped propel modern mass incarceration.”¹⁷² These advocacy efforts deflect important attention from other sentencing causes and effects. Moreover, the fact that many death penalty abolitionists have held out life without parole sentences as a worthy alternative to execution has only further entrenched the public’s lack of concern for excessive sentences, even for the “penultimate sentence.”¹⁷³

But the media are only a part—albeit a significant one—of the problem. The media’s depiction of crime, and the public’s consumption of these depictions, interacts with preexisting cognitive biases and informational errors that lead inextricably to support for tough-on-crime laws.

2. Dehumanization of “The Other” and Other Cognitive Errors

Since the vast majority of the voting public has neither been the victim of crime nor been in trouble with the law, they “tend to regard criminals as ‘the other.’”¹⁷⁴ Because there are “more crime victims than criminal defendants” there naturally tends to be “more conservatives than liberals on the subject of crime—many more.”¹⁷⁵ The media, not surprisingly, figure centrally in this dehumanizing effect: the “unwillingness or inability to admit [criminal defendants’] humanity is facilitated by the anonymity of the vast majority of defendants, whose cases aren’t televised . . .”¹⁷⁶ Additionally, both the perpetrators and victims of crime are largely from

171. *Id.* at 1195.

172. Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL’Y REV. ONLINE 1, 9 (Dec. 8, 2008), http://www.hlpronline.com/Berman_HLPR_120808.pdf [hereinafter Berman, *Progressive Perspectives*].

173. See *supra* notes 39–42 and corresponding text.

174. Kaminer, *supra* note 136.

175. *Id.* See also Dripps, *Criminal Procedure*, *supra* note 110, at 1089 (“[L]egislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant.”).

176. Kaminer, *supra* note 136.

traditionally disenfranchised communities—i.e., low-income communities of color. As these communities already have vastly reduced political power, they are in a weaker position to advocate for less punitive, more effective criminal justice policies to deal with both victim and victimless crimes. Instead, a largely white, largely middle class voter population drives criminal justice policy. Felon disenfranchisement laws only further decrease the political voice of minority communities, the ones most deeply affected by crime.¹⁷⁷

Once they view criminal defendants as “the other,” the public is able to compartmentalize the effect of harsh criminal laws on this disfavored and unknown population. Despite our own bad behavior, we expect “criminals” to be held absolutely accountable. This double standard is especially striking considering that “millions of Americans are complaining about their own histories of addiction and abuse.”¹⁷⁸ Holding people charged with crimes absolutely accountable may be a mechanism for self-protection. By punishing others, we are subconsciously able to forgive and exonerate ourselves for our own failings. Thus conceived, punishment fits within our innate need to express “appropriate condemnation” through criminal law.¹⁷⁹

This dehumanizing effect is further heightened because of the “availability heuristic,” a phenomenon whereby people predict the frequency of an event based on how easily an example can be brought to mind.¹⁸⁰ This phenomenon has been used to explain a wide variety of behaviors, including juror tendencies to recommend high damage awards in civil cases based on their knowledge of other excessive damage awards

177. See, e.g., THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf (noting that about thirteen percent of black men are disenfranchised due to a felony conviction); Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 318 (2006) (“[M]ass incarceration and its attendant civil barriers have an enormous impact on entire communities, particularly communities of color. . . . In a vicious cycle, this loss of voting power translates into a reduced capacity to change the very conditions that contribute to high rates of incarceration in urban communities.”); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 463–64 (2010) (discussing the “racial overtones of the felon disenfranchisement laws that have historically attended criminal convictions . . . and arguing that policies adopted in the 1980s and 1990s as part of the war on drugs and “tough on crime” movements “have interacted with dramatically increased incarceration rates to disproportionately impact individuals and communities of color in ways that legislators and policymakers have failed to recognize”).

178. Kaminer, *supra* note 136.

179. Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597–98, 606–07 (1996).

180. For a discussion of “availability heuristics” in criminal law, see Barkow, *Politics of Sentencing*, *supra* note 100, at 1283–84, 1292–94.

reported on by the media.¹⁸¹ Applied to criminal justice, this means that voters, like members of Congress, tend to think of the most heinous crimes, worst criminals, and the sensational headlines when they consider sentencing policies. The availability heuristic undermines the public's ability to sympathize with the plight of individual defendants because they reflexively think of the worst of the worst, since it is these cases the media tends to highlight. As a result, "[t]he most attention is paid to the least typical cases."¹⁸²

Not surprisingly, when the public is given more information about the backgrounds of particular defendants and the circumstances of their conviction, sentencing, and incarceration, "they frequently disagree with the harsh outcomes [certain general criminal laws] produce."¹⁸³ The major problem is, of course, that most individuals are generally not provided with this kind of detail outside of focus groups or empirical studies, and the skewed attention of the media only reinforces the public's preconceived notions and cognitive errors.¹⁸⁴ Congress, in turn, uses these settled perceptions to "mobilize voters to support . . . longer sentences . . . [while t]he weaker forces on the other side of the issue struggle to persuade the public that there is a cost to a tough-on-crime-approach to sentencing."¹⁸⁵ All of this leads to an obdurate confidence in the correctness of the sentencing status quo, the hardline view of sentencing and crime policy. That confidence is very difficult to shake.¹⁸⁶

As should be clear from the foregoing discussion, the reality of the political process bias in criminal law does not inspire optimism for reform. Pro-leniency scholars have all but thrown in the towel for hope of Congressional leniency legislation. For example, William Stuntz has concluded that, "[c]ertainly there is no sign in legislative halls of a renewed

181. See Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 978 (2010) (noting that "salient information is highly conducive to anchoring and availability heuristics, causing individuals to attribute disproportionate weight to such memorable evidence.").

182. Kaminer, *supra* note 136.

183. Barkow, *Two Tracks*, *supra* note 2, at 1198.

184. See CRAIG HANEY, *DEATH BY DESIGN* 67–91 (2005) (explaining that "public support for capital punishment . . . has depended on a lack of understanding about how the death penalty actually operates in our society" and highlighting studies that show how opinions shift when given additional information).

185. Barkow, *Administering Crime*, *supra* note 112, at 730.

186. See, e.g., Marc Mauer, *Take a Life Out of Crime*, THE RECORDER (Montgomery County, New York), Sept. 11, 1996, at 4 (noting the perversity and uniqueness of the public's criminal conditioning by stating, "In other areas of our life, our societal response is more proactive. For example, since we know that improving diet and exercise is a better way to fight heart disease than building hospital beds for heart attack patients, we have taken great strides in emphasizing this kind of preventive health care. Yet when it comes to crime control, we are still conditioned to think that building an \$80,000 prison cell is the best way to address the problem.").

interest in criminal code revision.”¹⁸⁷ Donald Dripps sees the political process not as “an historical accident but a predictable consequence of political incentives that appear to be of *indefinite duration*.”¹⁸⁸ Rachel Barkow has given up on Congress ever intervening to correct harsh state criminal laws: “Because [political] pressures push for more severe sentences and there is currently no political mileage to be had for forging compromises that require states to set lower sentences, *federal intervention will fail* to provide a correction for state competition that leads to overly-harsh sentences.”¹⁸⁹ Barkow concludes: “In fact, federal legislative intervention could exacerbate the problem.”¹⁹⁰ However, I do not believe that all hope is lost for Congressional reform of state criminal laws. The issue of JLWOP gives me hope.

D. JLWOP and the JJAIA: Countering the One-Way Ratchet

The following section explores why JLWOP may be an issue capable of surmounting the classic challenges and obstacles to leniency legislation, discussed in the previous sections of this Article. First, there is reason to believe that the right political conditions exist today for Congress to take action. Second, the severity of a punishment that results in locking away a child for the rest of his or her entire life, and America’s lone-star status as the only country in the world that consistently does so, has arguably made JLWOP more controversial than any other criminal justice issue since the juvenile death penalty. Third, those sentenced to JLWOP are an unusually sympathetic class of defendants. Beyond the powerful image of a child behind bars—his or her entire life squandered—the majority are first time offenders, more than a quarter of whom were convicted of felony murder.¹⁹¹ Many of those sentenced to JLWOP committed their crimes with adults,¹⁹² and many others were victims of automatic transfer provisions to adult court combined with mandatory life without parole sentences.¹⁹³

187. Stuntz, *supra* note 19, at 585.

188. Dripps, *Criminal Procedure*, *supra* note 110, at 1081 (emphasis added).

189. Barkow, *Political Market*, *supra* note 109, at 1723 (emphasis added).

190. *Id.* See also Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 FED. SENT’G REP. 94, 98 (1996) (“There is no reason to expect that members of Congress will ever completely stop talking about ‘sending a message’ to criminals through ‘tough, no-nonsense, mandatory sentencing.’”).

191. Fifty-nine percent of those sentenced to JLWOP had neither an adult criminal record nor a juvenile adjudication; twenty-six percent were convicted of felony murder. HRW 2008 REPORT, *supra* note 13, at 4–5.

192. In seventy percent of California JLWOP cases where a juvenile acted with codefendants, at least one codefendant was an adult. HRW 2008 REPORT, *supra* note 13, at 5. In fifty-six percent of these cases, the adult codefendant received a more lenient sentence than the teen. *Id.*

193. See Arya, *supra* note 93, at 104–10 (using *Graham* to summarize juvenile transfer

In this section, I examine these features of JLWOP, and the historical context in which efforts to eradicate the punishment are taking place. I conclude that JLWOP reform—specifically, the passage of the JJAIA—may well be able to overcome the political process bias.

1. *Something in the Air: Changing Political Winds and Legislative Courage*

In the past few years, the confluence of several dynamics has allowed the generally-inflexible pendulum of get-tough criminal law politics to swing slightly. This shift could be enough to give Congress the courage to do what is *actually* smart on crime, rather than what is *politically* smart on crime.

There has been an unprecedented drop in crime rates in the United States, especially between 2008 and 2010. Heralded as “the great American crime drop,” by the end of 2009 “America’s homicide and violent [crime] rates had dramatically plunged—more than doubling the decrease recorded in 2008.”¹⁹⁴ Moreover, “[t]he crime decline was widespread, encompassing cities in every region of the country.”¹⁹⁵ Preliminary figures on the first six months of 2010 indicate “a decrease of 6.2 percent in the number of violent crimes . . . when compared with figures reported for the same time in 2009.”¹⁹⁶ From 2000 to 2009, violent crime decreased 15.2 percent.¹⁹⁷

This decline parallels a waning of the salience of crime as a political issue, a trend which began at the turn of the Twenty-first Century.¹⁹⁸ Increasingly, crime has taken a back seat to other political issues such as

laws in the JLWOP context); Baldas, *supra* note 5, at 4.

194. Joe Domanick, *The Great American Crime Drop*, THE CRIME REPORT (Feb. 1, 2010), <http://thecrimereport.org/2010/02/01/the-great-american-crime-drop-part-1/>. See also FEDERAL BUREAU OF INVESTIGATION (FBI), UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2009, VIOLENT CRIME (2009) (“In 2009, an estimated 1,318,398 violent crimes occurred nationwide, a decrease of 5.3 percent from the 2008 estimate.”), <http://www2.fbi.gov/ucr/cius2009/documents/violentcrimemain.pdf>; FEDERAL BUREAU OF INVESTIGATION (FBI), UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2009, PROPERTY CRIME (2009) (“The 2-year trend showed that property crime decreased 4.6 percent in 2009 compared with the 2008 estimate. The 5-year trend, comparing 2009 data with that of 2005, showed an 8.4 percent drop in property crime.”), <http://www2.fbi.gov/ucr/cius2009/documents/propertycrimemain.pdf>.

195. Domanick, *supra* note 194.

196. FEDERAL BUREAU OF INVESTIGATION (FBI), PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT, JANUARY-JUNE 2010 (2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/preliminary-crime-in-the-us-2009>.

197. FEDERAL BUREAU OF INVESTIGATION (FBI), UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2009, TABLE 1A (2009), http://www2.fbi.gov/ucr/cius2009/data/table_01a.html.

198. Gest, *supra* note 138, at 764–65 (“As the twenty-first century began, crime as a political issue receded from the top of the national agenda.”).

costly wars, the economic recovery, health care, joblessness, and terrorism fears.¹⁹⁹ Rachel Barkow's observation that "[t]he tough-on-crime political climate has not been consistent throughout history, so it is possible that sentencing will recede as a central political issue,"²⁰⁰ seems to have come true. Even when then-candidate and Senator Barack Obama spoke about crime in September 2007, his comments were a far cry from the get-tough or lose politics of the previous decade. Obama called for review of "the wisdom of locking up some first-time, non-violent drug users for decades" and pledged as President to "review [long mandatory prison] sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders."²⁰¹ The current striking similarities between Democrats and Republicans on the issue of crime may also help explain crime's decreasing political import.²⁰² In the context of the death penalty, for example, many conservatives who were once the cornerstone of the pro-death penalty movement have become advocates for a moratorium.²⁰³ There is even a growing movement among Christian conservatives to expand prisoner reentry efforts.²⁰⁴ In December 2010, a vast array of conservative leaders and thinkers including Newt Gingrich, Grover Norquist, and former U.S. Attorney General Edwin Meese III, launched a national initiative entitled "Right on Crime,"²⁰⁵ which aims to "demonstrat[e] the growing support for effective criminal justice reforms within the conservative movement."²⁰⁶

Additionally, although states were once "flush with cash" and thus able to accommodate the harsh and costly sentencing schemes especially

199. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 2.1 (2008) (reporting that in 2008 fewer than 0.5 percent of respondents answered "crime; violence" when asked "what do you think is the most important problem facing this country today" as opposed to twenty percent in 1998); 2011 PEW REPORT, *supra* note 164.

200. Barkow, *Administering Crime*, *supra* note 112, at 726.

201. Senator Barack Obama, Remarks at Howard University Convocation (Sept. 28, 2007), http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php (last visited March 30, 2010).

202. See *supra* notes 103–104 and accompanying text.

203. Beale, *Restorative Justice*, *supra* note 104, at 434–35 ("[T]he Democrats' move toward matching the Republicans' punitive crime agenda made crime a less critical issue politically and reduced the importance of the death penalty as a defining credential for a conservative. Thus, several Republicans were leading figures in the moratorium movement.").

204. See Jane Lampman, *Fight Against Poverty Unites Christian Left and Right*, CHRISTIAN SCIENCE MONITOR, Feb. 18, 2009, <http://www.csmonitor.com/Business/2009/0218/p03s07-usec.html> (describing effort by Christians on the left and the right to attack the problem of poverty, including by increasing prisoner reentry initiatives).

205. See *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/wp-content/uploads/2011/03/RightOnCrime-Statement-of-Principles.pdf> (listing Gingrich, Norquist, and Meese as signatories to the organization's statement of principles) (last visited July 3, 2011).

206. *Id.*

created in the '80s and '90s, the current fiscal crisis has led to a vital rethinking of incarceration and crime policies nationwide.²⁰⁷ This reconsideration has opened the door to acceptance of reform strategies, not necessarily in reaction to appeals to justice but out of economic need.

Due in part to “[t]he relative absence of the crime issue from the headlines and the lawmaking binge,” public opinion has also shifted, at least at the margins, against the harshness of sentencing generally.²⁰⁸ This is true even as the public continues to believe, against all evidence to the contrary, that crime rates are still high.²⁰⁹ Sara Sun Beale notes that at the beginning of this century, for example, the percentage of respondents asked whether local courts were not harsh enough who responded yes dropped seventeen percentage points from 1994 to 2000, from eighty-five to sixty-eight percent.²¹⁰ Similarly, in 2000, sixty-eight percent of the public “believed that ‘attacking social problems’ was the best approach to lowering the crime rate, as opposed to twenty-seven percent who favored more money for additional prisons, police, and judges.”²¹¹ Other public opinion polls show similar movement away from punitive approaches to a more progressive view. An Open Society Institute public opinion poll taken in 2002 indicated that, “[p]ublic opinion has shifted substantially on the question of whether to take a preemptive approach to crime reduction by addressing the underlying causes of crime, or whether to focus on deterrence through stricter sentencing.”²¹² While, in 1994, forty-two percent of respondents favored a tougher approach to crime versus forty-eight percent who favored a tougher approach to the *causes* of crime, the percentages have since shifted broadly to thirty-two and sixty-five percent,

207. Gest, *supra* note 138, at 766 (noting the impact of financial constraints, but also attributing the changed politics to the drop in crime, the lack of crime as a wedge issue, and the terrorist attacks of September 11). See generally ROBIN CAMPBELL, VERA INST. OF JUSTICE, DOLLARS AND SENTENCES: LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS, (July 2003), <http://www.vera.org/download?file=105/Dollars%2Band%2Bsentences.pdf> (discussing a roundtable event where legislators spoke about how the budget crisis is affecting state criminal justice policies); Randal C. Archibold, *California, in Financial Crisis, Opens Prison Doors*, N.Y. TIMES, Mar. 23, 2010, at A14 (discussing California's goal of reducing the number of inmates it houses, in light of the budget crisis).

208. Gest, *supra* note 138, at 766–67.

209. Jeffrey M. Jones, *Americans Still Perceive Crime as on the Rise*, GALLUP.COM (Nov. 18, 2010) (“Two-thirds of Americans say there is more crime in the United States than there was a year ago, reflecting Americans' general tendency to perceive crime as increasing.”), <http://www.gallup.com/poll/144827/Americans-Perceive-Crime-Rise.aspx>.

210. Beale, *Restorative Justice*, note 104, at 423.

211. *Id.*

212. PETER D. HART RESEARCH ASSOCIATES, INC., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 1 (2002). Although the survey was taken shortly before and after September 11, 2001, Hart Research conducted a follow up survey to assess whether key attitudes had shifted, which indicated that “the findings from the initial survey remain accurate and relevant.” *Id.* at 20.

respectively.²¹³ And when asked in 2002 whether our nation's approach to crime was headed in the right direction fifty-four percent answered in the negative.²¹⁴

These factors have combined to create an opportunity today, if ever there will be one, to give "breathing room to . . . 'interdisciplinary' approaches to the crime problem that typically transcend the justice system."²¹⁵ Perhaps sensing this political opportunity, federal lawmakers have recently been more willing to support, advocate for, and introduce leniency legislation.

For example, in 2009, Senator Jim Webb (D-Va.) introduced the National Criminal Justice Commission Act of 2009 ("NCJCA") in an attempt to improve the federal and state criminal justice systems by reducing their high incarceration rates, especially for drug related crimes, improving their poor systems of post-incarceration reintegration, and ameliorating their harsh treatment of mentally ill inmates. The NCJCA attempted to achieve these goals by creating a commission responsible for undertaking a comprehensive review of criminal justice systems nationwide and recommending reforms to the President, Congress, state governments, and local and tribal officials.²¹⁶ Despite the changing criminal law political landscape, introducing this kind of legislation was not without political risks. A feature story on *Salon.com* commented on just how "politically thankless, and risky" Webb's pursuit of criminal justice reform was, especially given that "Webb is in the Senate not as an invulnerable, multi-term political institution from a safely blue state . . . but is the opposite: . . . a first term Senator from Virginia, one of the 'toughest' 'anti-crime' states in the country. . . ."²¹⁷ However, the bill has been surprisingly well received.²¹⁸ *Parade Magazine* even dedicated a cover story to the

213. *Id.* at 1.

214. *Id.* at 7.

215. Gest, *supra* note 138, at 766–67 (internal quotations omitted).

216. National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. §§ 2, 4–6 (2009).

217. Glenn Greenwald, *Jim Webb's Courage v. the "Pragmatism" Excuse for Politicians*, SALON.COM (Mar. 28, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/03/28/webb. See also Sandhya Somashekhar, *Webb Sets His Sights On Prison Reform*, WASH. POST, Dec. 29, 2008, at B1 (noting that while the NCJCA "is a gamble for Webb, a fiery and cerebral Democrat from a staunchly law-and-order state, . . . Webb has never been one to rely on polls or political indicators to guide his way. He seems instead to charge ahead on projects that he has decided are worthy of his time, regardless of how they play").

218. See, e.g., Editorial, *We Need a National Criminal Justice Commission*, L.A. TIMES, May 31, 2010, <http://articles.latimes.com/2010/may/31/opinion/la-ed-justice-20100531>; Editorial, *The Criminal Justice System Needs Help*, ROANAKE TIMES, Jan. 5, 2009, <http://www.roanoke.com/editorials/wb/190006>; *James Webb Shows Leadership Regarding Prison Reform*, U.S. NEWS & WORLD REPORT BLOG (Jan. 2, 2009), <http://www.usnews.com/opinion/blogs/john-farrell/2009/01/02/james-webb-shows->

cause.²¹⁹ It has also been strongly supported: it was reported out of the Senate Judiciary Committee in January 2010²²⁰ and a companion bill was introduced in the House of Representatives.²²¹ Though the House version passed,²²² the Senate bill was blocked despite efforts by supporters to include the legislation in an appropriations bill.²²³ Webb reintroduced the legislation in the next session of Congress.²²⁴

Additionally, in March 2010, the U.S. Senate Judiciary Committee approved leniency legislation introduced by Senator Dick Durbin (D-Ill.) when it voted *unanimously* for the Fair Sentencing Act (“FSA”), a bill that would reduce the 100:1 sentencing disparity between federal crack and powder cocaine offenses to 20:1.²²⁵ The full Senate passed the bill in March 2010,²²⁶ the House of Representatives passed a companion bill in July,²²⁷ and President Obama signed it in August.²²⁸ After the FSA’s passage, some argued that the bill did not go far enough in equalizing the sentences imposed for crack and powder cocaine offenses.²²⁹ Others complained that the bill did not apply retroactively, thus leaving those individuals sentenced for crack-based offenses prior to the FSA’s enactment without relief.²³⁰ In response to this latter criticism, Rep. Bobby Scott introduced the Fair Sentencing Clarification Act of 2010 on December 17, 2010 in the House of Representatives. The bill was soon after referred to the House Committee on the Judiciary, where (as of publication) it remains.²³¹

leadership-regarding-prison-reform.

219. Senator Jim Webb, *What’s Wrong With Our Prisons*, PARADE, Mar. 29, 2009, at 4–5, available at <http://webb.senate.gov/issuesandlegislation/Whats-Wrong-with-our-Prisons.cfm>.

220. Press Release, The Sentencing Project, Senate Committee Passes National Criminal Justice Commission Act of 2009 (Jan. 21, 2010), http://www.sentencingproject.org/detail/news.cfm?news_id=848.

221. National Criminal Justice Commission Act of 2010, H.R. 5143 111th Cong. (2010).

222. 156 Cong. Rec. H. 6129 (2010).

223. *Webb Again Presses For Criminal Justice Commission; Won’t Run For 2nd Term*, THE CRIME REPORT (Feb. 10, 2011), <http://www.thecrimereport.org/archive/2011-02-webb-again-presses-for-criminal-justice-commission-w>.

224. *Id.*

225. Fair Sentencing Act, S. 1789, 111th Cong. (2010). On the sentencing disparity, see Editorial, *Crack Breakthrough: The Fair Sentencing Act of 2010 Corrects a Longtime Wrong in Cocaine Penalties*, WASH. POST, Aug. 3, 2010, at A14.

226. Fair Sentencing Act, S. 1789, 111th Cong. (2010).

227. Fairness in Cocaine Sentencing Act, H.R. 3245, 111th Cong. (2010).

228. Scott Wilson, *Obama Signs Fair Sentencing Act*, WASH. POST BLOG (Aug. 3, 2010), <http://voices.washingtonpost.com/44/2010/08/obama-signs-fair-sentencing-ac.html>.

229. See, e.g., Press Release, Families Against Mandatory Minimums, Senate Judiciary Votes to Reform Federal Crack Law (Mar. 11, 2010), <http://www.famm.org/NewsandInformation/PressReleases/SenateJudiciaryVotestoReformFederalCrackLaw.asp>.

230. Press Release, Rep. Bobby Scott Introduces Bill to Provide Relief to Thousands of People Still Incarcerated Under Racist Crack/Powder Disparity (Dec. 17, 2010), <http://www.drugpolicy.org/news/pressroom/pressrelease/pr121710b.cfm>.

231. Fair Sentencing Clarification Act of 2010, H.R. 6548, 111th Cong. (2010).

Nevertheless, on June 30, 2011, the U.S. Sentencing Commission voted unanimously to give retroactive effect to the FSA.²³² This type of willingness by federal lawmakers to reassess practices that were passed in the middle of the get-tough era is an extremely positive sign for criminal justice reformists.

Likewise, the fact that the JJAIA was introduced in Congress at all, let alone the subject of two committee hearings,²³³ is a serious statement about the changing criminal law tenor of Washington. It is also a sign of courage on the part of the members of Congress who introduced the legislation and those who have supported it. The fact that the JJAIA, unlike the measures discussed above, has not yet made it out of committee does not indicate that it is a Congressional loser. For one, the JJAIA is structurally dissimilar: unlike the FSA or NCJCA, the JJAIA raises federalism concerns. The FSA proposes to reassess or reign in *federal* sentencing policies, while the NCJCA would create a commission to provide *recommendations* to state and federal criminal justice systems. In contrast, the JJAIA attempts to change *state* sentencing policy.²³⁴ Second, no less than 7,000 bills are introduced in every legislative session.²³⁵ Proponents of the bill rightly should view one, let alone two, hearings as a serious and positive signal.

The political landscape thus seems ripe for criminal law reform, but what makes the JJAIA a potential political winner? The next two sections discuss how JLWOP turns the institutional and perspective deficits of Congress, as well as the informational deficit of the public, on their head.

2. *Insulation and Influence: JLWOP Counters Institutional Deficits of Congress*

In this section, I analyze JLWOP and the JJAIA in the context of the institutional deficits of Congress described in Part III(B). I conclude that unlike normal leniency legislation, the goals of the JJAIA—and the JLWOP reform movement more generally—should be less challenging to communicate than other law reform policies. The law’s design should also

232. Press Release, U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf.

233. 2008 Hearing, *supra* note 21; 2009 Hearing, *supra* note 4.

234. I argue in Part IV, *infra*, that Congress’s federalism concerns in the context of the JJAIA and JLWOP, while not unwarranted, are overstated and should not stop the JJAIA from moving forward.

235. See Paul Singer, *Members Offered Many Bills But Passed Few*, ROLL CALL, Dec. 1, 2008, http://www.rollcall.com/issues/54_61/-30466-1.html (“No Congress since 1975 has introduced fewer pieces of legislation than the 7,991 bills and resolutions offered in the 104th Congress.”).

diminish Congressional concerns of unintended consequences. Moreover, interest group pressures behind the Act are more evenly balanced, providing members of Congress with more information about the consequences of JLWOP sentencing policies than is true of other types of leniency legislation.

a. Response: Election Cycles and Short Attention Spans

As detailed in the Introduction and Part II(B), the JJAIA would condition a portion of the federal money currently allocated to state criminal justice systems on the states' willingness to ensure that there is "meaningful parole review" for juvenile offenders after they have served fifteen years of their sentence, and every three years thereafter.²³⁶ However, the JJAIA does not mandate release, leaving it to the states to determine what "meaningful" means and to the parole boards to make the ultimate decision on whether to release the prisoner.

By curtailing a specific type of sentence for a specific class of defendants, the JJAIA is relatively straightforward and easy to implement. Moreover, politicians could reap instant political credit for the JJAIA's passage because it sends a direct and simple message to constituents and has an immediate retroactive effect. Because of its narrowness, the JJAIA is also something that members of Congress can wrap their minds around: "[T]he idea [of ending JLWOP] is becoming more and more prevalent . . . [because] instead of wholesale change, [legislation like the JJAIA is] smoothing off the rougher edges of the justice system."²³⁷ Thus, the JJAIA fits comfortably within Congressional pressure to pass legislation within recurrent election cycles for political credit.

b. Unraveling Willie Horton

Regardless of the JJAIA's merits, members of Congress might still hesitate to lend their support because of the fear of politically costly unintended effects.²³⁸ However, unlike other leniency legislation, the structure of the JJAIA insulates Congress from blame. The JJAIA allows Congress to take a stand on an important criminal justice issue without fear of the fallout of another Willie Horton incident. Critics of the act have mistakenly claimed that the JJAIA "is yet another example of the federal government butting into state issues and [that it] lumps all JLWOP

236. H.R. 2289, 111th Cong. § 3(a)(1) (2009) (requiring meaningful parole review); *id.* § 3(d)(2) (conditioning funding on compliance).

237. Lewis Beale, *Should Minors Ever Face Life Without Parole*, MILLER-MCCUNE, July 7, 2009 [hereinafter Beale, *Should Minors*], <http://www.miller-mccune.com/legal-affairs/minors-life-without-parole-3601> (quoting Mark Osler, Professor, Baylor Law School).

238. See discussion Part III(B)(2), *supra*.

offenders into the same eligible-for-parole category no matter how heinous the offense.”²³⁹ However, the bill does not mandate that persons who committed crimes as juveniles be immediately released from prison. It simply requires meaningful parole review after fifteen years and every three years thereafter. As Mark Osler, who testified on behalf of the JJAIA, later explained: “This bill is just about parole, and a lot of people up for parole never get parole. If you have a kid in for 15 years, and he still has a lot of problems, that kid will not be released.”²⁴⁰

Thus, even if Congress passes the JJAIA, the worst juvenile offenders will still likely spend the rest of their lives in prison. “An opportunity for parole is just that: a *chance* for a prisoner to show strong evidence of rehabilitation. If a juvenile offender does not demonstrate change and is deemed a threat to public safety, the parole board will not grant parole.”²⁴¹ If a juvenile is released from prison, her state’s parole board will be held accountable, rather than Congress. By passing the JJAIA, Congress can therefore rest easy because it is not inevitably releasing dangerous individuals onto the streets.²⁴²

Would-be Congressional concerns about unintended consequences in the context of JLWOP reform are therefore misplaced.

c. Giving Sight to Congressional Blindness

The issue of JLWOP is uniquely fungible, naturally fitted to a broad range of concerns and interests, ranging from civil liberties, children’s rights, international human rights, and disability rights, which weigh in favor of JLWOP reform. Due to this chameleon-like quality, those serving JLWOP are *not* a politically weak group, as criminal defendants so

239. Beale, *Should Minors*, *supra* note 237.

240. *Id.* (quoting Mark Osler).

241. Kristin Henning, *The Case Against Juvenile Life Without Parole: Good Policy and Good Law*, FINDLAW.COM (Oct. 26, 2009), http://writ.news.findlaw.com/commentary/20091026_henning.html. See also Adam Liptak, *Lifers as Teenagers, Now Seeking Second Chance*, N.Y. TIMES, Oct. 17, 2007, at A1 (quoting Bryan Stevenson) (“We’re not demanding that all these kids be released tomorrow. . . . I’m not even prepared to say that all of them will get to the point where they should be released. We’re asking for some review.”).

242. On the other hand, if Congress does *not* pass the JJAIA, members will not be able to rely on prosecutorial discretion to insulate juveniles from the harshest of sentences available. Forty-five states confer discretion on the juvenile court judge, not the prosecutor, to decide whether to try children as adults or not. Baldas, *supra* note 5, at 4. In addition, fifteen states have automatic transfer provisions, whereby certain charged offenders, regardless of age, are transferred to adult court. *Id.* See also GLOBAL JUSTICE REPORT, *supra* note 32, at 6 (“The rate of judicial waiver (allowing children to be tried as adults) increased 68% from 1988 to 1992.”). These provisions, combined with provisions imposing mandatory life without parole sentences for certain crimes mean that, in many states, prosecutors may have no choice but to expose juvenile defendants to the harshest available sentence.

commonly are. To the contrary, they have become one of the more influential criminal defense interest groups in history.

Because JLWOP affects a discrete class of sympathetic offenders and has diverse implications, a significant interest group has been able to identify and align in support of JLWOP reform *ex ante*. This interest group has expanded far beyond domestic civil liberties organizations like the ACLU and the NAACP Legal Defense and Educational Fund, sentencing reform organizations like The Sentencing Project, and individual reformists, activists, and defense attorneys common to all leniency legislation. Because of its implications for children's rights generally, JLWOP abolition has garnered the support of organizations like the 60,000-member American Academy of Pediatrics.²⁴³ Because juveniles with disabilities are disproportionately affected by the criminal justice system, disability rights organizations like the Disability Rights Legal Center have also joined the cause.²⁴⁴

The American Psychological Association, the American Psychiatric Association, and Mental Health America have also been strongly supportive of JLWOP reform.²⁴⁵ They have argued that the immaturity of juvenile brains makes JLWOP, like the death penalty, an inappropriate punishment for anyone who committed crimes before the age of eighteen.²⁴⁶ Human rights organizations like HRW, which normally focus on abuses abroad, have turned home, writing and advocating extensively on the topic.²⁴⁷ In addition to their seminal 2005 report,²⁴⁸ HRW also offered testimony on the JJAIA.²⁴⁹

Even more surprising and politically significant, however, is the support from victim's rights organizations, prosecutors, and corrections organizations. One such victim's rights organization is the Mothers Against Murderers Association, which was "created to assist parents or guardians of murder victims."²⁵⁰ Arguing that "[t]he federal government and all 50

243. See 2009 Hearing, *supra* note 4, at 389 (written testimony of American Academy of Pediatrics).

244. Brief for Disability Rights Legal Center as Amicus Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida*, at 1–2 (2009) (Nos. 08-7412, 08-7621).

245. Brief for American Psychological Association, et. al. as Amici Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida*, at 1–2 (2009) (Nos. 08-7412, 08-7621).

246. See *id.*

247. HRW 2005 REPORT, *supra* note 38; HRW 2008 REPORT, *supra* note 13; Brief for Amnesty International, et. al. as Amicus Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida* (2009) (Nos. 08-7412, 08-7621) (arguing that JLWOP abolition has become customary international law).

248. HRW 2005 REPORT, *supra* note 38.

249. 2008 Hearing, *supra* note 21, at 59–66 (testimony of Elizabeth M. Calvin, Children's Rights Division, Human Rights Watch); 2009 Hearing, *supra* note 4, at 127–29 (testimony of David C. Fathi, Director, U.S. Program, Human Rights Watch).

250. *Homepage*, MOTHERS AGAINST MURDERERS ASS'N, <http://mothersagainstmurderersassn.org/> (last visited July 3, 2011).

states legislatively recognize the victim's voice in sentencing defendants, including juveniles," the organization filed a highly persuasive amicus brief to the Supreme Court on behalf of the petitioners in *Sullivan* and *Graham*.²⁵¹ In the brief, families of murder victims tell the personal stories of their pain and loss, but stress the rehabilitative potential of young offenders, including killers.²⁵² They argue that putting a child behind bars for life without any possibility of parole, even if that child killed their own child, is antithetical to their goal of giving "both victims and juvenile offenders 'a chance at life again.'"²⁵³ The organization has also filed a letter in support of the JJAIA.²⁵⁴ Additionally, Linda White, a member of Murder Victims' Families for Reconciliation, filed powerful written testimony in the 2009 hearing on the JJAIA that described meeting her daughter's young killer. "Gary is proof that young people, even those who have done horrible things, can be reformed," she wrote.²⁵⁵

The additional support of corrections organizations and officers, as well as current and former District Attorneys, is particularly noteworthy because "those professionals whose work is affected by the current sentencing policy . . . have enormous credibility in Congress because they are generally viewed as realistic and unbiased; they tell it like it is."²⁵⁶ The Council of Juvenile Correctional Administrators, the National Association for Juvenile Correctional Agencies, the National Juvenile Detention Association, the National Partnership for Juvenile Services, the American Probation and Parole Association, and the International Community Corrections Association submitted a joint amicus brief to the Supreme Court in *Sullivan* and *Graham*.²⁵⁷ They are just a sampling of the corrections organizations advocating for JLWOP reform. Former prosecutors and judges have also advocated against JLWOP.²⁵⁸

None of the foregoing should be taken to imply that the interest groups aligned against JLWOP and in support of the JJAIA are *more* powerful than the traditionally influential counter alliance. The balance has not been reversed or even brought to an equilibrium. However, I also

251. Brief for Mothers Against Murders Association et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida*, at 2 (2009) (Nos. 08-7412, 08-7621).

252. *Id.* at 6–26.

253. *Id.* at 31.

254. *2009 Hearing, supra* note 4, at 271 (testimony of Mothers Against Murderers Association).

255. *Id.* at 29 (testimony of Linda L. White, Ph.D.).

256. Bergman, *supra* note 100, at 198 (making this observation in the context of drug sentencing policies).

257. Brief for the Council of Juvenile Correctional Administrators et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida* (2009) (Nos. 08-7412, 08-7621).

258. *2009 Hearing, supra* note 4, at 160–62 (testimony of seventeen current and former state and federal prosecutors, state judges, and state Attorney Generals).

do not mean to suggest that interest group power is strictly a head-counting game. As discussed at length in Part III(B)(3)(a), interest groups—particularly in criminal law—provide an invaluable lens through which national legislators who are removed from the daily realities of criminal justice policies receive and process information. Through hearing testimony, publications and reports, and individual lobbying, interest groups help frame the debate, and through their stories and advocacy, inform legislators' decisions regarding what is politically safe and/or smart.

The critical issue for leniency legislation generally is that pro-defense interest groups are virtually *nonexistent* and legislators in turn only get *one* side of the story. Yet because JLWOP has acquired such a broad and persuasive advocacy alliance, Congress may no longer be able to blindly overgeneralize juvenile offenders into a homogenized blob of the worst of the worst. Once legislators are focused on powerful individual stories of the most sympathetic offenders and the broad ramifications of this peculiarly harsh and distinctly American sentence, Congress will be compelled to hear the once silent voices, to put faces—powerful ones at that—to the once anonymous image of the “juvenile super-predator,”²⁵⁹ and to make policy decisions armed with more balanced knowledge of the consequences of acting, or alternatively, of failing to do so.

The force of the message conveyed by anti-JLWOP advocacy and testimony was not lost on Representative Louie Gohmert (R-Tex.), the principal and strongest voice in Congress in opposition to the JJAIA and the current Vice Chair on the Subcommittee on Crime, Terrorism, and Homeland Security.²⁶⁰ Raphael Johnson, who committed murder as a teenager, was not given a sentence of life without parole, and has since gone on to live a peaceful and productive life,²⁶¹ spoke in the initial hearing on the bill. After Johnson's testimony, Gohmert was clearly moved. He seemed perplexed that Johnson, someone who killed another human being, was so . . . well . . . human: “[Y]ou know, you seem like the kind of guy you would love to sit around and visit with or go have a meal or something.”²⁶² As Gohmert's allotted time came to a close, he seemed to

259. The specter of juvenile “super-predators” centered on “radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders[, and who] do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.” WILLIAM J. BENNETT, JOHN J. DI IULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 27 (1996).

260. In both the 2008 and 2009 Hearings on the JJAIA, Gohmert clearly indicated that he was against the legislation. Gohmert was responsible for the majority of the questioning of witnesses supporting the legislation. *See generally 2008 Hearing, supra* note 21; *2009 Hearing, supra* note 4.

261. *See 2008 Hearing, supra* note 21, at 54–58 (testimony of Raphael Johnson).

262. *Id.* at 69.

try to stick to his talking points about his concern over federal intervention, but came back to Mr. Johnson and the injustice of it all:

It is just once you start this federal intervention into state laws, then even though I have great concerns about the same issues you are concerned about, there does seem to be some real injustice in some of these cases, but like in Mr. Johnson's case, if I am the judge, and I have got discretion, I hear the positive things in his life, and I go this is not somebody we need to lock up because he is going to continuously be a threat to society. This young man has some real potential, because he has already begun to show it.²⁶³

As Gohmert put it, once JLWOP became more personalized, the issue "touched a nerve . . . about the need for some State reform."²⁶⁴ In the second hearing on the JJAIA, Gohmert pressed his federalism point more forcefully, but still could not help but admit, "[p]ersonally, I don't like the idea of sentencing children to life without parole. It is repugnant. But that is a matter for the States, and I hope my state will not do that."²⁶⁵

The issue of JLWOP and the JJAIA thus appear able to overcome the traditional institutional deficits of Congress. But, as discussed earlier, Congressional blindness is only part of the political process bias. The Article will now address JLWOP in the context of the second prong of the phenomenon: the informational deficits of the public.

3. *Something Quite "Striking:" Emotional Power, Media Interest, and Public Opinion*

a. *Media and the Perfect Storm of JLWOP*

A flood of nationwide media attention—amplified exponentially by *Sullivan* and *Graham*—has the potential not only to focus Congress's attention on the issue, but also to snap the general public out of its get-tough mentality.

In critiquing the media's culpability as enablers of the public's flawed perception of crime and justice, Susan Bandes asked two rhetorical questions: "Could media convey more progressive or at least more complex messages? Could they lead and challenge rather than pander, speak to our heads as well as our hearts, our better nature as well as our base instincts and fears?"²⁶⁶ Her answer was: "No doubt they could, if the *right constellation of factors existed*."²⁶⁷

263. *Id.* at 70.

264. *Id.*

265. 2009 *Hearing*, *supra* note 4, at 13.

266. Bandes, *supra* note 152, at 596.

267. *Id.* (emphasis added).

Today, Bandes' "right constellation of factors" seems to exist. The media—from print newspapers and magazines to network news programs, online blogs and webzines—are captivated by JLWOP.

Since 2000, even before *Graham* was decided, U.S. newspapers and magazines ran more than 559 stories or editorials that reference JLWOP. Most major U.S. newspapers did so, publishing over 300 items; newswires carried approximately 100 stories on the topic; nearly 750 blog posts were published and nearly 100 television stories aired.²⁶⁸ Many of these reports focus especially on the young children sentenced to JLWOP.

In May 2007, for example, PBS's *Frontline* documentary series aired "When Kids Get Life," an hour-long show highlighting Colorado's sentencing system and tracking the powerful, sympathetic stories of five individuals serving JLWOP.²⁶⁹ Several of the subjects were victims of abuse who were driven to kill in part because of their abuse; others were convicted of felony murder as accomplices. PBS delved into the causes and dire effects of the system, the pain of victims and their families, and the families of the teens put away for life. The show emphasized the misery and danger of youths in adult supermax prisons. PBS also created a multimedia website, which includes the television special, an interactive state-by-state map, a discussion forum, and additional reading.²⁷⁰

On YouTube, a video chronicling the story of Sara Kruzan, who at sixteen killed a thirty-three-year-old man who had molested her for three years and worked her as a child prostitute, has garnered more than 347,210 views.²⁷¹ Due in part to this video-gone-viral, as well as a broad-based public policy campaign on her behalf,²⁷² Governor Schwarzenegger granted

268. On January 24, 2011, the author conducted a search on LexisNexis.com in the "U.S. Newspapers," "U.S. Newswires," "Magazines," and "Major U.S. Newspapers" databases using the search terms ("juvenile" /p "life without parole") with a date range of 1/1/2000 to 5/16/2010 (the day before the *Graham* ruling). To find television news stories, the author conducted a search on LexisNexis.com in the "Transcript" database using the search terms ("juvenile" /p "life without parole") with the same date range. For blog posts, the author used <http://blogsearch.google.com/> and used the search term ("juvenile" and "life without parole"), as well as the same date range. This was not intended as a scientific survey and more research might show that these results were incomplete. However the data provide meaningful context for assessing the media impact of *Graham* for the purpose of this Article.

269. *Frontline: When Kids Get Life* (PBS television broadcast May 8, 2007), transcript and videostream available at <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/> (last visited July 3, 2011). *Frontline* has actually done quite a bit of coverage on criminal justice issues, such as a show on plea-bargaining in 2004. *Frontline: The Plea*, (PBS television broadcast June 17, 2004), videostream available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/> (last visited July 3, 2011).

270. *When Kids Get Life*, PBS, <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/> (last visited July 3, 2011).

271. *Sara Kruzan: Sentenced to Life Without Parole at Age 16*, YOUTUBE, <http://www.youtube.com/watch?v=qR7mno6p9iQ> (last visited July 5, 2011).

272. See, e.g., *Free Sara Kruzan*, FREE CHILD SEX TRAFFICKING VICTIM SARA

Kruzan clemency and commuted her sentence to twenty-five years *with* the possibility of parole on his last day in office.²⁷³

Additionally, the plight of the cute, pudgy-faced now thirteen-year-old Jordan Brown, charged with murdering his father's pregnant fiancé and facing JLWOP, blanketed the airwaves throughout 2009 and 2010 and stirred intense public debate, receiving extraordinarily heavy media scrutiny with segments on all major television networks.²⁷⁴ Since Brown's arrest in February 2009, ninety-two television segments and 122 U.S. newspaper and wire service articles have focused on his story.²⁷⁵ Anyone who managed to miss the JLWOP issue before the Jordan Brown saga inevitably tuned in.

In the year between the Supreme Court's grant of certiorari in *Sullivan* and *Graham* in May 2009 and its decision in May 2010, newspapers, newswires, magazines and television networks carried 300 stories about the two cases and 255 blog posts were written about them.²⁷⁶ Nearly one hundred of these articles were in major U.S. newspapers.²⁷⁷ Adam Liptak of *The New York Times* wrote five articles about JLWOP from the day the Court granted certiorari until just after oral arguments.²⁷⁸ The day before

KRUZAN, www.freesarakruzan.org (last visited July 3, 2011); Amanda Kloer, *Help Free Human Trafficking Victim Sara Kruzan From Life Without Parole*, CHANGE.ORG (Sept. 30, 2010), http://humantrafficking.change.org/blog/view/help_free_human_trafficking_victim_sara_kruzan_from_life_without_parole.

273. *Gov. Schwarzenegger Issues Last Day Commutations*, ASSOCIATED PRESS, JAN. 2, 2011, <http://www.google.com/hostednews/ap/article/ALeqM5juye7HI2Lx5kaI09rxI97FAtVIXQ?docId=aeef06e5544f4cc0b110f65753564e7d>.

274. *See, e.g., 12-Year-Old Charged With Murder*, FOX NEWS, Mar. 12, 2010, <http://video.foxnews.com/v/4102884/>; *12-Year-Old to Be Tried as Adult*, FOX NEWS, Mar. 30, 2010, <http://video.foxnews.com/v/4130050/12-year-old-to-be-tried-as-adult/>; *12-Year-Old May Face Life in Prison*, CBS NEWS Feb. 11, 2010, *available at* <http://www.youtube.com/watch?v=EwZepOHV5lc> (1,355,562 Views, as of June 26, 2011); *11 Year Old Accused Of Killing Dad's Pregnant Girlfriend*, MSNBC, Feb. 22, 2010, *available at* <http://www.youtube.com/watch?v=nDDr62qVVS4&feature=related> (last visited July 3, 2011); *From Fifth Grader to Alleged Murderer*, ABC NEWS, Apr. 28, 2010, <http://abcnews.go.com/Nightline/video/grader-murderer-10505246>.

275. On January 24, 2011, the author conducted a search on LexisNexis.com in the "US Newspapers and Wires" database using the search terms ("Jordan Brown" and "murder"). To find television news stories, the author conducted a search on LexisNexis.com in the "Transcript" database using the search terms ("Jordan Brown" and "murder") and omitting radio news transcripts.

276. On January 24, 2011, the author conducted a search on LexisNexis.com in the "US Newspapers," "US Newswires," "Magazines," "Major US Newspapers," and "Transcript" databases using the search terms ("juvenile" /p "life without parole") with a date range of 5/6/2009 (the date certiorari was granted) to 5/16/2010 (the day before the *Graham* ruling). For blog posts, the author used <http://blogsearch.google.com/> and used the search term ("juvenile" and "life without parole") with the same date range. This was not intended as a scientific survey and more research might show that the results were incomplete. However the data is useful in discussing the media reaction to the cases.

277. *Id.*

278. Adam Liptak, *Line Drawn in One Case Dissolves in Another*, N.Y. TIMES, Nov.

oral arguments, NPR aired a story titled “A Juvenile Life Without Parole,” which discussed the cases and profiled a Hispanic mother serving JLWOP in a northern California prison.²⁷⁹ On the day of the oral arguments, *The New York Times* sponsored an online debate between two experts on sentencing laws.²⁸⁰ And in March, 2010, CNN broadcast a segment called “Growing Up Behind Bars: Life in Prison for Teens,” which profiled Dwayne Betts, a juvenile offender who was spared the sentence of life without parole and is now leading a successful life.²⁸¹

Then *Graham* was handed down in May, 2010. Since *Graham*, U.S. newspapers, newswires, and magazines have published more than 200 articles or editorials on the topic, eighty-six of which were in major U.S. newspapers. All major television networks, with the exception of FOX News, aired stories related to the decision. The Blogosphere has been even more prolific, with 481 posts about *Graham* since the decision.²⁸²

Of course, not all of the JLWOP media attention has supported reform. In fact, most stories are textbook neutral journalism, discussing the issue with voices from both sides of the debate. Likewise, not all editorials favor JLWOP abolition.²⁸³ However, given the critical role that the media have played in influencing public opinion on criminal justice, the fact that the story has become so prevalent is consequential. Even neutral stories discuss facts and figures about JLWOP’s pervasiveness, including America’s position as the only country in the world that allows it, and are often paired with moving images of young people in orange jumpsuits and mug-shots of kids. Whether you are for or against JLWOP, its story has a

24, 2009, at A16; Adam Liptak, *Justices Consider the Role of Age in Life Sentences*, N.Y. TIMES, Nov. 10, 2009, at A25; Adam Liptak, *Supreme Court Set to Hear Appeals on Life in Prison for Youths Who Never Killed*, N.Y. TIMES, Nov. 8, 2009, at A24; Adam Liptak, *Two Cases Seek to Expand a Protection*, N.Y. TIMES, Oct. 5, 2009, at A16; Adam Liptak, *Justices Agree to Take Up Life-Without-Parole Sentences for Young Offenders*, N.Y. TIMES, May 5, 2009, at A16.

279. Nancy Mullane, *A Juvenile Without Parole*, NPR radio broadcast Nov. 8, 2009), *audiostream and transcript available at* <http://www.npr.org/templates/story/story.php?storyId=120220329>.

280. Marc Mauer & Kent Scheidegger, *Young Offenders Locked Up For Life*, N.Y. TIMES ROOM FOR DEBATE BLOG (Nov. 9, 2009), <http://roomfordebate.blogs.nytimes.com/2009/11/08/young-offenders-locked-up-for-life/?scp=5&sq=sullivan+v.+florida&st=nyt>.

281. Jason Carroll, *Life in Prison For Teens*, CNN.COM, Mar. 16, 2010, <http://www.cnn.com/video/#/video/us/2010/03/16/carroll.prison.teens.cnn>.

282. On January 24, 2011, the author conducted a search on LexisNexis.com in the “US Newspapers,” “US Newswires,” “Magazines,” “Major US Newspapers,” and “Transcript” databases using the search term (juvenile /p “life without parole”) with a date range of 5/17/2010 (the date of the *Graham* ruling) to present. For blog posts, the author used <http://blogsearch.google.com/> and used the search term (“Graham v. Florida”). This was not intended as a scientific survey and more research might show that the results are incomplete.

283. It is also unclear whether the editorial writers in support of *Graham* endorsed the abolition of JLWOP for *all* cases or just for nonhomicide offenses.

strong emotional impact.

The media have paid so much attention to the issue because, unlike most criminal law reforms, JLWOP is tailor-made for a sensationalized, episodic media. There is a heinous crime, but an unanticipated criminal. There are images of blood and gore, but also images of a young and once bright future, now without any hope. The tension is clear. We're torn between revulsion at the crime and an innate sympathy for children. Throw in a few facts and figures, two talking heads, and you've got yourself a provocative news piece. The story sells.

But will the public buy JLWOP reform? Are the stories enough to sway public opinion, especially when the majority of Americans are accustomed to hearing only one side of the criminal justice story, buoyed by politicians selling reelection platforms and the media selling news?

b. The JLWOP Wake Up Call

New situations and new information can shift public opinion. Sara Sun Beale noted this reality when discussing the obduracy of public opinion on criminal justice, which forms through decades of imbalanced news coverage based on a fear of would-be criminals.²⁸⁴ Beale suggested that new situations and information can be a “catalyst for dramatic shifts in public opinion.”²⁸⁵ But this only happens when the new information is something quite “striking.”²⁸⁶ In such cases, individuals “may suddenly reassess and adopt a new opinion (now held with equal fervor to the one just abandoned).”²⁸⁷

For such shifts to occur, Beale noted, direct and effective messaging is needed. In the context of the death penalty, she observed that the media began paying more attention once abolitionists replaced the old script of “guilty defendants stringing out the legal process through endless appeals based on technicalities” with a new one focusing on “innocent death row inmates as victims of ineffective counsel and/or incompetent, unethical or racist police, who narrowly escaped execution for someone else’s crime.”²⁸⁸ Critically, abolitionists also offered a new middle ground: the moratorium, which “permitted death penalty supporters to reassess without reversing their position.”²⁸⁹

The same is true for JLWOP. Like the moratorium in the death penalty context, the JJAIA is also a middle ground. The bill does not mandate release; it only requires parole review, which can be denied in any

284. Beale, *Restorative Justice*, *supra* note 104, at 434.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

specific case.²⁹⁰

The message of sentencing a child to “die in prison,” like the new death penalty abolition script, is distinctively powerful because it makes JLWOP’s harms easy to communicate. From an economic perspective, JLWOP is the most costly prison sentence for already cash-strapped states as children sentenced to life without parole will spend more years behind bars than adults will. It also presents the drastic opportunity cost of losing potentially productive members of society. Some of the most compelling voices for JLWOP reform are “former juvenile offenders who later achieved success,” including actor Charles S. Dutton, who stabbed a person to death in a street fight as a seventeen-year-old.²⁹¹ He was spared JLWOP, although under many state laws he would have been eligible.

Most importantly, JLWOP has an emotional cost: giving up on children. Any JLWOP reform messaging strategy is ultimately built on this recognition. Kids are indeed different, but not just for developmental reasons or because of their rehabilitative potential. As a class of criminals, kids are different because of their emotional impact on public consciousness. Douglas Berman argues that harnessing the public’s natural empathy for “distinct offender groups” is key for progressive reformists.²⁹² “Voices often raised with knee-jerk ‘tough-on-crime’ responses to crime issues will tend to be muted if progressives focus their advocacy for criminal justice reform on particularly sympathetic offender groups . . . [including] juvenile offenders,” he stated.²⁹³

But why are kids inherently sympathetic? I believe that it is for the same reason that child crime victims prompt a particularly acute “sense of revulsion on the part of the public.”²⁹⁴ It is because of our protective instincts, our realization that children are naive, helpless, and in need of protection. Children are purer. Few think that children are born bad. And, who hasn’t thought, “and he had his whole life ahead of him,” when a child dies?

Outside of the criminal justice system, public recognition of the differences between children and adults is reflected in countless laws. Children are not allowed to drive, to buy cigarettes, to watch R-rated movies, or buy pornography. They cannot vote or serve our country in war

290. H.R. 2289, 111th Cong (2009).

291. David. L. Hudson, Jr., *Adult Time for Adult Crimes: Is Life Without Parole Unconstitutional for Juveniles?*, 95 A.B.A. J. 16 (2009). Dutton, as well as other former juvenile offenders, filed an amicus brief in *Sullivan and Graham* on behalf of petitioners. See Brief for Former Juvenile Offenders Charles S. Dutton, et. al. as Amici Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida* (2009) (Nos. 08-7412, 08-7621).

292. Berman, *Progressive Perspectives*, *supra* note 172, at 18.

293. *Id.* at 18-19.

294. Beale, *What’s Law Got To Do*, *supra* note 98, at 63 (internal quotations omitted).

or in peace. In many states, kids cannot marry without permission. They are required to attend school and are limited in how many hours they can work at after-school jobs.²⁹⁵

American *criminal law* used to reflect this view of children. The juvenile justice system was created and guided by an important rehabilitative ideal, specifically excluding the concept of punishment.²⁹⁶ American juvenile justice was grounded in the same intuitions that drove *Roper* and *Graham*—i.e., the reduced culpability of kids and their greater capacity for change.²⁹⁷ But over time, the political salience of crime increased. The “juvenile super-predator”²⁹⁸ invaded America’s consciousness. Supreme Court cases, which heightened procedural protections in juvenile court, broke down the differences between the adult and juvenile proceedings.²⁹⁹ The result: American criminal law turned its back on the rehabilitative ideal by dramatically expanding waiver provisions³⁰⁰ and increasing the “range of harsh adult punishments” available for children.³⁰¹ Today, JLWOP stands out as the extreme symbol of this era and America stands out for its extreme treatment of juveniles.

Yet America’s outlier status does not necessarily reflect an unalterable American consensus about children in the criminal law. Recent polls raise hope that the public could support more progressive youth sentencing. Although ninety percent of respondents to one 2007 poll felt that youth

295. EQUAL JUSTICE INITIATIVE, FACT SHEET: SENTENCING CHILDREN TO DIE IN PRISON 1 (2007), <http://www.eji.org/eji/files/ciapfactsheet.pdf>.

296. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 685 (1998) [hereinafter Logan, *Proportionality and Punishment*].

297. *Id.*

298. See *supra* note 259, and accompanying discussion.

299. See *In re Winship*, 397 U.S. 358, 368 (1970) (holding that when a juvenile is charged with an offense that would be a crime if committed as an adult, the prosecution must prove each of the elements beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 33–34, 41, 57 (1967) (ruling that juveniles in juvenile delinquency proceedings require many of the same due process protections as adults in adult proceedings under the Fourteenth Amendment). See also Gail B. Goodman, *Arrested Development: An Alternative To Juveniles Serving Life Without Parole in Colorado*, 78 U. COLO. L. REV. 1059, 1069–70 (2007) (“As the juvenile justice system extended the procedural protections offered to adolescent offenders, it increasingly adopted characteristics similar to the more adversarial adult system [T]he practices of the juvenile court gradually began to resemble the more punitive approach of the adult court. Rather than focusing on interventions aimed at reducing recidivism, promoting values, and educating young offenders, the juvenile court shifted towards the goals of deterrence, retribution, and incapacitation.”).

300. See Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don’t Expect Any Miracles*, 20 EMORY INT’L L. REV. 43, 52 (2006) (“Between 1992 and 1997 alone, forty-five jurisdictions enacted or expanded provisions for juvenile waiver to adult court.”); *id.* at 53 (“As a result of these changes the number of juveniles prosecuted in adult court over the last generation has risen by more than eighty percent.”).

301. Logan, *Proportionality and Punishment*, *supra* note 296, at 686.

crime was a major problem,³⁰² ninety-one percent believed that rehabilitative services and treatment was a solution.³⁰³ In a different poll conducted the same year, eighty-nine percent of respondents agreed that “[a]lmost all youth who commit crimes have the potential to change.”³⁰⁴

Indeed, some scholars suggest that politicians actually misread popular opinion in the get-tough era.³⁰⁵ According to this account, while “the public wanted ‘something’ done” they did not necessarily want harsher punishments for kids, let alone JLWOP.³⁰⁶ Accordingly, sixty-seven percent felt that young people should not be incarcerated in jails and prisons that hold adult prisoners,³⁰⁷ and a whopping ninety-two percent believed that the decision to transfer a juvenile into adult court should be made on a case-by-case basis rather than as of a result of a blanket policy.³⁰⁸ Other scholars call public support for rehabilitation, particularly for juveniles, a “criminological fact,” because “over the course of the quarter century, it has been demonstrated in study after study.”³⁰⁹

Given these signs of potential support, perhaps the recent explosion of JLWOP as a provocative story of interest is the “something quite striking” the American public needs to snap out of its status quo.

4. Conclusion

It is difficult to gauge exact public opinion on JLWOP, particularly because of the recency of the news upsurge, the arguments in *Sullivan* and *Graham*, and the Court’s decision to bar JLWOP for nonhomicides,

302. BARRY KRISBERG & SUSAN MARCHIONNA, NAT’L COUNCIL ON CRIME & DELINQUENCY, FOCUS: ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM 2 (Feb. 2007), http://nccdrc.issuelab.org/sd_clicks/download2/attitudes_of_us_voters_toward_youth_crime_and_the_justice_system.

303. *Id.* at 1.

304. CENTER FOR CHILDREN’S LAW & POLICY, POTENTIAL FOR CHANGE: PUBLIC ATTITUDES AND POLICY PREFERENCES FOR JUVENILE JUSTICE SYSTEMS REFORM 1 (2007), available at <http://www.macfound.org/atf/cf/{b0386ce3-8b29-4162-8098e466fb856794}/CCLPPOLLINGFINAL.PDF> (last visited July 3, 2011). These polls do not necessarily conflict with the *Sourcebook of Criminal Justice Statistics* poll taken in 2003 which found that fifty-nine percent believed that “juveniles between the ages of 14-17 who commit violent crimes” should be treated the same as adults, while thirty-two percent believed that they should be given more lenient treatment. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, ATTITUDES TOWARD THE TREATMENT OF JUVENILES WHO COMMIT VIOLENT CRIMES tbl. 2.48 (2003). First, the poll was taken four years earlier, and it is likely that public opinion has since changed. Second, eight percent responded that it “depends,” which I take to mesh more closely with the respondents who favored more lenient treatment. *Id.*

305. Donna M. Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIM. & PUB. POL’Y 653, 656-7 (2006) (observing this view).

306. *Id.*

307. *Id.* at 5.

308. *Id.* at 4.

309. Francis T. Cullen, *It’s Time to Reaffirm Rehabilitation*, 5 CRIM. & PUB. POL’Y 665 (2006).

although a recent national poll taken post-*Graham* found that 61.4% agreed with the Court's decision in *Graham* by "disagree[ing that] a state should be allowed to sentence for life in prison a person under eighteen years of age for armed burglary."³¹⁰ Nevertheless, as this Part has shown, JLWOP reformers have reason to believe the political process bias in favor of harsher criminal laws may prove to be weaker in the JLWOP context than in other areas of the criminal law. Indeed, Congress should be more confident in its support of the JJAIA because maybe, for at least this issue, political survival is not on the line. In fact, the opposite may be true.

Despite these promising political signs, however, the JJAIA must overcome another obstacle: federalism.

IV.

FEDERALISM VALUES AND THE TRUMP CARD OF JLWOP FEDERALIZATION

In the hearings on the JJAIA in both 2008 and 2009 Representative Louie Gohmert spoke out about the federalism costs that would attend its passage. In both hearings, Gohmert expressed his belief that "it is inappropriate at best and unconstitutional at worst for Congress to seek to regulate the manner in which states determine appropriate sentences for state crimes committed and prosecuted within their jurisdiction."³¹¹ Gohmert also communicated his concern that the JJAIA represents an "unfunded mandate" to the states,³¹² going so far as to suggest that the JJAIA is "extortion" on the part of the federal government.³¹³

It would be all too easy to reject out of hand Gohmert's expressed concern for federalism as hypocritical given Congress's past willingness to support broad-sweeping criminal justice legislation, far more intrusive of state prerogatives than the JJAIA.³¹⁴ One could also cast aside Gohmert's reservations about the JJAIA as an "unfunded mandate" as misplaced, nothing more than a rhetorical flourish that conflates the Supreme Court's Tenth Amendment "anti-commandeering" cases with Congressional use of

310. STEPHEN ANSOLABEHRE & NATHANIEL PERSILY, KNOWLEDGE NETWORKS, CONSTITUTIONAL ATTITUDES SURVEY 99 (2010). Among those who "disagreed" with JLWOP for this nonhomicide crime, sixty-two percent indicated that they "strongly disagree[d]." *Id.* The same poll also found that 57.5% of people disfavor the death penalty for those convicted of murder for crimes committed before the age of eighteen. *Id.* at 57.

311. 2009 Hearing, *supra* note 4, at 13 (prepared statement of Rep. Louie Gohmert); 2008 Hearing, *supra* note 21, at 84 (prepared statement of Rep. Louie Gohmert).

312. 2009 Hearing, *supra* note 4, at 13 (prepared statement of Rep. Louie Gohmert); 2008 Hearing, *supra* note 21, at 83 (prepared statement of Rep. Louie Gohmert).

313. 2008 Hearing, *supra* note 21, at 69.

314. See, e.g., Beale, *Many Faces*, *supra* note 19, at 753-756 (describing the over-federalization phenomenon in criminal law). See also Part IV(C), *infra* (describing the consequences of Congress's past extensive use of its Spending Power to pass broad criminal laws).

conditional grants—not mandates—under their Spending Power.³¹⁵

But this arguable hypocrisy or legal imprecision should not distract from the importance of Gohmert's message in the context of criminal justice policy. For it is Congress's past treatment of federalism as a "second-order concern"³¹⁶ that has led, in large part, to the vast federalization of crime and punishment. If Congress had historically paid more attention to the Constitution's internal federalism check, it might have passed fewer, yet sounder criminal justice policies. Instead, Congress has driven federal criminal law without any brakes. This structural breakdown has had dire consequences for criminal defendants and unintended repercussions for their communities. Propelled by the powerful political process bias in favor of harsher sentences and broader substantive criminal laws and without any meaningful federalism countercheck either within or outside it,³¹⁷ Congress has passed criminal legislation that has eroded political accountability, duplicated state laws, imposed substantial costs on state governments, and undermined many positive and progressive state sentencing policies and experiments.³¹⁸

Given this history, it is not surprising that some of the most ardent supporters of federalism values and advocates for more stringent judicial review of Congress's power over criminal law are those who favor more progressive criminal justice policies and/or more lenient sentences.³¹⁹ If federalism were taken more seriously, the argument goes, the United States might not have the highest incarceration rate in the world and criminal defendants might be far better off.

It is inadequate simply to argue that federalism is irrelevant because of Congress and the Court's fair-weather adherence to the principle. To do so would be disingenuous at best and dangerous at worse: it would only further condone future federal criminal justice policies that may in fact be unjustified in a particular case.

In this section, I therefore take this federalism challenge at face value. I examine the values of federalism in the context of criminal justice and

315. See *Printz v. United States*, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."); *New York v. United States*, 505 U.S. 144, 175–77 (1992) (striking down a federal statute that coerced states into compliance with a federal waste management program as "inconsistent with the federal structure of our government," whether viewed as beyond Congress' enumerated powers or as a violation of the Tenth Amendment).

316. Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 107 (2008) [hereinafter Logan, *Criminal Justice Federalism*].

317. For a discussion of the limitations of judicial federalism review see *infra* Part IV(B).

318. See Part IV(C), *infra*, for a discussion of these ramifications.

319. See, e.g., *infra* notes 333–337 (describing and criticizing the overfederalization of criminal law).

address the potential and actual costs incurred by displacing it. To fairly assess the federalism implications and thus the legitimacy of the JJAIA, I construct limiting principles to define when Congress can and should displace state criminal law under its Spending Power. Finally, I apply this framework to the JJAIA and argue that unique federal interests at stake in the JLWOP context trump federalism concerns.

A. Federalism Values in the Context of Criminal Justice

Although discussing the doctrine of enumerated powers in today's federal administrative landscape is like "discussing the redemption of Imperial Chinese bonds," traditionally the power of the federal government in criminal law was narrow.³²⁰ Criminal policy was strictly a matter of local concern.³²¹

James Madison famously described Congress's powers as "few and defined" to be "exercised principally on external objects," while the powers of the states were "numerous and indefinite," extending to "all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."³²² The fact that general control over crime and punishment—save for a few discrete areas—naturally fell within the ambit of state control "reflect[ed] both the structure of the Constitution and a policy preference."³²³ This traditional understanding was not just empty formalism—there were and still are important reasons for states to retain primary control over crime.

Crime and punishment is inherently a local interest with inherently local effects. Because crime and morals differ from state to state, the Founders understood that the states would be "capable of protecting themselves against whatever evils they chose to proscribe and punish."³²⁴ With state and local governments able to see the daily consequences of their criminal justice policies, they are more likely to pay "greater attention to the costs and benefits of sentencing policies and [have an] ability to assess what works best in their particular jurisdiction."³²⁵

320. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

321. See, e.g., Beale, *What's Law Got To Do*, *supra* note 98, at 40 ("For the first 150 years of the Republic, crime was not an issue on the national political agenda. It was not until Herbert Hoover that a president even mentioned crime in his inaugural address.").

322. THE FEDERALIST NO. 45 (James Madison).

323. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1230 (2000) [hereinafter Beale, *Federalizing Hate*]. See also Lawson, *supra* note 320, at 1234 (critiquing the modern administrative state by arguing that, "[n]one of [Congress's constitutional] powers, alone or in combination, grants the federal government anything remotely resembling a general jurisdiction over citizen's affairs").

324. Brickley, *supra* note 99, at 1138-39.

325. Rachel Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 130

Moreover, the effects of the vast majority of crimes and sentencing policies are internalized by states and localities with little to no impact on other states or the national government: “Limited federal jurisdiction under the Constitution is based on the rationale that divided powers protect liberty and that states should bear responsibility for crime because the effects of crime are, in most cases, *localized and have no repercussions outside a community, let alone outside a state.*”³²⁶

Additionally, states and localities are generally better equipped to develop novel approaches to seemingly intractable criminal justice problems because of the locality of crime and concomitant local variances. Criminal justice advocates have noted that, particularly in the criminal justice field, state experimentation often leads to progressive policies.³²⁷ In fact, “many of the most promising current trends in criminal enforcement began at the state and local levels, including specialized drug courts, community policing, boot camps, and sentencing guidelines.”³²⁸ These positive developments not only can be replicated in other states, but also at the national level.³²⁹ If an experiment fails, the repercussions will generally only affect the experimenting state.

Criminal justice also maps onto other important federalism values. First, criminal justice federalism checks the power of the federal government by “resist[ing] the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”³³⁰ We have already seen the importance of this safeguard given the impulsivity of federal legislation passed in response to sensationalized, headline crimes and the susceptibility of federal lawmakers to politics over policy. Second, criminal justice federalism has the capacity to maintain democratic accountability and state autonomy, which “enhance[s] popular influence on public policy choices and . . . improve[s] answerability for their

(2005) (emphasis added) [hereinafter, Barkow, *Our Federal System*]. See also Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 470 (1994) (“[S]tate and local prosecutors and judges are more closely attuned to local standards of fairness than are their federal counterparts.”).

326. Barkow, *Our Federal System*, *supra* note 325, at 123.

327. Logan, *Criminal Justice Federalism*, *supra* note 316, at 102 (“Criminal justice policy, especially relative to corrections, has been a fertile field for experimentation and development, leading to policy diffusion.”). See also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L. J. 979, 994 (1995) [hereinafter Beale, *Too Many*] (“The variety inherent in the federal system also permits desirable experimentation.”)

328. Beale, *Too Many*, *supra* note 327, at 994.

329. Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869, 881–82 (1998).

330. *New York v. United States*, 505 U.S. 144, 187 (1992) (“[T]he Constitution protects us from our own best intentions.”).

consequences.”³³¹ Voters need to know whom to hold accountable for bad criminal justice policies and whom to credit when developments work. In other words, “[f]ederalism serves to assign political responsibility, not to obscure it.”³³² When the federal government passes laws that state governments carry out this accountability may blur.

Despite these criminal justice federalism values, the federal government has increasingly nationalized crime and justice. As the “culture of mobility” “transformed what had been uniquely local concerns into national ones,”³³³ the federal government began passing “limited and episodic” laws directed toward interstate criminal problems like the transportation of stolen vehicles, alcohol and narcotics and crimes like kidnapping, racketeering, and transporting women across state lines for immoral purposes.³³⁴ But historically, the federal government still ostensibly respected state boundaries as much as possible.

Even when Congress—encouraged by Presidents Nixon and Johnson and in reaction to “unprecedented high rates of violent crime”—formally recognized in the 1960’s that crime had become a national problem and passed a number of omnibus crime bills, the legislation continued to “emphasize[] the essential role of states in combating the nation’s social ills” and reflected “ongoing Congressional concern over federal displacement of state crime control authority” by leaving policy decisions largely to the states.³³⁵

Less than thirty years later, however, the exception of federal involvement in criminal justice matters became the rule. Congress no longer seemed as concerned about federalism values when dictating criminal policy for the states. The result was, *inter alia*, increased criminal justice grants to the states that allowed the federal government more say in routine state criminal justice matters, the passage of sweeping sex offender registration laws and truth-in-sentencing mandatory minimums, and the rapid federalization of substantive crimes.³³⁶ Federalism concerns were noticeably absent—or at least remote—from Congressional debates.³³⁷

331. David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 8 (1994). See also *Printz v. United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own citizens.”); *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (“[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. . . . The . . . inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”).

332. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

333. Brickley, *supra* note 99, at 1141–1144.

334. Logan, *Criminal Justice Federalism*, *supra* note 316, at 54.

335. See *id.* at 57.

336. *Id.* at 57-61.

337. See, e.g., *id.* at 103-06 (describing the “little resistance” and “reticence” to federal

B. The Supreme Court's "Toothless" Spending Power Jurisprudence

Congress is only partly to blame. Yes, the Rehnquist Court reemerged to protect federalism values by overturning Congress's use of the Commerce Power in certain criminal justice matters,³³⁸ narrowing Congress's broad enforcement powers under Section Five of the Fourteenth Amendment,³³⁹ and strengthening the protections of the Tenth Amendment.³⁴⁰ However, the "toothless" review of Congress's Spending Power³⁴¹—under which the JJAIA was introduced—allows Congress an end-run around federalism concerns if it reimages legislation as conditional grants to states.³⁴²

Under Spending Power jurisprudence, Congress has wide latitude to condition federal grants on state behavior in order to promote ends outside of its enumerated powers.³⁴³ As long as conditional legislation is (1) passed to promote the "general welfare," (2) the condition is unambiguous, (3) the condition is related to "the federal interest in particular national projects or programs," and (4) the legislation does not run afoul of any other constitutional provision, the legislation passes constitutional muster.³⁴⁴ Congress has the sole power to determine the "general welfare," making this power exceptionally strong.³⁴⁵ "[S]imply by

sex offender laws based on federalism grounds, despite major Congressional encroachment into traditional state prerogatives).

338. See *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that certain portions of the Violence Against Women Act exceeded Congress's Commerce Clause Power); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (reigning in Congress's Commerce Clause power and holding unconstitutional Congress's attempt to regulate and criminalize the carrying of handguns near schools).

339. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) (limiting the breadth of Congress's Section Five enforcement powers).

340. See *New York v. United States*, 505 U.S. 144, 188 (1992) (forbidding the federal government from compelling states to enact or administer a federal regulatory program); *Printz v. United States*, 521 U.S. 898, 932–33 (1997) (holding a statute unconstitutionally coercive).

341. Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, And How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L. J. 459, 461 (2003) [Baker, *Getting Off the Dole*].

342. See Lynn A. Baker, *Federalism and the Spending Power From Dole to Birmingham Board of Education*, in *THE REHNQUIST LEGACY* 205, 215 (Craig Bradley ed., 2006) ("[T]he states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.").

343. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[O]bjectives 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 citations omitted).

344. *Id.* at 207–08.

345. See *Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("The discretion [to define the general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.").

passing a law, Congress declares the public welfare,"³⁴⁶ a reality which at least one scholar has described as a "Pandora's box."³⁴⁷ No court has invalidated a law passed under the Spending Power on the ground that it does not promote the general welfare.³⁴⁸

Much the opposite. While the Rehnquist Court was in the process of curtailing Congress's enumerated powers in the name of federalism, the Court reinforced its deference to Congressional use of conditional grants. For example, in *New York v. United States*, the Court expressly approved of Congress's use of its Spending Power "short of outright coercion" to "regulate in a particular way, or . . . [to] hold out incentives to the States as a method of influencing a State's policy choices."³⁴⁹ Similarly in *Printz v. United States*, Justice O'Connor, while concurring in the majority decision to strike down, on Tenth Amendment grounds, a federal law requiring state and local law enforcement officers to perform background checks on prospective handgun owners, noted that the program would be constitutional if enacted pursuant to Congress' Spending Power. "Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes," she reasoned.³⁵⁰

There are two plausible justifications for this deferential treatment of Congress's Spending Power: (1) the political process protects states because of their representation in Congress³⁵¹ and (2) the conditional nature of grants authorized under the Spending Power permits states to say no, thereby retaining their autonomy, and thus preserves federalism values.³⁵² However, these justifications are generally undermined in the particular context of criminal justice. The same political pressures in Congress to appear "tough on crime" also impair the ability of state legislators to turn down federal grants allocated for crime control. Because states fear that refusing criminal justice grants puts them at a competitive

346. Squire, *supra* note 329, at 901–02.

347. Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 463 (2002).

348. Baker & Berman, *Getting off the Dole*, *supra* note 341, at 464 n.34 (describing the "general welfare" prong as "a complete throw away" and citing decisions upholding laws under the "general welfare" prong); Emily R. Hutchinson, *Solomon's Choice: The Spending Clause and First Amendment Rights in Forum for Academic & Institutional Rights v. Rumsfeld*, 80 WASH. L. REV. 943, 948 (2005).

349. *New York v. United States*, 505 U.S. 144, 166 (1992).

350. *Printz v. United States*, 521 U.S. 898, 935 (1997) (O'Connor, J., concurring).

351. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (upholding federal legislation based on the faith that "political process ensures that laws that unduly burden the States will not be promulgated.").

352. See *New York*, 505 U.S. at 169 (stressing that the contractual nature of the Spending Power preserved accountability because "residents of the State retain the ultimate decision as to whether or not the State will comply . . . and state government's remain responsive to the local electorate's preferences").

disadvantage,³⁵³ the federal aid “may be seen as an offer that the states cannot refuse.”³⁵⁴ For these reasons, scholars have argued that even conditional grants can and should be understood as coercion bordering on direct mandates.³⁵⁵

C. Federalism Costs From Spending Power Criminal Law

Given the combination of a weakened political check, pseudo-coercion by Congress, and reluctance by states to refuse federal money, conditional grants under Congress’s Spending Power can have significant federalism costs.

Conditional grants can erode state autonomy and diminish political accountability. For example, The Violent Crime Control and Law Enforcement Act of 1994,³⁵⁶ which provided incentive grants to states to implement truth-in-sentencing policies, requiring certain offenders to serve out at least eighty-five percent of their sentences, undercut the ability of states to carry out their preferred criminal justice policies.³⁵⁷

Conditional grants can also reverse and diminish state experimentation. When the federal government proposes one-size-fits-all solutions on the entire country, discussions about criminal justice policy and positive criminal law developments may be quashed, even in the Spending Power context. Wayne Logan described this effect as a result of the passage of the Wetterling Act and Megan’s Law, which were enacted under Congress’s Spending Power.³⁵⁸ He noted how states and municipalities spearheaded the first sex offender registration laws and that before the Wetterling Act in 1994 and Megan’s Law in 1996, states

353. Somin, *supra* note 347, at 466 (“[S]tates that refuse conditional federal expenditures realize that refusal may place them at a competitive disadvantage relative to other states, which now have more funds available to attract individual and corporate migrants.”).

354. Beale, *Too Many*, *supra* note 327, at 1010.

355. See, e.g., Logan, *Criminal Justice Federalism*, *supra* note 316, at 97 (“In this atmosphere, . . . state criminal justice policy . . . has tagg[ed] along after federal money like a hungry dog.”) (internal quotations omitted); Macey, *supra* note 23, at 286 (“In an era in which the federal government provides considerable funding of state-sponsored projects through direct grants and matching funds, state representatives have much to gain by appeasing Congress.”); Squire, *supra* note 329, at 919 (“The choice to accept or reject, therefore, is frequently illusory, much like the ‘choice’ presented to the states in *New York*. . . . There may be no clearer example of coercion.”). *But see* Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 882, 934–35 (2008) (arguing, *inter alia*, that “there is no evidence that state officials are in any meaningful sense constrained to accept federal grants”).

356. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

357. Barkow, *Our Federal System*, *supra* note 325, at 130.

358. See generally, Logan, *Criminal Justice Federalism*, *supra* note 316 (examining these laws).

engaged in debates ranging from “whether a conviction or risk-based registration classification scheme is preferable” to “the appropriateness of requiring adjudicated juveniles to register.”³⁵⁹ Yet, “[f]ederal intrusion . . . quelled this discussion, disrupting what has been an ongoing natural experiment.”³⁶⁰ The result was the passage of harsh and overbroad laws across the country, regardless of local policy preferences.³⁶¹

Lastly, conditional grants can impose substantial economic costs on states. When states accept federal conditions, they can retain grants that would otherwise be withheld, but the financial costs of implementation may exceed the grant and cause “a snowballing effect.”³⁶² For example, Congress passed its sex offender registration laws without “provid[ing] funds to accommodate the broad gamut of related matters that carry expenses for states, including possible reductions in the number of guilty pleas (and attendant rise in jury trials) as a result of the harsher, non-discretionary . . . regime, or costs required to handle judicial challenges prompted by changes in state laws.”³⁶³ Federal truth-in-sentencing laws have amounted to millions of dollars of extra costs to the states for the extended stays of inmates. Outside the criminal justice context, the No Child Left Behind Act, which also was authorized under Congress’s Spending Power, required a complete overhaul of state education systems, with heavy financial burdens falling upon the states.³⁶⁴

D. Limiting Principles

So what should we make of all this? We can recognize that federalism has great importance in the criminal justice context. We can also recognize that, while current political and judicial constraints on Congress’s use of its Spending Power may be weak, there are also circumstances when Congress

359. *Id.* at 102.

360. *Id.* at 103.

361. Even when the federal government does not intrude into state prerogatives through direct legislation or its Spending Power, parallel criminal jurisdiction can alter state incentives to develop the best criminal law solutions. When states share jurisdiction with the federal government, “they may hope to free ride off federal initiatives, dampening states’ incentives to develop their own innovations.” Barkow, *Our Federal System*, *supra* note 325, at 124. On the other hand, “when states bear the primary responsibility for crime, they have incentives to come up with the best solutions.” *Id.* Federal involvement has many times led to harsher solutions than the states had come up with. *See, e.g.*, Barkow, *Our Federal System*, *supra* note 325, at 120 (observing that Congress enacts new crimes and extends sentences for existing ones in reaction to high-profile local crimes); Beale, *Many Faces*, *supra* note 19, at 768 (noting that “overfederalization . . . allow[s] federal and state prosecutors to override state laws intended to protect state citizens”); Brickley, *supra* note 99, at 1166–67 (discussing federal laws that allow punishment when state laws did not).

362. Brickley, *supra* note 99, at 1146.

363. Logan, *Criminal Justice Federalism*, *supra* note 316, at 98.

364. Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 893 (2006) [hereinafter *No Child Left Behind*].

should act to displace state criminal law. The issue is what principles (not recognized by the current jurisprudence) appropriately limit Congressional Spending Power.

The answer cannot be a bright-line rule. For example, some scholars argue against any Congressional interference into state and local criminal law prerogatives absent a concurrent enumerated power.³⁶⁵ Yet this cannot be right. A more moderate, and I believe, reasonable view is expressed by scholars who believe that “the text, history, structure, and theoretical premises of the Constitution point toward the importance of *both* diverse local ‘laboratories of democracy’ *and* a larger, national community—a Union constituted by ‘We the People.’”³⁶⁶ But even if we accept that Congress can, in some cases, legislate with regard to state criminal justice, it cannot always do so. The Spending Power—whether or not the Framers so intended—cannot be interpreted as plenary. We have seen just how dangerous such a conception is, especially in the context of criminal justice policy.

Other scholars have echoed, to varying degrees, the Supreme Court’s recent admonishment that the “Constitution requires a distinction between what is truly national and what is truly local” in the Spending Power context.³⁶⁷ But national and local are not mutually exclusive and federalism accommodates this equivalency. As Judith Resnik has observed, “‘state’ and ‘federal’ interests are not preexisting sets but are interactive and interdependent conceptions that vary over time.”³⁶⁸

The inquiry must be flexible and broad, yet still sensitive to the importance of state interests in criminal law policy. I believe that a functional, totality-of-the-circumstances test that balances the federal interests against the federalism costs is the most appropriate inquiry that

365. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995) [hereinafter Baker, *Conditional Spending*] (proposing “that the Court presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers”); Johan D. Van der Vyver, *International Standards for the Promotion and Protection of Children’s Rights: American and South African Dimensions*, 15 BUFF. HUM. RTS. L. REV. 81, 101 (2009) (“Federal legislation that seeks to regulate matters which, under the American Constitution have been reserved for the states, including the juvenile criminal justice system, will without question be unconstitutional.”).

366. Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL’Y 5, 7 (2009) (emphasis in original).

367. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). See, e.g., Squire, *supra* note 329, at 929 (proposing that a rational Spending Power balance would “limit federal spending to furthering the general, that is national, welfare and prohibit Congress’s involvement in purely local matters.”); Baker, *Getting off the Dole*, *supra* note 341, at 526 (“[E]xpenditures and conditions thereto [are] constitutional only when some general interest of the union lies behind them.”).

368. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 220–21 (1995).

Congress should undertake in the context of debating and enacting Spending Power criminal justice legislation, such as the JJAIA.

At the risk of critiquing vagueness and then doling out a hefty dose myself, I will spell out the considerations that Congress, from a normative perspective, should take into account. In doing so, I borrow heavily from the Founders, the Court, other scholars, as well as the above observations about federalism values and protections in the context of criminal justice. By balancing the federal interest against the federalism costs, these factors will help determine when it is necessary and appropriate for Congress to act.³⁶⁹ Like any totality-of-the-circumstances or balancing test, none of the considerations are necessary or sufficient in and of themselves.

The federal interest strongly supports spending legislation when the state criminal law experiment or policy imposes externalities on other states or the nation,³⁷⁰ when the federal criminal justice policy passed through its Spending Power is concurrently founded upon an enumerated power of Congress;³⁷¹ and/or when the state criminal law experiment or policy discriminates against a minority group.³⁷²

Balanced against these federal interests are federalism costs: whether the financial inducement passes the point where “pressure turns into

369. Some scholars have recommended or implied that Congress may only intrude upon state criminal justice prerogatives when it is necessary and appropriate to do so, but have not fleshed out considerations to determine when such conditions exist. *See, e.g.*, Barkow, *Our Federal System*, *supra* note 325, at 129-30 (“Congress should intervene with the states’ decisionmaking process *only when it is necessary* to achieve a national objective.”) (emphasis added); Beale, *Federalizing Hate*, *supra* note 323, at 1230-31 (“In accordance with . . . the principles of federalism, federal criminal jurisdiction should be created only when there is a *demonstrated need* for federal intervention.”) (emphasis added).

370. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 24 (1995) (listing as appropriate subjects of federal criminal jurisdiction, *inter alia*, “criminal activity with substantial multistate or international aspects.”); Barkow, *Our Federal System*, *supra* note 325, at 124 (“Because of the many advantages of the states’ control over crime, the federal role in criminal law enforcement should be limited to those areas in which it has a decided advantage over the states. . . [including] when state regulation would *impose externalities on other states.*”) (emphasis added); *Eighth Randolph Resolution of the 1787 Constitutional Convention*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 131-32 (Max Farrand ed., 1966) (urging that the national legislature should be competent “in all cases . . . in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.”). *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments *without risk to the rest of the country.*”) (emphasis added).

371. *See* Baker, *Getting Off the Dole*, *supra* note 341, at 499.

372. *See* Part IV(E)(2)(c), *infra*, *see also* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1896 (1996) (“Congress typically has served as a regulator of last resort where the states have failed to act in response to persistent discrimination.”).

compulsion;³⁷³ the extent to which states still will ultimately maintain autonomy in criminal justice choices after adopting the federal policy; the amount of resources states will be required to spend after accepting the federal condition; and the extent to which the federal policy conflicts with local morals. In addition, the extent to which a state criminal justice experiment or policy has failed or is inadequate is an important indicator of the force of the states' interest in maintaining autonomy over their criminal justice policies.³⁷⁴

In the following section I argue that under the totality-of-the-circumstances, it is both necessary for Congress to act to prohibit the states from sentencing juveniles to life without parole and proper to do so pursuant to its Spending Power through the JJAIA.

E. Federalism Response: Federal Interests in JLWOP Abolition Trump Federalism Costs

1. Introduction

A balance between federal interests and federalism costs in the context of JLWOP weighs heavily in favor of Congressional intervention.

First, the federal interests supporting intervention are strong. The JLWOP "experiment," if it can be so called, has escaped state lines to impose substantial international, foreign affairs, and reputational costs on the nation, which implicate distinctive federal interests within Congress's enumerated powers. Further, the disproportionate imposition of JLWOP on African-American and other minority youths authorizes—and some would argue, obligates—Congressional intervention in light of the Reconstruction Amendments and the traditional federal concern over discrimination.

Second, the federalism costs associated with Congressional intervention through the JJAIA are slight. The JJAIA is minimally coercive. States would maintain ultimate decision-making authority about whether an individual juvenile offender should be released. Additionally, the legislation would impose few additional costs on the states because existing parole boards are capable of handling the minor increase in their docket that would result from the JJAIA. Given the relatively recent introduction of JLWOP into state sentencing schemes and the public's

373. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). See also Engdahl, *supra* note 331, at 21 ("Congress's spending power constitutes competence to offer, but not to oblige acceptance; competence to tender, but not to compel receipt.").

374. See, e.g., Barkow, *Our Federal System*, *supra* note 325, at 123 ("To be consistent with the constitutional allocation of power, federal criminal law should duplicate state criminal law only when state enforcement of criminal law is inadequate.").

continuing belief in juvenile rehabilitation,³⁷⁵ the JJAIA would not necessarily undermine local morals and values. Finally, state JLWOP experimentation has failed.

2. *JLWOP and the Federal Interest: Breaking Down Borders, International Consensus, and Discrimination*

a. *JLWOP Imposes Harmful Externalities on the Nation*

As described at some length in Part IV(A)–(B), scholars in favor of a limited federal role in criminal law argue that crime and punishment are inherently local interests with local effects and that when a state experiment goes bad its effects are internalized. These same scholars, however, also argue that this general presumption reverses when state criminal law policy starts to injure other states and, particularly, the federal government. “[T]here is general agreement that federal criminal jurisdiction is appropriate in the case of conduct that interferes with *federal interests*, programs, or personnel. In this context, federal criminal law is *necessary* to prevent the frustration of federal programs and activities.”³⁷⁶

The forty-four states that currently allow JLWOP sentences afford the nation the unenviable designation as the *sole* country responsible for one hundred percent of all child offenders serving life without parole sentences.³⁷⁷ This pariah status has had serious consequences for the nation. By undermining several of the United States’ treaty obligations—and arguably violating customary international law—state practice has damaged the United States’ international reputation, foreign affairs capabilities, and diplomatic leverage.

As a start, state JLWOP practices are inconsistent with the International Covenant on Civil and Political Rights (“ICCPR”), which was ratified by the United States in 1992 and is the first document formally to address juvenile rights in judicial proceedings.³⁷⁸ It demands that no one be subjected to torture or to cruel, inhuman or degrading treatment or

375. See *supra* notes 302–304, and accompanying text (discussing the public’s continuing belief in the rehabilitative potential of juveniles).

376. Beale, *Federalizing Hate*, *supra* note 323, at 1231–32 (emphasis added).

377. Christina Okereke, *The Abuse of Girls in U.S. Juvenile Detention Facilities: Why the United States Should Ratify the Convention on the Rights of the Child and Establish a National Ombudsman for Children’s Rights*, 30 *FORDHAM INT’L L.J.* 1709, 1751–72 (2007) (“The United States lives in international isolation in its support for life sentences without the possibility of parole for juvenile offenders, similar to when the country sanctioned the universally condemned practice of executing child offenders.”).

378. Marina Anna Magnuson, *Taking Lives: How the United States Has Violated the International Covenant of Civil and Political Rights By Sentencing Juveniles to Life Without Parole*, 14 *U.C. DAVIS. J. JUV. L. & POL’Y* 163, 168 (2010).

punishment,³⁷⁹ calls for the separation of juveniles from adults in penitentiary systems,³⁸⁰ and requires that justice systems take into account the age of juveniles and the desirability of their rehabilitation when imposing punishment.³⁸¹ While the United States entered a reservation to the treaty, reserving “the right, in *exceptional circumstances*, to treat juveniles as adults,”³⁸² many scholars rightfully argue that “the widespread sentencing of juveniles to life without parole in the United States . . . has stretched the exceptional circumstances provision beyond its meaning.”³⁸³ The U.N. Human Rights Committee took notice in 2006, castigating the United States because its “treatment of children as adults is not only applied in exceptional circumstances,” and expressing its view that “sentencing children to a life sentence without parole *is of itself* not in compliance with [the Covenant].”³⁸⁴ That same year, the U.N. Committee Against Torture (“CAT”) spoke out against the “conditions of the detention of children,” including “the large number of children sentenced to life imprisonment in the [United States].”³⁸⁵

Similarly, JLWOP is at odds with the United States’ obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), which requires ratifying states to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin . . . [t]he right to equal treatment before the tribunals.”³⁸⁶ Again the United Nations took notice of the United States’ failure to abide by its treaty obligations because of JLWOP: The U.N. Human Rights Council noted concern by civil society organizations over “the issue of sentencing youth to life without parole” and racial disparities attendant to JLWOP.³⁸⁷

379. International Covenant on Civil and Political Rights, art. 7, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 19, 1966) [hereinafter ICCPR].

380. ICCPR art. 10(3).

381. ICCPR art. 14(4).

382. S. Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Doc. No. 102-23, 102d Cong., 2d Sess. 6-21 (1992) (emphasis added).

383. Templeton, *supra* note 33, at 242 (2008). See also Robert E. Shepherd, Jr., *What is Next After Roper? Part 2*, 21 CRIM. JUST. 51, 52 (2006) (“[Y]et there are now more than 12,000 juveniles being held in adult facilities in the United States—hardly an exceptional or extraordinary practice any longer.”).

384. U.N. International Covenant on Civil and Political Rights, U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee on United States of America, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) (emphasis added).

385. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Conclusion and Recommendations of the Committee Against Torture on the United States of America, ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

386. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, Art. 5(a), S. Treaty Doc. No. 95-18 (1994), 660 U.N.T.S. 195, available at <http://www2.ohchr.org/english/law/cerd.htm>.

387. Human Rights Council, Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-up to and Implementation of the Durban Declaration and

But the international implications of state JLWOP practices do not end there. The United States is also a party to the American Declaration on the Rights and Duties of Man,³⁸⁸ the signatory document of the Inter-American Commission on Human Rights. The Declaration states, in pertinent part, that “all children have a right to special protection.”³⁸⁹ The Commission has interpreted this provision to require States to “make substantial efforts to guarantee [minors’] rehabilitation in order to allow them to play a constructive and productive role in society.”³⁹⁰ The United States’ practice of JLWOP formed the basis for a challenge under this provision before the Inter-American Commission on Human Rights alleging violations of the human rights of juveniles sentenced to life without parole in the United States.³⁹¹

Lastly, the practice of JLWOP is in direct contravention of the Convention on Rights of the Child (“CRC”). Although the United States proposed more provisions than any other country during the drafting stage of the CRC,³⁹² the United States has signed the convention³⁹³ but has yet to ratify it, due in large part to federalism concerns.³⁹⁴ The CRC specifically outlaws JLWOP sentences and reinforces many of the protections in the ICCPR for juveniles. The United States’ failure to ratify the treaty is all the more striking considering that “every self-governed nation in the world has both signed and ratified the CRC”³⁹⁵ and that no state party has filed

Programmed of Action, ¶ 51, U.N. Doc. A/HRC/11/26/Add.3 (Apr. 28, 2009). See Part IV(E)(2)(c), *infra* for further discussion of the racial disparities of JLWOP.

388. American Declaration of the Rights and Duties of Man, arts. I, VII, XXVI, XVIII, XXIV, XXV, XXVI, Ninth Int’l Conference of Amer. States, Apr. 30, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.92 doc. 31 rev. 3 at 17 (May 3, 1996).

389. *Id.* art. VII.

390. Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. ¶ 83, available at <http://iachr.org/annualrep/2002eng/USA.12285.htm> (internal quotations omitted).

391. Petition Alleging Violations of the Human Rights of Juveniles Sentenced to Life Without Parole in the United States of America (Feb. 21, 2006), available at http://www.aclu.org/images/asset_upload_file326_24232.pdf.

392. Okereke, *supra* note 377, at 1728.

393. Simply by signing the CRC, the United States may have obligations under international treaty law. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 81 I.L.M. 769 [hereinafter VCLT] (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . subject to ratification.”).

394. Convention on the Rights of the Child, art. 37. Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (signed by the United States on Feb. 16, 1995). See Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years*, 42 FAM. L.Q. 619, 657–58 (2008) (“[Federalism] has served as a justification for the United States’ refusal to ratify certain international agreements, such as the Convention on the Rights of the Child.”).

395. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV.

reservations to the CRC's prohibition on JLWOP.³⁹⁶ Only Somalia, one of the poorest nations in the world with no government, joins the United States in its failure to ratify the treaty, further emphasizing how out of line state JLWOP practices are with global views.³⁹⁷

More recently, the U.N. General Assembly also acted on JLWOP, passing two resolutions in 2007 calling upon nations to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of eighteen years at the time of the commission of the offense."³⁹⁸ In both resolutions, out of 186 and 184 parties respectively, the lone voice in dissent was the United States.³⁹⁹

The wide global consensus against JLWOP, as evidenced by the ICCPR, CERD, CAT, the virtual unanimity of the CRC and the unique circumstances of its ratification, and the U.N. resolutions has led many international law scholars to argue that the prohibition against JLWOP has become a customary international law *jus cogens* norm.⁴⁰⁰ If established, this would have "binding effect on all states, including those that have not formally ratified [the norm or treaty] themselves."⁴⁰¹

HUM. RTS. J. 161, 162 (2006). *See also* Quinn, *supra* note 33, at 305 ("[N]ot even the CRC's most enthusiastic supporters could have predicted the extent to which it has been embraced by the international community or the speed with which it has become a legally binding treaty.' There are currently 192 parties to the CRC. Only the United States and Somalia are not parties, although both states are signatories.") (internal brackets omitted).

396. Quinn, *supra* note 33, at 305 ("No state has registered a reservation to the prohibition on life imprisonment without the possibility of release in Article 37(a).").

397. Cynthia L. Schirmer, *Punishing Children As Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT'L L. 715, 716 (2008) ("The richest country, the United States, and the poorest country, the collapsed state of Somalia, stand alone among the entire family of nations in their refusal to ratify this convention that promises to protect that class of persons who cannot protect themselves—children.").

398. Rights of the Child, G.A. Res. 61/146, ¶ 31(a), U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (Jan. 23, 2007); Promotion and Protection of the Rights of Children, G.A. Res. 62/L.24 ¶ 31(a), U.N. GAOR, 62d Sess., U.N. Doc. A/C.3/62/L.24 (Oct. 23, 2007).

399. De La Vega & Leighton, *supra* note 13, at 1012.

400. *See, e.g.*, Brief for Amnesty International, et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida, Sullivan v. Florida*, at 3 (2009) (Nos. 08-7412, 08-7621); GLOBAL JUSTICE REPORT, *supra* note 32, at ii ("More than ever before, the community of nations today resolutely condemns the practice as against modern society's shared responsibility toward child protection and, more concretely, as a human rights violation prohibited by treaties and customary international law."); Quinn, *supra* note 33, at 284–85 ("Based on the near-universal rejection of life without parole for youth offenders in other nations and the express prohibition of it in the CRC, the prohibition on life imprisonment without the possibility of release for juvenile offenders has become a matter of customary international law, and is binding on the United States.").

401. VCLT, *supra* note 393, at art. 53 (defining a *jus cogens* norm as a "norm accepted and recognized by the international community of states as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."); GLOBAL JUSTICE REPORT, *supra* note 32, at 16.

It is beyond the scope of this Article to weigh in on the legal effect that treaty ratification has or should have on domestic law in the United States under our constitutional structure. That scholarly battle has been and continues to be waged at length elsewhere.⁴⁰² Likewise, it is also beyond the scope of this Article to determine whether the prohibition on JLWOP is *jus cogens*. The effect of such international customary norms on domestic law has also been subject to rigorous scholarly attention.⁴⁰³ For the purpose of this Article, it is sufficient to conclude that state imposition of JLWOP has significant and unique implications for U.S. compliance with international law, and may have an ongoing impact on U.S. foreign policy. These implications alone, I argue, justify federal legislative action in this area based upon Congress's enumerated foreign affairs power. The next part addresses this power and its implications for federal JLWOP intervention.

b. Federal Foreign Affairs Power and JLWOP

The U.S. Constitution was founded on the recognition that the chief flaw of the Articles of Confederation was that “[s]tates often pursued their own interests in a manner that undermined the collective interest in . . . diplomatic respect.”⁴⁰⁴ Among other transgressions, states refused to prosecute individuals who attacked other nations’ diplomats and to

402. Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing against the view that Congress’s treaty-making power trumps the Tenth Amendment and normal federalism constraints), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing against the view put forward by Bradley, defending the “nationalist view” of the treaty power) and Carlos Manuel Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 618 (2008) (“[Treaties are] enforceable in court without the need for prior legislative implementation or incorporation into domestic law.”).

403. Compare Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that international law questions should be treated as arising under federal law) and Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (“International law is not merely law, binding on the United States internationally but is also incorporated in United States law.”), with Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 673–73 (1986) (arguing that “customary international law lacks ‘legitimacy’ as a doctrine suitable for judicial application”).

404. Jack B. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643 (1997) [hereinafter Goldsmith, *Federal Courts*]. See also Beth Stephens, *Federalism and Foreign Nations: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations”*, 42 WM. & MARY L. REV. 447, 465–66 (2000) (“To avoid giving offense through violations of commonly accepted norms of international behavior constituted a prudent course of behavior. In addition, given that the law of nations provided the rules governing international commerce, adherence to its norms promoted the economic growth of the new nation. . . . [T]he weak national government [under the Articles of Confederation] had little ability to prevent or redress such offenses by the states, given its limited powers.”).

enforce treaties between the federal government and foreign states.⁴⁰⁵ This had dire effects for the national government, ranging from weakened diplomatic leverage and the increased threat of war⁴⁰⁶ to reputational and sovereignty costs.⁴⁰⁷ Underlying these issues was the recognition that ultimately, the federal government would be held accountable for state subversion of international law.⁴⁰⁸ Thus “[o]ne of the primary and least controversial purposes of the Constitutional Convention was to strengthen the foreign relations powers of the federal government vis-à-vis the states.”⁴⁰⁹

The Constitution reflects this purpose, with half—nine out of eighteen—of Congress’s enumerated powers relating to foreign affairs.⁴¹⁰ This affirmative grant of foreign affairs powers to Congress, combined with explicit prohibitions on the states’ exercise of authority over foreign affairs in Article I, Section 10,⁴¹¹ reveals the Framers’ understanding that “foreign affairs . . . [are] different from other issues facing the nation, justifying exceptional federal powers in order to centralize and regularize

405. See Stephens, *supra* note 404, at 466 (discussing examples)

406. *Id.* at 467 (quoting Edmund Randolph complaining that the Confederation might be “doomed to be plunged into war, from its wretched impotency to check offenses against this law”).

407. THE FEDERALIST NO. 22 (Alexander Hamilton) (observing that under the Articles of Confederation, “[t]he faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed” and asking “[i]s it possible that foreign nations can either respect or confide in such a government?”).

408. Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 334–35 (1994) (“[W]here the constituent states of the Union violate international legal norms, the ultimate responsibility falls upon the federal government. This is true not only as a practical matter—for in the eyes of other nations, the federal government will get the blame—but as a legal matter as well. The constituent states are not themselves formal subjects of international law, and any remedies for international legal violations will be directed against the national government.”).

409. Goldsmith, *Federal Courts*, *supra* note 404, at 1643.

410. See U.S. CONST. art. I, § 8 cl. 1 (vesting Congress with the power to “provide for the common Defense”); *id.* cl. 3 (vesting Congress with the power to “regulate Commerce with foreign Nations”); *id.* cl. 10 (vesting Congress with authority to “define . . . offenses against the law of nations”); *id.* cl. 11 (vesting Congress with the power “[t]o declare War”); *id.* cl. 12 (vesting Congress with authority “[t]o raise and support Armies”) *id.* cl. 13 (vesting Congress with the power “[t]o provide and maintain a Navy”); *id.* cl. 14 (vesting Congress with the power to “make rules for the Government and regulation of the . . . naval Forces”); *id.* cl. 15 (vesting Congress with the power to “call[] forth the Militia to . . . repel invasions”); *id.* cl. 16 (vesting Congress with the power to govern the militia when “employed in the Service of the United States”). See also JOHN HART ELY, ON CONSTITUTIONAL GROUND 149 (1996) (“[V]irtually every substantive constitutional power touching on foreign affairs is vested in Congress.”).

411. U.S. CONST. art. I, § 10. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 189 (2000) [hereinafter Goldsmith, *Foreign Affairs Preemption*] (“Article I, Section 10 reflects a decided preference for federal over state regulation with respect to some of the traditional ‘high’-agenda foreign relations issues concerning war, peace, and *diplomacy*.”) (emphasis added).

our interactions with the rest of the world.”⁴¹² The Supreme Court, in turn, has thus recognized the unique, and some argue,⁴¹³ exclusive power of the federal government over foreign affairs and its ability to oversee state compliance with federal international prerogatives.⁴¹⁴ The decision in *United States v. Belmont* aptly summed up the Supreme Court’s treatment of the federal government’s foreign affairs power: “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”⁴¹⁵

This robust conception of Congress’s foreign affairs power is as, if not more, critical today than it was when first articulated. Globalization, the increasing interconnectedness of the world, and the advent of broad human rights treaties touching “many areas that were formerly regulated only by domestic law”⁴¹⁶ have resulted in the “erosion . . . of the distinction between domestic and foreign affairs.”⁴¹⁷ This erosion has allowed state policies, which traditionally would have had little impact on international relations, greater potential to exert—inadvertently (and sometimes purposefully)—influence on the world stage.⁴¹⁸

Indeed, as early as *Brown v. Board of Education*, the United States filed an amicus brief urging the Court to overturn state segregation policies

412. Stephens, *supra* note 404, at 452.

413. See, e.g., Brilmayer, *supra* note 408, at 342 (“[P]ower over international relations is traditionally federal. A presumption that Congress does not want the states to violate international law, for this reason, makes enormous sense.”); Stephens, *supra* note 404, at 463 (“As has been well documented, the framers consistently expressed a strong commitment to a federal government that would regulate domestic enforcement of international law norms.”).

414. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“[T]he powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution” but rather are “vested in the federal government as necessary concomitants of nationality.”); *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (holding that state regulations “must give way if they impair the effective exercise of the Nation’s foreign policy”); *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 311 (1994) (“In international relations . . . the people of the United States act through a single government with unified and adequate national power.”) (internal quotations omitted).

415. 301 U.S. 324, 331 (1937).

416. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1105 (1999) [hereinafter Bradley, *New American*].

417. *Id.* See also Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441, 1444 (1994) (“[A]s the barriers between countries fall, the lines we have drawn between the national government and the states will come under increasing strain.”); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 141 (2001) (“[I]t is no longer possible in an age of globalization to draw a bright line between ‘foreign’ and ‘domestic’ affairs.”).

418. See Young, *supra* note 417, at 180–81 (setting forth the problem of “convergence,” which he describes as the increasing interaction between “areas of legitimate (even if not exclusive) state activity” and “national foreign policy”).

because of their negative impact on foreign policy.⁴¹⁹ Citing serious practical diplomatic impediments described by the Secretary of State, the brief stated, in pertinent part:

The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy. The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.⁴²⁰

Similarly and more recently, a group of former United States diplomats filed an amicus brief in *Roper v. Simmons*, arguing that the “continuation of [the juvenile death penalty] by a few states in the United States strains diplomatic relations with close American allies, increases America’s diplomatic isolation, and impairs important U.S. foreign policy interests at a critical time.”⁴²¹ As Jack Goldsmith has observed, “[e]ven the application of a state’s criminal law to crimes committed within the state can have profound international repercussions.”⁴²² The Supreme Court has recognized this danger and applied a “dormant foreign affairs power” doctrine to overturn state laws that negatively affect foreign relations, even in realms traditionally left to the states, and even in the absence of federal legislation on point.⁴²³

In *Zschernig v. Miller*, for example, the Court overturned an Oregon statute that limited the ability of foreign residents, particularly those in Communist countries, to claim property devised to them by will. The Court found that the law “has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.”⁴²⁴ Despite traditional state regulation over the “distribution of estates,” the Court could not ignore the fact that the law

419. Brief for the United States as Amicus Curiae Supporting Petitioners, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (Nos. 8, 101, 191, 413, 448).

420. *Id.* at 6.

421. Brief for the Former U.S. Diplomats, et al., as Amici Curiae Supporting Petitioners, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), at 1.

422. See Goldsmith, *Foreign Affairs Preemption*, *supra* note 411, at 176.

423. See Carolyn A. Pytynia, *Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption after Medellin v. Texas*, 43 VAND. J. TRANSNAT’L L. 1413, 1420 (2010) (“[I]n cases in which the federal government possesses the exclusive authority to act, but has yet to do so, the dormant foreign affairs power allows for preemption of state law that seeks to beat the federal government to the legislative punch.”).

424. 389 U.S. 429, 441 (1968).

“affects international relations in a persistent and subtle way.”⁴²⁵

Similarly, in *Holmes v. Jennison*, Chief Justice Taney, despite a divided court on the issue of jurisdiction, spoke for four justices when he asserted that the Governor of Vermont lacked authority to surrender fugitives to another country.⁴²⁶ Taney’s conclusion rested on the notion that “[e]very part of [the U.S. Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government.”⁴²⁷ Despite Justice Thompson’s belief that the Court lacked jurisdiction to hear the case, Thompson also made clear that the Governor had no authority to order the surrender.⁴²⁸ This was despite the fact that the release of a prisoner, like most criminal law, “is a part of the ordinary police powers of the states.”⁴²⁹

The Supreme Court more recently overturned a Massachusetts law that imposed economic sanctions on Burma because it “undermine[d] the President’s capacity, in this instance for effective diplomacy. . . . [and] compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.”⁴³⁰ Notably, the Court found that *protests* and *complaints* from other countries were compelling evidence that the Massachusetts law harmed the country’s international relations. “[S]tatements of foreign powers . . . , indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of Congressional objectives by the state Act.”⁴³¹

Critics have attacked this line of foreign affairs jurisprudence by arguing that in our increasingly connected world, states can and should play a more central role in foreign affairs.⁴³² Scholars have also criticized

425. *Id.* at 440.

426. *Holmes v. Jennison*, 39 U.S. 540, 579 (1840) (dismissing case due to a tie-vote 4-4 (Justice McKinley was absent) on the issue of jurisdiction).

427. *Id.* at 575.

428. *Id.*, at 580-81 (opinion of Thompson, J.) (“[A]dmitting this to have been an *arbitrary exercise of power, without even the colour of authority*; it does not rest with this Court to control or correct the exercise of such power, unless the case is brought within some one of the three classes of cases specified in the act of Congress.”) (emphasis added).

429. *Id.* at 568.

430. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

431. *Id.* at 385.

432. See, e.g., Goldsmith, *Foreign Affairs Preemption*, *supra* note 411, at 190 (“[T]here are benefits from decentralization—experimentation, information generation, maximizing preference satisfaction, local control, and the like Thus, for example, state and local activities can put underscrutinized foreign activities on the federal agenda.”); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L. J. 31, 34 (2007) [hereinafter Resnik, *Foreign as Domestic Affairs*] (pointing out the importance of “state and local political leaders . . . in welcoming insights from abroad and in shaping American law”).

the notion of a federal common law of foreign relations,⁴³³ and castigated federal courts for conducting a “special” and “radically different” analysis in foreign policy matters to overturn state laws.⁴³⁴

Importantly, however, the scholarship in this area largely criticizes the ability of *federal courts* independently to overturn state law that may impact foreign affairs *in the absence of Congressional action*.⁴³⁵ In advocating for limitations on exclusive federal power over foreign affairs, revisionists only reinforce Congress’s affirmative foreign affairs power. For example, Jack Goldsmith challenges the “conventional wisdom concerning the allocation of state and federal power in the *absence of . . . a controlling federal foreign relations enactment*.”⁴³⁶ Goldsmith goes on to observe that “[s]ometimes, states act in ways that adversely affect U.S. foreign relations but that do not violate any provision of the Constitution and that are *not preempted by federal statute or treaty*.”⁴³⁷ Judith Resnik suggests that, “[b]efore finding that national action is the exclusive means of interacting with ‘the foreign,’ [federal courts] ought to require *specific national legislative directives* as well as the presentation of detailed factual information about how concurrent or overlapping rules (federal and state) do harm national interests.”⁴³⁸ Similarly, Lea Brilmayer, though a strong proponent of direct enforceability of international law against the states, describes the “most convincing” counterargument to be that “*Congressional approval of international law* (either through the treaty process or *through statutory enactment*) is both a necessary and a

433. See, e.g., Goldsmith, *Federal Courts*, *supra* note 404, at 1622 (arguing that the breakdown between what is foreign and domestic “make it more difficult for federal courts to ascertain the need for and content of federal foreign relations law”).

434. G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1116 (1999) (critiquing the “special jurisprudential treatment” of cases with only a “nominal ‘foreign’ component”); Young, *supra* note 417, at 188 (arguing for the development of “sensible rules . . . to manage the inevitable conflict when two jurisdictions [(i.e. federal and state)] regulate similar subject matter.”).

435. A notable exception is G. Edward White, who critiques more broadly the “plenary federal power in foreign relations.” White, *supra* note 434, at 1116. However, White’s argument focuses on the problem of basing such plenary power upon mere “garden variety economic transactions taking place across international boundaries and sporadic, unpredictable geopolitical disputes,” which he describes currently as the “majority of foreign contacts by American citizens.” *Id.* Such instances, he makes clear, stand in direct contrast to legitimate justifications for plenary federal control “such as the need for secrecy and swiftness of action, or the embarrassment to the United States that might come from the intervention of parochial state or local interests in diplomatic relations.” *Id.* (emphasis added).

436. Goldsmith, *Federal Courts*, *supra* note 404, at 1620 (emphasis added).

437. *Id.* (emphasis added). See also Goldsmith, *Foreign Affairs Preemption*, *supra* note 411, at 177 (“[Federal courts] should eschew independent judicial foreign policy analysis, and preempt state law only on the basis of policy choices traceable to the political branches in enacted law.”).

438. Resnik, *Foreign as Domestic Affairs*, *supra* note 432, at 41–42 (emphasis added).

sufficient condition for invalidation of state law on the grounds of inconsistency with international law.”⁴³⁹

Notably, two recent cases where the Supreme Court *upheld* state prerogatives that butt heads with international law reinforced this “Congressional action” exception. *Barclays Bank PLC v. Franchise Tax Bd. of California* upheld a California tax on foreign multinational corporations even though the law would “impair[] federal uniformity and prevent[] the federal government from speaking with one voice” when regulating foreign commercial relations.⁴⁴⁰ In so holding, however, the Court deferred foreign affairs decisions to Congress: “[W]e leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”⁴⁴¹ Likewise, in *Breard v. Greene*, the Supreme Court declined to stay an execution despite the direct conflict between a Virginia procedural default rule and the Vienna Convention on Consular relations.⁴⁴² While more subtle, the *Breard* court also deferred to Congress, concluding: “[N]othing in our existing case law allows *us* to make that choice for [the Governor].”⁴⁴³

Even under a more moderate view of Congress’s foreign affairs power, Congress could pass legislation *directly* mandating that states abolish JLWOP. State JLWOP practice has put a clear strain on the diplomatic relations of the United States and interferes with our treaty and even possible customary international law obligations. Moreover, the JJAIA was introduced in part to respond to the foreign affairs implications of state JLWOP practice.⁴⁴⁴ From a practical standpoint, such a direct mandate, of course, would likely be impossible to pass. But certainly if Congress *could*, under its enumerated foreign affairs penumbra, pass such a direct mandate, Congress *can*, *a fortiori*, pass the JJAIA under its conditional Spending Power.

439. Brilmayer, *supra* note 408, at 329–30 (“Where the President or Congress acknowledges a norm of international law, then courts may rely on it to invalidate particular exercises of state power. Until Congress does so, courts (both state and federal) have no such power.”) (emphasis added).

440. Bradley, *New American*, *supra* note 416, at 1099 (summarizing *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994)).

441. 512 U.S. 298, 331 (1994). *Accord* *Atherton v. Fed. Deposit. Ins. Corp.*, 519 U.S. 213, 218 (1997) (“Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.” (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1988))).

442. 523 U.S. 371, 378 (1998).

443. *Id.* (emphasis added).

444. H.R. 2289, 111th Cong. § 2(5) (2009) (“While there are no youth serving such sentences in the rest of the world, research indicates that there are over 2,500 youth offenders serving life without parole in the United States.”).

c. Disparate Impact of JLWOP on Minorities

JLWOP sentences are disproportionately imposed on minorities, particularly African-American youths, who account for more than sixty percent of the current juveniles serving life without parole.⁴⁴⁵

In a February 2008 hearing before the United Nations Committee on the Elimination of Racial Discrimination, the Department of Justice defended these racial disparities. It argued that because of higher crime rates among black youth, the “disparate impacts are not per se evidence of racial discrimination. There is no proof that they were sentenced to life without parole because of racial discrimination.”⁴⁴⁶ However, after comparing the ratio between youths arrested for murder and those sentenced to life without parole among black and white youths respectively, and still finding significant inequalities, HRW concluded that, “[t]hese disparities suggest that there is something other than the relative criminality of these two racial groups—something that happens after their arrest for murder, such as discriminatory treatment by prosecutors, before courts, and by sentencing judges.”⁴⁴⁷ This unfortunate fact speaks strongly not only to the failure of individual state JLWOP experimentation,⁴⁴⁸ but also to the strong national interest justifying a reversal of the typical federalism balance.

The Reconstruction Amendments⁴⁴⁹ reflect a deep skepticism of state courts and legislatures and the need for enhanced federal power in areas related to race and discrimination.⁴⁵⁰ Among the most revolutionary aspects of the Fourteenth Amendment is Section Five, which gives Congress “power to enforce, by appropriate legislation, the provisions of [the Fourteenth amendment].”⁴⁵¹ At least in theory, this Section gives Congress “a positive grant of legislative power”⁴⁵² to “intrude into

445. HRW 2005 REPORT, *supra* note 38, at 39. In addition, African-American juveniles are more likely to enter the criminal justice system in the first place. They are “nine times more likely to be brought into custody than white children even though they make up just 16% of the total U.S. child population (compared to 78% white children).” GLOBAL JUSTICE REPORT, *supra* note 32, at 7.

446. *Id.* at 6.

447. *Id.* at 7.

448. See the discussion of JLWOP as a failed state experiment, *infra* Part IV(E)(3).

449. U.S. CONST. amend. XIII (prohibiting state-sponsored and private forms of slavery or indentured servitude); U.S. CONST. amend. XIV (enacting, inter alia, the equal protection, due process, and privileges and immunities clause); U.S. CONST. amend. XV (prohibiting state governments from denying a citizen the right to vote based on that citizen’s “race, color, or previous condition of servitude”).

450. See BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS 86–99 (1991) (describing his concept of “intertemporal synthesis,” which views the Reconstruction Amendments as a second formative era of constitutionalism in the United States).

451. U.S. CONST. amend. XIV, § 5.

452. *Katzenbach v. Morgan*, 384 U. S. 641, 651 (1966)

'legislative spheres of autonomy previously reserved to the States.'"⁴⁵³ However, the Supreme Court's jurisprudence has retracted this power in recent years.⁴⁵⁴

Under current law, Congress has remedial power to pass prophylactic legislation to correct state violations of the Fourteenth Amendment.⁴⁵⁵ But such legislation must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁴⁵⁶ In practice, this means Congress must first show that a state—or states—has violated a right protected by the Fourteenth Amendment, *as articulated by the Supreme Court*, and the remedial legislation must map precisely onto that violation in order to be upheld as appropriate.⁴⁵⁷ Yet under the strict scrutiny analysis applied to racial classifications, a violation of the Equal Protection Clause for legislation that is race-neutral on its face exists only if there is evidence of discriminatory intent, in addition to evidence of disparate impact.⁴⁵⁸ Thus although the disproportionate imposition of JLWOP on minorities described above evidences a disparate impact, discriminatory intent—as always—is difficult if not impossible to prove.⁴⁵⁹ The JJAIA would therefore likely not withstand constitutional scrutiny as an exercise of Congress' Section Five power, in part, because of the difficulties in meeting this standard. The JJAIA's national scope and the variance of state motivations in creating their existing JLWOP laws would make discriminatory intent particularly difficult to prove.⁴⁶⁰

For purposes of our discussion, however, the would-be

453. *United States v. Morrison*, 529 U.S. 598, 619 (2000) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)) (internal brackets omitted).

454. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (limiting the reach of Congress's enforcement power under Section Five of the Fourteenth Amendment to remedying violations of the Fourteenth Amendment as interpreted by the Supreme Court, as opposed to interpreting the reach of the Fourteenth Amendment itself).

455. *Morrison*, 529 U.S. at 625–26.

456. *Boerne*, 521 U.S. at 520.

457. *See id.* at 520–36.

458. *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

459. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (stating that finding discriminatory purpose demands careful inquiry into available evidence, and that the disproportionate effect of a given piece of legislation on a particular race may be an important starting point for finding discriminatory intent); Michael A. Zuckerman, *Constitutional Clash: When English-Only Meets Voting Rights*, 28 *YALE L. & POL'Y REV.* 353, 362 (2010) (noting that under current Supreme Court precedent "a state must intend specifically to discriminate against a suspect class—meaning that its purpose was to do so—in order for its action to be unconstitutional.").

460. *See, e.g., Morrison*, 529 U.S. at 626 (overturning Congressional legislation as not congruent or proportional under Section Five in part because the law "applie[d] uniformly throughout the Nation . . . [and] the problem of discrimination against the victims of gender-motivated crimes does not exist in all States.").

constitutionality of the JJAIA if passed under Section Five is not the important takeaway. Rather, the critical point is that there is a strong federal interest in JLWOP intervention because it is at least arguable that Congress *could* mandate the elimination of JLWOP under its power to rectify state-sponsored racial discrimination.

Thus, the federal interest in ending JLWOP is buoyed by externalities imposed on the nation by state sentencing practices, Congress's robust foreign affairs power, and JLWOP's implication of racial discrimination. This Article now turns to the other side of the federalism balance: the costs imposed by federal JLWOP intervention.

3. *The JJAIA and Slight Federalism Costs*

The strong federal interest in Congressional JLWOP intervention is balanced against the relatively slight federalism costs that would attend the passage of the JJAIA.

First, the JJAIA is minimally coercive. If a state fails to comply with the JJAIA three years after its enactment, the federal government will withhold ten percent of Edward Byrne Memorial Justice Assistance Grant Program funds.⁴⁶¹ However, the Byrne grant program already contains more than sixty conditional directives to states.⁴⁶² Mark Osler noted in written testimony submitted for the 2009 subcommittee hearing on the JJAIA that “[i]f the harm perceived in this bill is that the federal government is granting money in order to achieve federal (not state) policy goals, that pattern is already established by the grant program itself, and will not change whether or not this bill becomes law.”⁴⁶³

Even viewed in isolation, however, a ten percent reduction in federal funds would not be enough to turn “pressure” into “compulsion” under a Spending Power analysis.⁴⁶⁴ California, for example, where 227 individuals were serving JLWOP sentences as of 2008,⁴⁶⁵ received approximately \$55 million in 2009 through the grant program⁴⁶⁶ so would only lose approximately \$5.5 million if it failed to comply with the JJAIA. Pennsylvania, home to 444 individuals serving JLWOP, the largest number

461. H.R. 2289, 111th Cong. §3(d)(2) (2009).

462. 2009 Hearing, *supra* note 4, at 22–23 (testimony of Mark W. Osler, Professor, Baylor Law School).

463. *Id.* at 23.

464. *Cf.* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

465. HRW 2008 REPORT, *supra* note 13, at 3 fig.1.

466. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM: FY 2009 ALLOCATIONS AND DISPARATE INFORMATION, CALIFORNIA (2009), <http://www.ojp.usdoj.gov/BJA/grant/09jagallocations.html> (last visited July 3, 2011).

in the country, would only lose \$1.7 million.⁴⁶⁷ Louisiana, home to the second highest number (334), would only lose \$800,000.⁴⁶⁸

Second, because states would maintain ultimate decision-making authority about whether an individual juvenile offender is released, state accountability under the JJAIA is preserved, rather than obscured.⁴⁶⁹

Third, the legislation would impose few additional costs on the states. In stark contrast to the sweeping and costly changes that took place in the '80s and '90s in state criminal justice and sentencing policies, the JJAIA represents "relatively minor, incremental, and well-substantiated modifications."⁴⁷⁰ Parole boards are already in place and capable of handling a minor increase in their docket. The JJAIA mandates meaningful parole review "not less than once during the first 15 years of incarceration, and not less than once every 3 years of incarceration thereafter."⁴⁷¹ The states would therefore not be required to grant parole review to the vast majority of individuals right away. While approximately 703 inmates nationwide were sentenced to JLWOP in 1995 or earlier,⁴⁷² making them eligible for parole review under the JJAIA if passed in 2010, the JJAIA still would not require states to grant these individuals parole review immediately.⁴⁷³ The JJAIA provides a three-year window for state compliance with the Act, as well as a discretionary two-year extension for states "making a good faith effort" to comply with the Act.⁴⁷⁴ Thus, states will have up to five years to grant parole review even for individuals who would immediately be affected by the Act.

Fourth, the JJAIA would not necessarily undermine local morals and values. While spending legislation like the No Child Left Behind Act imposed a one-size fits all policy that was arguably out of step with many state and local educational values,⁴⁷⁵ public opinion polls show that much

467. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM: FY 2009 ALLOCATIONS AND DISPARATE INFORMATION, PENNSYLVANIA (2009), <http://www.ojp.usdoj.gov/BJA/grant/09jagallocations.html> (last visited July 3, 2011).

468. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM: FY 2009 ALLOCATIONS AND DISPARATE INFORMATION, LOUISIANA (2009), <http://www.ojp.usdoj.gov/BJA/grant/09jagallocations.html> (last visited July 3, 2011).

469. See discussion *supra* Part III(D)(2)(b) and accompanying notes.

470. 2009 Hearing, *supra* note 4, at 22 (testimony of Mark W. Osler, Professor, Baylor Law School).

471. H.R. 2289, 111th Cong. § 3(a)(1) (as reported by H. Subcomm. on Crime, Terrorism, and Homeland Sec., May 6, 2009).

472. HRW 2005 REPORT, *supra* note 38, at 31 fig. 3.

473. H.R. 2289, 111th Cong. § 3(d)(2) (2009).

474. *Id.* §3(d)(1).

475. See *No Child Left Behind*, *supra* note 364, at 897-899 (highlighting the widespread displeasure among various states with the No Child Left Behind Act's stringent requirements and value code, including a state representative who criticized the NCLB as a

of the country continues to believe strongly in juvenile rehabilitation, a value that permeates the JJAIA.⁴⁷⁶ Furthermore, given the relatively recent expansion of JLWOP in states, the public and media's sympathetic response, and the clear public interest in rehabilitating juveniles, it is difficult to imagine that merely allowing for parole review for juveniles, and not necessarily release, would inexorably clash with local morals.

Finally, it is a stretch even to claim that the current state practice of JLWOP is an "experiment," deserving of deference. The concept of experimentation implies considered thought, testing over time, and reasoned decision-making. Experimentation is the polar opposite of impulsivity. However, as discussed in Part III(D)(3)(b), the juvenile justice reforms that occurred in the get-tough era, including JLWOP at the symbolic extreme, were anything but the product of rational thought and expertise. JLWOP was a political poker chip, used to up the ante in an arms race of politicians aiming to appear tougher on crime, regardless of what they actually considered good policy and regardless of what their constituents actually wanted. The result is not only a harsh sentence, unique in the rest of the world, but an inherently unworkable one.

I recognize that these problematic characteristics of JLWOP could map onto almost all state sentencing decisions without any logical stopping point. But even assuming that JLWOP represents a "reasoned experiment," the JLWOP experiment has undeniably failed. Deterrence is among the key justifications for most sentencing policies.⁴⁷⁷ But there is strong evidence—both empirical and scientific—that JLWOP does not deter children from committing crimes. In the wake of the imposition of adult sentences in nearly all states, the number of juvenile crimes quadrupled from 1965 to 1990.⁴⁷⁸ Additionally, HRW and AI note that because of developmental differences, "young people are less likely than adults to pause before acting, and when they do, research has failed to show the threat of adult punishment deters them from crime."⁴⁷⁹ Their report concludes that deterrence is unlikely because "adolescents cannot really grasp the true significance of the sentence."⁴⁸⁰

JLWOP is also not supported by the three other main justifications for sentencing policies: rehabilitation, retribution, and incapacitation. JLWOP rejects out of hand any hope of rehabilitation for youth offenders. As Connie De La Vega and Michelle Leighton argue, "[w]ith no hope of

"blanket over all the country").

476. See *supra* notes 302–309 and accompanying text.

477. See *Ewing v. California*, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Some or all of these justifications may play a role in a State's sentencing scheme.").

478. Schirmer, *supra* note 397, at 732.

479. HRW 2008 REPORT, *supra* note 13, at 10.

480. *Id.*

release, they feel no motivation to improve their development toward maturity. This is reinforced by the fact that youths [serving JLWOP] receive little or no rehabilitative programming.”⁴⁸¹ JLWOP is also a disproportionate form of retribution because juveniles, by virtue of their youth and diminished mental capacity to understand the difference between right and wrong, are arguably less culpable as a class of defendants.⁴⁸² Finally, incapacitation goals are not served by sentencing a juvenile to life without parole. No doubt, JLWOP serves the goal of incapacitation by removing certain offenders from the streets, but “the need to incapacitate a particular offender ends once he or she has been rehabilitated.”⁴⁸³ Scientific evidence has shown that juveniles as a class have more potential for rehabilitation than other classes of offenders.⁴⁸⁴ Given this fact, HRW and AI argue “[t]here is no basis for believing that all or even most of the teens who receive life without parole sentences would otherwise have engaged in a life of crime.”⁴⁸⁵

Another sign that JLWOP has failed as a sentencing policy is the multitude of harmful unintended consequences that result from its imposition.

First, no legislator could have foreseen the high number of juveniles currently serving the sentence, especially the very young (fourteen and under). JLWOP is in theory a punishment reserved for the worst of the worst. However, the simultaneous passage of ever-harsher transfer provisions, felony murder rules, mandatory sentences, and the elimination in many states of juvenile court hearings altogether for certain crimes led to an exponential growth in children serving the sentence, far exceeding any expectations, reasonable or not.⁴⁸⁶ Although crime rates have declined

481. De La Vega & Leighton, *supra* note 13, at 985.

482. HRW 2008 REPORT, *supra* note 13, at 10.

483. *Id.*

484. See, e.g., GLOBAL JUSTICE REPORT, *supra* note 32, at 1 (“Imposing [LWOP] on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child’s rehabilitation and redemption.”); Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System—A Former Prosecutor’s Perspectives on Reform*, 48 FAM. CT. REV. 322, 328 (2010) (“Recent advances in scientific and psychosocial research confirm that anatomical immaturity renders youth less able to assess risks, control impulsive behavior, and engage in moral reasoning. This body of research also confirms that youth are more amenable to rehabilitation than adults as their brains continue to mature.”) (citing Brief for American Medical Association, et al. as Amici Curiae Supporting Petitioner, *Roper v. Simmons*, 543 U.S. 551 (2005), at 10).

485. HRW 2008 REPORT, *supra* note 13, at 10.

486. GLOBAL JUSTICE REPORT, *supra* note 32, at 6 (providing overview of state juvenile justice initiatives, including judicial waiver and transfer provisions, as well as the elimination of juvenile court proceedings, which made JLWOP’s high rate possible); *id.* at Appendix, 26–34 (listing state laws, including mandatory life without parole and transfer laws, as of 2007). See also *supra* note 242 for a summary of how these factors combined to create the high rate of JLWOP in America.

steadily since 1994, the rate at which states sentence minors to life without parole is an estimated three times higher.⁴⁸⁷

Second, because there were relatively few juveniles serving time in adult prisons prior to the get-tough era, there were also fewer empirical studies on the consequences of locking children away with adults. Today, after an eighty percent increase in the number of juveniles prosecuted in adult court in the last generation, the effects are clear and dire.⁴⁸⁸ Because only a small fraction of prisons maintain separate housing for youthful offenders,⁴⁸⁹ children are five times more likely to be sexually assaulted in adult prisons than in juvenile facilities,⁴⁹⁰ are more susceptible to severe mental and emotional trauma, and are more likely to commit suicide.⁴⁹¹ EJI attorneys, for example, spoke with an inmate who was sentenced to JLWOP when he was fifteen:

Since being incarcerated in adult prison, this boy has been repeatedly raped. He was forced to prostitute himself in exchange for protection from physical beatings and sexual assault by other inmates. His ‘protectors’ forced him to have their names tattooed on his body to signify their ownership of him. Prison guards target him for beatings and harassment because of his sexual relationships into which he has been forced. His nickname, “Brown Sugar,” is one of the prison tattoos that brand him as a victim of repeated and ongoing sexual abuse.⁴⁹²

EJI noted that “[t]his boy’s story is not unusual.”⁴⁹³

Finally, the imposition of JLWOP ignores the significant medical research, cited by Justice Kennedy in *Roper v. Simmons*, and reasserted in

487. H.R. 2289, 111th Cong. § 2(6) (“The estimated rate at which the sentence of life without parole is imposed on children nationwide remains at least 3 times higher today than it was 15 years ago.”); GLOBAL JUSTICE REPORT, *supra* note 32, at 6.

488. Guggenheim, *supra* note 300, at 53.

489. HRW 2005 REPORT, *supra* note 38, at 65 (“A national survey conducted by the U.S. Department of Justice . . . found that only 13 percent of institutions surveyed in the single year of 1997 maintained separate units for child offenders.”) The study also cautioned that “the presence of separate housing for youthful offenders does not necessarily mean that all youthful offenders were housed in these separate facilities.” (citing JAMES AUSTIN, KELLY DEDEL JOHNSON & MARIA GREGORIOU, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS 43 (2000)).

490. EJI REPORT, *supra* note 32, at 14 (citing 42 U.S.C. § 15601 (2003) (noting Congressional findings in support of The Prison Rape Elimination Act)).

491. EJI REPORT, *supra* note 32, at 12, 15, 18 (describing several JLWOP clients’ suicide attempts); HRW 2005 REPORT, *supra* note 38, at 63–64 (“Perhaps it is not surprising that the psychological strain of a sentence that will only end in death causes youth offenders to contemplate suicide.”); HRW 2008 REPORT, *supra* note 13, at 8 (“Once in prison, youth offenders sentenced to life without parole believe that society has thrown them away, and their loss of hope can result in self-harm and suicide.”).

492. EJI REPORT, *supra* note 32, at 15.

493. *Id.*

Graham v. Florida, about the developmental differences between children and adults that justify more humane treatment. The fact that the kind of medical unanimity on this topic exists illustrates the flawed logic of JLWOP practices. The fact that the states continue to ignore this unanimity further evidences the need for a federal fix.

4. Conclusion

The structure and content of the JJAIA preserve important federalism values while implementing a necessary and proper federal interest. The federal interests are so strong, in fact, that even if the JJAIA constituted a direct mandate and carried with it far greater federalism intrusiveness, under the framework developed in this Article the legislation would be on solid constitutional and normative footing. Federalism concerns should therefore not defeat passage of the JJAIA.

V.

CONCLUSION

This Article examined JLWOP's potential as an antidote to Congress's general reluctance to pass leniency legislation. It began by describing the state of JLWOP advocacy, which has focused primarily on litigation and state-by-state abolition strategies. While these advocacy efforts are commendable and have resulted in many positive developments for the JLWOP abolition cause, more attention should be focused on Congressional advocacy. The narrow and limited holding in *Graham* only adds urgency to the need for federal intervention like the JJAIA to address the vast majority of individuals still serving and eligible for JLWOP.

The Article then turned to the political process bias, one of the two primary obstacles to the passage of any leniency legislation. The politics of criminal law have generally resulted in a one-way ratchet toward harsher policies and punishments, but JLWOP is an issue that operates outside of this mold. The media have found a story in JLWOP, the public has tuned in, and Congress can no longer brush the issue aside as political kryptonite that is not worth the risk, time, or energy.

The Article then examined whether JLWOP federal legislation, the JJAIA in particular, properly respects criminal law federalism values. It concluded that Congress will not be able to legitimately stand behind federalism as an excuse for inaction because federalism concerns are overstated in the JLWOP context. The state practice of JLWOP has failed and the breakdown has hurt the United States' international reputation and standing. With an administration especially keen on the United States' reemergence as the leader in international human rights, Congressional action that enacts the JJAIA through its Spending Power is both a

necessary and proper means to return not only to our founding principles, but also to the original and important goals of our juvenile justice system.

As I made clear at the outset of this Article, however, I am still skeptical about the likelihood of the passage of the JJAIA. And even if the JJAIA does ultimately pass, it may not be the ideal legislation for JLWOP reformists. After all, with sufficient political support and improved state economies, legislatures could merely forego federal funds in order to continue their JLWOP practice. Moreover, the JJAIA does not address lengthy juvenile term-of-years sentences *with* the possibility of parole, which states are still free to impose. More significantly, the JJAIA attacks the end consequence, not the root causes of JLWOP. Perhaps a better approach would be to address and fix the issue from the ground up. Perhaps Congress and advocates should instead focus on mandatory sentencing practices for juveniles, transfer provisions, the separation of adults and children in prison, and more broadly, improvements to the juvenile justice system and a reemergence of the rehabilitative ideal in juvenile sentencing. These step-by-step reforms may also be easier for politicians and their constituents to stomach.

Regardless of the avenue taken for JLWOP reform on the national level, however, the observations and empirics in this Article carry the same force and relevance. No matter the circumstances of the crime, no matter the public's general punitiveness, no matter the normal political process, no matter traditional federalism concerns, no matter our obligations under international law, kids are just different.

