

DISRUPTING THE PATHWAY FROM FOSTER CARE TO THE JUSTICE SYSTEM—A FORMER PROSECUTOR’S PERSPECTIVES ON REFORM

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Nearly half a million children are victims of abuse and neglect and part of our foster care system. Over time, many of these youth cross into our juvenile and then adult justice systems; some will end up as federal offenders, immersed in a process where mandated penalties provide little room for flexibility or consideration of the characteristics and needs of the individual. This article will offer the perspectives of a former prosecutor and child welfare advocate on: (i) the current conditions and challenges within our foster care system—the feeder for many youth into gangs and criminal activity; (ii) the misaligned priorities and disheartening patterns we currently see in our justice system; and (iii) the ill-advised practices, that set our nation apart from the rest of the world, allowing juvenile offenders to receive life without parole sentences. The article will then discuss a series of recommendations in all of these areas that would enable us to turn the corner and chart an improved and more hopeful path for our nation’s vulnerable and at-risk children and youth.

Keywords: *foster care; juvenile justice; juvenile life without parole (JLWOP); child welfare reforms; federal prosecutions; gang prevention and intervention; crossover youth*

The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.

Franklin D. Roosevelt¹

There are two lasting bequeaths we can give our children.
One is roots. The other is wings.

Hodding Carter, Jr.²

I. INTRODUCTION

It has been said that a society’s soul should be judged by how it treats its children.³ Using that measuring rod, we justifiably can question the integrity of our nation’s soul as we continue to allow millions of our children to live out a life marked by poverty, neglect, emotional and mental health struggles, homelessness, and despair.

Nearly half a million children are victims of abuse and neglect and part of our foster care system. Over time, too many of our foster children plummet down a slippery slope into the juvenile and then adult justice systems. It is not a long fall before some of those youth end up as federal offenders, immersed in a process where mandated penalties provide little room for flexibility or consideration of the characteristics and needs of the individual.

With a new administration in place and a progressive attorney general committed to implementing policies that are *smart* on crime as opposed to simply tough on crime, we find

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ourselves at a turning point.⁴ We are at a critical moment in time with new opportunities to rethink past practices, devise more effective approaches, and chart a more positive path for the thousands of children and youth in our country who stand at a precipice.

It is my aim in this article to offer the perspectives of someone who has seen firsthand two bookends of a far too common and disheartening path: the *starting* point for the thousands of abused and neglected youth who grow up in foster care and frequently face a childhood of upheaval, trauma, and instability and the *ending* point for youth who graduate to the federal justice system and often find themselves facing inflexible and unforgivingly harsh penalties.

I served as a federal prosecutor for over a decade and a half—both in Los Angeles and with an Organized Crime and Drug Enforcement Task Force in the mid-Atlantic region. My tenure with the Department of Justice (DOJ) coincided with the “tough on crime” mindset of the late 80s and early 90s. I saw prosecutive tools used effectively to investigate large scale criminal enterprises and I worked alongside committed law enforcement professionals who sought to make our communities safer. I handled numerous investigations, indictments, and appeals and participated in the first prosecution in the Districts of Maryland and Virginia resulting from Los Angeles street gang members’ efforts to establish a foothold in the DC corridor. While with the Los Angeles U.S. Attorney’s office, I prosecuted and supervised hundreds of criminal cases and appeals, many involving narcotics or firearms violations by suspected gang members.

Over the course of my decade and a half with the DOJ, I observed firsthand the downstream byproduct of our failure to attend to the needs and concerns of youth at risk. I saw numerous federal offenders, many barely older than eighteen, with a past history of abuse and neglect that propelled them into unfortunate life circumstances and a craving for connection often satisfied by gang affiliation. I also encountered the frustration of judges and lawyers with harsh mandated federal penalties that allow little room for judgment, attention to the needs and history of the individual, or simple humanity. I have observed the tremendous cost to society as thousands of young offenders every year are destined to an adult future behind bars. And I have seen the tragic loss of human potential when we give up on notions of rehabilitation and subscribe to the view that public safety is furthered solely by longer and harsher penalties.

More recently, I have spent nearly ten years as an advocate in the foster care system, an endeavor I pursued out of a desire to scroll back and find windows of opportunity that would enable me to positively impact children and youth at risk when the first wake-up call sounded. Over these years, I have seen many opportunities missed as a system dealing with disjointed leadership, siloed funding, information gaps, uncertain accountability, and woefully insufficient resources fails to address the social, developmental, and emotional needs of youth in foster care.

With this backdrop in mind, my intent in this article is to offer perspectives in four areas that I believe to be particularly timely as our new attorney general and our nation’s leaders and policy makers grapple with ways to combat youth crime and positively impact youth at risk:

- Current conditions and challenges in our foster care system—the feeder for too many youth who become gang involved and cross into the justice system,
- Observations of our justice system and the particular difficulties facing urban communities,
- Sentencing practices (unique to our country) that allow juvenile offenders to be sentenced to inflexible and unforgiving life sentences, and

- Recommendations for how we turn the corner and chart a new path for our most vulnerable children and youth.

II. THE CURRENT STATE OF OUR FOSTER CARE SYSTEM—THE JUVENILE JUSTICE “FARM CLUB”

There are approximately 500,000 children in foster care nationally, almost double the number from the 1980s.⁵ Some children remain under child welfare jurisdiction for only a few months while their parents get their lives back on track; thousands of others, however, cannot safely be returned home and grow up in foster care. These are children we all, collectively, commit to parent. Yet too often we struggle mightily to responsibly attend to their needs.

Life for many youth in foster care is characterized by movement from placement to placement, disruption of schooling, and the severing of ties with all that is familiar to the child, often including siblings and extended family. Half of our youth in foster care do not receive appropriate mental health services, many lack timely and basic medical care, some suffer emotional or physical abuse at the hands of the foster caregivers we entrust to keep them safe, and almost one-third of children in foster care live below the poverty line.⁶ It is not surprising, with these challenges as a starting point, that foster youth find it difficult to keep up—75% of children in foster care are working below grade level in school, almost half do not complete high school, and as few as 15% attend college.⁷ Nor is it surprising that these troubled youth become troubled adults. Within the first couple of years after young people emancipate from foster care, commonly at the ill prepared age of eighteen:

- 51% will be unemployed,
- One-third will be on public assistance,
- 25% become homeless and many more will return to the biological parent we sought to protect them from by keeping them in foster care, and
- 25% will be incarcerated.⁸

With these facts and figures in mind, the imperative to improve policy and practice and responsibly parent the most vulnerable children in our community is clear. Yet too often policy making in this arena is scattered, responding to the crisis of the moment; practices and decision making are reactive, rather than strategic; public perceptions are driven by the negative shadow cast by tragedy and scandal-driven media coverage; and the resolve to devote needed resources and attention to reform is anything but strong.

In 1991, the National Commission on Children issued the following harsh indictment of our foster care system: “If the nation had deliberately designed a system that would frustrate the professionals who staff it, anger the public who finance it, and abandon the children who depend on it, it could not have done a better job than the present child-welfare system.”⁹ Unfortunately, not enough has changed since that blunt assessment. There remains a conspicuous lack of cohesive and collaborative decision making in today’s child welfare system and no collective sense of accountability for the individual child. As a result, far too many problems are left unidentified or unresolved because the various arms of the government responsible for raising these youth operate in silos and no one takes overall responsibility for ensuring the well-being and success of foster children.

As a result of all of these challenges, foster care—for too many youth—is the first step down a path to the justice system. Foster youth commonly lack a stable or positive adult

role model, tend to feel socially isolated, and are deprived of the opportunity to participate in extracurricular activities that are a fundamental part of development. As a result, foster youth are at an elevated risk of gang involvement as they seek to fill their family void. And these youth quickly find themselves on the doorstep of the justice system.

Studies confirm that the risk of delinquent behavior is nearly 50% higher for victims of abuse and neglect.¹⁰ So-called crossover youth who move from the dependency to the juvenile justice system are disproportionately youth of color. Many of these youth (1/3) enter the justice system as a result of “placement crimes” stemming from their residence in group home facilities where adolescent misbehavior is addressed differently than it would be in a family setting and often results in engagement by law enforcement.¹¹ Many other foster youth find themselves vulnerable to criminal misbehavior as a result of:

- Lack of a stable living environment—one study in Pennsylvania found that over 90% of foster youth who move five or more times will end up in juvenile justice¹²;
- Unattended to mental health and substance abuse concerns—research in Los Angeles revealed that while over 83% of crossover youth have mental health or substance abuse problems, very few (8%) have received substance abuse treatment¹³; and
- School absences or problems—Los Angeles research revealed that over 45% of crossover youth were truants or had irregular attendance and nearly one-quarter of foster youth who came into contact with law enforcement were simply not enrolled in school.¹⁴

All of these risk factors make these youth particularly susceptible to recruitment by and the influence of gangs. Indeed, recent research determined that at least one-quarter of Los Angeles’ crossover youth were known to be gang involved.¹⁵

Once they come into contact with law enforcement, foster youth often find themselves battling the justice system with few supports. Reports on the foster care bias these youth face confirm that they are more likely to end up arrested, detained, charged with a crime, and pushed deeper into the justice system than other similarly situated nonfoster youth.¹⁶ Thereafter, given the lack of ongoing child welfare services and support for the child or family once the youth crosses into juvenile justice, foster youth have no home to return to upon exiting custody and tend to spend longer periods of time incarcerated or under probation supervision.¹⁷

Understanding these struggles, and the enhanced risk facing youth in foster care for entry into gangs and the juvenile justice system, can help define where and how our system can improve.

III. PERSPECTIVES ON THE JUSTICE SYSTEM

Our nation today has the dubious distinction of leading the world in incarceration rates with more than 2.2 million people behind bars and another 5 million on probation or parole.¹⁸ While we profess to embrace enlightened views on the need for prevention and early interventions, an astounding one of every 100 adult Americans is incarcerated. Indeed, the number of inmates in our prisons has increased seven-fold since 1970.¹⁹

Equally concerning is the striking overrepresentation of individuals of color in our criminal justice system. According to Bureau of Justice statistics, African American males

were incarcerated at six times the rate of White males and accounted for approximately 900,000 of the nation's 2.3 million inmates held in federal, state, or local jails as of midyear 2007.²⁰ If this trend line and current incarceration rates continue, one in every three African American males and one in every six Latino males will end up in jail in their lifetime.²¹

Juveniles have not been spared from this crush of arrests and prosecutions. In 2007, law enforcement agencies in the United States made an estimated 2.18 million arrests of individuals under the age of eighteen; females accounted for nearly one-third of these arrests.²² As with adult prosecutions, the racial composition of arrests and prosecutions of juveniles reflects a disturbingly disproportionate number of youth of color. While African American youth represent only 16% of the total population, they account for 28% of juvenile arrests, 35% of youth judicially waived to criminal courts, and 58% of youth admitted to state adult prisons.²³

As a result of this massive prison population, even while we find ourselves in challenging fiscal times, we continue to spend billions of dollars for new prison construction to house a rapidly increasing number of persons convicted of federal and state offenses. My home state of California leads the nation in prison population and incarceration expenditures. California has over 175,000 individuals in state and county jails and spends over \$10 billion per year in incarceration costs—a figure that significantly exceeds the state's total expenditure on both the University of California and the Cal State University higher education systems' budgets combined.²⁴ That figure does not even begin to account for the accompanying human toll and loss of potential resulting from young offenders who spend their adult years behind bars. Moreover, these expenditures dwarf the modest investments we have made in prevention and intervention; indeed, while costs associated with incarceration and prisons have been on the rise, we have seen a reduction in investments in juvenile delinquency prevention.²⁵

Not surprisingly, a large number of California's juvenile prosecutions occur in Los Angeles and many of those cases arise in the context of gang investigations. Los Angeles County is estimated to have over 1000 gangs and more than 80,000 gang members.²⁶ Local gang injunctions have been employed with increased frequency in recent years to combat gang activity and affiliation. These injunctions include prohibitions that forbid youth who are deemed gang affiliated from engaging in activities such as congregating in groups in particular designated areas, using cell phones, possessing pagers or bikes, or being out after hours.²⁷

The federal prosecutive arm in Los Angeles—the U.S. Attorney's Office for the Central District of California—has some of the most capable, dedicated and hard-working attorneys in the nation. With nearly 200 prosecutors, the office has identified criminal gang violence as one of its priority areas. Joint state and federal task forces have investigated and prosecuted a number of criminal organizations, including the Mexican Mafia, the Drew Street gang, the Vineland Boys, and several other violent street gangs. These prosecutions tend to be large and sweeping, often involving as many as fifty to seventy-five defendants. Prosecutions seek to remove from the streets not simply the gang leadership, but also what are viewed as second and third tier members of the organization. Federal charges include narcotics violations (most of which trigger mandatory minimum federal penalties), gun offenses (also frequently resulting in mandated penalties), RICO allegations, and sometimes civil rights violations (if the criminal acts were racially motivated).²⁸ These federal offenses often carry mandatory minimum penalties that can result in sentences in excess of ten, twenty, or more years.

Whatever one may think about the dearth of investment in prevention and intervention efforts, these prosecutive efforts should not be summarily dismissed as ill advised or unnecessary. Many dangerous and violent offenders have been removed from the streets as a result of the dedicated work of law enforcement and prosecutors. And we know that, while the causative factors may be less than clear, violent crime and homicides have declined in recent years.

As one assesses this landscape, however, certain questions necessarily come to mind:

- Are federal prosecutions sweeping too far and wide, pulling in too many lower-level gang members who could have been diverted from federal prosecution and may simply end up emerging from federal prison with a more entrenched involvement in and allegiance to the gang?
- Will removal of large numbers of gang members from the street address the community's long-term safety if we do little to invest in strategies aimed at preventing a new generation of gang members from rising up and filling the void?
- Can incarceration and stiff penalties adequately deter gang leadership and organizations that we now know operate robustly from within the jails?
- Do mandated federal penalties—and in particular the harsh penalties that result from simple possession of minimal quantities of crack cocaine—leave sufficient room for courts to consider an individual's past and the potential for rehabilitation?
- How do we ameliorate the disproportionate number of youth of color who fall into our justice system?

There are no easy answers to these questions, nor quick fixes to the underlying root problems they implicate. We must, however, seriously consider these questions and struggle with understanding the answers as efforts to reevaluate our justice system move forward in the coming years.

In the wake of a recent large-scale gang prosecution in Los Angeles, a former federal prosecutor summed up what he perceived to be the futility of federal efforts: "They will send lots of people to jail, but won't change the streetscape." Within a matter of months, he predicted, a new set of gangs will be "fighting to control turf old gangs controlled."²⁹ While the never-ending cycle and revolving door of gang members does *not* mean that we should abandon federal prosecution and suppression efforts, it does suggest that our balancing of investments and setting of priorities may be in need of recalibration.

IV. JUVENILE LIFE WITHOUT PAROLE SENTENCES

While juvenile crime has been on the decline from the late 1980s, our public—largely as a result of increased coverage and sensationalist reporting of juvenile crimes—is increasingly fearful of young offenders and has been calling over time for less forgiving approaches and harsher penalties. Every year, over 200,000 children are transferred for prosecution into the adult system.³⁰ On any given night over 10,000 children are held in adult jails where they are particularly vulnerable to victimization and abuse. Nearly 100,000 children, some as young as ten, are confined in juvenile detention and residential facilities, which are often plagued by harsh and abusive conditions.³¹

Many youthful offenders will never surface from our jails. In particular, over 2500 individuals are serving life without parole sentences (known as "JLWOPs"—juvenile life

without parole) for crimes they committed at age seventeen or younger.³² Seventy-three of those individuals committed their crimes at age thirteen or fourteen.³³ Yet these non-parolable life sentences—which strip the youth of any opportunity to earn release based on rehabilitation—contradict what science has proven in regard to both diminished adolescent culpability and the increased amenability of juveniles to change and rehabilitation. Recent advances in scientific and psychosocial research confirm that anatomical immaturity renders youth less able to assess risks, control impulsive behavior, and engage in moral reasoning. This body of research also confirms that youth are more amenable to rehabilitation than adults as their brains continue to mature.³⁴

A. THE UNITED STATES AS AN INTERNATIONAL OUTLIER

The United States leads the world in the practice of sentencing juveniles to life without parole; in fact, we are now the *only* nation in the world that allows this sentencing practice.³⁵ Moreover, settled international law *bans* the sentencing of children to life without parole. The Convention on the Rights of a Child contains an absolute ban on the practice³⁶ and the United Nations Committee on the Elimination of Racial Discrimination found that racial disparities in the sentencing of youth to life without parole in the United States results in a sentencing practice “incompatible” with the Convention.³⁷ The oldest human rights treaty to which the United States is a party, the International Covenant on Civil and Political Rights, similarly prohibits this sentence.³⁸ Thus, the United States now parts company not simply with every other country in the world, but also with international legal precepts, by continuing to sanction these sentences.

B. GEOGRAPHIC DIFFERENCES AMONG THE STATES

Our states have adopted widely disparate approaches and as a result, reflect vast differences in regard to the imposition of juvenile life sentences. As of 2007, nine jurisdictions in the United States prohibited the sentencing of youth offenders to life without parole sentences.³⁹ Other states are considering reforms or have efforts underway to eliminate the sentence.⁴⁰ States with the largest population of individuals serving JLWOP sentences include:

- Pennsylvania—444
- Michigan—346
- Florida—266
- California—250
- Missouri—116
- Illinois—103 (note that the neighboring state of Indiana, which has only 2 individuals serving JLWOP sentences)

These six states alone account for over 1500 individuals nationally serving JLWOP sentences. A few large states are at the other end of the spectrum: New York has 0 individuals serving JLWOP sentences and Texas has only 4.⁴¹ This breakdown underscores the fact that the fortuity of geography factors heavily into the consequences a youth might face upon conviction.

C. OFFENDER CHARACTERISTICS AND DEMOGRAPHICS

The majority of youth sentenced to life in prison are first-time offenders—59% of children nationwide who received JLWOPs had no prior convictions. Over 100 youth in the United States were sentenced to life in prison for crimes where no one was killed. And the vast majority of JLWOP cases—over 95%—were automatically transferred from juvenile court to adult criminal court with no opportunity for a judge to review the appropriateness of the transfer.⁴²

An estimated 25 % of these youth were convicted based on accomplice liability or the “felony murder” doctrine—they were not the principal actor in the offense.⁴³ As such, the youth serving a life sentence may have participated in a felony during which another participant committed murder, without the knowledge or intent of the youth.

Youth in these cases are often acting under the influence of an adult. In nearly 70 percent of cases reported to Human Rights Watch in which the youth was not acting alone, at least one codefendant was an adult. California data collected by Human Rights Watch reveals that in 56 percent of those cases, the adult received a lower sentence than the juvenile.⁴⁴

JLWOP sentences disproportionately impact youth of color. On average, Black youth are sentenced to JLWOPs at a per capita rate that is ten times that of White youth.⁴⁵ California has the worst record in the nation for racial disparity in the imposition of life without parole for juveniles. African American youth in California are sentenced to life without parole at over eighteen times the rate of White youth and Hispanic youth are sentenced to life without parole five times more often than White youth.⁴⁶

These troubling figures, both separately and collectively, provide compelling reasons to revisit our nation’s practice—now the only one in the world—of sentencing youth to unparolable life terms of imprisonment.

V. TURNING THE CORNER—RECOMMENDATIONS FOR REFORM

The coming years are likely to bring about renewed interest in and consideration of policy reforms in relation to our most at-risk youth. This part proposes four specific recommendations to consider, consistent with the topics discussed in this article, as ongoing efforts to improve outcomes for vulnerable youth move forward:

- (1) We must develop reforms that will address the foster care breeding ground for the juvenile justice system;
- (2) We must strengthen the public will to support early and proactive interventions for youth at risk;
- (3) We must reevaluate excessive juvenile sentences—and in particular, juvenile life without parole penalties—that allow little room for consideration of the juvenile offender’s immature judgment and potential for rehabilitation; and
- (4) We must develop and promote a new and more positive image of our at-risk youth.

A. ELIMINATING THE BREEDING GROUND—EFFORTS TO COMBAT JUVENILE CRIME NECESSARILY MUST ADDRESS THE NEEDS AND CHALLENGES OF YOUTH IN OUR FOSTER CARE SYSTEM

The Midwest Study of Adult Functioning of Former Foster Youth confirmed that the youth we fail in our foster care system today are at greater risk of adult incarceration

tomorrow. Within eighteen months after aging out of foster care, 54% of young men and 25% of young women had been incarcerated.⁴⁷ No parent would stand for these outcomes; yet we allow this cycle of hopelessness to continue for the children we *all* collectively commit to parent when we bring them into our charge.

Greater efforts must be made to address some of the basic and underlying challenges facing our foster care system. Our failure to do so will continue to push more youth from the chambers of our dependency courts into the halls of our adult justice facilities.

1. Attending to Foster Youth Education and Mental Health Needs

While a quality education is a key component of every child's successful transition to adulthood, a sound educational foundation is especially crucial for children who spend long periods of their childhood in foster care. Too many children in foster care find themselves shuttled from school to school with each placement disruption, out of school due to record or information delays, and falling behind educationally with no safety net upon which to rely. Ensuring education support, stability, and oversight for youth in foster care could go far in slowing the crossing of these youth into juvenile justice. As Victor Hugo aptly opined: "He who opens a school door closes a prison."⁴⁸

Foster children similarly face a wide array of untreated mental health concerns. Experts estimate that 40 to 85 percent of youngsters in out-of-home care suffer significant emotional disturbance and report that adolescents living with foster parents or in group homes have a four times higher rate of serious psychiatric disorders than youth living with their own families.⁴⁹ The mental health needs of foster children frequently are overlooked until the child exhibits extreme and harmful behavior. Even then, the lack of coordination between the child welfare, juvenile justice, mental health, and school systems results in fragmented and disjointed provision of services. Children are not properly assessed, no one is given the clear responsibility of monitoring the mental health needs of these children, and when mental health services are finally made available, they are often either inadequate or too late to be of meaningful benefit to the child.

Until all foster children receive educational stability and support and prompt assessment and individualized mental health services, we will continue to see children leaving the dependency system more damaged than when they entered care and exiting foster care to our justice system.

2. Addressing the Needs of Teens In and Emancipating from Foster Care

Recent findings regarding adolescent brain development highlight the unique needs of adolescents. Without proper stimulation, experiential learning, and guidance, teens experience far greater challenges in negotiating the adult world and learning to exercise sound judgment.

Even the best-prepared teen is not ready to be completely self-sufficient at age eighteen. Yet, throughout the country, foster children exit care on their eighteen birthday or the day after high school graduation ill prepared for life on their own. These youth often have no one to share the holidays with and no one to help them prepare for their first job interview or secure their first apartment. They commonly emancipate from foster care with no significant connection to a responsible adult, little financial support, no one to provide them with desperately needed guidance, and no place to turn when they falter. It is no wonder that so many adolescent or emancipated foster youth end up gang involved or incarcerated.

As noted in this Special Issue of *Family Court Review*, recent federal legislation will provide federal funds to states, for the first time, to extend child welfare support through age twenty-one.⁵⁰ Yet ongoing questions regarding interpretation of the legislation could unduly hamper state efforts to implement this new law. Congress should keep a watchful eye on state implementation efforts, encourage favorable guidance from Health and Human Services that will further expansive implementation, and assist states struggling with retooling their child welfare system to attend to the needs and challenges of young adults.

3. Creating Greater Flexibility in Foster Care Funding to Keep Families Intact and Divert Children from Foster Care

The federal government sends \$7 billion annually to the states to ensure that children are protected from abuse and neglect.⁵¹ Unfortunately, that financial investment in at-risk children often does not improve the young lives we undertake to protect and nurture. Because the largest source of federal child welfare funds (Title IV-E money) can only be accessed once a child is removed from the home and brought into foster care, child welfare has little or no resources to provide in-home or other preventative services that could keep more families intact. As a result, too many children unnecessarily enter foster care and an already overburdened system cannot attend to the children in its charge.

Even absent new resources, federal funding streams should be reformed to provide child welfare officials with flexibility to develop and offer preventative social services and supports that could give troubled but still functioning families a fighting chance to stay together.

B. PRIORITIZING INVESTMENTS IN PROVEN PREVENTION AND EARLY INTERVENTION EFFORTS

Shay Bilchik, a national expert on juvenile justice, Director of the Center for Juvenile Justice Reform at Georgetown University, and former head of the Office of Juvenile Justice and Delinquency Prevention, put it well in a recent congressional hearing when he aptly observed: “it is never too early and almost never too late to intervene to prevent juvenile delinquency.”⁵² With this philosophy in mind, Bilchik urged that every dollar put into law enforcement and juvenile criminal programs be met by a twofold investment in prevention efforts. Other national experts similarly have stressed the critical importance of early and proven prevention and intervention efforts.⁵³

The common ingredients of successful prevention and early intervention approaches are not rocket science. Several common themes thread through the growing chorus of voices urging enhanced attention to prevention:

- Youth need a safe and supportive place to spend their time and occupy their after-school hours;
- Youth—especially disconnected youth—need positive role models and mentors, someone who can believe in them and help them envision a better future;
- Promoting job skills and creating employment opportunities are a key way to break the often-intergenerational cycle of criminal activity; and
- Community engagement, participation, and partnerships are critical.

Research analyzing the benefits of positive interventions for crossover youth yielded similar results. Youth with strong levels of positive attachment (positive connections to

foster caregivers or others), involvement in after-school programs or religious organizations, were significantly less likely to experience a delinquency petition.⁵⁴

We know that many youth will initially come to the attention of law enforcement before they are entrenched in criminal conduct. Recent statistics estimate that over 400,000 juvenile arrests a year will be the result of minor nonviolent offenses—youth running away, curfew violations and loitering, or liquor law violations.⁵⁵ Indeed, youth accused of less serious and nonviolent offenses account for $\frac{3}{4}$ of the youth referred annually to justice authorities. In 2004, juvenile arrests for disorderly conduct outnumbered arrests for aggravated assault by three to one (198,800 compared to 60,450) and more juveniles were arrested for curfew violations (137,400) than for murder, rape, robbery, and aggravated assault combined (91,100).⁵⁶ Unfortunately, however, especially in large cities, the first few crimes are ignored.⁵⁷ These numbers reinforce our ability to identify at-risk youth for whom early engagement and intervention would be most valuable.

While suppression efforts are equally important, existing federal penalties are anything but inadequate. Federal mandatory minimum penalties, statutory gang enhancements, and the vast ability under the sentencing guidelines to account for aggravating gang-related circumstances provide a broad array of tools that prosecutors have at their disposal in combating the criminal arm of violent street gangs. Indeed, the lament from judges and prosecutors has *not* been that they need to build that arsenal of penalties or expand the list of potential federal charges, but rather that existing inflexible federal statutes strip them of the ability to exercise judgment and discretion in appropriate cases. While some changes at the margins might be warranted, it is hard to argue the case—especially in challenging fiscal times—for investing in tougher penalties and devoting even more to suppression efforts in lieu of proven prevention strategies.

Pending federal legislation seeks to strike this delicate balance between crime suppression and prevention efforts. The Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support and Education (“Youth PROMISE”) Act (H.R. 1064, S. 435), authored by Rep. Bobby Scott (D-VA), would provide significant resources to local communities to invest in evidence-based prevention and intervention strategies aimed at decreasing juvenile delinquency and reducing criminal gang activity. The Act promotes positive youth development programs, supports efforts to keep youth engaged in and connected to their communities and schools, and provides resources for treatment and intervention when the first warning bell rings. The bill has now garnered bipartisan support from over 200 members of Congress and has been endorsed by over 250 state, local, and national organizations, policy leaders, government officials, and juvenile justice professionals and experts. Hopefully this chorus of voices will be heard in Congress as federal policy in this arena is charted in the coming years.

C. REVISITING HARSH AND INFLEXIBLE JUVENILE LIFE WITHOUT PAROLE SENTENCES

As a former prosecutor, I am a firm believer in the need to keep our community safe and the importance of removing from the street individuals who commit violent crimes. But sentencing youngsters to a life in prison with no possibility—*ever*—for review of their sentence as they age and mature into adulthood is not simply excessive, it is contrary to the interests of our entire community.

Scientific research confirms that youth have weaker impulse control; they simply are not at a point in life where they are capable of making fully reasoned decisions. These factors,

among others, led our Supreme Court a few years ago to conclude that youth should be treated differently by the criminal justice system and that a death penalty for juvenile offenders is unconstitutional. The Court concluded that “it would be misguided to equate the failings of a minor with those of an adult.” (*See Roper v. Simmons*, 543 U.S. 551, 570 (2005).)

There is also widespread agreement that youth have greater potential for reform than adults; in many cases youth age out of the type of behavior that leads to crime. Our laws should reflect these scientific findings and appropriately recognize that young people are capable of redemption and reform.

Pending federal legislation, also authored by Rep. Bobby Scott, would advance these objectives and acknowledge that juvenile offenders *are* different.⁵⁸ Similar bills pending in state legislatures would make juvenile life sentences amenable to review.

Clearly there are some people who have committed heinous crimes and are unfit to be released into the community regardless of the age when they committed their crime. Elimination or reform of JLWOP sentences will *not* allow these people to return to our communities. Indeed, proposed reforms of these sentences would not mandate the release of a single individual to the streets. Instead, they would simply allow for thoughtful judicial *review* of sentences—often after the juvenile offender has spent decades behind bars—to determine whether the individual poses a continued threat to the community.

This reform is not simply the right approach, it is also the fiscally wise course. Every youth life-without-parole case costs thousands of dollars per year in incarceration costs. It costs over \$22,000 to incarcerate a person in prison for one year, or nearly \$1.5 million dollars for 60 years.⁵⁹ Moreover, children are at greater risk of sexual and physical abuse in jail. Human Rights Watch reported that 59% of youth were physically or sexually victimized in prison. Many youth consider or attempt suicide while serving JLWOP sentences.⁶⁰ Is this really the best use of scarce resources, let alone the wisest way to avoid squandering human potential?

This term, the Supreme Court will have the opportunity to weigh in on this issue. In two cases pending before it, the Court will consider the reach of the holding and reasoning set forth in the *Roper* juvenile death penalty decision. The two cases before the Court, however, arise from convictions for crimes where no murders occurred and also present the Court with the ability to base its decision on an age-based line of demarcation.⁶¹ In light of these limiting facts, it is unlikely that the Court will use these cases to deem all JLWOPs unconstitutional. Thus, national debate on this issue is likely to continue and the playing field for reform may well shift to federal and state legislative efforts. The new administration may also have the opportunity to weigh in through an anticipated push to get the United States to ratify the U.N. Convention on the Rights of the Child—a set of principles that include denunciation of JLWOPs. All of these efforts will present our nation’s leaders with a long-overdue opportunity to revisit our approach to the punishment of our youngest offenders.

D. CRAFTING A NEW IMAGE FOR AT RISK YOUTH

It was not that long ago, in the wake of an upsurge in coverage of and resulting concerns about juvenile crime, that youth who strayed into the criminal arena were deemed a “ticking time bomb, a national wolf pack of super-predators.”⁶² While public perceptions have evolved somewhat since that unfortunate label first surfaced in the mid-1990s, and while recent polls suggest that voters strongly favor strengthening rehabilitative programs and

prevention over harsher penalties,⁶³ we must do more to improve the image of young people and strengthen our communities' resolve to rally around them.

We need to encourage the media to responsibly cover the tremendous potential, resilience and achievements of our youth to the same degree they cover the sensational crime of the moment. And we must involve and empower the eloquent voices of youth who have turned a corner in carrying to the public messages around the benefit of prevention efforts.

VI. CONCLUSION

We can—and we must—work together to chart a better future for the next generation. And we must do so promptly, with due consideration of the swift passage of time on a child's clock. It is not simply a “test of our progress”—as we attend to the needs of those who “have too little”⁶⁴—it is the very essence of our societal soul and the legacy we leave behind. While we may not be able to replace the roots our foster youth often lack, we can seek to strengthen their “wings”⁶⁵ to move beyond their past and ascend into a better future.

NOTES

1. Franklin D. Roosevelt, Pres. of the U.S., Second Inaugural Address (Jan. 20, 1937).
2. Hodding Carter, Jr., http://www.famous-quotes-and-quotations.com/hodding_carter_jr.html (last visited Jan. 10, 2010).
3. See Nelson Mandela: “There can be no keener revelation of a society's soul than the way it treats its children.” United Nations Women's Guild: Promises to Keep Campaign, <http://www.un.org/other/unwg/> (last visited Sept. 2, 2008).
4. See remarks by Attorney General Eric Holder at the 2009 ABA Convention, Chicago (Aug. 3, 2009) (“There is no doubt that we must be ‘tough on crime.’ But we must also commit ourselves to being ‘smart on crime.’ And we must realize that these approaches complement, rather than contradict, each other.”)
5. Admin. For Child. and Families, Admin. on Child., Youth, and Families, Children's Bureau, U.S. Dep't of Health and Hum. Services, The AFCARS Rep. (2003), available at <http://www.acf.hhs.gov/programs/cb>.
6. See Child Welfare League of American, 2009 National Fact Sheet, available at <http://www.cwla.org/advocacy/nationalfactsheet09.htm>; see also Foster Care Facts, Children's Law Center of Los Angeles, available at http://www.clcla.org/facts_overview.htm (last visited Nov. 6, 2010).
7. Challenges in Legislative Implementation: Common Themes, New Approaches and Systemic Solutions: Hearing before Cal. Assem. Select Comm. on Foster Care and Health and Human Services Comm., (March 7, 2006) (statement of Miriam Aroni Krinsky, then-Exec. Dir., Children's Law Center of Los Angeles), available at www.clcla.org.
8. See “Foster Care Facts,” www.clcla.org; see also MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 19, Chapin Hall (2005); CASEY FAM. PROGAMS, IMPROVING FAM. FOSTER CARE: FINDINGS FROM THE NORTHWESTERN FOSTER CARE ALUMNI STUDY (2005), available at <http://www.nxtbook.com/nxtbooks/casey/alumnistudies/>.
9. Nat'l Comm'n on Child. Beyond Rhetoric: A New American Agenda for Children and Families: Final Report of the Nat'l Comm'n on Child. 293 (Gov't Printing Office 1991).
10. J.P. Ryan, & M.F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*. 27 CHILD. & YOUTH SERVICES REV. 227–249 (2005).
11. See D. Herz et al., *Improving System Responses to Crossover Youth: The Role of Research and Practice Partnerships*, THE LINK, Summer 2006.
12. Ryan & Testa, *supra* note 10, at 230.
13. See Herz et al., *supra* note 11, at 4.
14. *Id.*
15. Dennis C. Herz, Understanding Crossover Youth in Los Angeles County, (unpublished power point presentation) (Spring 2006).

16. See J.P. Ryan et al., *Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 CHILD. & YOUTH SERVICES REV. 1035 (2007).
17. *Id.*
18. See International Centre for Prison Studies, World Prison Population List, 1 (8th ed, Jan. 2009), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf; see also The Pew Center on the States, The Charles Hamilton Houston Institution for Race & Justice, No More Children Left Behind Bars (2008).
19. See Remarks by Attorney General Eric Holder at 2009 ABA Convention, Chicago (August 3, 2009).
20. W. Sabol & C. Heather *Prison Inmates at Midyear 2007*, U.S. Dep't of Justice, Bureau of Justice Statistics (2008); see also America's Cradle to Prison Pipeline—Report of the Children's Defense Fund (2007), p. 1, available at www.childrensdefense.org.
21. *Id.*
22. See Office of Juvenile Justice Delinquency Prevention, Juvenile Justice Bulletin (April 2009), www.ojp.usdoj.gov.
23. Linh Vuong & Fabiana Silva, *Evaluating Federal Gang Bills*, Special Report from the National Council on Crime and Delinquency (December 2008), p. 9.
24. See Judith Greene & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies. A Justice Policy Institute Report*, (July 2007), available at www.justicepolicy.org; California Budget, 2008–09 Budget, available at www.ebudget.ca.gov.
25. Direct expenditures for each of the major criminal justice functions has increased substantially since 1982 (396% increase for police, 619% increase for corrections, and 474% increase for judicial); in contrast, 1994 figures reflect that delinquency prevention accounted for only 8% of juvenile justice expenditures. See A Guide for Understanding Effective Community-Based Gang Intervention, issued by L.A. City Councilmember Tony Cardenas (2007), p. 6 (citing U.S. Department of Justice, Bureau of Justice Statistics). "Direct expenditure by criminal justice function, 1982–2005," available at <http://www.ojp.usdoj.gov/bjs/glance/exptyp.htm>; National Association of State Budget Officers. "State Juvenile Justice Expenditures and Innovations."
26. See A Guide for Understanding Effective Community-Based Gang Intervention, issued by LA City Councilmember Tony Cardenas (2007), p. 7, citing Advancement Project. "Citywide Gang Activity Reduction Strategy: Phase III Report. Los Angeles," (January 2007), available at www.advanceproj.com.
27. See Gang Injunctions & Civil Abatement in Los Angeles, available at <http://www.streetgangs.com/injunctions>; see also *Gang Injunctions: How and Why They Work*, Report from the Office of the Los Angeles City Attorney (April 2007).
28. See <http://www.usdoj.gov/usao/cac/aboutusao/divisions/criminal.html> (last visited Nov. 1, 2009).
29. *Feds Using Anti-Mafia Laws to Pursue Organized Street Gangs*, ASSOCIATED PRESS, Aug. 18, 2008, available at foxnews.com (quoting former prosecutor and Chapman Law Professor Lawrence Rosenthal).
30. See Danielle Mole & Dodd White, *Transfer and Waiver in the Juvenile Justice System*, Report from the Child Welfare League of America (2005), available at www.cwla.org; see also Campaign for Youth Justice, <http://www.campaign4youthjustice.org/facts.html> (last visited Nov. 1, 2009).
31. Annie E. Casey Foundation, 2008 KIDS COUNT Data Book essay: "A Road Map for Juvenile Justice Reform."; The Constitution Project, *Smart on Crime—Recommendations for the Next Administration and Congress* (2008), available at <http://www.2009transition.org/criminaljustice/>
32. Human Rights Watch 2009 JLWOP figures, available at http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf.
33. See *Cruel and Unusual Punishment: Sentencing 13 and 14 Year Old Children to Die in Prison*, Equal Justice Initiative (Nov.2007), available at <http://eji.org/eji/files/20071017cruelandunusual.pdf>.
34. See Amicus Brief, American Medical Association, et al., *Roper v. Simmons*, 543 U.S. 551 (2005) at 10.
35. See Eartha Jane Melzer, *Juveniles Sentenced to Life Without Parole Cost the State Millions*, The Michigan Messenger, Feb. 24, 2009.
36. See Convention on the Rights of the Child ("CRC"), Article 37(a), G.A. res. 44/25 annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1980. The CRC has been signed and ratified by every country except the US and Somalia. While the US signed the CRC in 1995, our country has yet to ratify it.
37. See Position Paper on JLWOP In The United States, The Campaign for the Fair Sentencing of Youth (July 2009).
38. International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States of America on June 8, 1992, art. 24. The

ICCPR's oversight Committee instructed the US to: "Ensure that no such child offender is sentenced to life imprisonment without parole," and to "adopt all appropriate measures to review the situation of persons already serving such sentences."

39. These states are: Alaska, Colorado, Kansas, Kentucky, Maine, New Mexico, New York, West Virginia, and the District of Columbia. Today five additional states have joined the growing chorus of bans on JLWOP sentences, including New Jersey, Ohio, Oregon, and Vermont. See Campaign for the Fair Sentencing of Youth, <http://www.endjwop.org/stats-by-state/california/>.

40. These states are: Arkansas, Florida, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Nebraska, and Washington. *Id.*

41. Figures come from State Distribution of JLWOP Sentences, The Campaign for the Fair Sentencing of Youth, available at <http://www.endjwop.org/stats-by-state/>.

42. See Human Rights Watch and Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, October 2005, available at <http://hrw.org/reports/2005/us1005/index.htm>, pp. 104–107; University of San Francisco School of Law, Center for Global Law and Practice; see also Snyder, Howard N. and Sickmund, Melissa (2006), *Juvenile Offenders and Victims: 2006 National Report*, Washington DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention at 110–11.

43. *Id.* In my home state of California, Human Rights Watch estimates that as many as 45% of youth offenders serving LWOP were convicted for involvement in a murder but not as the person who committed the murder. See Human Rights Watch, VOL. 20, NO. 1 (G), "WHEN I DIE, THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 4 (2008), p. 21, available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf>.

44. *Id.* at 36.

45. HUMAN RIGHTS WATCH, VOL. 20, NO. 2 (G), SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 21 (2008), available at <http://www.hrw.org/reports/2008/us0208/us0208web.pdf>.

46. See HUMAN RIGHTS WATCH, VOL. 20, NO. 1 (G), "WHEN I DIE, THEY'LL SEND ME HOME": YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA 4 (2008), available at <http://www.hrw.org/reports/2008/us0108/us0108web.pdf>.

47. COURTNEY, *supra* note 8.

48. Victor Hugo (1802–1885), available at http://www.brainyquote.com/quotes/authors/v/victor_hugo_3.html (last visited Jan. 10, 2010).

49. See Ellen Battistelli, Child Welfare League of America, Fact sheet: The Health of Children in Out-of-Home Care (May 17, 2001).

50. See *Fostering Connections to Success and Increasing Adoptions Act of 2008*, H.R. 6893 (P.L. 110–351), discussed more fully in Miriam Krinsky, *A Not So Happy Birthday: The Foster Youth Transition From Adolescence Into Adulthood*, 48 FAM. CT. REV. 250 (2010).

51. See Time for Reform: Investing in Prevention: Keeping Children Safe at Home, report by Kids Are Waiting: Fix Foster Care Now (2007), available at http://www.preventchildabuse.org/about_us/media_releases/pew_kaw_prevention_report_final.pdf.

52. Shay Bilchik, Director, Center for Juvenile Justice Reform Georgetown University Public Policy Institute Statement at Congressional Youth Violence Summit on the Youth Promise Act (Dec. 3, 2008).

53. See Remarks by Attorney General Eric Holder at 2009 ABA Convention, Chicago, Illinois (August 3, 2009) ("getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government's ability to enhance public safety before the crime is committed and after the former offender is returned to society"); Jeffrey A. Butts, *A Sensible Model for Juvenile Justice*, Youth Transition Funders Group Briefing Paper #3, Beyond the Tunnel Problem (Summer 2008) ("The juvenile justice system needs a new, sensible model for policy and practice, one that can be used to design and deliver interventions for the full range of delinquent offenders coming to the attention of law enforcement and the courts."); Charles J. Ogletree, Jr., No More Children Left Behind Bars—A Briefing on Youth Gang Violence and Juvenile Crime Prevention, Institute for Race & Justice, Harvard Law School (March 6, 2008) ("The research on youth violence, child development and education now provides more than enough evidence that well-tested education and community-based 'prevention' strategies can work to stem youth crime and redirect children and teens away from gang involvement and on to paths of productive membership and participation in society.").

54. See Joseph P. Ryan et al., *African American Males in Foster Care and the Risk of Delinquency: The Value of Social Bonds and Permanence*, 87 CHILD WELFARE LEAGUE OF AMERICA, #1 at 115.

55. See U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, Juvenile Arrests, 2006 (2008), available at www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf.

56. Butts, *supra* note 3, citing data from U.S. Department of Justice Programs, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

57. *Id.* at 7.

58. The Juvenile Justice Accountability and Improvement Act of 2009 (HR 2289), introduced by Representative Bobby Scott (D-VA) and Judiciary Committee Chairman John Conyers (D-MI), would eliminate JLWOP in the states and the federal system.

59. “America’s Cradle to Prison Pipeline”—Report of the Children’s Defense Fund (2007), p.2, available at www.childrensdefense.org. In California, the estimated costs to incarcerate an adult are even higher—\$46,000 per year—and the cost to incarcerate one youth on a yearly basis is estimated to be over \$250,000. See *A Guide for Understanding Effective Community-Based Gang Intervention*, issued by LA City Councilmember Tony Cardenas, p. 7. California will spend over \$500 million annually simply for the incarceration of offenders *already* sentenced to JLWOPs and, in the future, will have to spend upwards of \$2 million incarcerating each new youth sentenced to a life term. See “When I Die They’ll Send Me Home”, *supra*, note 42, at 61.

60. See “When I Die They’ll Send Me Home”, *supra* note 42, at 54–5.

61. The two cases—*Graham v. Florida* and *Sullivan v. Florida*, 129 S. Ct. 2157 (U.S. 2009)—involve youth aged 17 and 13 respectively.

62. See Council on Crime in America, *The State of Violent Crime in America* (1996)—the author of this report, John Dilulio, has since recanted this statement; see also John Dilulio, et al., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996) (coined the “super predator” phrase).

63. National survey showed that nine out of 10 individuals nationally agreed with the statement that “almost all youth who commit crimes are capable of positive growth and have the potential to change for the better” and more than three out of four agreed that “incarcerating youth offenders without rehabilitation is the same as giving up on them.” See “Potential for Change: Public Attitudes and Policy Preferences for Juvenile Justice Systems Reform,” *Center for Children’s Law and Policy*, p. 2, available at www.modelsforchange.net.

64. See Roosevelt, *supra* note 1.

65. See Carter, *supra* note 2.

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