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# WHAT'S BENEATH THE *GRAHAM* CRACKER?: THE POTENTIAL IMPACT OF COMPARATIVE LAW ON THE FUTURE OF JUVENILE JUSTICE REFORM AFTER *GRAHAM V. FLORIDA*

David A. Shapiro\*

"There can only be a few issues where government policies in countries like Libya and Burma appear more progressive than those in the United States. Juvenile sentencing is one of them."<sup>1</sup>

"But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to [the majority's] appeal . . . to the views of . . . members of the so-called 'world community' . . . whose notions of justice are (thankfully) not always those of our people."<sup>2</sup>

## INTRODUCTION

In the United States, juvenile sentencing reformers find themselves battling parties espousing varied and conflicting interests. American juvenile sentencing practices are the harshest in the world, despite the fact that the United States once was the global leader in juvenile justice reform.<sup>3</sup> Nations spanning the six inhabited continents modeled their

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<sup>1</sup> Ari Paul, *America's Imprisoned Kids*, AM. PROSPECT (May 10, 2007), <http://prospect.org/article/americas-imprisoned-kids>.

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting).

<sup>3</sup> See Barry Krisberg, *Rediscovering the Juvenile Justice Ideal in the United States*, in *COMPARATIVE YOUTH JUSTICE: CRITICAL ISSUES* 6–7 (John Muncie & Barry Goldson eds., 2006) [hereinafter *CRITICAL ISSUES*].

enlightened, compassionate juvenile justice systems on our own.<sup>4</sup> Today, however, the roles are reversed. It appears that it is the fifty states that have much to learn from juvenile justice reforms overseas.

This article examines the Supreme Court's application of international law in its Eighth Amendment jurisprudence and argues that reformers should look beyond the Court's analysis and use comparative law to obtain their goals of juvenile sentencing and policy reform. In 2010, the United States Supreme Court had the opportunity to declare unconstitutional the sentence of life without the opportunity of parole for crimes committed by minors (also known as juvenile life without parole, or "JLWOP").<sup>5</sup> Such a decision would have remedied a discrepancy that sets the United States apart from virtually all other nations.<sup>6</sup> Instead, in *Graham v. Florida*, the Court tiptoed around the issue,<sup>7</sup> holding that JLWOP violated the Eighth Amendment only when imposed for non-homicide crimes and that while "a state need not guarantee the offender eventual release . . . it must provide . . . some realistic opportunity to obtain release before the end of that term."<sup>8</sup>

The holding in *Graham* left many questions unanswered: What constitutes a "realistic opportunity to obtain release?"<sup>9</sup> What if our "standards of decency"—the relatively fluid standard used to measure the constitutionality of state punishment—evolve more within the next few years?<sup>10</sup> Will

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<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *Juvenile Life Without Parole (JLWOP)*, CTR. FOR CHILD. L. & POL'Y, <http://www.cclp.org/jlwop.php> (last visited Jan.15, 2012).

<sup>6</sup> See *Juvenile Life Without Parole*, NAT'L CTR. FOR YOUTH L., [http://www.youthlaw.org/juvenile\\_justice/6/](http://www.youthlaw.org/juvenile_justice/6/) (last visited Jan. 15, 2012).

<sup>7</sup> To be fair, some scholars consider the *Graham* decision to be a giant leap in Eighth Amendment jurisprudence, marking "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." Scott Hechinger, *Juvenile Life Without Parole (JLWOP): An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 410 (2011).

<sup>8</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

<sup>9</sup> See Lloyd Dunkelberger, *Juvenile Offenders Still Get Near-Life Terms*, SARASOTA HERALD-TRIBUNE, Nov. 21, 2010, available at <http://www.heraldtribune.com/article/20101121/ARTICLE/11211086> (wondering the same).

<sup>10</sup> "Standards of decency have evolved since 1980. They will never stop doing so." *Graham*, 130 S. Ct. at 2036 (Stevens, J., concurring).

*Graham* soon be extended to homicide offenses?<sup>11</sup> Those questions I leave for others.<sup>12</sup>

Rather, this article argues that scholars ought to explore the views that Justice Scalia rejected out-of-hand in his dissent—that the Supreme Court “should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions.”<sup>13</sup> Indeed, advocates ought not wait for the next Supreme Court decision to argue for reforms. They can use Scalia’s reasoned bases relative to the far more progressive juvenile justice policies of other nations to pursue change domestically through state and local legislatures.

This tactic is necessary for two reasons. First, conservatives on the Supreme Court will continue to rail against the use—even the mere consideration—of international law, rendering the Court’s liberals, allied with Justice

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<sup>11</sup> Clearly, the United States Supreme Court’s juvenile jurisprudence continues to surprise scholars. In 2010, Jeffrey Fagan argued that “the best way to understand *Graham* is to see it as results-oriented. The Court denied juvenile LWOP to non-murderers so that it could save mandatory LWOP for capital crimes and other murders.” Jeffrey Fagan, *Juvenile Justice Delayed?*, NAT’L L.J., June 14, 2010, available at <http://www.law.yale.edu/news/11875.htm>. Following *Roper*, Fagan continued, “the Court would have risked a crisis of legitimacy if it went the next step and banned the second-harshes punishment, no matter how logical that extension might be.” *Id.* On March 20, 2012, the Supreme Court heard oral argument on two cases related to the imposition of JLWOP for homicide crimes, but will most likely limit its holding to young teens. Petition for Writ of Certiorari, *Jackson v. Arkansas*, 2011 WL 5322575 (No. 10-9647); Petition for Writ of Certiorari, *Miller v. Alabama*, 2011 WL 5322568 (No. 10-9646).

<sup>12</sup> Scholars have already started to answer them. See, e.g., Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75 (2010) (commenting on whether *Graham* provides any hope at all for sentencing reform); Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?*, 5 HUM. RTS. L. REV. 393, 400 (2005) (arguing that the *Roper* decision should apply to all JLWOP); Elizabeth Cepparulo, Note, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2007) (arguing that the *Roper* decision should apply to all JLWOP). Some commentaries appear to be more like stabs in the dark. See generally Richard S. Frase, *Graham’s Good News—and Not*, 23 FED. SENT’G REP. 54 (2010) (arguing that *Graham* will most likely not be applied beyond its present context of juvenile non-homicide offenses); Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1 (2010) (arguing that there may not be much progress).

<sup>13</sup> *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

Kennedy, far too timid to explicitly harness foreign law to effect change.<sup>14</sup> Because federal decisions have been so tentative in their embrace of international standards,<sup>15</sup> state legislatures, rather than the federal courts, ought to be the focal point of juvenile justice reform for advocates seeking to highlight both the progress made and standards developed abroad. Second, the best policy choices can only come about after comparing and considering the best ideas. Using international ideas at the state and local levels will maximize the amount of reform-oriented action and thus promote the change advocates seek.

This article proceeds in three parts. Part I discusses how the United States Supreme Court has used international law in its Eighth Amendment jurisprudence, focusing in particular on how its decisions have in some instances relied upon, and in other instances repudiated, international law.<sup>16</sup> Even where the justices incorporated international law into judicial decision-making, the current treatment of international sources fails to provide the nuanced approach necessary to produce compelling change in the field of juvenile justice reform.

Part II posits that reformers' efforts are misplaced when they emphasize international law as a rationale to encourage this country's federal courts to increase leniency on juvenile offenders. Specifically, I argue that the current focus relies too heavily on international treaties that the United States has not even ratified, such as the United Nations Convention on the Rights of the Child (CRC), and on broad generalizations regarding the practices of the Western world as a whole. This focus is improper not only because the sources lack nuance, but because international law does not just lead—it follows. International legal norms do not just set standards—they are derived from pre-existing policies and laws. We ought to look

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<sup>14</sup> See, e.g., Jim Kelly, *U.S. Supreme Court Clarifies Limits on its Use of International Law*, GLOBAL GOVERNANCE WATCH (May 19, 2010), [http://www.globalgovernancewatch.org/spotlight\\_on\\_sovereignty/us-supreme-court-clarifies-limits-on-its-use-of-international-law](http://www.globalgovernancewatch.org/spotlight_on_sovereignty/us-supreme-court-clarifies-limits-on-its-use-of-international-law).

<sup>15</sup> See *id.*

<sup>16</sup> See generally James I. Pearce, *Note: International Materials and the Eighth Amendment: Some Thoughts on Method*, 21 DUKE J. COMP. & INT'L L. 235 (2010) (explaining that the Court wasted opportunities in both *Roper* and *Graham* to clarify the methodology by which the majorities incorporated international opinion into their Eighth Amendment jurisprudence).

to the rationales behind the laws and policies of individual countries, rather than countries as groups, viewing the CRC as a compromise, rather than as the gold standard. This new framework emphasizes a dynamic, comparative approach to juvenile rights reform in America over a consensus-based international law paradigm that has, so far, been the go-to standard for advocates.

In Part III, using the framework I have established, I argue that advocacy emphasizing reforms and policies of individual nations directed towards state legislatures is the best way to reform juvenile sentencing. By evaluating the rationales that various nations have put forth to justify their more flexible approaches to juvenile sentencing, reformers here can change not only sentencing, but also the whole arena of juvenile justice. I examine decisions of foreign courts and the policy choices of legislatures internationally. By learning from the trial and error of other sovereign nations,<sup>17</sup> we can reform juvenile sentencing nationwide, well beyond the timid limits that the Supreme Court established in *Graham*.<sup>18</sup> Ultimately, I believe this more nuanced approach is illustrative of how far juvenile sentencing reform can and should go in the United States.<sup>19</sup>

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<sup>17</sup> "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." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617, 630 (1999) (writing, about the context of ideas for internet governance, "[o]ther forms of regulatory arbitrage suit U.S. interests . . . given our federal system, however, it seems a little odd to find . . . that the contribution of nations as 'big labs of democracy' is not recognized.") (emphasis added).

<sup>18</sup> And that may or may not change in the near future, as it looks beyond *Graham*'s implications, most likely to juveniles who have committed homicide.

<sup>19</sup> This article does not address how the Supreme Court has used international law in weighing due process protections for juveniles. Because the juveniles facing JLWOP have been transferred to adult court, Eighth Amendment, rather than Fourteenth Amendment standards apply to the sentences given. See Mark Soler, Dana Schoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 508 (2009).

I. THE CAUTIOUS AMBIGUITY OF EIGHTH AMENDMENT  
JURISPRUDENCE

*A. The Supreme Court and International Law within an Eighth Amendment Framework*

Today, in determining whether a sentence violates the Eighth Amendment of the United States Constitution,<sup>20</sup> the Supreme Court looks to what it has termed the “evolving standards of decency that mark the progress of a maturing society.”<sup>21</sup> To negotiate<sup>22</sup> the current evolving standard, the Justices first use “objective indicia of consensus.”<sup>23</sup> These include the sentencing policies of state legislatures<sup>24</sup> and actual sentencing practices.<sup>25</sup> Then the Court applies its “own independent judgment” to determine violations of constitutionality.<sup>26</sup>

Advocates have struggled to find a place for international law within this muddled framework.<sup>27</sup> The “own independent judgment” prong is vague and seems to grant the Justices much leeway to hold a sentence cruel and unusual. On one hand, this prong implicates international norms because, in

<sup>20</sup> “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

<sup>21</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>22</sup> I use this term because some scholars believe that the Court does not actually apply the “evolving standards” test. See John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT’G REP. 87 (Oct. 2010) (arguing that the Supreme Court is at least tacitly leaving the “evolving standards of decency test behind”).

<sup>23</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

<sup>24</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>25</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 831–32 (1988) (plurality opinion).

<sup>26</sup> *Roper*, 543 U.S. at 564.

<sup>27</sup> Amnesty International argues that international “standards also provide an important indicator of evolving standards of decency, which in turn illuminate the contours of acceptable conduct under the Eighth Amendment.” Brief for Amnesty International et al. as Amici Curiae Support of Petitioners, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) [hereinafter Brief for Amnesty International]; see also James I. Pearce, *Note: International Materials and the Eighth Amendment: Some Thoughts on Method*, 21 DUKE J. COMP. & INT’L L. 235 (2010) (noting that one could fit international law into either the subjective prong or the objective indices prong).

today's burgeoning, fast-globalizing marketplace of ideas, the Justices' opinions are at least subtly informed by laws and norms of other nations.<sup>28</sup> Indeed, David Nelkin posits: "[in] a globalizing world, legal systems find their place in a field of 'inter-cultural legality' whereby other models (or better, models of models) serve as cultural resources for development of our own system through processes of imposition, imitation or rejection."<sup>29</sup>

Unfortunately, pressure from conservatives prevents the Justices from placing real meaning in the sentencing laws of other nations, or at least prevents them from being honest in their use of international law.<sup>30</sup> Instead, Justices refuse to admit the persuasive power contained in international law, even when there is no reason to cite to it other than for its persuasion. Thus, juvenile justice advocates tackling sentencing reform should first address what I call "the honesty problem."

### *B. The Supreme Court's Use of International Law & The Honesty Problem*

#### 1. Introduction

Throughout its jurisprudence, the United States Supreme Court has refused to quantify anything approaching the exact value or even significance of international law.<sup>31</sup> I call this "the

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<sup>28</sup> See David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 181 (2006) (arguing that the Supreme Court's *Roper* opinion did not admit to its true rationale for finding capital punishment for juveniles unconstitutional and that, in fact, an honest reading of *Roper* necessitates a reliance on international law); cf. Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, 95 J. CRIM. L. & CRIMINOLOGY 427, 495 (2005) (arguing that since the Court had considered the constitutionality of the juvenile death penalty in 1989 in *Stanford v. Kentucky*, that societal norms had evolved "opposing the death penalty for juvenile offenders").

<sup>29</sup> David Nelken, *Italy: A Lesson in Tolerance?*, in CRITICAL ISSUES, *supra* note 3, at 148. [approved]

<sup>30</sup> For pressure from outside the Court, see, e.g., Steven Groves, *Questions for Judge Sotomayor on the Use of Foreign and International Law*, HERITAGE FOUND. (July 6, 2009), [http://s3.amazonaws.com/thf\\_media/2009/pdf/wm25\\_25.pdf](http://s3.amazonaws.com/thf_media/2009/pdf/wm25_25.pdf) (arguing that Sotomayor might attempt to "impos[e] foreign norms and practices through judicial fiat").

<sup>31</sup> See *infra* notes 33–38.



honesty problem.” In cases prior to *Graham*, the Court “recognized,”<sup>32</sup> “noted,” and “observed”<sup>33</sup> international law, deeming it “not irrelevant.”<sup>34</sup> International law provided “confirmation,”<sup>35</sup> but has not been “controlling”<sup>36</sup> in determining the validity of opinions. The *Graham* majority expressly recognized that international law played a role in its decision, helping to define cruel and unusual punishment for the seventh time since 1958.<sup>37</sup> Still, even the most progressive Justices have described foreign law in ambiguous, cursory, and conservative ways.

In 1958, in the landmark case of *Trop v. Dulles*, a plurality of the Supreme Court of the United States held as unconstitutional the punishment of the revocation of citizenship,<sup>38</sup> noting that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime.”<sup>39</sup> This case marked the first time the Court looked outside our borders to determine what global society felt about certain punishments. The plurality further noted that a United Nations (“UN”) survey “of the nationality laws of 84 nations of the world reveals that only two countries . . . impose denationalization as a penalty for desertion. In this country, the Eighth Amendment forbids that to be done.”<sup>40</sup> The

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<sup>32</sup> See *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

<sup>33</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31, 830 n.31 (1988) (plurality opinion) (noting the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”).

<sup>34</sup> “It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005).

<sup>35</sup> *Id.* at 576.

<sup>36</sup> *Id.* at 575.

<sup>37</sup> “Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion).

<sup>38</sup> *Id.* at 102.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 103.

*Trop* plurality cited to nations that had banned citizenship revocation as a punishment.<sup>41</sup> The link between international law and the Court's holding, however, was unclear.<sup>42</sup> The *Trop* dissent never attacked the *use* of other countries' laws in coming to a holding that denaturalization constituted a cruel and unusual punishment. In fact, the dissent showed that the laws of certain countries *allowed* the punishment of denaturalization, meaning those governments could have thought it neither cruel nor unusual.<sup>43</sup>

In 1988, Justices Stevens, Brennan, Marshall, and Blackmun once again embraced a conception of "the 'evolving standards of decency that mark the progress of a maturing society' that had no express limits or 'contours.'"<sup>44</sup> Their plurality opinion in *Thompson v. Oklahoma*, holding that a fifteen-year-old could not be executed for murder, once again compared the laws of various nations, including those of the Soviet Union, the United Kingdom, Canada, Italy, Spain, and Switzerland, among others.<sup>45</sup> The opinion also cited international treaties, including the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Geneva Convention. It relegated much of the discussion of international and comparative law to a footnote.<sup>46</sup> Scalia scathingly dissented, "[t]he plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation."<sup>47</sup> Conservatives throughout the Court's

<sup>41</sup> *Id.* at 102–03.

<sup>42</sup> Justice Rehnquist, dissenting in *Atkins*, explicitly noted that "the *Trop* plurality—representing a view of only a minority of the Court—offered no explanation for its own citation." *Atkins v. Virginia*, 536 U.S. 304, 325 (2002).

<sup>43</sup> *Trop*, 356 U.S. at 126 (Frankfurter, Burton, Clark, and Harlan, J., dissenting).

<sup>44</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion) (Stevens, J.) (citing *Trop*, 356 U.S. at 101 (plurality opinion) (Warren, C.J.)).

<sup>45</sup> *Thompson*, 487 U.S. at 830–31 (plurality opinion) (Stevens, J.).

<sup>46</sup> Of course, footnotes are not items to be cast aside. The famous *Carolene* footnote, after all, bore the doctrine of strict scrutiny. See Abner Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985). "All too often, yesterday's *obiter dictum* become tomorrow's law of the land." *Id.* at 649.

<sup>47</sup> *Thompson*, 487 U.S. at 869 n.4 (Scalia, J., dissenting) (citation omitted).

Eighth Amendment jurisprudence have held this line.

## 2. *Roper v. Simmons*<sup>48</sup> and International Law

Justice Scalia decried the use of international law in *Stanford v. Kentucky*, the 1989 decision upholding the constitutionality of capital punishment for minors.<sup>49</sup> A majority signed onto his first footnote, which read, “[w]e emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant.”<sup>50</sup> Justice Kennedy’s opinion in *Roper v. Simmons*, holding the juvenile death penalty unconstitutional, overturned Scalia’s *Stanford v. Kentucky* opinion.<sup>51</sup> Kennedy wrote, “[o]ur determination that the death penalty is a disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>52</sup> Kennedy noted that such laws and international authorities had always been “instructive”<sup>53</sup> to the Court’s Eighth Amendment jurisprudence even though the past opinions he cited for this proposition, however, never used the term.<sup>54</sup> Perhaps most revealing is that the citations he used to support his proposition all referenced either pluralities or footnotes—never an in-text five-Justice majority.<sup>55</sup> Thus, *Roper* was groundbreaking in that the majority did not relegate international treaties, including the CRC,<sup>56</sup> to a footnote. Justice O’Connor, even in dissent,

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<sup>48</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>49</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>50</sup> *Id.* at 370 n.1.

<sup>51</sup> *Roper*, 543 U.S. at 551.

<sup>52</sup> *Id.* at 575.

<sup>53</sup> The word “instructive” is perhaps purposefully broad—it might mean either “serving to instruct” or simply “enlightening.”

<sup>54</sup> *Roper*, 543 U.S. at 576–77.

<sup>55</sup> Justice O’Connor lists these references in a long string cite referring to the *Trop* plurality, an *Atkins* footnote, the *Thompson* plurality, a *Thompson* plurality footnote, an *Enmund* footnote, and, lastly, a *Coker* footnote. *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting).

<sup>56</sup> See *Roper*, 543 U.S. at 575 (Kennedy, J., majority opinion).

expressly revoked her prior accord with Scalia in *Stanford*,<sup>57</sup> disagreeing with his contention “that foreign and international law have no place in our Eighth Amendment jurisprudence.”<sup>58</sup> For the first time, six Justices agreed that international law was at least relevant to Eighth Amendment jurisprudence.

Whereas Justice Scalia would like to see an end placed on the Supreme Court’s use of international law in most contexts,<sup>59</sup> this article would ask that the Supreme Court only apply it consistently. As Justice Scalia pointed out, for example, the United Kingdom banned the death penalty for both juveniles and adults, yet the majority cited to the UK ban to show how the country from which we derived our Eighth Amendment disallowed capital punishment of juveniles.<sup>60</sup> Such a distinction would only matter if we also banned the death penalty completely.<sup>61</sup> Justice Scalia was also prescient in acknowledging that “in addition to barring the execution of under-18 offenders, the [CRC] prohibits [JLWOP]. 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 ‘[JLWOP] is itself a severe sanction,’ . . . gives little comfort.”<sup>62</sup>

Still, given the “evolving standards of decency” framework used to determine the constitutionality of punishments,<sup>63</sup> there is little need to place what it means to be decent in a particularly localized, i.e., Westernized, concept of human decency.<sup>64</sup> As the *Roper* Court both acknowledged and

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<sup>57</sup> She dissented in spite of her acknowledgment of the relevance of international law because there was “no such domestic consensus . . . and the recent emergence of an otherwise global consensus does not alter that basic fact.” *Roper*, 543 U.S. at 605 (O’Connor, J., dissenting).

<sup>58</sup> *Id.* at 604.

<sup>59</sup> See Justice Antonin Scalia, Keynote Address at the Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (2004), in 98 AM. SOC’Y INT’L. L. PROC. 305 (2004).

<sup>60</sup> *Cf. Roper*, 543 U.S. at 577 (majority opinion) (“As of now, the [U.K.] has abolished the death penalty in its entirety.”).

<sup>61</sup> *Cf. id.* at 623 (Scalia, J., dissenting).

<sup>62</sup> *Id.* (citation omitted).

<sup>63</sup> A plurality of the Court in 1958 established this standard as the go-to, and it has been utilized ever since. *Trop*, 356 U.S. at 101 (plurality opinion).

<sup>64</sup> There is nothing particularly originalist about Eighth Amendment jurisprudence. Many scholars disagree with the primacy placed upon the new “evolving” framework. See, e.g., John F. Stinneford, *The Original*

cautioned, “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>65</sup> Indeed, the *Graham* majority appeared to look to those precepts.

The *Graham* majority stated that “the overwhelming weight of international opinion against [JLWOP for non-homicide offenses] provide[s] respected and significant confirmation for our conclusions [that the imposition of JLWOP was cruel and unusual].”<sup>66</sup> However, the Court has still never asked why such confirmation from international sources is even necessary to make determinations regarding the Eighth Amendment of the American Constitution. Certainly, its use of international opinion begs the question—what is the value of looking outside America for confirmation if such confirmation adds nothing to the opinion? The answer must be, of course, that the Court must be using international law not only for mere confirmation, but also for persuasive power. The *Graham* majority either misspoke when it said it looked to underlying rationales, or it misspoke when it said it did not use international law beyond its “confirmatory value.”<sup>67</sup>

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*Meaning of ‘Unusual’: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1825 (2008) (arguing “The Framers of the Bill of Rights understood the word ‘unusual’ to mean ‘contrary to long usage.’ Recognition of the word’s original meaning will precisely invert the ‘evolving standards of decency’ test and ask the Court to compare challenged punishments with the longstanding principles and precedents of the common law, rather than shifting and nebulous notions of ‘societal consensus’ and contemporary ‘standards of decency.’”).

<sup>65</sup> *Roper*, 543 U.S. at 578.

<sup>66</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (majority opinion) (citing *Roper*, 543 U.S. at 572). Because the conservative Justice Alito replaced Justice O’Connor on the bench, only five in *Graham* continued to advocate for the inclusion of international law within the majority’s determination. Although six justices voted to repeal the JLWOP sentence in *Graham*, Chief Justice Roberts did not agree it should be done in every instance. Interestingly, and most certainly on purpose, Chief Justice Roberts never mentions the word “international” or another country’s name in his concurrence. *Id.* at 2036–43 (Roberts, C.J., concurring). Today, only three justices criticize the use of international law explicitly. The criticism is, as Justice Thomas notes, “confine[d] to a footnote.” *Id.* at 2053 n.12 (Thomas, J., dissenting).

<sup>67</sup> *Graham*, 130 S. Ct. at 2034. A discussion of the Supreme Court’s honest use of international law I leave to other, more equipped scholars. *See*,

Confirmatory value in this context is not merely an affirming tool. The honesty problem remains.

## II. THE PROBLEM OF LOOKING TO INTERNATIONAL NORMS

The Supreme Court has never addressed the reasons why essentially all other nations have done away with JLWOP. Up to and including *Graham*, aside from discussing the policy of Great Britain, the Court has discussed broad treaties and placed persuasive emphasis on the sheer number of nations opposing certain sentencing policies.<sup>68</sup> It has not emphasized underlying rationales. Because there is no evidence the Court will examine these rationales in the future, advocates ought to examine them themselves.

### A. *The Graham Court and the United Nations Convention on the Rights of the Child*

The *Graham* majority cited the CRC,<sup>69</sup> ratified by all but the United States and Somalia,<sup>70</sup> as part of its argument to end JLWOP in America. Crucially, the Brief for Amnesty International cited to international law throughout, paying particular attention to the CRC.<sup>71</sup> The relevant provision, Article 37(a), reads: “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”<sup>72</sup> Thus, the Court’s honesty problem reveals itself once more—the relevant provision of the CRC clearly makes no exception for JLWOP when a juvenile offender has committed homicide. Despite this

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e.g., Ernst A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (discussing the Court’s use of foreign law to provide support for its reasoning in normative terms).

<sup>68</sup> For more on the idea of the power of “sheer numbers” in terms of international law and Eighth Amendment jurisprudence, see Young, *supra* note 67.

<sup>69</sup> *Graham*, 130 S. Ct. at 2034.

<sup>70</sup> David Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 209, 210 (2006).

<sup>71</sup> Brief for Amnesty International, *supra* note 27.

<sup>72</sup> United Nations Convention on the Rights of the Child art. 37(a), opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3.

fact, *Graham*'s holding makes a distinction between juveniles who kill and juveniles who do not.

The CRC also states that juvenile offenders are to be incarcerated for the minimum necessary time;<sup>73</sup> though the *Graham* Court conveniently avoided any discussion of incarceration lengths for juveniles beyond the absolute of JLWOP, amici felt no need to press the issue upon the Court.<sup>74</sup> Thus, while reformers should continue to advocate for its ratification, the use of the CRC at the federal court level is disingenuous at best and potentially harmful to the cause of national juvenile justice reform due to its likelihood of closing off conservatives to the underlying policy debate regarding juvenile sentencing.

Additionally, as a matter of pure constitutional law, the Supreme Court's choice to examine the CRC arguably usurped the Senate's authority to ratify international treaties<sup>75</sup> because the United States has signed, but not ratified, the CRC and is therefore not bound by its provisions.<sup>76</sup> Reformers should certainly push for ratification of the CRC, particularly to provide the federal government with the impetus to abide by its sensible provisions. Ratifying the CRC would also help provide a national impetus for change at the state level.<sup>77</sup> But ratification is a separate task from pre-ratification advocacy, which should and must be carried out in a forum apart from

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<sup>73</sup> *Id.* art. 37(b) ("No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.").

<sup>74</sup> There is no mention of this provision anywhere in the brief. See Brief for Amnesty International, *supra* note 27.

<sup>75</sup> See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 486, 492 (2002).

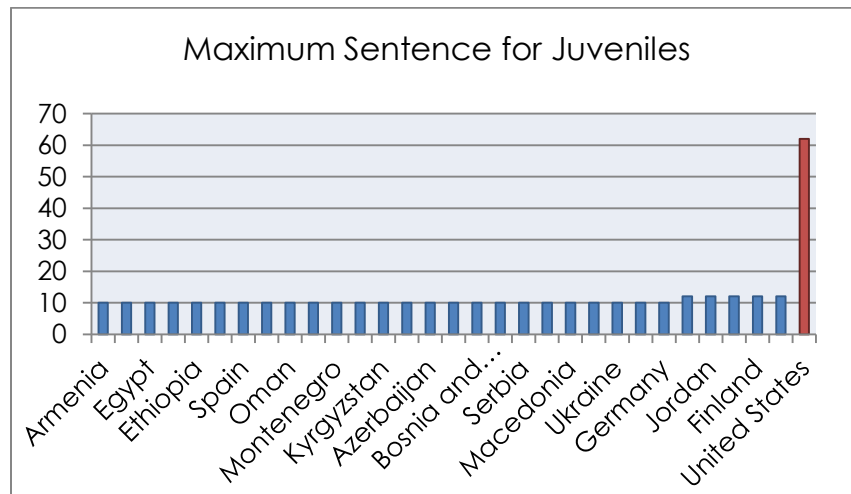
<sup>76</sup> *Id.* at 512–13. Bradley writes, "courts properly will decline to apply international law to override the considered choices of the president and Senate in their ratification of treaties. In addition, because of concerns relating to both separation of powers and federalism, courts properly will decline to apply customary international law to override state criminal punishment, especially when (as is the case here) the political branches have expressly declined to do so by treaty." *Id.*

<sup>77</sup> Were the United States to ratify the CRC (without reservation), it would become the law of the land. See Jeffrey Huffines, *The Role of N.G.O.s in U.S. Ratification of Human Rights Treaties*, 3 ILSA J. INT'L & COMP. L. 641, 650 (1997).

the Supreme Court. By using a non-ratified document at the Court to ask for juvenile sentencing reform, advocates might be doing more harm than good. To move the discussion forward, advocates ought to more strongly consider allying with conservatives to enact real juvenile policy reforms on the local and national stage.<sup>78</sup>

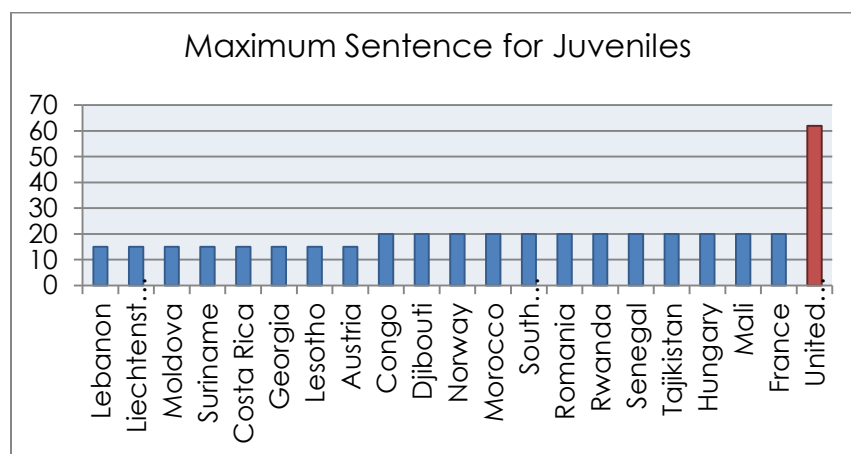
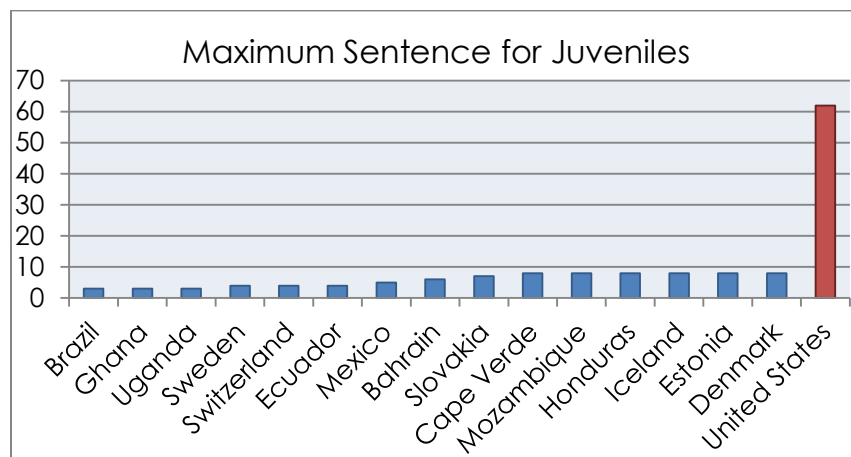
### *B. Just How Progressive are Juvenile Sentences Elsewhere?*

Finally, looking to the CRC hides the amazing truth of what lies beneath its JLWOP standard: that many countries with juvenile-specific sentencing laws go well beyond what even the most progressive juvenile sentencing reform advocates in the United States seek to achieve. The sentencing lengths below represent not what reformers should pursue, but only serve to demonstrate that a varied, yet large, number of countries all agree on one thing—dealing with juvenile offenders does not require the harsh sentencing that the United States feels is appropriate.



<sup>78</sup> Perhaps the strongest ally is the Right on Crime movement. Advocating a reduction in unnecessary confinement, an increase in effective school discipline policies, reviews of juvenile sentences, and increased community-based programming, the Right on Crime movement makes a powerful ally. See *Priority Issues: Juvenile Justice*, RIGHT ON CRIME, <http://www.rightoncrime.com/priority-issues/juvenile-justice/> (last visited Jan. 15, 2012).





Country	Max. Sent.	Country	Max. Sent.	Country	Max. Sent.
Brazil <sup>79</sup>	3	Ghana <sup>80</sup>	3	Uganda <sup>81</sup>	3

<sup>79</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Brazil*, ¶ 575, U.N. Doc. CRC/C/3/Add.65 (Dec. 17, 2003).

<sup>80</sup> U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1997: Ghana*, ¶ 52, U.N. Doc. CRC/C/65/Add.34 (July 14, 2005).

<sup>81</sup> Children Act of 1997, C. 59, § 94(7) (Uganda), available at [http://www.ulii.org/ug/legis/consol\\_act/ca199786/](http://www.ulii.org/ug/legis/consol_act/ca199786/) (Uganda's three-year maximum is also dramatic in that it replaces an adult corollary punishment of death, making it one of the most liberal juvenile sentencing statutes in the world).

Ecuador <sup>82</sup>	4	Sweden <sup>83</sup>	4	Switzerland <sup>84</sup>	4
Mexico <sup>85</sup>	5	Bahrain <sup>86</sup>	6	Slovakia <sup>87</sup>	7
Cape Verde <sup>88</sup>	8	Denmark <sup>89</sup>	8	Estonia <sup>90</sup>	8
Honduras <sup>91</sup>	8	Iceland <sup>92</sup>	8	Mozambique <sup>93</sup>	8

<sup>82</sup> U.N. Comm. on the Rights of the Child, *Fourth Periodic Reports of States Parties Due in 2007, Ecuador*, ¶ 526, U.N. Doc. CRC/C/ECU/4 (July 10, 2009).

<sup>83</sup> See *Juvenile Care for Teen Girlfriend Murder*, THE LOCAL, Aug. 3, 2010, available at <http://www.thelocal.se/28158/20100803>.

<sup>84</sup> *Juvenile Criminal Law*, SWISS PORTAL, <http://www.ch.ch/private/00093/00104/00514/00524/index.html> (last visited Jan. 15, 2012).

<sup>85</sup> U.N. Comm. on the Rights of the Child, *Third Periodic Reports of States Parties Due in 2002: Addendum, Mexico*, ¶ 304, U.N. Doc. CRC/C/125/Add.7 (Aug. 24, 2005).

<sup>86</sup> U.N. Comm. on the Rights of the Child, *Report on the Implementation of the Convention on the Rights of the Child in Bahrain*, 29<sup>th</sup> Sess., Jan. 14, 2002–Feb. 1, 2002, 37, (Oct. 1, 2001). One juvenile had been sentenced to ten years for throwing a bomb at a policeman, but the sentence was later reduced. *Id.* at 38. In 2010, one lawyer reported that “the toughest punishment ever meted on a minor” was six years, after a court found a sixteen-year-old guilty of running over an older gentleman several times, killing him. Suad Hamada, *Rights-Bahrain: Law on Young Offenders Needs Fixing – Critics*, INTER PRESS SERVICE (Aug. 25, 2010), <http://www.globalissues.org/news/2010/08/25/6734>.

<sup>87</sup> U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1999, Slovakia*, ¶ 319, U.N. Doc. CRC/C/SVK/2 (Sept. 21, 2006).

<sup>88</sup> U.N. Comm. on the Rights of the Child, *Periodic Reports Due in 1994, Cape Verde*, ¶ 184, U.N. Doc. CRC/C/11/Add.23 (Jan. 9, 2001).

<sup>89</sup> Denmark, now controlled by a right-wing parliament, kept its maximum sentence at eight years, the punishment that has been in place since 1930. See Britta Kyvsgaard, *Youth Justice in Denmark*, 31 CRIME & JUST. 349, 372 (2004).

<sup>90</sup> U.N. Comm. of the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Estonia*, ¶ 40, U.N. Doc. CRC/C/8/Add.45 (July 11, 2002).

<sup>91</sup> U.N. Comm. on the Rights of the Child, *Third Periodic Reports of States Parties Due in 2002, Honduras*, ¶¶ 370–71, U.N. Doc. CRC/C/HND/3 (July 27, 2006).

<sup>92</sup> U.N. Comm. of the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Iceland*, ¶ 379, U.N. Doc. CRC/C/11/Add.6, (Mar. 15, 1995).

<sup>93</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1996, Mozambique*, ¶¶ 564–68, U.N. Doc. CRC/C/41/Add.11 (May 14, 2001) (children under sixteen cannot be incarcerated for any reason).

Armenia <sup>94</sup>	10	Azerbaijan <sup>95</sup>	10	Bosnia and Herzegovina <sup>96</sup>	10
Burma <sup>97</sup>	10	Cameroon <sup>98</sup>	10	Chad <sup>99</sup>	10
Croatia <sup>100</sup>	10	Czech Republic <sup>101</sup>	10	Egypt <sup>102</sup>	10
Eritrea <sup>103</sup>	10	Ethiopia <sup>104</sup>	10	Germany <sup>105</sup>	10

<sup>94</sup> UNICEF, ASSESSMENT OF JUVENILE JUSTICE REFORM ACHIEVEMENTS IN ARMENIA 23 (2010).

<sup>95</sup> U.N. Comm. of the Rights of the Child, *Second Periodic Reports of States Parties Due in 1999, Azerbaijan*, ¶ 452, U.N. Doc. CRC/C/83/Add.13 (Apr. 7, 2005).

<sup>96</sup> U.N. Comm. of the Rights of the Child, *Initial Reports of States Parties Due in 1999, Bosnia and Herzegovina*, ¶ 360, U.N. Doc. CRC/C/11/Add.28 (Oct. 14, 2004).

<sup>97</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Myanmar*, ¶ 71, U.N. Doc. CRC/C/8/Add.9 (Sept. 18, 1995).

<sup>98</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1995: Addendum, Cameroon*, ¶ 226, U.N. Doc. CRC/C/28/Add.16 (Mar. 26, 2001).

<sup>99</sup> U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1997, Chad*, ¶ 271, U.N. Doc. CRC/C/TCD/2 (Dec. 14, 2007).

<sup>100</sup> U.N. Comm. of the Rights of the Child, *Second Periodic Reports of States Parties Due in 1998, Croatia*, ¶ 151, U.N. Doc. CRC/C/70/Add.23 (Nov. 28, 2003).

<sup>101</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1994: Addendum, Czech Republic*, ¶ 245, U.N. Doc. CRC/C/11/Add.11 (June 17, 1996).

<sup>102</sup> UN Comm. on the Rights of the Child, *Periodic Reports of States Parties Due in 1997: Addendum, Egypt*, ¶ 194 (xi), U.N. Doc. CRC/C/65/Add.9 (Nov. 11, 1999).

<sup>103</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1996: Addendum, Eritrea*, ¶ 78(b), U.N. Doc. CRC/C/41/Add.12 (Dec. 23, 2002).

<sup>104</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Ethiopia*, ¶ 43, U.N. Doc. CRC/C/8/Add.27 (Sept. 12, 1995).

<sup>105</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1994: Addendum, Germany*, ¶ 36, U.N. Doc. CRC/C/11/Add.5 (Sept. 16, 1994).

Kyrgyzstan <sup>106</sup>	10	Latvia <sup>107</sup>	10	Lithuania <sup>108</sup>	10
Macedonia <sup>109</sup>	10	Montenegro <sup>110</sup>	10	Oman <sup>111</sup>	10
Serbia <sup>112</sup>	10	Slovenia <sup>113</sup>	10	Spain <sup>114</sup>	10
Togo <sup>115</sup>	10	Tunisia <sup>116</sup>	10	Ukraine <sup>117</sup>	10
United Arab Emirates <sup>118</sup>	10	Bulgaria <sup>119</sup>	12	Finland <sup>120</sup>	12

<sup>106</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1996, Kyrgyzstan*, ¶ 255, U.N. Doc. CRC/C/41/Add.6 (Sept. 20, 1999).

<sup>107</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1994, Latvia*, ¶ 231, U.N. Doc. CRC/C/11/Add.22 (Mar. 22, 2000).

<sup>108</sup> Penal Code, § 90(5) (2000) (Lith.) (even this punishment is only instituted for acts of terrorism committed by a juvenile).

<sup>109</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, The Former Yugoslav Republic of Macedonia*, ¶ 236, U.N. Doc. CRC/C/8/Add.36 (June 27, 1997).

<sup>110</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 2008, Montenegro*, ¶ 324, U.N. Doc. CRC/C/125/Add.7 (Nov. 23, 2008).

<sup>111</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1999: Addendum, Oman*, ¶ 55, U.N. Doc. CRC/C/78/Add.1 (July 18, 2000).

<sup>112</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties due in 2003, Serbia*, ¶ 452, U.N. Doc. CRC/C/SRB/1 (Aug. 31, 2007).

<sup>113</sup> UN Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1998, Slovenia*, ¶ 269, U.N. Doc. CRC/C/70/Add.19 (June 18, 2003).

<sup>114</sup> See Cristina Rechea Alberola & Esther Fernández Molina, *Continuity and Change in the Spanish Juvenile Justice System*, in INTERNATIONAL HANDBOOK OF JUVENILE JUSTICE 342 (J. Junger-Tas & S.H. Decker eds., 2006) [hereinafter INTERNATIONAL HANDBOOK].

<sup>115</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Addendum, Togo*, ¶ 101, U.N. Doc. CRC/C/3/Add.42 (May 28, 1996).

<sup>116</sup> UN Comm. on the Rights of the Child, *Periodic Reports of States Parties Due in 1999, Tunisia*, ¶ 25, U.N. Doc. CRC/C/83/Add.1 (Oct. 30, 2001).

<sup>117</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Ukraine*, ¶ 24, U.N. Doc. CRC/C/8/Add.10/Rev.1 (Jan. 18, 1995).

<sup>118</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1999, United Arab Emirates*, ¶ 108, U.N. Doc. CRC/C/78/Add.2 (Oct. 24, 2001).

<sup>119</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Bulgaria*, ¶ 264, U.N. Doc. CRC/C/8/Add.29 (Oct. 12, 1995).

<sup>120</sup> E-mail from Tapio Lappi-Seppälä, Dir., Nat'l Research Inst. of Legal

Jordan <sup>121</sup>	12	Kazakhstan <sup>122</sup>	12	Syria <sup>123</sup>	12
Austria <sup>124</sup>	15	Costa Rica <sup>125</sup>	15	Georgia <sup>126</sup>	15
Lebanon <sup>127</sup>	15	Lesotho <sup>128</sup>	15	Liechtenstein <sup>129</sup>	15
Moldova <sup>130</sup>	15	Suriname <sup>131</sup>	15	Congo <sup>132</sup>	20

Policy, Finland, to David A. Shapiro (Nov. 19, 2010, 4:53 AM) (on file with author).

<sup>121</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Jordan*, ¶ 155, U.N. Doc. CRC/C/8/Add.4 (Nov. 26, 1993). The adult corollary is the death penalty. *Abolitionist and Retentionist Countries*, AMNESTY INT'L, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited Dec. 20, 2010).

<sup>122</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1996: Addendum, Kazakhstan*, ¶ 306, U.N. Doc. CRC/C/41/Add.13 (Sept. 24, 2002). The adult corollary is the death penalty. *Abolitionist and Retentionist Countries*, *supra* note 121.

<sup>123</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1995: Addendum, Syrian Arab Republic*, ¶ 250, U.N. Doc. CRC/C/28/Add.2 (Feb. 14, 1996). The Syrian sentences are served with compulsory labor. *Id.* The adult corollary is the death penalty. *Id.*

<sup>124</sup> Karin Bruckmüller, *Austria: A Protection Model*, in INTERNATIONAL HANDBOOK, *supra* note 114, at 287. See also, U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1999, Austria*, ¶ 640, U.N. Doc. CRC/C/83/Add.8 (July 8, 2004) (individuals between eighteen and twenty one receive a maximum of twenty years).

<sup>125</sup> U.N. Comm. on the Rights of the Child, *Third Periodic Reports of States Parties Due in 2002, Costa Rica*, ¶ 601, U.N. Doc. CRC/C/125/Add.4 (Oct. 13, 2004).

<sup>126</sup> Crim. Code § 88(2) (2000) (Geor.).

<sup>127</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Lebanon*, ¶ 135, U.N. Doc. CRC/C/8/Add.23 (Feb. 3, 1995).

<sup>128</sup> Carina du Toit, *A Measure of Last Resort? Child Offenders and Life Imprisonment*, 17 S. AFR. CRIME Q. 13, 15 (Sept. 2006).

<sup>129</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1998, Liechtenstein*, ¶ 235, U.N. Doc. CRC/C/61/Add.1 (Aug. 2, 1999).

<sup>130</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1995, Moldova*, ¶ 110, U.N. Doc. CRC/C/28/Add.19 (May 3, 2002).

<sup>131</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1995: Addendum, Suriname*, ¶ 18, U.N. Doc. CRC/C/28/Add.11 (Sept. 23, 1998) [hereinafter U.N. Comm. on the Rights of the Child, *Suriname*].

<sup>132</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1999, Congo*, ¶ 432, U.N. Doc. CRC/C/COG/1 (Feb. 20, 2006).

Djibouti <sup>133</sup>	20	France <sup>134</sup>	20	Hungary <sup>135</sup>	20
Mali <sup>136</sup>	20	Morocco <sup>137</sup>	20	Norway <sup>138</sup>	20
Romania <sup>139</sup>	20	Rwanda <sup>140</sup>	20	Senegal <sup>141</sup>	20
South Korea <sup>142</sup>	20	Tajikistan <sup>143</sup>	20	United States <sup>144</sup>	62

As the charts above depict, at least forty countries, from Europe, Africa, the Middle East, and beyond, abide by the principle that ten years is the maximum appropriate sentence

<sup>133</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993, Djibouti*, ¶ 141, U.N. Doc. CRC/C/8/Add.39 (Aug. 3, 1998).

<sup>134</sup> ORDONNANCE DU 2 FEVRIER 1945 RELATIVE À L'ENFANCE DELINQUANTE [ORDINANCE OF 2 FEBRUARY 1945 RELATIVE TO JUVENILE DELINQUENCY], art. 33 (Fr.).

<sup>135</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Hungary*, ¶ 77, U.N. Doc. CRC/C/8/Add.34 (Sept. 24, 1996).

<sup>136</sup> UN Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1997, Mali*, ¶ 111, U.N. Doc. CRC/C/MLI/2 (Apr. 11, 2006).

<sup>137</sup> U.N. Comm. of the Rights of the Child, *Initial Reports of States Parties Due in 1995: Addendum, Kingdom of Morocco*, ¶ 310, U.N. Doc. CRC/C/28/Add.1 (Aug. 19, 1995).

<sup>138</sup> U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Addendum, Norway*, ¶ 163, U.N. Doc. CRC/C/8/Add.7 (Oct. 12, 1993).

<sup>139</sup> U.N. Comm. of the Rights of the Child, *Periodic Reports of States Parties Due in 1999, Romania*, ¶ 169, U.N. Doc. CRC/C/65/Add.19 (July 5, 2002).

<sup>140</sup> UN Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1998, Rwanda*, ¶ 92, U.N. Doc. CRC/C/70/Add.22 (Oct. 8, 2003).

<sup>141</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Addendum, Senegal*, ¶ 199, U.N. Doc. CRC/C/3/Add.31 (Oct. 17, 1994).

<sup>142</sup> U.N. Comm. of the Rights of the Child, *Periodic Reports of States Parties Due in 1998, Republic of Korea*, ¶ 52, U.N. Doc. CRC/C/70/Add.14 (June 26, 2002).

<sup>143</sup> UN Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 2000, Tajikistan*, ¶ 100, U.N. Doc. CRC/C/TJK/2 (Apr. 2, 2009).

<sup>144</sup> Assuming life imprisonment without parole as maximum punishment, based on current average life expectancy, for youth arrested at approximately fourteen years. *Life Expectancy at Birth*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/2102.html> (last visited Jan. 15, 2012).

for juveniles.<sup>145</sup> No fewer than five countries have maximums of twelve years.<sup>146</sup> At least eight have fifteen-year maximums.<sup>147</sup> A mix of at least twelve Asian, African, and both Eastern and Western European nations have maximum sentences of twenty years imprisonment.<sup>148</sup>

Several countries apply simple rules to make sense of sentencing laws, typically in the form of fractional punishments.<sup>149</sup> Chile, for instance, reduces the maximum possible sentence to the lowest applicable measure, and then reduces it even further.<sup>150</sup> In six countries, the maximum juvenile sentence is half the maximum of an adult sentence.<sup>151</sup> In Russia, the maximum punishment of a juvenile is two-thirds the time of the potential adult sentence.<sup>152</sup> In Suriname, where minors under the age of sixteen cannot be imprisoned for any reason, those between the ages of sixteen and eighteen can be

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<sup>145</sup> See *supra* pp. 17–23.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *infra* p. 17–20.

<sup>150</sup> UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1993: Addendum, Chile*, ¶ 237, U.N. Doc. CRC/C/3/Add.18 (June 22, 1993).

<sup>151</sup> UN Comm. on the Rights of the Child, *Initial Periodic Reports of States Parties Due in 1994, Albania*, ¶ 480, U.N. Doc. CRC/C/11/Add. 27 (July 5, 2004); UN Comm. on the Rights of the Child, *Initial Reports of States Parties, Andorra*, ¶ 125, U.N. Doc. CRC/C/61/Add.3 (July 3, 2001); UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1992: Addendum, Benin Corrigendum*, ¶ 99, U.N. Doc. CRC/C/3/Add.52 (July 4, 1997); UN Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 1997, Bhutan*, ¶ 388, U.N. Doc. CRC/C/BTN/2 (July 16, 2007); UN Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1994: Addendum, Cambodia*, ¶ 234, U.N. Doc. CRC/C/11/Add.16 (June 24, 1998). In Albania, the absolute maximum is twelve and a half years. UNICEF, ASSESSMENT OF JUVENILE JUSTICE REFORM ACHIEVEMENTS IN ALBANIA 21 (2009). The same is true for those fourteen to sixteen in Guinea, while those sixteen to eighteen can only be sentenced to terms that allow for their rehabilitation. UN Comm. on the Rights of the Child, *Initial Reports Awaited from the States Parties For 1992: Addendum, Guinea*, ¶ 108, 113, U.N. Doc. CRC/C/3/Add.48 (June 17, 1997); Anne Wyvekens, *The French Juvenile Justice System*, in INTERNATIONAL HANDBOOK, *supra* note 114, at 184.

<sup>152</sup> UN Comm. on the Rights of the Child, *Periodic Reports of States Parties Due in 1997: Addendum, Russian Federation*, ¶ 410, U.N. Doc. CRC/C/65/Add.5 (Nov. 20, 1998).

sentenced to one-third the equivalent adult penalty.<sup>153</sup> These countries all recognize that there is something different about childhood.

Globally, then, sentences are as progressive as they are diverse and there are no clear trends in the countries from which one can infer that the sentence caps were hastily passed into law, that they do not work, or that they are a product of a certain type of globalized thinking necessarily at odds with American values. Countries have gone well beyond the calling of the CRC and they have done just enough to comply with it. They have enacted reforms at the United Nations' urging and they have led the charge encouraging other countries to comply.

From an American perspective, massing hundreds of nations into one conglomerate of those "more reformed than us" is ineffective in the long-term. Each country has its own reasons for its specific juvenile justice system. The sentencing schemes delineated above illuminate the various individual juvenile sentencing practices across the globe. The juvenile justice reform community has overlooked these individual sentences, and the rationales behind them, for far too long. This article encourages advocates to think about these sentences and how they might be able to domesticate them in the fifty states.

### III. BRINGING INTERNATIONAL JUVENILE SENTENCING STANDARDS & REFORMS HOME

Because some countries have reformed their juvenile sentencing laws based upon doctrine that does not resemble our Eighth Amendment jurisprudence, America can learn from, but the Supreme Court cannot consider, the sentencing policies in these countries. The United States' arguably unique traditions and interest rooted in independence, responsibility, and its lack of primacy on protecting children (exemplified by the fact that its Constitution does not seek to provide for their education or protection), prevents major change on the national level in the arena of juvenile justice reform. Reformers remain

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<sup>153</sup> UN Comm. on the Rights of the Child, *Suriname*, *supra* note 131, ¶ 18.



in a position to advocate for change on the state and local levels.

While scholars continue to include international law in amicus briefs to the Supreme Court,<sup>154</sup> the better approach is to use the same evidence and analysis to convince state legislators to enact viable reform. State legislatures enact the overwhelming majority of criminal laws. The states are called “test tubes”<sup>155</sup> because legislatures at the local level may be more willing to take risks and embrace new ideas.<sup>156</sup> Finally, by shifting advocacy from the federal courts to the state legislatures, reforms will be implemented sooner and without the conservative backlash that comes with advocating “foreign” ideas in American courts.

State governments, even as they have recently become more conservative, will be receptive to the ideas of juvenile justice reformers provided they are appropriately framed. Counties in Arizona and Florida have recently become part of the Juvenile Justice System Improvement Project, a program that will help localities institute effective policies to increase outcomes for court-involved youth.<sup>157</sup> North Carolina is working to increase the age at which children can be automatically tried as adults.<sup>158</sup> The Annie E. Casey Juvenile Detention Alternative Initiative is helping spread reform to counties of all sizes and political values.<sup>159</sup>

Social theorists point out how policies and sentences of other countries can be made relevant in the United States. According to the social impact theory, in order for individuals to adopt and advocate for new ideas, they must have stable and consistent access to them. Thus, as long as ideas espoused by

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<sup>154</sup> See, e.g., Brief for Amnesty International, *supra* note 27.

<sup>155</sup> See *supra* note 17 and accompanying text.

<sup>156</sup> Eric Holder, Attorney Gen., Address at the National Association of Counties Legislative Conference (Mar. 7, 2001), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110307.html>.

<sup>157</sup> *Juvenile Justice System Information Project*, CENTER FOR JUVENILE JUST. REFORM, <http://cjjr.georgetown.edu/jjsip/jjsip.html> (last visited Feb. 15, 2012).

<sup>158</sup> Shavonne Potts, *NY Only Other State Treating 16-, 17-Year-Olds as Adults*, SALISBURY POST (July 17, 2011, 12:00 AM), <http://www.salisburypost.com/News/071711-juvenile-offender-sidebar-qcd>.

<sup>159</sup> ROCHELLE STANFIELD, *PATHWAYS TO JUVENILE DETENTION REFORM: THE JDAI STORY* (1999).

the global community are consistently highlighted by advocates, the more those ideas will be discussed and the more they will become normalized.<sup>160</sup>

It stands to reason, therefore, that knowledge and discussion of foreign sentencing policies is helpful to formulating state sentencing laws. As Justice Thomas worried in his *Graham* dissent, the majority's decision to hold JLWOP unconstitutional constituted a "moral judgment" that had no place in federal court jurisprudence.<sup>161</sup> These moral judgments, however, form the basis of how we all think. Using the model of social impact theory, advocates can increase exposure to new ideas in order to help inform the moral judgments of state legislators—the people Justice Thomas would like to see make changes.

The countries below have been selected for analysis because their models offer dichotomous approaches to those that exist in the United States and because there is something about the country that makes it an interesting (though not necessarily apt) comparator. It is important to recognize that they are included not because they provide the "correct" ways of reforming juvenile justice, but because they provide unique perspectives on the issue.

#### *A. Country Models for Reform<sup>162</sup>: South Africa*

South Africa's model of juvenile justice reform is one of a conflux of international law, public policy expertise, and democratic and local values coming together to form a more reformed, progressive juvenile justice system. Crucially, South Africa has been perhaps the greatest success story for juvenile reform through an almost complete reconstructing of its

<sup>160</sup> "To the extent that individuals are relatively uninvolved in an issue, they should be influenced by the strength, immediacy, and number of people advocating a contrary position." Andrzej Nowak et. al., *From Private Attitude to Public Opinion: A Dynamic Theory of Social Impact*, 97 PSYCHOL. REV. 362, 364 (1990).

<sup>161</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2053 (2010) (Thomas, J., dissenting).

<sup>162</sup> I chose several countries' juvenile justice systems for evaluation. The choices were relatively random—I simply attempted to pick countries that either had a strong connection to America, either culturally, socially, or historically, or those with a plethora of research available.

governing system following Apartheid, during which it created a strong, progressive Constitution.<sup>163</sup>

As recently as 1999, South Africa had four children serving LWOP.<sup>164</sup> In 1995, however, South Africa ratified the CRC. International law is binding upon South Africa, but it still enacted a new law to eliminate JLWOP, amongst other reforms.<sup>165</sup> The CRC and the principles of restorative justice were the joint impetus behind the new law.<sup>166</sup> The protections for juveniles in South Africa also centered on “the indigenous concept of *Ubuntu*,<sup>167</sup> thus Africanizing the international principles by emphasizing family and community.”<sup>168</sup> Certainly, this makes the juvenile justice reformer’s task more difficult. Advocating for reduced sentencing in America to be more like South Africa’s, or the sentencing of any country where its constitution was similarly established, ignores the

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<sup>163</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 261 (2001) (calling South Africa’s Constitution: “[t]he most admirable constitution in the history of the world” and “the world’s leading example of a transformative constitution.”).

<sup>164</sup> Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 999 (2008) (citing U.N. Comm. on the Rights of the Child, *Initial Reports of States Parties Due in 1997: Addendum, South Africa*, ¶ 514, U.N. Doc. CRC/C/51/Add.2 (May 22, 1998)). A law instituted in 1998, however, ensured the opportunity for a parole hearing after one had served twenty-five years of his or her life sentence. ANN SKELTON & BOYANE TSHEHLA, INSTITUTE FOR SECURITY STUDIES, *CHILD JUSTICE IN SOUTH AFRICA*, 18 (2008) (citing the Correctional Service Act 111 of 1998 (S. Afr.)).

<sup>165</sup> John 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, 106 (2009); Julia Sloth-Nielsen & Benyam D. Mezmur, *2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)*, 16 INT’L J. CHILDREN’S RTS. 1, 3 n.3 (2008).

<sup>166</sup> SKELTON & TSHEHLA, *supra* note 164; *see also* Child Justice Act of 2008 (S. Afr.).

<sup>167</sup> *Ubuntu* is “a frame of mind prevalent in sub-Saharan Africa, which relates to a specific communal approach to the notion of people.” Stefan Schulz & Marthinus Hamutenya, *Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice?* 1 (Polytech of Namibia, Paper, 2004). “*Ubuntu* is very difficult to render into a Western language. It speaks of the very essence of being human.” Archbishop Desmond Tutu explains *Ubuntu* is linked to forgiveness, and a system of shared values that enables survival and increases the humanity of all. Ann Skelton, *Restorative Justice as a Framework for Juvenile Justice Reform*, 42 BRIT. J. CRIMINOL. 496, 499 (2002).

<sup>168</sup> S. AFR. L. COMM’N, PROJECT 106: JUVENILE JUSTICE REPORT 8 (2000).

fundamental differences between our society and theirs, which must be addressed before we can pursue real change.

Still, that some South African values are not American should not mean that they are the wrong values or that America cannot adopt these values for its own. South Africa provides a clear model of a country that can create its own juvenile legislation in accordance with both domestic and international law. It is also special in that the creation of its current juvenile legislation was done in an open manner, embracing criticism and suggestions from laypeople, lawyers, scholars, and even children.<sup>169</sup> Ironically, the Commission that helped craft the legislation expressly repudiated placing a maximum on juvenile sentencing.<sup>170</sup> In fact, the South African drafters were “concerned that this might lead to effective multiplicity of charges in order to ensure the possibility of lengthy sentences (e.g., several fifteen-year terms) being imposed.”<sup>171</sup> Relying on *Ubuntu* and international law, therefore, the drafters “opted not to set a maximum term of imprisonment, and trust[ed] that the fact of youthful age [would] play a large role in mitigating excessively long sentences for children.”<sup>172</sup> Though *Ubuntu* might not be easily Westernized, advocates can still press for juvenile sentencing maximums and more holistic treatment options at the state level. Reformers can also look to the method by which South Africa passed its legislation, instituting similar committees in the United States.

*B. Increasing Rehabilitative Reform Efforts: Argentina, Greece & Finland*

Reformers can also use international juvenile sentencing norms to advocate for an increased emphasis on rehabilitation in the United States. Argentina’s highest court looked to several factors in prohibiting JLWOP, including various UN treaties, the CRC, and even *In re Gault*,<sup>173</sup> the United States Supreme Court case that recognized the due process rights of

<sup>169</sup> *Id.* at 166.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 168.

<sup>172</sup> *Id.* at 168–69.

<sup>173</sup> *In Re Gault*, 387 U.S. 1 (1967).

minors.<sup>174</sup> Indeed, the Supreme Court of Justice of Argentina held, “the decision of the [lower chamber sentencing the juvenile to life imprisonment without parole for at least twenty-five years] does not exhibit any understanding why a penalty of [fourteen] years in prison for a crime committed at age [sixteen] was insufficient.”<sup>175</sup> The insufficiency probably lay in the instinct and desire to enact vengeance. Reformers ought to press this notion by digging deeper into sentencing law and asking what rehabilitation—not vengeance—requires. This tactic might be difficult to use at the state level. It requires an honest examination of America’s willingness to punish for retribution over all other reasons, asking legislators to re-evaluate how they conceive of punishment.

Greece was also concerned with the rehabilitation/retribution balance. The CRC had little impact in Greece prior to 2010, as the nation had always complied with the Article 37 mandate.<sup>176</sup> Still, in 2002, the UN Committee on the Rights of the Child asked Greece to abolish provisions allowing for a child to be imprisoned for a period of twenty years.<sup>177</sup> Greece responded in 2010, passing legislation to change the maximum sentence to fifteen years.<sup>178</sup> Greece reformed its sentencing for many reasons, one of which was a worry that a longer sentence

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<sup>174</sup> Corte Suprema de Justicia de la Nación, [CSJN][National Supreme Court of Justice], 7/12/2005, “Maldonado, Daniel Enrique/Senetencia” (Arg.).

<sup>175</sup> *Id.* It is unclear whether the Maldonado decision applies retroactively. As the UN Committee on the Rights of the Child reported, while *Maldonado* was significant, “of the 12 life sentences of children passed since 1997 to 2002, three still face[d] life imprisonment . . . [and] that their cases have been brought to the attention of the Inter-American Commission of Human Rights.” Convention on the Rights of the Child, *Concluding Observations: Argentina*, May 25, 2010–June 11, 2010, ¶ 38, U.N. Doc. CRC/C/ARG/CO/3–4, 54<sup>th</sup> Sess., (June 21, 2010). “While welcoming the fact that no more life sentences have been passed since 2002, the Committee urges the State party to refrain from sentencing children to life imprisonment or sentences that may amount to life imprisonment.” *Id.* at ¶ 39.

<sup>176</sup> Angelika Pitsela, *Greece: Criminal Responsibility of Minors in the National and International Legal Orders*, 75 INT’L REV. PEN. L. 356, 377 (2004).

<sup>177</sup> Convention on the Rights of the Child, *Greece*, ¶ 78(h), U.N. Doc. CRC/C/15/Add.170; 29<sup>th</sup> Sess., (Apr. 2, 2002).

<sup>178</sup> E-mail from Professor Calliope Spinellis to David A. Shapiro, (Sep. 29, 2010, 3:51 AM) (on file with author) (translating Article 54 of the Greek Penal Code as amended by Article 1 Act 3860/2010).

constituted cruel and unusual punishment.<sup>179</sup> The other reasons included “the absence of [effective] rehabilitation programs” in juvenile facilities.<sup>180</sup> This implies, ironically, that Greece decreased sentences because there was not enough of an emphasis on rehabilitation. American legislators ought to follow suit. To reach both liberal and conservative legislatures, the argument is this: we can tie sentencing norms to the availability of best practices models that assure all that is possible has been done to protect juveniles and to dissuade them from committing crimes. Reducing crimes reduces costs. Sentencing reforms, thus, can be part of a national juvenile justice overhaul, conducted state-by-state.

In Finland, where the maximum adult sentences are also quite low, its less punitive juvenile sentencing regime is also based on an overall emphasis on rehabilitation rather than on a conception of cruel and unusual punishment.<sup>181</sup> Indeed, the “[sentencing] reform movement was inspired by the belief that crime was predominantly a social problem that could be counteracted by social reform, rather than repression.”<sup>182</sup> In *Ewing v. California*, the Supreme Court expressly held that “[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.”<sup>183</sup> If reform toward rehabilitation were to become the norm, pursuing such change at the federal court level could prove ill-advised because the Supreme Court has never required a singular justification for punishment. Still, to obtain the overwhelmingly successful results Finland has seen, states would need to embrace a more welfare-oriented ideology, at

<sup>179</sup> E-mail from Professor Calliope Spinellis, to David A. Shapiro (Nov. 17, 2010, 4:33 AM) (on file with author).

<sup>180</sup> *Id.*

<sup>181</sup> E-mail from Tapio Lappi-Seppälä, Dir., Nat’l Research Inst. of Legal Policy, Finland, to David A. Shapiro (Nov. 22, 2010, 4:33 AM) (on file with author).

<sup>182</sup> See Tapio Lappi-Seppälä, *Finland: A Model of Tolerance?*, in CRITICAL ISSUES, *supra* note 3, at 183–84.

<sup>183</sup> *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (Scalia, J. concurring in the judgment at 31–32); cf. Vincent G. Lévy, Note, *Enforcing International Norms in the United States after Roper v. Simmons: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 COLUM. J. TRANSNAT’L L. 262, 290 (2007) (providing no citation for the proposition that “[n]evertheless, the Constitution arguably could require U.S. jurisdictions to emphasize rehabilitation,” clearly in conflict with *Ewing*).

odds with the emphasis on individuality and due process protections that defines the American justice system. Success would not become a left versus right battle, but one of prioritization—would the American electorate be more comfortable, if forced to choose, with a model more steeped in expertise, or rights protection?

*C. Bringing our Own Norms Back Home: Afghanistan & Japan*

In evaluating American concepts of evolving dignity, reformers should look to the nations that America helped to create and the juvenile justice systems within fledgling nations in which we have commanded a strong presence. Many countries with some of the most progressive sentencing regimes can be found in Africa and Eastern Europe, where developing countries have modeled their democracies and governing structures on our own.<sup>184</sup> Outside of a basis in the CRC, or customary *jus cogens* norms, these countries have reformed their juvenile sentencing policies because of American values and our own history of juvenile legislation. Developing nations and those coming out of dictatorial rule look to Western guidelines to develop sound rules of law and governance. These same countries are on the forefront of progressive juvenile sentencing. If these nations are going off what they most admire in the United States, is it not time to reevaluate our own principles, particularly as they relate to what makes sense in terms of juvenile sentencing in the twenty-first century? It must be possible to justify banning JLOWP within a domestic context, after all, if other nations were able to look to our own to justify doing away with JLOWP. Again, as its rhetoric demonstrates, the Supreme Court is too timid to face this truth, and such an argument should play out not only at the Court, but locally.

In 2005, after the ratification of its new United States-inspired Constitution, Afghanistan enacted a Juvenile Code, affirming that “the best interests of the child should be taken into consideration.”<sup>185</sup> Significantly, the Code banned life

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<sup>184</sup> See *infra* pp. 26–28.

<sup>185</sup> U.N. Comm. on the Rights of the Child, *Initial Report of States Parties Due in 1996, Afghanistan*, ¶ 41, U.N. Doc. CRC/C/AFG/1 (June 13, 2010).

imprisonment and the death penalty for minors.<sup>186</sup> Afghanistan continues to build its new government with America's help. Indeed, Afghanistan's laws allow for capital punishment,<sup>187</sup> yet its juvenile sentences are more progressive. This is an emotive argument—one that can be made to states. Do we really want to be behind the countries we help to build? To conservatives, advocates can argue that we maintain American exceptionalism by being true to our values—that is, those we have exported abroad.

Japan's original juvenile legislation was also passed almost entirely due to American influence: "to bring the juvenile justice system into line with the post-war democratic constitution."<sup>188</sup> Aware that the American system "focused on what was best for the juvenile—and thus society—in the long-term,"<sup>189</sup> Japan sought to emulate what was most effective about the American legal system.<sup>190</sup> It makes sense that the Japanese adopted a rather progressive juvenile sentencing regime. Indeed, while scholars compare domestic sentencing to sentencing regimes of foreign lands, Japan serves as a crucial comparator because its media culture resembles our own.<sup>191</sup> There, as here, media portrayals of youth violence play a large role, contributing to America's desire to institute harsh, punitive sentences at the expense of more progressive, restorative, and rehabilitative practices.<sup>192</sup> Indeed, in response to several highly publicized, horrific incidents committed by juveniles, Japan revised its Juvenile Act in 2000; it had not done so "since the Allied Occupation in 1949."<sup>193</sup> While juveniles would receive a maximum sentence of fifteen years

<sup>186</sup> *Id.* ¶ 82. For children sixteen to eighteen, it allows for only half the equivalent adult sentence. *Id.* For children twelve to sixteen, it allows only up to a third of the equivalent adult sentence. *Id.*

<sup>187</sup> *Abolitionist and Retentionist Countries*, *supra* note 121.

<sup>188</sup> Trevor Ryan, *Creating 'Problem Kids': Juvenile Crime in Japan and Revisions to the Juvenile Act*, 10 J. JAPAN L., 153, 155 (2005).

<sup>189</sup> *Id.*

<sup>190</sup> Mark Fenwick, *Japan: From Child Protection to Penal Populism*, in CRITICAL ISSUES, *supra* note 3, at 147.

<sup>191</sup> See *Japanese Juvenile Justice*, BBC WORLD SERVICE (Feb. 24, 2001), [http://www.bbc.co.uk/worldservice/people/highlights/010223\\_japan.shtml](http://www.bbc.co.uk/worldservice/people/highlights/010223_japan.shtml).

<sup>192</sup> See Ryan, *supra* note 188 at 176–78.

<sup>193</sup> See *Japanese Juvenile Justice*, *supra* note 191; Ryan, *supra* note 188, at 153.



for an act punishable by life imprisonment if committed by an adult, Japan still allows life imprisonment for minors who have committed capital crimes.<sup>194</sup> In 2005, its Supreme Court authorized the sentence of life imprisonment with labor for a juvenile who had committed homicide.<sup>195</sup> Reformers can learn two things from Japan: first, how to respond to media, and second, how to push for quick reforms.

*D. Learning from the Research: The UK & Western Europe*

Not only does Great Britain provide an example of a country with penal legislation and values extremely similar to our own, but it also highlights the value that can be found in effective data collection to promote juvenile justice reform. Great Britain has effectively prohibited the punishment of JLWOP “for the better part of the past seventy-five years. The prohibition emerged historically in recognition of the inherent instability and emotionally imbalance of persons under age [eighteen], which made such sentences cruel and unusual.”<sup>196</sup> Many of the countries with the harshest juvenile sentencing laws only have them because such “legislation . . . [drew] heavily from the U.K. Children’s Act of 1908, long since abandoned by the British, which was based on the outdated notion of rounding up and containing all delinquent and ‘incorrigible’ children.”<sup>197</sup> Research shows that “[t]his approach has been proven to be both costly and ineffective; in most

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<sup>194</sup> U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 2001, Japan*, ¶ 91, U.N. Doc. CRC/C/104/Add.2 (July 24, 2003) [hereinafter U.N. Comm. on the Rights of the Child, *Japan*].

<sup>195</sup> Tomoki Ikenaga, *The Phenomenon in the United States Juvenile Justice System of Blending Protective Sentencing and Criminal Sentencing, and the Issue of Stiffer Penalties in the Japanese Justice System*, 1–2 (Ctr. for the Study of Law & Soc., Berkeley, Working Paper, May 27, 2005). “However, the amended law now allows the court to decide whether the sentence should be life imprisonment or limited-term imprisonment.” U.N. Comm. on the Rights of the Child, *Japan*, *supra* note 194, ¶ 91. Finally, not only is parole available in Japan, but it is often obtained within seven years of the sentence. UN Comm. on the Rights of the Child, *Third Periodic Reports of States Parties Due in 2006, Japan*, ¶ 512, U.N. Doc. CRC/C/JPN/3 (Sept. 25, 2009).

<sup>196</sup> Brief for Amnesty International, *supra* note 27.

<sup>197</sup> UNICEF REG’L OFFICE FOR SOUTH ASIA, *JUVENILE JUSTICE IN SOUTH ASIA: IMPROVING PROTECTION FOR CHILDREN IN CONFLICT WITH THE LAW* 28 (2006).

commonwealth countries, it has been supplanted by more child-centered, rights-based approaches focused on restorative justice and community-based rehabilitation.”<sup>198</sup> While England’s approach remains “more repressive than that of most other European countries,”<sup>199</sup> crucially, “it seems more pragmatic than that of the United States.”<sup>200</sup> Pragmatism is what is called for. Indeed, we have a “tradition”<sup>201</sup> of “strong empirical research,”<sup>202</sup> yet we refuse to build upon it.<sup>203</sup> Instead, Western Europe has used our research time and time again to build programs that comply with international norms, reduce recidivism, minimize juvenile crime, respect individualism, and increase educational opportunity.<sup>204</sup> England has invested heavily in “generalized preventive policies”<sup>205</sup> and a “gradual approach to youth crime”<sup>206</sup> rather than bending to American all-or-nothing conceptions of three-strikes policies and a “do the crime-pay the time mindset” that fails the test of logic when applied to juveniles.<sup>207</sup>

Finally, in Belgium, only recently was the maximum sentence lowered to thirty years from life imprisonment.<sup>208</sup> The change had little to do with the CRC.<sup>209</sup> The Belgian system is

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<sup>198</sup> *Id.*

<sup>199</sup> Josine Junger-Tas, *Trends in International Juvenile Justice: What Conclusions Can Be Drawn?*, in INTERNATIONAL HANDBOOK, *supra* note 114, at 513.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 527.

<sup>203</sup> On the other hand, two of the more powerful and far-reaching juvenile justice reform programs, Models for Change and the Annie E. Casey Foundation’s Juvenile Detention Alternative Initiative (JDAI), have recently begun to use data in their push for change.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 513.

<sup>206</sup> *Id.*

<sup>207</sup> Donna M. Bishop & Scott H. Decker, *Punishment and Control: Juvenile Justice Reform in the US*, in INTERNATIONAL HANDBOOK, *supra* note 114, at 20–21.

<sup>208</sup> U.N. Comm. on the Rights of the Child, *Second Periodic Reports of States Parties Due in 2001, Japan*, ¶ 11, U.N. Doc. CRC/C/15/Add.38 (June 20, 1995).

<sup>209</sup> E-mail from An Nuytiens, to David A. Shapiro (Nov. 22, 2010, 6:14 AM) (on file with author). In 1995, it appeared that, at least statutorily, life imprisonment was available for minors between the ages of sixteen and eighteen.

welfare-oriented.<sup>210</sup> While more criminal justice elements are being added to juvenile legislation, the fact that Belgium recently changed its maximum sentence reveals that retributivism—an increasingly punitive practice—can co-exist beside a juvenile welfare-oriented legal system. Thus, reformers can use models present in Belgium to advocate for the welfare-oriented models found in Scandinavian countries, resolving the problem of rehabilitation versus retribution. Reformers should concentrate on domestic reform using various international principles so that our standard of decency *will* evolve, placing real reform on much more stable ground than tenuous 5–4 Supreme Court decisions.<sup>211</sup>

We can reform juvenile practices while acknowledging that some of the ideas behind reforms in other countries appear not to mesh with our cultural norms. The United States does not have *Ubuntu*, nor can we ask our citizens to suddenly adopt a concept that has been thriving in Africa. Scholars can use the values of education and rehabilitation, however, to build a model that enables children to become more independent.

Reformers might want to push for an elimination of the transfer procedures that allow youth to be tried in adult courts, for example. What is perhaps most troubling about the use of the juvenile transfer is that it is based entirely on retributive ideology and has little to do with the American value of individualized judgment. The model exists to prosecute the “worst” juvenile offenders, judging children as adults by looking first at the horrific nature of their crime and only second (if ever) to the reduced culpability that comes from youth. Even in jurisdictions that claim to look at the offender holistically before conducting a transfer, this statement is accurate. Transfer would not even be contemplated for relatively minor crimes, even if the juvenile were completely aware of the nature of the crime and its consequences. Thus, there needs to be an acknowledgment at the most basic level that our justice system at the juvenile level is still based in a concept of vengeance, rather than rehabilitation. If America

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<sup>210</sup> *Id.*

<sup>211</sup> Although *Graham* was a 6–3, Judge Roberts’ concurrence stipulated that he would not ban LJWOP for non-homicide offenders as a general rule. See *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts, J. concurring).

truly values independence and freedom, it must do away with juvenile transfers, just as many other nations have. The average maximum juvenile sentence internationally, across all continents, is roughly fifteen years.<sup>212</sup> Clearly, America needs real change. These issues become meaningless if juvenile justice reformers at the state and national levels can successfully advocate for juvenile sentencing reforms using the examples provided by the various countries discussed in this article.

We have already made progress. *Roper* and *Graham* have led the discussion at the national level. At the state and local levels, as the so-called “superpredator myth” of the early 1990s that derailed<sup>213</sup> progress comes to a head, America is also moving in a less punitive direction. The Annie E. Casey Foundation’s Juvenile Detention Alternative Initiative<sup>214</sup> and Models for Change programs make headway,<sup>215</sup> as does “the rise in litigation against juvenile corrections and fiscal pressures.”<sup>216</sup> The Obama Administration has also recently announced “Race to the Top” grants to encourage states to think outside the box on juvenile justice reform issues.<sup>217</sup> These discretionary grants go to the states that develop the most innovative, groundbreaking methods for increasing outcomes for juvenile offenders and reducing recidivism. Advocates can use this incentive to push state legislatures to look not only to competitor states, but to other countries, with whom they do not have to compete for the block funding. As juvenile reformers continue to move forward on these bases, I urge them not to forget all they can learn from the international arena.

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<sup>212</sup> See *supra* pp. 17–19.

<sup>213</sup> E-mail from Dr. Barry Krisberg to David A. Shapiro (Nov. 22, 2010, 12:23 PM) (on file with author).

<sup>214</sup> STANFIELD, *supra* note 159.

<sup>215</sup> *Systems Reform in Juvenile Justice*, MODELS FOR CHANGE, <http://www.modelsforchange.net/index.html> (last visited Jan. 15, 2012).

<sup>216</sup> *Id.*

<sup>217</sup> *Administration Revises Proposal on Race to the Top Funding for Juvenile Justice*, OFF. JUV. JUST. & DELINQ. PREVENTION (Apr. 1, 2011), <http://ojjdp.gov/enews/11juvjust/110401.html>.

*E. Starting Points Inspired by Comparing other Nations*

This article has emphasized the importance of focusing on comparative, rather than international, law and using the models found in other nations to advocate at the local levels for change rather than the nation's highest court. It might be best to return to a more welfare-oriented system, premised in the notion of expertise that justifies the existence of administrative adjudicatory bodies. In France, for example, the most violent juvenile offenders are tried by a three-judge panel of two youth court judges and a regular chief magistrate.<sup>218</sup> Of course, the primacy placed on due process must be balanced with the need for a welfare-oriented model. This system is easier to advocate on paper than in practice. The transition can begin with a decreased emphasis on the retributive model of punishment.<sup>219</sup> Even where retribution is emphasized, however, as in Scandinavia and Scotland,<sup>220</sup> the principle of "just desserts" remains prominent, but balanced, by "welfare boards, their restraint in punishment and institutionalization and their emphasis on treatment interventions."<sup>221</sup>

A changed emphasis might also rest in education. The Council of Europe's 1987 recommendation for juvenile justice argued that all sentences for juveniles ought to have "an educational character."<sup>222</sup> In America, the National Council of Juvenile and Family Court Judges similarly argued that "[c]hildren are developmentally different from adults; they are developing emotionally and cognitively; they are impressionable; and they have different levels of understanding than adults."<sup>223</sup> The key difference is not just the phrase "educational," but the very idea that the European system emphasizes an alternative to incarceration, not simply what separates adolescents from adults in terms of culpability and cognition, as the standard made by the American judiciary

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<sup>218</sup> Wyvekens, *supra* note 151, at 183.

<sup>219</sup> J. Junger-Tas, *supra* note 199, at 509.

<sup>220</sup> *Id.* at 528.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 510.

<sup>223</sup> *Id.* at 510 (citing THE NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, THE JANICULUM PROJECT: STRUCTURAL, PROCEDURAL AND PROGRAMMATIC RECOMMENDATIONS FOR THE FUTURE JUVENILE COURT (1998)).

elucidates.

Jeffrey Fagan proposes having “states . . . recognize the constitutional fact of diminished culpability of adolescents by applying a ‘youth discount’ on sentences for juveniles who are sentenced as adults.”<sup>224</sup> This idea can be borrowed directly from other countries<sup>225</sup> and would certainly be a good start. As Fagan continues, such a standard would reduce “the guesswork in parole decision-making and [would infuse] the virtue of even-handedness into the jurisprudence of juvenile crime.”<sup>226</sup>

Given America’s early 1990s media coverage that focused on juvenile crime, reformers should seek to take control of the media message. This could prove as important as, or even more important than, sentencing reform.<sup>227</sup> “Media images”<sup>228</sup> have forced the hand of domestic politicians. “Penal populism may emerge as the outcome of such media and political pressures.”<sup>229</sup> Understanding the power of media images is crucial to reform efforts.<sup>230</sup>

Overall, as Josine Junger-Tas argues, it would be best for America “to merge the evidence-based approach of the Anglo-Saxon states with the essentially humanistic juvenile justice tradition of continental Europe”<sup>231</sup> into a due process framework, deemphasizing retribution for juveniles and, at the same time, prioritizing education. While that sounds like a lot to swallow, these types of changes should not be hard to institute. America started the evidence-based model.<sup>232</sup> It was the first country to proffer a humanist model to deal with juvenile justice.<sup>233</sup> Our Constitution emphasizes, moreover, due process proudly as a model for all others. In the end, the

<sup>224</sup> Fagan, *supra* note 11.

<sup>225</sup> See *supra* notes 109–113 and accompanying text.

<sup>226</sup> Fagan, *supra* note 11.

<sup>227</sup> See generally Carolyn Hamilton & Rachel Harvey, *The Role of Public Opinion in the Implementation of International Juvenile Justice Standards*, 11 INT’L J. CHILD. RTS. 369 (2004) (describing the role the media plays in determining the public’s view on juvenile justice legislation).

<sup>228</sup> INTERNATIONAL HANDBOOK, *supra* note 144, at xi.

<sup>229</sup> *Id.*; see also J. Junger-Tas, *supra* note 199, at 522.

<sup>230</sup> Bishop & Decker, *supra* note 209, at 28 (citing T.J. BERNARD, *THE CYCLE OF JUVENILE JUSTICE* (1992)).

<sup>231</sup> J. Junger-Tas, *supra* note 199, at 529.

<sup>232</sup> *Id.* at 527.

<sup>233</sup> *Id.*

call for reform by looking abroad is a Conservative one. It asks us to harken back to our own traditions and history—and this is something that reformers of all political stripes can declare allegiance to.

#### CONCLUSION

Even if the United States finally enacts a total ban on JLWOP, life imprisonment remains a viable option. In Florida, for example, where Terrance Graham was originally sentenced to LWOP, the courts “are re-sentencing . . . juveniles to new terms that still amount to life sentences.”<sup>234</sup> This kind of sentencing, unfortunately, shows that the optimism held by juvenile justice reformers for Supreme Court decisions is misguided.

This article has introduced a new paradigm, moving beyond potential upcoming cases in the Supreme Court—which will probably ask what “a meaningful opportunity of release”<sup>235</sup> consists of or whether JLWOP is unconstitutional when applied to juveniles who have committed felony murder<sup>236</sup> and homicide,<sup>237</sup> and noting that basing the validity of JLWOP upon international law will neither persuade decision-makers nor lead to any real change.<sup>238</sup> Instead, by analyzing comparative rationales for progressive juvenile sentencing norms, this article demonstrates that scholars can make the most compelling case possible for real reform.

America used to be the inspiration for countries pursuing juvenile justice reform. It stood for fairness and compassion. It no longer does. By looking at other countries, however, the

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<sup>234</sup> Ashby Jones, *Is Florida Ignoring a High Court Ruling on Juvenile Sentences?*, WALL ST. J., (Nov. 23, 2010; 11:31AM), <http://blogs.wsj.com/law/2010/11/23/is-florida-ignoring-a-high-court-ruling-on-juvenile-sentences/>.

“More than six months after the U.S. Supreme Court ruled that Florida’s practice of sending juveniles to prison for the rest of their lives for non-murder crimes was unconstitutional, not a single former juvenile sentenced in such cases has found much relief.” Lloyd Dunkelberger, *Juvenile Offenders Still Get Near-Life Terms*, SARASOTA HERALD-TRIBUNE (Nov. 21, 2010, 1:00AM), <http://www.heraldtribune.com/article/20101121/ARTICLE/1121108>.

<sup>235</sup> See *People v. Mendez*, 114 Cal. Rptr. 3d 870 (Ct. App. 2010).

<sup>236</sup> See *Miller v. State*, 63 So.3d 676 (Ala. 2010). Indeed, the Supreme Court has granted cert in this case. See *infra* note 11.

<sup>237</sup> See *Gonzalez v. Florida*, 50 So. 3d 633 (Fla. Dist. Ct. App. 2010).

<sup>238</sup> See Bradley, *supra* note 75, at 557.

United States can not only recapture the American values that once led the juvenile justice movement across the globe, but help these values reinvigorate our own conceptions of what it means to be fair and just. Even though the majority of western nations increased their emphasis on punishment over rehabilitation during the 1980s and 1990s,<sup>239</sup> juvenile sentencing structures remained largely intact. Reformers need to take *Graham* further. Such steps start by going well beyond the Eighth Amendment context and actually evaluating what other countries do. Foreign approaches may not always be better, but they provide a fresh perspective—one that is much needed given the current state of America's juvenile justice system. Advocates have been right to look abroad. They should dig deeper for rationales that can help to create substantive change here. They should no longer rely upon the Supreme Court to achieve results. We can do it. Justice Ginsburg said it best: we should never “abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.”<sup>240</sup>

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<sup>239</sup> J. Junger-Tas, *supra* note 199, at 511.

<sup>240</sup> Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, NY TIMES, Apr. 2, 2005 (quoting Justice Ginsburg).