Eliminating Life Without Parole for Juveniles: An Incremental and Principled Change

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My name is Mark Osler. I am a former federal prosecutor (E.D. Mich.) and currently serve as Professor of Law at Baylor Law School in Texas. My teaching and study concentrate on sentencing and questions of faith related to criminal law. I welcome the chance to address the issue of life without parole for juveniles. My testimony will focus on placing this bill in context—both the larger context of broad changes in sentencing and the idea that this bill is consistent with a principle that is a part of the faith of most Americans.

I believe in punishment, and I believe that incarceration of the violent and the dangerous is necessary to an ordered society. I am proud of much of my work as a prosecutor, and that includes urging judges to impose many long prison terms. My time as a prosecutor also allowed me insight into a city with a particularly troubled legacy of violent children. In my hometown of Detroit, that legacy was largely created in 1978. That summer, a drug trafficking gang known as Young Boys Incorporated took over much of the heroin trade on the streets of Detroit. Their tactics were particularly heinous—as its name reflected, it relied on juveniles to do much of the hard work, and the killing, related to drug trafficking. The template established by Young Boys Incorporated was copied by drug gangs in that city for at least two decades, resulting in a disheartening number of children accused of very serious crimes. As a prosecutor in Detroit in the late 1990's, I saw the power of this legacy as young boys and girls were still commonly used in the drug trade.

The bill under consideration would not allow children such as those involved with Young Boys Incorporated to escape prosecution, or to avoid a long prison sentence. It would, however, give them hope that someday,

perhaps in middle age, they might see something other than the inside of a prison. Life with the possibility of parole would be both a reasonable and a principled incremental change.

I. The Context of Modern Sentencing

The changes proposed by H.R. 2289 are not sweeping. Rather, they represent an adjustment that would affect relatively few cases, as compared with the total criminal caseload. This is consistent with the current trend in criminal law generally. We are not in a period of sweeping legal changes but one of small steps taken to "right-size" the relationship between retribution, rehabilitation, and relative culpability. I will first discuss this broader context, and then contrast it with a period of genuine sweeping change, 1984-1986.

In the federal and state criminal justice systems, we see similar movement in many jurisdictions. The members of this committee are very familiar with the changes at the federal level, as they are very often considered here. Notably, these changes have been small and thoroughly deliberated.

Most recently, for example, we have seen a reconsideration of the federal sentences we impose for possessing and trafficking in crack cocaine. Thus far, those changes have been driven by the Supreme Court and the United States Sentencing Commission. The Supreme Court has ruled, in *Kimbrough v. United States*[1] and *Spears v. United States*,[2] that sentencing judges may reject the 100:1 ratio between powder and crack cocaine contained in the federal sentencing guidelines. In turn, the Sentencing

[1] 128 S. Ct. 558 (2007).
[2] 129 S. Ct. 840 (2009).

Commission has lessened (but not eliminated) that disparity. Meanwhile, members of this committee have authored bills which would entirely eliminate the disparity between crack and powder. Though these changes are significant, they only affect a fraction of drug cases, which in turn are only a fraction of the total criminal caseload. Moreover, the changes to the crack guidelines have been incremental and well-considered; for example, these changes have found support in the massive 2007 study of crack sentencing conducted by the Sentencing Commission itself.

In the realm of the death penalty, we are also in an era of incremental change. In relation to this bill, for example, the Supreme Court's 2005 decision in *Roper v. Simmons*[3] did not radically change our use of the death penalty, but rather eliminated a small group of defendants (children) from eligibility for the sanction of death.

In the states, the movement is also towards incremental rather than sweeping changes. In many states, such as Ohio, these changes are driven by financial constraints as tax revenues dwindle. One of the more severe financial crises affecting criminal law is in California, but even there we are seeing a genuine reluctance to engage in wholesale change, an a deliberative dialogue about incremental change has taken place.[4] The mood overall is not an atmosphere of dramatic or reckless transformation, but instead reflects ideas (like this bill) which constitute a thoughtful re-evaluation of narrow and specific aspects of sentencing and incarceration.

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[3] 543 U.S. 551 (2005).

[4] For more information on the California budget cuts and the changes that result, see the excellent California Correctional Crisis blog (http:Californiacorrectionscrisis.blogspot.com), which is maintained by students and faculty and students at U.C.-Hastings Law School.

Not every era is this way. In contrast, from 1984-1986, federal criminal law was drastically changed, often with little deliberation or debate. The Sentencing Reform Act of 1984 abruptly abolished parole and created the United States Sentencing Commission to establish strict and mandatory guidelines to restrict judicial discretion in sentencing. The same year, the Bail Reform Act of 1984 created broad presumptions in favor of detention before trial, which was a radical change from prior practice. Subsequently, the Anti-Drug Abuse Act of 1986 mandated harsh mandatory minimum sentences for drug crimes, despite the fact that no hearings whatsoever were held on this change which may have been the most significant of all.[5]

Getting rid of parole entirely, largely rejecting presumptive bail, and sharply limiting judicial discretion in nearly all criminal cases—that is drastic change, and in stark contrast to the relatively minor, incremental, and well-substantiated modifications contained in this bill.

The fact that these are small changes on a large body of existing law is also important context in relation to the federalism concerns that some members of this committee have expressed. The bill would withdraw some funding from states which continue to impose sentences of life without parole on those who committed their crimes as juveniles, and there can be no doubt that this implicates questions of federalism. This bill would, certainly, use federal money to direct state decisions. However, the funds would be withheld under the provisions of the Edward Byrne Memorial Justice Assistance Grant Program, which already directs state decisions in a startling number of ways. That program presently contains well over 60 specific

[5] Those mandatory minimums are codified at 21 U.S.C. § 841(a) . For a compelling discussion of this process see Eric E. Sterling's *Drug Laws and Snitching: A Primer,* available at http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/.

directives to the states on what they must (or must not) do to receive federal funding.[6] While this bill would add one additional condition to the use of this money, a challenge to federalism cannot be properly viewed in isolation. If 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.

II. The Principle of Balance

The present trend towards incremental changes in which we back away from the most retributive parts of our criminal justice scheme is not only consistent across jurisdictions, but echoes the traditional religious value of seeking a balance between the virtues of justice and mercy.

In what has become one of the best-known scriptural passages in this nation, Micah 6:8 advises the people of Israel thus: "And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God." To those in criminal law, the passage presents a challenge. If justice means to treat people equally and with a sense of punishment, and mercy means to offer an unearned chance for redemption, the two are in tension.

This tension reveals at least two truths: That we are to be humble in considering the question, and that our justice systems must incorporate some elements of both justice and mercy.

This requirement of balance between justice and mercy speaks directly to the bill at issue, which does stake out territory somewhere between purely retributive justice (life without parole) and mercy (release or

[6] 42 U.S.C. §§ 3743- 3797.

a short sentence), and neatly incorporates aspects of both. The bill allows for retributive sentences, even of life in prison, but also offers the hope of redemption in the form of parole. Notably, this hope is different than the promise of a shorter sentence, and is tied to the behavior of the prisoner himself, as parole will more likely be granted to those who have turned away from violence and drugs.

The child sentenced to life *with* the possibility of parole is still likely to perceive the weight of a nearly overwhelming punishment. The position of such a convict is perhaps best described in Lamentations 3:27-29: "It is good for a man to bear the yoke while he is young. Let him sit alone in silence, for the Lord has laid it on him. Let him bury his face in the dust—there may yet be hope."

Life with the possibility of parole for a child will encompass precisely this balance between values Americans treasure.

III. Conclusion

I cannot pretend that this is an easy issue. As a child, our family was close with our next-door neighbors on Harvard Road in Detroit. The children played in the yards as the parents sat on porches and laughed. We remained close as the families moved and the children grew. In 1990 the father in that family, Benjamin Gravel, was shot and killed by a group of fifteen-year-old and sixteen-year-old children who were trying to steal his car. Two of the defendants received life without parole sentences for killing the man I had run to with skinned knees or important news. I saw directly the righteous pain and anger of his wife and children.

Though the issue is difficult for those of us who have known or been victims, we should not look away. There is something very deep running

through a discussion of imprisoning children for their natural life, because the crimes of our children reveal so much about the nature of our society as a whole: the children who killed Mr. Gravel were a part of my community. I fear that part of what we do when we lock up a child forever is absolve ourselves, the adults. So long as the crime is the result of a child's evil alone (and thus merits giving up on that child for his natural life), we bear no responsibility as a society, as adult political actors. Yet, an examination of the lives of child offenders reveals something different— what we would like to see as pure evil is too often a product of what we have tolerated in our community of adults. The shocking thing about Young Boys Incorporated is not that children committed murders and sold drugs on the command of adults, but that they were made to do that for the eight years that the organization thrived in plain sight. For *eight years* we tolerated an organization that did such harm, and addressed it largely by sweeping up those very children at the center of the evil.

Addressing the societal forces that mold felon-children raises complex societal questions that run into thorny issues of economics, culture, the role of government, and free speech. The easy answer is to ignore those questions and push all of the evil onto the child, but to do so is wrong. To lock up a child forever is against our good and present impulse to back away from the most severe retributive sentences. It also is against a faith imperative, the balance between justice and mercy, which informs Americans when we are at our best.